

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on minority issues; the Special Rapporteur on extreme poverty and human rights; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur on violence against women and girls, its causes and consequences

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(Please use this reference in your reply)

3 May 2023

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 extrajudicial, summary or arbitrary executions; Special Rapporteur on minority issues; Special Rapporteur on extreme poverty and human rights; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and Special Rapporteur on violence against women and girls, its causes and consequences, pursuant to Human Rights Council resolutions 44/15, 44/5, 43/8, 44/13, 43/36 and 50/7.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the alleged failure of Unilever Tea Kenya Ltd. (UTKL), a business enterprise with operations in your country, to provide effective remedy to the 218 UTKL employees and their families who were victims of attacks and serious human rights violations (i.e. killings, rapes, lootings) committed by third parties and fellow UTKL employees on the UTKL plantation, before and after the presidential elections in December, 2007, in the Rift Valley Province, Kenya.

According to the information received:

In December 2007, before and after the presidential elections, a series of violent attacks took place against Kisii ethnic minority workers and/or residents living on a tea plantation in Kericho, in the Rift Valley Province of Kenya, owned and operated by UTKL, a subsidiary of Unilever PLC. The attacks were allegedly carried out by individuals belonging to the Kalenjin ethnic majority, including fellow UTKL employees, who entered the plantation, freely roamed the residential areas where employees lived, looking for workers who were members of Kisii ethnic minority, and attacked them and their families. According to information received, seven people were killed, hundreds were brutally attacked, and 56 women were raped. As a result, thousands fled the plantation. Victims and their families claim that UTKL's senior management was aware of the likelihood of violence but failed to take adequate measures to protect them from the risk of ethnically motivated violence and failed to respond adequately in the aftermath of the attack.

According to information received, the victims continue to suffer serious physical and psychological consequences of the attack, including serious permanent or partial disabilities, as a result of which many of the victims are no longer able to work, and have lost their source of livelihood for their families. One of the victims reportedly contracted HIV as a result of being

raped. Six victims were found to have Post Traumatic Stress Disorder, five of whom were categorised as severe/chronic and require significant treatment with therapy and medication.

Victims claim that by employing tea pickers belonging to the Kalenjin ethnic majority of the Rift Valley Province alongside the Kisii minority ethnic group, UTKL exposed its workers and their families to serious risk of ethnic violence and, as such, failed to prevent, and consequently address, the serious human rights violations they suffered.

There had previously been instances of inter-ethnic violence during elections (for example in 1992 and 1997 elections), including in the Rift Valley. It was therefore reasonable to expect a risk of violence against ethnic minorities around the 2007 elections. In this context, UTKL's Crisis Management Plan of 2007 identified the risk of "Country Instability", "Riot and Ethnic Clashes", "Land invasion by indigenous people reclaiming historic land" and "Armed attack on company property or personnel" and the need for special arrangements "if there is a targeted ethnic group".¹ The Plan identified elections as posing a particular increased risk of ethnic clashes and civil unrest. According to the information received, former and current employees of UTKL victims and former UTKL managers indicated that threats were repeatedly made against the Kisii minority in the plantation in the run-up to the 2007 elections. These threats were reported to UTKL's management, who failed to take the necessary preventive measures. Those in management positions at UTKL, including senior managers belonging to the Kalenjin ethnic group, allegedly incited hatred and violence against the Kisii minority, including by displaying posters with threatening language in Kericho.

The immediate response of the company to the crisis was to shut down the operations in the plantation and to send the workers from the Kisii minority back to their hometowns, most of which were in the Kisii area, located about two hours from Kericho by road. The company failed to provide the victims with emergency medical assistance, and immediately stopped paying wages for a period of six months. Workers who subsequently returned to the plantation had their wages resumed, however, no retroactive payment was made for the previous six months.

Workers who returned to the plantation after the attacks and whose accommodations were looted during the attacks allegedly received very limited financial assistance from the company (a lump sum of around £80, equivalent to one month's wages), which was not proportionate to the loss of wages, housing, and possessions they had suffered. Those who did not return received nothing. Those victims who sought medical and psychological treatment while away from the plantation did not receive any financial assistance to cover those costs. Those who did not return to the plantation received no medical or psychiatric support from the company. Even for those who returned to work at the plantation, little further support was made available.

In 2018, 218 claimants, including the families of the victims who were killed in the plantation, filed a complaint to the United Kingdom of Great Britain and

¹ Crisis and Emergency Management in Unilever Tea Kenya

Northern Ireland (UK) Court of Appeal. The victims initially sought redress by submitting a claim for civil damages in the UK on the basis that Unilever PLC, as the parent company of UTKL, failed to protect its workers from the risk of violence and unlawfully withheld wages after the attack. The victims addressed their claim to the UK courts as the parent company (Unilever PLC) is registered in the United Kingdom. The victims sought access to remedy in the UK courts because of the barriers they would face if seeking judicial remedy in Kenya, including high costs, risks of persecution and harassment. Later decisions by the UK Supreme Court have made clear that a UK parent company could have a duty of care to its subsidiary's workers and local communities in such circumstances.

According to information received, as of today, the victims of the incidents that occurred in the plantation in 2007 have not had access to justice and/or to an effective remedy.

While we do not wish to prejudge the accuracy of these allegations, we wish to express deep concern about the lack of access to justice and to an effective remedy of the UTKL workers of the Kisii ethnic minority who were subject to attacks surrounding the 2007 election. The absence of an effective response by Your Excellency's Government exacerbates the human rights impacts suffered by the victims. We are particularly concerned that the events described above affected the right to life, the right to the highest attainable standard of physical and mental well-being, the right to work and safe working conditions, the right to an effective remedy, the right to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to housing, and others.

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 highlight the steps that your Excellency's Government has taken, or is considering to take, to protect against negative human rights impacts of Kenyan business enterprise activities, ensuring that business enterprises domiciled in its territory and/or within its jurisdiction conduct effective human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights throughout their operations, including in conflict-affected areas, as set forth by the UN Guiding Principles on Business and Human Rights (UNGPs).
3. Please provide information regarding the measures that Your Excellency's Government has taken, or is considering to take, to ensure that those UTKL employees and their families who were victims of

serious human rights abuses occurred in the UTKL plantation in the aftermath of the 2007 elections, have access to effective judicial and/or State-based non-judicial remedies in line with the UNGPs and relevant provisions contained in the Kenyan National Action Plan on Business and Human Rights on ensuring effective access to remedy for business-related human rights abuses.

4. Please indicate whether the victims and survivors of rape have had access to remedies, including medical treatment and psychological services as well as other measures by the Government to identify and hold accountable the perpetrators of violence.
5. Please indicate the steps that Your Excellency's Government has taken, or is considering to take, to ensure that business enterprises domiciled in your territory and/or jurisdiction establish and participate in effective operational-level grievance mechanisms, or cooperate with legitimate remedial processes, to address adverse human rights impacts that they have caused or contributed to.
6. Please describe the guidance, if any, that Your Government has provided to Kenyan business enterprises on how to respect human rights throughout their operations, including in conflict-affected areas, in line with the UNGPs. In particular, please indicate what measures your Excellency's Government has taken or has planned to take to implement the relevant provisions in the Kenyan National Action Plan on Business and Human Rights with regard to developing and disseminating guidance for businesses "on their duty to respect human rights, including the implications of their operations on ... minorities...", to cooperating with government agencies and other stakeholders "in facilitating remedies for business-related human rights violations", and to address the statement that "business association stated they lack proper guidance on establishing credible operational-level grievance mechanisms".
7. Please indicate the steps Your Excellency's Government has taken, or is considering to take, to address the structural and procedural barriers to access to remedy identified in the National Action Plan on Business and Human Rights.
8. Please indicate the steps Your Excellency's Government has taken, or is considering to take, to implement the policy actions in relation to access to remedy identified in the National Action Plan on Business and Human Rights.
9. Please provide information regarding measures that your Excellency's Government has taken to implement the recommendations contained in the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to Kenya in 2018 (A/HRC/41/43/Add.2), including:
 - a. Provide guidance and set clear expectations for all business enterprises about their responsibility to respect human rights

throughout their operations;

- b. Step up efforts to address gender-based discrimination and sexual harassment in the workplace, including with a view to protecting all individuals, irrespective of their sexual orientation or gender identity, and adopt legislation criminalizing sexual harassment in the workplace and include sanctions for all perpetrators;
- c. Take additional steps to scale up collaboration and coordination across public institutions at the national and county levels, in order to ensure policy coherence and clear allocation of responsibilities, including in the oversight of businesses operating at the county level; and
- d. Enforce the Legal Aid Act, including by ensuring free legal assistance.

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

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 be informed that a letter on this subject matter has been sent to the Government of the United Kingdom of Great Britain and Northern Ireland, Unilever Tea Kenya Ltd. and Unilever PLC.

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

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transnational corporations and other business enterprises

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xenophobia and related intolerance

Reem Alsalem
Special Rapporteur on violence against women and girls, its causes and consequences

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 article 27 of the International Covenant on Civil and Political Rights (ICCPR), which Kenya accessioned to 1 May 1972, together with the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which call on States to protect the existence and identity of ethnic minorities.

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) following years of consultations involving Governments, civil society, and the business community. The Guiding Principles have been established as the authoritative global standard for all States and business enterprises with regard to preventing and addressing adverse business-related human rights impacts. These Guiding Principles are grounded in recognition of:

- a. "States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b. The role of business enterprises as specialized organs or society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- c. The need for rights and obligations to be matched to appropriate and effective remedies when breached."

According to the Guiding Principles, States have a duty to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises.

The obligation to protect, respect, and fulfil human rights, recognized under treaty and customary law entails a duty on the part of the State not only to refrain from violating human rights, but to exercise due diligence to prevent and protect individuals from abuse committed by non-State actors (see for example Human Rights Committee, general comment no. 31 para. 8).

It is a recognized principle that States must protect against human rights abuse by business enterprises within their territory. As part of their duty to protect against business-related human rights abuse, States are required to take appropriate steps to "prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication" (guiding principle 1). This requires States to "state clearly that all companies domiciled within their territory and/or jurisdiction are expected to respect human rights in all their activities" (guiding principle 2). In addition, States should "enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights..." (guiding principle 3). The Guiding Principles also require States to ensure that victims have access to effective remedy in instances where adverse human rights impacts linked to business activities occur. States may be considered to have breached their international human law obligations

where they fail to take appropriate steps to prevent, investigate and redress human rights violations committed by private actors. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.

According to guiding principle 7, because the risk of gross human rights abuses is heightened in conflict affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by: (a) engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships; (...) (d) ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses. As it is pointed out by the Commentary, “it is important for all States to address issues early before situations on the ground deteriorate. In conflict-affected areas, the “host” State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their “home” States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighbouring States can provide important additional support.”

According to guiding principle 25, as part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative, or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. As noted in the Commentary to guiding principle 25, „many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended consequences of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.” In addition, guiding principle 26 requires States to take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical, and other relevant barriers that could lead to a denial of access to remedy. guiding principle 26 provides that access to effective remedy should not be denied because of “...the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws (which) facilitates the avoidance of appropriate accountability.” This is specifically the case “...where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim...”. Guiding principle 27 also notes that States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

Business enterprises, in turn, are expected to carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their impacts on human rights. Where a business enterprise causes or may cause an adverse

human rights impact, it should take the necessary steps to cease or prevent the impact. Similarly, where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible (commentary to guiding principle 19). Furthermore, business enterprises should remedy any actual adverse impact that it causes or contributes to. Remedies can take a variety of forms and may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome (commentary to guiding principle 25).

As specified in the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises to the General Assembly (A/75/212), on the steps that States and business enterprises should take to prevent and address business related human rights abuse in conflict and post-conflict affected contexts, business should exercise heightened due diligence in conflict affected contexts because of the increased risk of being involved in serious human rights abuses. The same applies to States.

We would like to also refer your Excellency's Government to the report of the Special Rapporteur on violence against women and girls, its causes and consequences on rape to the Human Rights Council (A/HRC/46/26), which calls States to provide access to justice and support for victims of rape, including through the criminalization and prosecution of rape and the harmonization of national criminal laws and practices with international standards on rape. As highlighted in the report of the Special Rapporteur on indigenous women and girls to the Human Rights Council (A/HRC/50/26), it is also imperative to implement extraterritorial human rights obligations and to hold non-State actors accountable for the human rights violations they committed, especially against indigenous women and girls.

We highlight the peremptory norm of international law prohibiting racial discrimination and the obligation arising under article 2(1) of the Convention on the Elimination of Racial Discrimination (ICERD), acceded by your Excellency's Government on 13 September 2001, to "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms". We would like to recall your Excellency's Government's obligation under article 5(b) of the ICERD to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

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