

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

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(Please use this reference in your reply)

29 July 2022

Mr. Harmening,

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, 50/17, 43/16 and 43/36.

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 (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.

In this regard, we would like to bring to the urgent attention of your Excellency's Government the information we have received regarding 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.

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

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 S.A. 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 as Pespi-Co², General Mills³ y Nestlé⁴. 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 1,430 hectares of communal territory in the canton.⁵

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.⁶

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

² https://www.pepsico.com/docs/default-source/sustainability-and-esg-topics/pepsico-global-palm-oil-supplier-list-2021.pdf?sfvrsn=27984ad3_3

³ <https://www.generalmills.com/-/media/Project/GMI/corporate/corporate-master/Files/Issues/General-Mills-Mill-List-H2-List-March-2022.pdf?rev=0ca5efc1912a476c961a393781219e2a>

⁴ <https://www.nestle.com/sites/default/files/2019-08/supply-chain-disclosure-palm-oil.pdf>

⁵ 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.

⁶ Oficio Nro.MAG –CGAJ-2021-0090-OF

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.

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 human rights due diligence policies and processes established by your company to identify, prevent, mitigate and account for how they address their human rights impacts, in accordance with the UN Guiding Principles on Business and Human Rights, in particular in its supply chain. Please clarify how your company requires suppliers to conduct human rights due diligence in order to respect human rights, including those of community leaders and human rights defenders as well as their legitimate work of defending human and environmental rights.
3. Please provide information on the remedial measures your company has taken, or plans to take, to address the negative human rights impacts caused by its activities, including across its supply chain, as such as intimidation of human rights defenders.
4. Please provide information on policies your company has taken or is considering taking to ensure the protection of human rights defenders.

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.

We may publicly express our concerns in the near future, as we believe that the information we have received is sufficiently reliable to indicate that there is a

matter that warrants immediate attention. In addition, we believe that the public needs to be informed of the potential implications related to the above allegations. The press release will indicate that we have been in contact with your company to clarify the relevant issues.

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

Please accept, Mr. Jeff Harmening, the expression of our most distinguished 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 your attention 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 consultation with governments, civil society and the business community. The Guiding Principles have been established as the authoritative global standard for all States and businesses to prevent and address business-related adverse human rights impacts. These Guiding Principles are based on the recognition of:

- 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 corporations performing specialised functions, which must comply with all applicable laws and respect human rights;
- c. The need for rights and obligations to be matched by appropriate and effective remedies when they are violated".

The Guiding Principles also make clear that companies have an independent responsibility to respect human rights. Principles 11-24 and 29-31 provide guidance to companies on how to meet their responsibility to respect human rights and to provide remedies where they have caused or contributed to adverse impacts. The Guiding Principles have identified two main components of the corporate responsibility to respect human rights, which require "business enterprises to:

- (a) Prevent their own activities from causing or contributing to adverse human rights impacts and address those impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts directly related to operations, products or services provided through their business relationships, even where they have not contributed to those impacts" (Guiding Principle 13). (Guiding Principle 13).

The commentary to Guiding Principle 13 notes that companies can be affected by adverse human rights impacts, either through their own activities or as a result of their business relationships with other parties (...) The 'activities' of business enterprises are understood to include both actions and omissions; and their 'business relationships' include relationships with business partners, entities in their value chain and any other non-State or State entities directly linked to their business operations,

products or services".

To meet their responsibility to respect human rights, companies should have in place policies and procedures appropriate to their size and circumstances:

- (a) A political commitment to uphold their responsibility to respect human rights;
- b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their human rights impact;
- c) Processes to redress any adverse human rights impacts they have caused or contributed to. (Guiding Principle 15)

According to Guiding Principles 16-21, human rights due diligence involves:

- (a) Identifying and assessing actual or potential adverse human rights impacts that the enterprise has caused or contributed to through its activities, or that are directly related to the operations, products or services provided by its business relationships;
- (b) Integrate the results of impact assessments into relevant business functions and processes, and take appropriate action in accordance with their involvement in the impact;
- (c) Monitor the effectiveness of the measures and processes adopted to address these adverse human rights impacts in order to know whether they are working;
- (d) Communicate how adverse effects are addressed and demonstrate to stakeholders - particularly those affected - that appropriate policies and processes are in place to implement respect for human rights in practice".

This process of identifying and assessing actual or potential adverse human rights impacts should include substantive consultation with potentially affected groups and other stakeholders (Guiding Principle 18).

Where an enterprise causes or is likely to cause an adverse human rights impact, it should take the necessary steps to end or prevent that impact. "The establishment of operational-level grievance mechanisms for those potentially affected by corporate activities can be an effective means of redress provided they meet certain requirements listed in Principle 31 (Guiding Principle 22).

In addition, the Guiding Principle 18 and 26 underline the essential role of civil society and human rights defenders in helping to identify potential adverse human rights impacts related to business. The Commentary to Principle 26 underlines how States, in order to ensure access to remedies, must ensure that the legitimate activities of human rights defenders are not obstructed. In its 2021 guidance on ensuring respect for human rights defenders (A/HRC/47/39/Add.2), the Working Group on Business and Human Rights highlighted the urgent need to address the adverse impacts of business activities on human rights defenders. It explains, for States and companies, the normative and practical implications of the Guiding Principles in relation to protecting and respecting the vital work of human rights defenders.

The Working Group outlined in its guidance illustrative steps that Companies 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. Be aware of and demonstrate a commitment to the rights of human rights defenders through policies and procedures relating to human rights due diligence or impact assessments.
2. Not expose human rights defenders to undue risk, for example, by initiating frivolous legal proceedings, including SLAPPs, or by reporting them to the authorities as a means of intimidation. Recognise that SLAPPs are not only wrong in terms of operating on a principled basis, but are incompatible with the activity of human rights defenders.
3. Use leverage in business relationships to ensure that respect for human rights defenders is developed and maintained.
4. Recognise that human rights due diligence is a tool for greater coherence. Conduct human rights due diligence in which community leaders and human rights defenders are an important expert resource as part of human rights due diligence processes, enabling companies to understand the concerns of affected individuals and communities on the ground.
5. Continuously improve human rights due diligence policies and processes through regular and open engagement with affected stakeholders, civil society organisations, human rights defenders and trade unions, and be transparent about the management of potential and actual impacts.
6. Adopt a preventive approach by actively monitoring risks against HRDs, adopting an open and inclusive approach to stakeholder and worker participation, especially with those most at risk.
7. Be as transparent as possible in responding to concerns raised by defenders, as well as about human rights risks and reprisals faced by defenders and how the company has addressed them. This information should be produced in a way that respects the wishes of human rights defenders and also protects them from reprisals.
8. Design and implement an operational-level grievance mechanism that addresses the greatest risks to defenders, can protect confidentiality, provide anonymity and is accessible through multiple channels.
9. Have clear protocols in place to address attacks against human rights defenders. This includes designating individuals responsible for receiving, investigating and responding to complaints regarding threats against human rights defenders, and learning lessons to avoid a repetition of the same behaviour.

We would like to draw your attention to article 12 of the International Covenant on Economic, Social and Cultural Rights, which Ecuador ratified in March 1969, which enshrines the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The right to health is also guaranteed as part of the Universal Declaration of Human Rights, Article 25, which reads in terms of the individual's potential, the social and environmental conditions that affect the individual's health, and in terms of health services. General Comment No. 14 of the Committee on Economic, Social and Cultural Rights describes the normative content of Article 12 of the International Covenant on Economic, Social and Cultural Rights and the legal obligations undertaken by States Parties to respect, protect and fulfil the right to physical and mental health. In General Comment No. 14, paragraph 11, the Committee on Economic, Social and Cultural Rights interprets the right to health as "an inclusive right that encompasses not only timely and appropriate health care, but also the underlying determinants of health, such as access to safe drinking water and

adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information".

Furthermore, the Committee on Economic, Social and Cultural Rights affirmed that "business activities can adversely affect the enjoyment of Covenant rights", including through adverse impacts on the right to health, standard of living and the natural environment, and reiterated "the obligation of States parties to ensure that all economic, social and cultural rights set forth in the Covenant are fully respected and that the holders of these rights are adequately protected in the context of business activities" (E/C.12/2011/1, para. 1).

They would also like to draw your company's attention to article 14 of the International Covenant on Civil and Political Rights, ratified by Ecuador in March 1969, 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, 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 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)aurantee 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 your company's attention 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 your attention to provisions in the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which Ecuador ratified on 22 September, 1996. 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.

We would like to refer your Excellency's Government 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. We also wish to refer to articles 5(a), 6(c), 9 and 12, which state that everyone has the right, individually and in association with others, to meet or assembly peacefully for the purpose of promoting and protecting human rights; to study, discuss, form or hold opinions on the observance of all human rights and fundamental freedoms and to draw public attention to these matters; to benefit from an effective remedy and be protected in the event of the violation of these rights; and to participate in peaceful activities against violations of human rights and fundamental freedoms.