

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; the Special Rapporteur on the right to food; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the rights of indigenous peoples; and the Special Rapporteur on the human rights to safe drinking water and sanitation

REFERENCE:
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13 February 2019

Dear Mr. Wilkes,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the right to food; Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the rights of indigenous peoples; and Special Rapporteur on the human rights to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 35/7, 37/8, 32/8, 36/15, 33/9, 34/9, 34/5, 33/12 and 33/10.

We are sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received.¹ Special Procedures mechanisms can intervene directly with Governments and other stakeholders (non-state actors) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

¹ Further information about the communication procedure is available at:
<http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>

In this connection, we would like to bring to your attention information we have received concerning the adverse human rights impacts that your company has contributed to in Didipio, Nueva Vizcaya Province, in the Philippines, including with regard to the human rights of indigenous peoples residing in the region and the overall environmental degradation.

According to the information received:

Your company, is an Australia-based mining company that operates a gold and copper mine in Didipio (hereafter “the mine”) in the Northern Luzon province of Nueva Vizcaya, under a Financial and Technical Assistance Agreement (FTAA), which grants rights to explore, extract and utilize minerals for development and commerce for a 25-year period. Originally, the FTAA was signed in 1994 between the Government of the Philippines and Climax-Arimco Mining Corporation, which merged with OceanaGold in 2006. The FTAA will expire in June 2019, but can be renewed by the Government for another 25 years.

The protests of local communities, including indigenous peoples, among them the Bugkalot, Ifugao, Ibaloi, Kankanaey, and criticism from various organizations delayed the operations of the mining company for more than a decade. In June 2008, around 180 families were forcibly evicted from their homes, which were destroyed by the company staff supported by heavily-armed members of the national police. Residents were beaten and suffered various injuries while their houses were being bulldozed off cliffs and burned down. It is reported that these forced evictions were carried out without a court order. In addition, some small farmers, including from indigenous communities, were forced through intimidation and harassment to sell their lands and farms to the company, or convinced to do so because the company and its proxies, including some local officials, mis-represented the impacts of the mining activities on the economic development of the region and the environment. In addition, some who had agreed to sell their lands never received an adequate compensation or even the amount they had agreed to.

In October 2009, another attempt to demolish several houses was reported which resulted in the violent dispersal of protesting residents by the national police who used truncheons, shields and tear gas.

In 2011, the Commission on Human Rights of the Philippines investigated the human rights abuses and violations that occurred in the context of the establishment of the mine. It concluded that the company had violated the residents’ rights to adequate housing, rights to property, rights to freedom of movement, and their rights to security, as well as the rights of the indigenous communities to manifest their culture and identity. It further concluded that the police had used excessive force during the forced evictions. Therefore, the Commission recommended that the Government investigate the human rights abuses and “consider the probable withdrawal of the FTAA”. In spite of the

conclusions of the Commission, the company started the commercial exploitation of the mine in 2013, both through an open-pit and via underground mining.

In 2014, some civil society organizations (CSOs) conducted in depth studies of the negative impacts of the mining activities on the environment and surrounding ecosystems.² They concluded that the establishment of the mining facilities and conduct of the mining operations were threatening the rich biodiversity of the area and had devastating impacts on the environment. For example, large areas of forests have been lost as the company was given in 2008 a special permit to cut more than 17,000 trees for the development of the mine. Reportedly, the company continued to cut trees afterwards and in breach of the 1995 Mining Act and the Revised Forestry Code, it did not undertake the mandatory reforestation of the zone. At the same time, the local and indigenous communities were prohibited from harvesting trees and forest products in forest areas located within the mining concession.

Currently, as the mine operates 24 hours a day, seven days a week, air pollutants, primarily dust, are persistent and led to a high incidence of respiratory illnesses particularly among children and the elderly, especially during summer time. In addition to impacting the right to health, those air pollutants also affected agricultural productivity, with lower crop yields being experienced by local farmers.

The Didipio river is allegedly contaminated by heavy metals. It is reported that the local communities rely on the Didipio river as source of drinking water and water for personal uses as well as for agriculture and irrigation purposes. Due to the contamination of the river, allegedly, the local communities were not able to access safe drinking water. The CSOs found that the concentration of copper in the river exceeds the Severe-Effect Level and the maximum level both for irrigation use and the survival of aquatic organisms, which are 200 µg L⁻¹ and 50 µg L⁻¹, respectively. The sediments of the river are heavily polluted and could negatively affect human health as well as benthic or sediment-dwelling organisms. The mine stands at the headwaters of a river that flows into the longest river system in the entire country, as it flows through four provinces, past millions of homes, and becomes the mighty Cagayan River before emptying into the Pacific Ocean on the northern end of Luzon island. The same river flows through irrigation facilities that sustain agriculture and through hydro-electric dams that provide power to the Luzon Grid. Therefore, contaminants from the mine could potentially put at risk millions of livelihoods and critical ecosystems.

² Environmental Investigation Mission on the Impacts of Large Scale Mining in Nueva Vizcaya, Philippines, Technical report, Kalikasan People's Network for the Environment (Kalikasan PNE) and AGHAM – Advocates of Science and Technology for the People, in cooperation with Center for Environmental Concerns - Philippines (CEC) Alyansa ng Nagkakaisang Novo Viscayano para sa Kalikasan (ANNVIK) Defend Patrimony! Alliance Ecosystem Alliance, September 2014.

Moreover, in spite of the strict laws governing toxic chemicals in the Philippines, the company has managed to maintain a total opacity on the possible use of cyanide, a toxic chemical, in its mining activities. It appears that no government officials know with certainty what processing chemicals are used at the mine, while the presence of dead and dying trees in the surroundings of the tailings pond and impacts on water quality and biota downstream suggest that dangerous chemicals are indeed used or released through processing.

Through 2017, forced evictions of at least 133 families were carried out in the villages of Kakiduguen, Biyoy and Dine. In addition, there has been an increase of the military presence in the region, allegedly to fight against the communist insurgents. However, in practice, the military appear to be protecting the company and preventing any form of protest against the company and its activities. As a result of this heavy military presence in the region, community leaders and environmental rights defenders feel increasingly at risk of being harassed, arbitrarily arrested and detained, especially as they have been accused by the military of supporting the communist rebels.

In February 2017, the Nueva Vizcaya Provincial Government issued a report in which it denounced the negative impacts of the mine activities on the environment and the local communities.

On 14 February 2017, following an audit, the then-Secretary of the Department of Environment and Natural Resources (DENR), Ms. Gina Lopez, issued an order of suspension of the mining activities of the company in Didipio because of the human rights and environmental violations and abuses documented since the company started its activities. However, the company appealed to the Office of the President of the Philippines, which stayed the suspension order, citing due process issues. Furthermore, the DENR Secretary was replaced by a former military officer.

In 2018, your company requested to extend and expand its mining operations. Local communities sent numerous petitions to the Government, including the new DENR Secretary, and to local authorities to oppose the extension of the mine and to request the suspension of its operations. The petitioners have not received any reply yet.

While we do not wish to prejudge the accuracy of these allegations, we are deeply concerned about the reports that your company is failing to meet its international responsibility to respect human rights of indigenous peoples and local communities living near the Dipidio mine.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information about the alleged role of your company in the forced eviction of families and its complicity in the excessive use of force by police and military of the Philippines.
3. Please provide information as to the steps that the company has taken, or is proposing to take, in addressing concerns of local communities while seeking extension and expansion of the mining license in Didipio.
4. Please provide detailed information on the process of human rights due diligence (including the environmental impact assessment) conducted by your company in order to identify, prevent, mitigate, and remedy the negative impacts on the human rights of affected communities that the exploitation of the Dipidio mine could have caused or, contributed to, as set out in the United Nations Guiding Principles on Business and Human Rights.
5. Please provide information on steps taken by your company to establish any grievance mechanisms at the company-level to address adverse human rights impacts caused by your company and to deal with the concerns of affected communities in an effective manner.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from you will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please be informed that a letter on the same subject has also been sent to the Governments of the Philippines and Australia.

Please accept, Mr. Wilkes, the assurances of our highest consideration.

Surya Deva
Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

David R. Boyd
Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a
safe, clean, healthy and sustainable environment

Baskut Tuncak
Special Rapporteur on the implications for human rights of the environmentally sound
management and disposal of hazardous substances and wastes

Dainius Puras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable
standard of physical and mental health

Leilani Farha
Special Rapporteur on adequate housing as a component of the right to an adequate
standard of living, and on the right to non-discrimination in this context

Michel Forst
Special Rapporteur on the situation of human rights defenders

Victoria Lucia Tauli-Corpuz
Special Rapporteur on the rights of indigenous peoples

Léo Heller
Special Rapporteur on the human rights to safe drinking water and sanitation

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to draw your attention to the United Nations Guiding Principles on Business and Human Rights, which were unanimously endorsed by the Human Rights Council in its resolution (A/HRC/RES/17/31), after years of consultations involving governments, civil society and the business community.

The Guiding Principles have been established as the global authoritative norm for all States and companies to prevent and address the negative consequences related to companies on human rights. The responsibility to respect human rights is a global standard of conduct applicable to all companies, wherever they operate. It exists regardless of the ability and / or willingness of States to meet their own human rights obligations and does not reduce those obligations. It is an additional responsibility to comply with national laws and regulations for the protection of human rights.

"The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."(Guiding principle 13).

To fulfill their responsibility to respect human rights, business enterprises should have in place:

- “(a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”(15 guiding principle)

The Guiding Principles also recognise the important and valuable role played by independent civil society organisations and human rights defenders. In particular, Principle 18 underlines the essential role of civil society and human rights defenders in helping to identify potential adverse business-related human rights impacts. The Commentary to Principle 26 underlines how States, in order to ensure access to remedy, should make sure that the legitimate activities of human rights defenders are not obstructed.

In this connection, we recall that Guiding Principle 22 states that “[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes”. The Guiding Principle 20 states that business should track the effectiveness of their response. Tracking should: a) be based in appropriate qualitative and quantitative indicators; and b)

draw on feedback from both internal and external sources, including affected stakeholders.

The Guiding Principles 25 to 31 provide guidance to business enterprises and States on steps to be taken to ensure that victims of business-related human rights abuse have access to effective remedy.

Guiding Principle 29 states that “[t]o make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted”. Moreover, as underlined in the commentary to Guiding Principle 29, operational-level grievance mechanisms should reflect certain criteria to ensure their effectiveness in practice (as set out in Guiding Principle 31) and they should not be used to preclude access to judicial or other non-judicial grievance mechanisms.

Guiding Principle 31 clarifies that in order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms; Operational-level mechanisms should also be:
- (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

Furthermore, we wish to draw your company’s attention to the “Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights” issued by the Committee on the Economic, Social and Cultural Rights (E/C.12/2011/1, para. 1) in July 2011. The Committee states that “corporate activities can

adversely affect the enjoyment of Covenant rights”, including through harmful impacts on the right to health, standard of living, including of indigenous peoples, and the natural environment (E/C.12/2011/1, para. 1). Accordingly, business enterprises are required to respect the right of everyone to the enjoyment of the highest attainable standard of physical and mental health enshrined in the International Covenant of Economic Social and Cultural Rights Article 12. The Committee describes the normative content of Article 12 in its General Comment No. 14, noting that the private business sector has responsibilities regarding the realization of the right to health (para. 42).

Business enterprises have to respect the right to an adequate standard of living, including the right to housing, under article 11 of the International Covenant on Economic, Social and Cultural Rights. In this context we recall the General Comments No. 4 and 7 of the Committee on Economic Social and Cultural Rights (CESCR), which stress the need to provide adequate legal protection from forced eviction, due process, alternative accommodation, and access to an effective remedy of those that are affected by eviction orders. As forced evictions usually violate also other human rights, such the freedom from cruel, inhuman and degrading treatment (ICCPR, art. 7), the right to security of the person (ibid., art. 9.1) and the right to non-interference with privacy, home and family (ibid., art 17) they constitute gross violations of human rights. According to these General Comments, all feasible alternatives to forced eviction must be explored in consultation with the affected individuals and families. Moreover, evictions should not lead to homelessness by providing adequate alternative housing facilities, resettlement and compensation for lost property. We also call your attention to the Basic Principles and Guidelines on Development-based Evictions and Displacement (A/HRC/4/18, Annex) which stress in paragraph 73 that “transnational corporations and other business enterprises must respect the human right to adequate housing, including the prohibition on forced evictions, within their respective spheres of activity and influence.”

Furthermore, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007, elaborates upon existing binding rights in the specific cultural, historical, social and economic circumstances of indigenous peoples. With respect to their rights to property in the form of land and natural resource rights, Article 26 states the right of indigenous peoples to ‘the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired’.

In addition, UNDRIP sets out that indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources (Article 29).

UNDRIP provides for the rights of indigenous peoples to redress for actions that have affected the use and enjoyment of their traditional lands and resources. In that regard, Article 28 states that ‘indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.’ Article 10 affirms that indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place

without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

As detailed in the Framework Principles on Human Rights and the Environment (A/HRC/37/59), annex), which summarize the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights (Framework Principle 1). Furthermore, States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment (Principle 2). States should also ensure the effective enforcement of their environmental standards against public and private actors (Principle 12), and they should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities (Principle 14).

Regarding the alleged lack of information on the possible use of cyanide, which is a toxic chemical, we wish to refer to the fundamental principles laid down in Article 19 of the UDHR, and Article 19(2) of the ICCPR which guarantee the right to “seek, receive and impart information” as part of the right to freedom of expression. Access to information is a prerequisite to the protection of human rights from hazardous substances, to public participation in decision-making and for monitoring governmental and private-sector activities. Public participation in decision-making is based on the right of those who may be affected to speak and influence the decision that will impact their basic human rights.

The importance of the right to information about hazardous substances to the public, and the responsibilities of businesses in this regard, is emphasized in the 2015 Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes (A/HRC/30/40) in section III.B.

A human rights-based approach to hazardous substances and wastes, including pollutants, toxic industrial chemicals and pesticides, requires a specific focus on the protection of those most vulnerable or at risk: children, the poor, workers, persons with disabilities, older persons, indigenous peoples, migrants and minorities, while taking into account gender-specific risks, as noted by the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes in his report A/HRC/36/41 (section III). Specifically, regarding the risk of exposure by children, businesses have a responsibility to prevent childhood exposure to toxic and otherwise hazardous substances that may result from their activities and business relationships (A/HRC/33/41, section IV).

We would also like to highlight the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular,

we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.