

Mandates of the Special Rapporteur on the situation of human rights defenders and the Working Group on the issue of human rights and transnational corporations and other business enterprises

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(Please use this reference in your reply)

18 October 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights defenders and Working Group on the issue of human rights and transnational corporations and other business enterprises, pursuant to Human Rights Council resolutions 52/4 and 53/3.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning a strategic lawsuit against public participation that a Canada based mining company First Quantum Minerals (FQM) would pursue against a non-governmental organisation - South African Research Watch (SARW) - because of its independent work to report on human rights impacts that the company has allegedly caused.

South African Research Watch (SARW) is a non-governmental organisation based in Johannesburg. It monitors the conduct of State and corporate actors involved in the extraction of natural resources in Southern Africa, applying an inter-generational socio-economic lens to their research and paying particular attention to human rights and environmental impacts.

According to the information received:

In March 2021, SARW and two of its staff members received notice of a lawsuit brought against it by the Canadian-headquartered mining company First Quantum Minerals (FQM) and Kansanshi Mining PLC, in which FQM holds an 80% stake, at the High Court in Johannesburg. The companies sought 1 million South African Rand in damages and unconditional apology from SARW in response to a report published by the NGO in December 2020, following two fact-finding visits to the companies' Kansanshi copper and gold mine in Solwezi, north-west Zambia. The report was the second of two studies carried out by SARW to examine the impact of the Kansanshi mine on the human rights of local communities, including the right to a clean healthy and sustainable environment. Both reports concluded that the corporate social responsibility (CSR) projects implemented by the companies had been insufficient to offset negative impacts on the local environment and the communities' rights, such as their right to health. A draft of both reports was shared with the company by SARW prior to their publication, leading to the threat of legal action by the companies in each instance.

In May 2021, SARW submitted its intention to defend itself in the case, arguing that the suit brought against it by the companies constituted a SLAPP intended to intimidate and silence it. The case was eventually withdrawn by the company in December 2022, following consultations with SARW.

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 this Canada-based company.

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 or comments that may be relevant.
2. Please provide information on the measures the Government of Canada 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 Canada 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, including the CORE.

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.

Please note that a communication expressing similar concerns has also been sent to the Government of South Africa, as well as to Tendele Coal Mining (PTY) Ltd, and First Quantam Minerals.

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

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

Damilola S. Olawuyi
Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Annex

Reference to international human rights law

In connection with the allegations detailed above and our connected concerns, 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. "

Concerning article 6 of the Covenant, in the Human Rights Committee's General Comment 36, expanding on the article, it was held that the obligation of State parties to respect and ensure the right to life "extends to reasonably foreseeable threats and life-threatening situations" and that State parties may be in violation of article 6 of the Covenant "even if such threats and situations do not result in loss of life" (para 7). The Committee further stated that State parties must "take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence" and stated that "such persons include human rights defenders" (para 26). State parties to the Covenant must take "necessary measures to respond to death threats and to provide adequate protection to human rights defenders, including the creation and maintenance of a safe and enabling environment for defending human rights" (para 53).

We would also like to strongly underline the 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, adopted by consensus by the UN General Assembly in 1998 and of which article 1 states 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.

Further to article 1 of the Declaration, we wish to refer to several provisions of the standard with particular relevance for the above-detailed allegations, notably article 6(b) of the Declaration, which holds that all persons have the right to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; article 6(c), which guarantees the right to study, discuss, form and hold opinions on the observance, both in law and practice, of all human rights and fundamental freedoms and to draw attention to these matters; and article 9.5, which states that States shall conduct prompt and impartial investigations whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred in any territory under its jurisdiction.

We would also like to emphasise article 12 of the Declaration, which states that everyone has the right to participate in peaceful activities against violations of human rights and fundamental freedoms *and* that the State shall take all necessary measures to ensure the protection of any persons exercising their rights as referred to in the Declaration from violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action they are subjected to as a consequence.

In addition to the Declaration on Human Rights Defenders, we would like to highlight the recommendations for States included in the report of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises concerning business and human rights defenders (A/HRC/47/39/Add.2).

To conclude, we would like to recall Human Rights Council resolution 38/12, which calls on States to take all steps necessary to prevent threats, attacks, discrimination, arbitrary arrests and detention or other forms of harassment, reprisals and acts of intimidation against civil society actors, to investigate any such alleged acts, to ensure access to justice and accountability, and to end impunity where such violations and abuses have occurred.