

Mandates of the Special Rapporteur on the situation of human rights in Myanmar; 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 minority issues and the Special Rapporteur on the human rights to safe drinking water and sanitation

REFERENCE:
AL MMR 2/2020

17 April 2020

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on the situation of human rights in Myanmar; 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 minority issues and Special Rapporteur on the human rights to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 40/29, 35/7, 37/8, 34/18, 34/6 and 42/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **environmental impact of the Tan Lay Htaung cement plant in Myaing Kalay village, Kayin State, and the criminal complaint filed against Mr Tha Phoe, a Karen environmental activist.**

According to information received:

The Tan Lay Htaung cement plant in Myaing Kalay village is run by the military-owned Myanmar Economic Corporation (MEC) and was built in the 1980s. It was expanded more than a decade ago to increase its capacity to produce over 4,000 tonnes of cement per day.

In 2016, officials from the plant reportedly explained to nearby minority Karen communities that running the plant on gas was not sustainable in the long term due to potential shortfalls in supply, so it would be converted to coal. Local communities opposed this change, but there was no public consultation process.

From around October 2018, coal for the plant was transported from Pho Sho port to the cement factory. In light of the reported information that around 200kg of coal will be needed to make one ton of cement, the plant is estimated to burn at least 800 tonnes of coal per day. There does not appear to have been an

Environmental Impact Assessment (EIA) carried out to assess the impacts of the change from a gas-fired to a coal-fired kiln.

In early October 2019, three villages located near the cement plant experienced water sources changing colour, the death of fish and health issues such as itching skin when they bathed. Villagers report that this had never happened in the past. Relevant government departments then undertook water testing and announced on Facebook that water sources remained suitable for irrigation, domestic use and aquatic life. It is not clear what sources were tested, nor what results were obtained since these have not been made public.

By late October 2019, the water colour changes had spread to other villages and in some areas the water had turned black. Further water testing was carried out by the an independent environmental laboratory. The results of those tests revealed that:

- The water in wells was within acceptable limits provided that it was filtered.
- Water from three ponds / streams had phosphate and chlorine levels above the U.S. Environmental Protection Agency (EPA) Surface Water Standard for Aquatic Life.
- Water from at least one stream had excessive levels for biological oxygen demand (BOD) and chemical oxygen demand (COD).
- High BOD and COD, together with phosphates, reduce oxygen levels and these exceedances along with the high chlorine levels caused the death of the fish.
- High chlorine levels could lead to skin problems for humans, such as inflammation, reddish skin, blisters and itching.

It is also noted that many affected villagers may not have access to household filtration to make the water in wells safe to drink. Testing by another laboratory has further shown exceedance of acceptable levels for total solids, turbidity and iron as well as of pH.

As of late January 2020, 27 villages near the factory had discoloured water in their wells, for which they blame the cement factory.

On 6 March 2020, a representative of the military responded to questions asked by members of Parliament regarding the cement plant and water pollution, stating that the water was within acceptable limits.

Karen environmental defender Tha Phoe has been advocating for improved environmental protections regarding dams on the Salween River and has been working with local Karen minority communities in Kayin State since 2013. He attended a traditional Karen ceremony in January 2020, during which local residents and village monks came together to pray for protection from pollution. Police from Myaingkalay and Hpa-an police stations attempted to arrest Tha Phoe on the evening of 6 March 2020. The deputy chief of the Hpa An General Administration Department had earlier filed a complaint in the Hpa An Township Court under section 505(b) of the Penal Code. Reportedly, Tha Phoe did not receive a summons to attend court and did not receive official written notification of the claim against him. Hence, he has not been provided any information about any alleged act that is related to the complaint.

We are concerned that the Tan Lay Htaung cement plant in Myaing Kalay is having a negative impact on the environment and multiple human rights of the Karen minority. We are also concerned about the complaint against Tha Phoe, which seem related to his activities as an environmental rights defender.

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 additional information about the above allegations.
2. What approval process was followed to construct a coal-fired kiln to replace the gas-fired kiln at Tan Lay Htaung cement plant? Was an environmental impact assessment obtained as required by the Environmental Impact Assessment Procedure 2015? If not, why not? Was human rights due diligence conducted in accordance with all applicable national and international standards?
3. Please provide any details regarding any consultations undertaken with residents of minority Karen villages affected by the cement plant.
4. Please provide information about how the cement plant's operation complies with the Environmental Conservation Law 2015 and Myanmar's obligations under the International Convention on Economic, Social and Cultural Rights, in particular articles 11 and 12.

5. Please provide information about the steps taken by your Excellency's Government to ensure that all business enterprises, including State-owned enterprises, conduct human rights due diligence, in line with the UN Guiding Principles on Business and Human Rights, to prevent, mitigate and remediate adverse impacts.
6. Please provide information about steps taken by the Government and/or MEC to provide effective remedies to the minority Karen communities affected by the cement plant's operations.
7. Please provide information about the complaint against Tha Phoe including the factual allegations against him.
8. Please provide information about how the complaint under section 505(b) of the Penal Code against Tha Phoe complies with articles 19 and 20 of the Universal Declaration of Human Rights.
9. Please provide information about measures that your Excellency's Government has taken, or is considering to take, to ensure that environmental rights defenders are able to carry out their legitimate work without fear of any intimidation, including arising from criminal cases.
10. Please provide information about how section 505(b) of the Penal Code complies with articles 19 of the Universal Declaration of Human Rights.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government 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 company involved in the abovementioned allegations

Please accept, Excellency, the assurances of our highest consideration.

Yanghee Lee
Special Rapporteur on the situation of human rights in Myanmar

Githu Muigai

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

Fernand de Varennes

Special Rapporteur on minority issues

Léo Heller

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

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to refer your Excellency's Government to articles 19 and 20 of the Universal Declaration of Human Rights, which protect the right to freedom of expression, and the rights to freedom of peaceful assembly and of association, respectively.

We recall the explicit recognition of the human rights to safe drinking water by the UN General Assembly (resolution 64/292) and the Human Rights Council (resolution 15/9), which derives from the right to an adequate standard of living, protected under, inter alia, article 25 of the Universal Declaration of Human Rights, and article 11 of ICESCR. In its General Comment No. 15, the Committee on Economic, Social and Cultural Rights clarified that the human right to water means that everyone is entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.

Furthermore, the UN General Assembly (resolution 70/169) and the Human Rights Council (resolution 33/10) recognized that water and sanitation are two distinct but interrelated human rights. In particular, we recall explicit recognition that "the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living".

We would further like to refer your Excellency's Government to the United Nations "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011, which note that States must protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises. They also recognise the important and valuable role played by independent civil society organisations and human rights defenders.,