

**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 contemporary forms of racism, racial discrimination, xenophobia and related intolerance**

Ref.: AL USA 16/2022  
(Please use this reference in your reply)

29 July 2022

Excellency,

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 contemporary forms of racism, racial discrimination, xenophobia and related intolerance, pursuant to Human Rights Council resolutions 44/15, 46/7, 43/4, 41/12, 43/16 and 43/36.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **alleged misuse of the judicial system by the palm oil company Energy & Palma against four Afro-descendant community leaders and human rights defenders of the Barranquilla de San Javier Community, Esmeraldas Province, Ecuador: Antonio Olivero Mina Caicedo, Luis Fernando Quintero Mina, Andrés Humberto Arce Quintero and Néstor Javier Caicedo Caicedo for exercising their right to protest, collective defence of the territory and the environment.**

According to the information received:

**The company Energy & Palma S.A.** is an oil palm cultivation company of the La Fabril group. La Fabril, Holding La Fabril S.A., the bank of the Ecuadorian Social Security Institute and the Social Security Institute of the National Police ISSPOL are the shareholders of Energy&Palma. The company started its activities in 2006 in the parish of Carondelet, Canton San Lorenzo, in the Province of Esmeraldas. La Fabril supplies palm oil to transnational companies such as Pespi-Co<sup>1</sup>, General Mills<sup>2</sup> y Nestlé<sup>3</sup>. La Fabril is also part of the "Roundtable on Sustainable Palm Oil - RSPO".

The Afro-Ecuadorian community of Barranquilla de San Javier is located in the San Lorenzo canton in the coastal province of Esmeraldas. The region is composed of the tropical rainforests of the Chocó and is considered extremely biodiverse. In 2000, the community obtained a collective property title over

<sup>1</sup> [https://www.pepsico.com/docs/default-source/sustainability-and-esg-topics/pepsico-global-palm-oil-supplier-list-2021.pdf?sfvrsn=27984ad3\\_3](https://www.pepsico.com/docs/default-source/sustainability-and-esg-topics/pepsico-global-palm-oil-supplier-list-2021.pdf?sfvrsn=27984ad3_3)

<sup>2</sup> <https://www.generalmills.com/-/media/Project/GMI/corporate/corporate-master/Files/Issues/General-Mills-Mill-List-H2-List-March-2022.pdf?rev=0ca5efc1912a476c961a393781219e2a>

<sup>3</sup> <https://www.nestle.com/sites/default/files/2019-08/supply-chain-disclosure-palm-oil.pdf>

1,430 hectares of communal territory in the canton.<sup>4</sup>

Since 2005, several agro industrial companies have attempted to grab the community's land to extract timber and palm oil. One of these is the Energy& Palma Company, which has gradually acquired up to 251 hectares of the territory.<sup>5</sup>

In response, the community has organized to express their opposition to the annexation of part of their collective lands, the contamination of the water of the rivers, and the soil of the land, on which they depend, and which have caused negative impacts to the health of the community members, and the deforestation of key vegetation vital to the maintenance of the biodiversity of their territories.

After failed attempts at dialogue with the company, the community decided to set up a peaceful sit-in on one of the roads in front of the company's office in November 2019. In February 2020, this sit-in was violently quashed by the police, with an alleged improper use of force.

In September 2020, the company filed a lawsuit against seven community leaders for damages allegedly caused by the peaceful protest, demanding the payment of USD351.000 (No. 08256202000471). In particular, the company pleaded that their crops could not be transported due to the sit-in. It was evidenced during the hearings that the company had alternative routes to transport its products. However, in September 2021, Judge Fernando Saldarriaga of the Multi competent Court gave judgment in favour of the company and sentenced four of the community leaders, Antonio Olivero Mina Caicedo, Luis Fernando Quintero Mina, Andres Humberto Arce Quintero and Nestor Javier Caicedo Caicedo, to pay USD 151,000 for the loss and damage caused.

On 28 July 2022, the hearing for the reading of the sentence of the appeals filed by the company and the defendants was held. Judge Juan Francisco Gabriel Morales Suárez of the First Specialised Court for Civil, Commercial, Labour, Childhood, Adolescence and Adolescent Offenders of the Provincial Court of Justice of Esmeraldas ruled that the appeal filed by Energy&Palma was partially rejected, considering that the evidence provided was not sufficient to create the court's conviction regarding the participation of the defendants in the alleged facts. On the other hand, the Court partially accepted the defendants' allegation regarding the disproportionality of the sanction imposed by the judge of first instance. In the written judgment, the value of the compensation will be adjusted to a symbolic value.

Without prejudging the accuracy of these allegations, we express our deep concern regarding the alleged acts of intimidation and criminalization of human rights defenders and the lack of protection against the human rights abuses that they have allegedly suffered at the hands of the company.

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<sup>4</sup> On the 28th of June 2000, under registry Na 070 of the Canton's Property Registry Book, and with N. 01 of the Repertorio Book, Page n°038 of this office, an Adjudication of a lot of 1430,80 hectares was registered, granted by INDA in favour of the Afro-Ecuadorian Commune, registered in the Fourth Public Notary of the Canton of Esmeraldas.

<sup>5</sup> Oficio Nro.MAG –CGAJ-2021-0090-OF

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.

It is our responsibility, in accordance with the mandates given to us by the Human Rights Council, to seek to clarify the information brought to our attention. In this regard, we would be very grateful to have your cooperation and comments on the following matters:

1. Please provide any additional information or comments that may be relevant.
2. Please provide information on the measures the Government of your Excellency has taken, or is considering taking, to ensure that companies domiciled in its territory and/or jurisdiction respect human rights in all their activities, including the rights of human rights defenders.
3. Please provide information on concrete progress made in requiring or encouraging companies domiciled in its territory and/or jurisdiction to implement human rights due diligence processes.
4. Please provide information on the steps the Government of your Excellency is taking or considering taking to ensure that individuals affected by the activities of business enterprises domiciled in its jurisdiction have access to remedy in your country, through judicial or extrajudicial state mechanisms.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. 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.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please note that a letter expressing similar concerns will also be sent to Energy & Palma and La Fabril, RSPO, PEPSICO, General Mills and Nestle, as well as the Governments of Ecuador, and Switzerland.

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

Fernanda Hopenhaym  
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

Irene Khan  
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

Mary Lawlor  
Special Rapporteur on the situation of human rights defenders

E. Tendayi Achiume  
Special Rapporteur on contemporary forms of racism, racial discrimination,  
xenophobia and related intolerance

## **Annex**

### **Reference to international human rights law**

In connection with the above alleged facts and concerns, we would like to draw the attention of the Government of your Excellency to the applicable international human rights norms and standards, as well as authoritative guidance on their interpretation. These include the following:

- United Nations Guiding Principles on Business and Human Rights
- International Covenant on Economic, Social and Cultural Rights;
- International Covenant on Civil and Political Rights;
- United Nations Declaration on the Rights of Indigenous Peoples;
- United Nations Framework Principles on Human Rights and the Environment.

We would like to highlight the UN Guiding Principles on Business and Human Rights, which were unanimously endorsed in 2011 by the Human Rights Council in its resolution (A/HRC/RES/17/31) after years of consultations with governments, civil society and the business community. The Guiding Principles were established as the authoritative global standard for all states and companies to prevent and address the negative impacts of business on human rights. The Guidelines are based on the recognition that:

- a. "The existing obligations of States to respect, protect and fulfil human rights and fundamental freedoms;
- b. The role of business enterprises as specialised bodies or companies performing specialised functions, which must comply with all applicable laws and respect human rights;
- c. The need for appropriate and effective remedies for rights and obligations when they are violated.

The Guiding Principle 1 reiterates the State's duty to "protect against human rights abuses by business enterprises on its territory and/or under its jurisdiction". The Guiding Principle 2 provides that States should make clear that all companies domiciled on their territory and/or under their jurisdiction are expected to respect human rights in all their activities. In addition, the Guiding Principle 3 reiterates that States must take appropriate measures to "prevent, investigate, punish and remedy such abuses through effective policies, laws, regulations and adjudication". In addition, it requires, among other things, that a State "provide effective guidance to business enterprises on how to respect human rights throughout their operations".

The Guidelines also state that business enterprises have an independent responsibility to respect human rights. Principles 11 to 24 and 29 to 31 provide guidance to companies on how to fulfil their responsibility to respect human rights, including through human rights due diligence processes.

The commentary to Guiding Principle 13 notes that companies can have negative impacts on human rights, either through their own activities or through their business relationships with other parties (...) The "activities" of companies include both actions and omissions; and their "business relationships" include relationships with business partners, entities in their value chain, and any other state or non-state

entities directly related to their business operations, products or services.

Furthermore, according to Guiding Principle 26, States should take appropriate measures to ensure the effectiveness of domestic judicial mechanisms when dealing with business-related human rights abuses, including by considering how to limit legal, practical and other obstacles that may lead to denial of access to remedy. The commentary states that it should ensure that judicial corruption does not impede the administration of justice, that courts are independent of economic or political pressures from other state actors and companies, and that obstacles are not placed in the way of legitimate and peaceful activities of human rights defenders.

In addition to Guiding Principle 26, Principle 18 emphasises the essential role of civil society and human rights defenders in helping to identify potential negative impacts of business on human rights.

In its 2021 Guidelines for ensuring respect for human rights defenders (A/HRC/47/39/Add.2), the Working Group on Business and Human Rights stressed the urgency of addressing the negative impacts of business activities on human rights defenders. It highlighted the normative and practical implications of the Guidelines for States and companies to protect and respect the vital work of human rights defenders.

The Working Group highlighted in its guidance illustrative steps that States should take to ensure that strategic litigation against public participation (SLAPP) is not used to silence the voices of human rights defenders, for example by:

1. Introduce legislative reforms to prevent human rights defenders from being sued for criminal defamation and commercial companies from claiming large sums of money for alleged damage to their reputation through criminal defamation.
2. Sanction companies that bring strategic lawsuits against public participation (SLAPP), as they are an abuse of process and not a legitimate tool for a company to use to achieve its own objectives.
3. End the collusion between states and companies, where companies use the police to demand action against human rights defenders, who then end up in detention for an alleged criminal offence, which is actually designed to silence their protests about company activities.
4. Introduce stronger laws and institutions to protect whistleblowers, and to prevent SLAPPs through strong anti-SLAPP laws.
5. Ensure that judges and prosecutors are trained to recognise SLAPPs, to identify frivolous complaints against human rights defenders and to establish procedures to manage and respond to this situation.
6. Give courts the power to dismiss a case if they consider that the intention of the complaint/charge is to misrepresent the facts about a human rights defender's work, or to harass or take advantage of the defendant. In this case, the plaintiff/complainant could be barred from bringing the same case again.

The Working Group also stated that companies should not expose human rights defenders to undue risk, for example by engaging in frivolous litigation, including SLAPPs, or reporting them to the authorities as a means of intimidation. They should recognise that SLAPPs are not only wrong in principle, as they are incompatible with responsible business, but also that engaging in them makes poor

strategic sense, as they destroy any credibility of the company's commitment to respect human rights generally.

It is also important to recall that the Committee on Economic, Social and Cultural Rights, in its general recommendation 24 (2017), states that "the extraterritorial obligation to protect requires States parties to take steps to prevent and remedy violations of Covenant rights that occur outside their territory as a result of the activities of business entities over which they may exercise control, in particular in cases where remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective. "

We would also like to draw the attention of the Government of your Excellency that the article 14 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in June 1992, which states that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of his rights and obligations in a suit at law. Furthermore, the article 19 of the same Covenant enshrines the right of everyone to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print or in the form of art.

We would like to emphasise the article 21 of the ICCPR which guarantees the right to freedom of peaceful assembly. The article also stipulates that any restriction on this right must be strictly governed by the principles of legality, necessity and proportionality. Related to this, we would also like to refer to the report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on the exercise of these rights for the promotion of climate justice, which indicates that "(S)tates should recognise and provide spaces for civil disobedience and non-violent direct action campaigns, (...)" (A/76/222, para. 90(d)). The Rapporteur proceeds to urge that States should "(G)arantee that their legal systems do not provide possibilities through which corporations and other public and private entities can intimidate, criminalize and repress climate justice activists with legal processes, including strategic lawsuits against public participation, binding orders and injunctions (...)" (A/76/222, para. 90(e)).

In addition, we would like to draw the attention of the Government of your Excellency to the United Nations Declaration on the Rights of Indigenous Peoples, which reflects existing legal obligations arising from international human rights treaties. In particular, article 24(2) of the Declaration states that indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. Similarly, article 24 of the Convention on the Rights of the Child recognises the right of the child to the enjoyment of the highest attainable standard of physical and mental health and the concomitant duty of the State to provide adequate nutritious food and safe drinking water, taking into account the dangers and risks of environmental pollution.

We would also like to draw attention to the Framework Principles on Human Rights and the Environment detailed in the 2018 report of the Special Rapporteur on human rights and the environment (A/HRC/37/59). The Principles provide that States must ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights (Principle 1); States must respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment

(Principle 2); and States must ensure effective enforcement of their environmental standards against public and private actors (Principle 12).

Also, on 8 October 2021, the Human Rights Council adopted resolution 48/13 recognising the right to a clean, healthy and sustainable environment. In addition, the Framework Principles on Human Rights and the Environment, presented to the Human Rights Council in March 2018 (A/HRC/37/59) set out the core obligations of States under human rights law regarding the enjoyment of a safe, clean, healthy and sustainable environment. Principle 4 states that "States should establish a safe and enabling environment in which individuals, groups of individuals and organs of society concerned with human rights or environmental issues can operate free from threats, harassment, intimidation and violence."

We would like to draw Excellency's Government attention to provisions in the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which United States of America ratified on 21 October 1994. Article 5 of CERD makes clear that State parties must in compliance with the fundamental obligations laid down in article 2 of this Convention, undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law. This includes the right to equal treatment before the tribunals and civil rights, including the right to freedom of peaceful assembly and association.

We would also like to draw your attention to the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on "Global extractivism and racial equality" ([A/HRC/41/54](#)) in which the Special Rapporteur stresses that the prohibition on racial discrimination in international human rights law requires States to take action to combat intentional or purposeful racial discrimination, as well as to combat de facto or unintentional racial discrimination. In its general recommendation [No. 32 \(2009\)](#), the committee on the elimination of racial discrimination (CERD) clarifies that the prohibition of racial discrimination under the Convention cannot be interpreted restrictively. It not only aims to achieve formal equality before the law, but also substantive (de facto) equality in the enjoyment and exercise of human rights. The Committee emphasizes the fact that the Convention applies to purposive or intentional discrimination, as well as discrimination in effect and structural discrimination. This substantive, non-formalistic approach to equality applies even to the extractivism economy. Within territories of extraction, politically marginalized groups have few means of protection against extractivist projects that violate their rights or interests when confronted with the militarized States and corporate actors that are a mainstay of the extractivism economy. Extractivist projects can threaten the very physical and cultural existence of these groups as peoples and, on account of their devastating environmental impact, also result in gross violations of the rights to health and life, by causing illness and death. These projects profoundly affect the cultural identity and religious freedoms of these groups. When these communities lose effective control of their lands and territories due to extractivist encroachment and displacement, they lose their main sources of livelihood.