

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 promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the rights of indigenous peoples

REFERENCE:
AL OTH 27/2019

17 June 2019

Dear Mr. Gao,

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 promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders and Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolutions 35/7, 37/8, 34/18, 32/32, 34/5 and 33/12.

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. Special Procedures mechanisms can intervene directly with governments and other stakeholders (including companies) 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

In this connection, we would like to bring to your attention information we have received concerning the criminalisation of members of the indigenous community, **Mr. Gregorio Rojas Paniura, Mr. Edison Vargas Huamanga and Ms. Nohemí Portilla Vargas in Peru**. These allegations are related to their work defending the rights of indigenous peoples and the environment in the context of the mining project Las Bambas, implemented by your company, MMG Limited.

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

MMG Limited
Mr. Xiaoyu Gao
Chief Executive Officer

All three human rights defenders hold leading positions in the indigenous community of Fuerabamba, located in the Challhuahuacho province, in the department of Apurimac in Peru. Mr. Gregorio Rojas Paniura is the president of the indigenous community, Mr. Edison Vargas Huamanga is the vice-president and Ms. Nohemí Portilla Vargas the secretary of minutes. As community leaders, they act as spokespersons for decisions made in the community assembly and act as intermediaries between the indigenous community and government institutions and the mining company.

The criminalisation of human rights defenders in the context of the Las Bambas mining project was the subject of a previous communication sent by Special Procedures to the government of Peru on 14 July 2017 (AL PER 4/2017). The letter includes allegations of violent repression in 2015 and 2016 in response to the demands of the population in relation to the Las Bambas project that left four indigenous community members dead and more than 30 people injured. These acts of violence remain unpunished to this day.

According to the information received:

Las Bambas is one of the largest mining projects in the world. It has been in operation since 2014 and is being operated by the company MMG Limited. It is located between the provinces of Cotabambas and Grau, in the department of Apurimac in Peru.

Under this project, millions of tons of copper are transported from the mines through several communities in the province of Cotabambas. This creates problems for the adjacent communities along the entire road because of the use of their communal territories, for which they do not receive adequate compensation. Due to the transit of trucks on the unpaved road, surrounding grasslands are covered in dust, which appears to cause health problems for people and livestock, and damage to housing structures.

The community of Fuerabamba is the closest one to the mining operations. The indigenous community's claims, led by Mr. Gregorio Rojas Paniura, focus on the compensation for the use of their land. The community was relocated from their ancestral territory to lands on the Yavi-Yavi estate when the mining operations began. A neighboring road crosses the estate, and, according to law, the company has to compensate the owners for the use of the road. Without prior consultations with the indigenous community, the Ministry of Transport and Communications has changed the road's legal regime to a national route. This change allows the company to use the road without having to compensate the community.

In the beginning of 2019, the community initiated a series of protests to demand adequate compensation for the use of the road, and to denounce the related environmental and health impact. These protests take place in the midst of the state of emergency that the Peruvian state has maintained for more than two years in

the Apurimac – Cusco – Arequipa road corridor. The declaration of the state of emergency appears not to be based on grave and imminent risks to national security.

On 21 March 2019, Mr. Gregorio Rojas Paniura and three legal advisors of the indigenous community were arrested in Lima. The arrests were authorised by an order of the Preparatory Investigation Court of Cotabambas as part of an investigation against community leaders of Fuerabamba, and their legal advisors, for the alleged acts of organised crime and extortion of the Peruvian State and the mining company MMG Las Bambas.

Mr. Rojas was released on 29 March 2019. The charges against him, however, are still pending and he has been placed under alternative imprisonment measures.

Arrest warrants against Mr. Edison Vargas Huamanga and Ms. Nohemí Portilla Vargas were issued in relation to the same investigation. Both human rights defenders went into hiding. The arguments for the preliminary arrest warrant against them are based on their classification as key members of an unlawful criminal association.. Their acts of protest have been qualified as criminal acts and as a “tool of threat and coercion” against the state and the company. Allegedly, the communications between the communities and their advisors, as well as the demands asking the state for compensation of damages, are being used as evidence justifying the charges of extortion.

We wish to express grave concern about the investigations against the indigenous community leaders and human rights defenders in relation to their role in protests against the non-fulfilment of agreements with the government and the mining company MMG Las Bambas, and violations of human rights related to land and territory, such as the lack of consultation to obtain their free, prior and informed consent.

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 on the human rights due diligence steps that your company has taken to prevent, identify and remedy the adverse human rights impacts that your company could have caused or contributed to, in line with the UN Guiding Principles on Business and Human Rights. In particular, please indicate if an independent external human rights

impact assessment on the project Las Bambas has been carried out, and if relevant, provide information regarding the findings and any actions taken to prevent, mitigate and redress adverse human rights impacts.

3. Following the meeting of MMG Las Bambas company representatives with the Working Group members during their official visit to Peru in 2017, please provide detailed information of the steps taken by your company to engage in dialogue with communities about their grievances in a safe and peaceful manner, and the outcomes of such engagement.
4. Please provide information on steps taken by your company to provide for effective remedy or cooperate in remediation of adverse human rights impacts that they have caused or contributed to, through legitimate processes, as set forth in the UN Guiding Principles on Business and Human Rights.. In particular, following the official visit to Peru, please provide further information on the status of your company's efforts to establish an operational-level grievance mechanism in line with the effectiveness criteria set out in the Guiding Principles (principle 31).

We would appreciate receiving a response within 60 days. Beyond 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.

Please be informed that letters on the same matter have also been sent to the Government of Peru, the Government of Australia, the Government of China, China Minmetals Corporation and MMG Las Bambas.

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 accept, Mr. Fuping, 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

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst
Special Rapporteur on the situation of human rights defenders

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

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to draw your attention to articles 9, 17, 19, 21 and 22 of the International Covenant on Civil and Political Rights, which guarantee the rights to liberty and security of person, to not be subjected to arbitrary or unlawful interference with one's family or home, to freedom of opinion and expression and to freedom of association.

We would also like to refer to 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.

Furthermore, we would like to bring to your attention the following provisions of the UN Declaration on Human Rights Defenders:

- article 5 (a), which establishes that for the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: to meet or assemble peacefully;
- article 6 (b) and c) which provide that everyone has the right, individually and in association with others to freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; and to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and to draw public attention to those matters.
- article 12, paragraphs 2 and 3, which provides that the State shall take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration;

The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on 13 September 2007. In particular, we would like to refer to article 7.1 on the right to life, physical and mental integrity, liberty and security of indigenous persons, to article 32 on the obligation to obtain their free and informed consent before approving any project affecting their lands, territories and other resources, particularly in relation to development, the use or exploitation of mineral, water or other

resources, and article 28 on the right to redress by means which may include restitution or, where this is not possible, fair and equitable compensation for land which has been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

We would also like to refer to Human Rights Council Resolutions 12/2, 24/24 and 36/21, which reaffirm the right of everyone, individually or in association with other, to unhindered access to and communication with international bodies, in particular the United Nations, its representatives and mechanisms in the field of human rights. In these resolutions, the Human Rights Council calls on States to prevent and refrain from all acts of intimidation or reprisals, to take all appropriate measures to prevent the occurrence of such acts. This includes the adoption and implementation of specific legislation and policies [as well as the issuance of appropriate guidance to national authorities] in order to effectively protect those who seek to cooperate, cooperate or have cooperated with the United Nations. The Council also urges States to ensure accountability for any act of intimidation or reprisal by ensuring impartial, prompt and thorough investigations of any alleged act of intimidation or reprisal in order to bring the perpetrators to justice; to provide access to effective remedies for victims in accordance with their international human rights obligations and commitments; and to prevent any recurrence.”

Furthermore, 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 independently of the ability and/or willingness of States to meet their own human rights obligations and does not reduce those obligations.

"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."(Guiding Principle 15)

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.

Finally, General Comment No. 24 (2017) of the CESCR affirms that extraterritorial obligations of States under the Covenant follow from the fact that the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction (para 27). It also provides that extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory (para 28). The CESCR underlines that the extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective. (para 30).

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.