

Mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

REFERENCE:
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Dear Mr. Polman,

I have the honour to address you in my capacity as Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, pursuant to Human Rights Council resolution 27/23. I wish to refer my email of 1 March 2016 and your emails of 13 March 2016 and 29 March 2016.

In this connection, I would like to bring to your attention information I have received concerning the recent settlement reached between Hindustan Unilever Ltd (HUL) and the former workers of their thermometer factory in Kodaikanal.

According to the information received:

In 2001, a mercury thermometer factory operated by Unilever subsidiary Hindustan Unilever Ltd (HUL) was shut down by state environmental regulators after it was found to have illegally disposed of tonnes of hazardous mercury wastes at a local scrapyards. In addition, the factory site, which is situated between two biodiverse and ecologically valuable watershed forests in Kodaikanal, southern India, was found heavily contaminated with mercury. Mercury levels were alleged to have been more than 50,000 times higher than naturally occurring soil background values in some areas.

A 2002 study by Unilever's consultant URS Dames & Moor reported that HUL discharged more than 1.3 tonnes of mercury into Pambar Shola Reserved Forest. This mercury waste has not and cannot be recovered and shall remain within the forest ecosystem. In 2015 the National Environment Engineering Research Institute (NEERI) concluded that silt-bound mercury continued to be leaking from the contaminated site, based on its finding that three out of five sediment samples taken from streams in Pambar Shola forests contained elevated levels of mercury. In March 2016, Hindustan Unilever Ltd (HUL) reached a settlement with approximately 591 former employees who once worked at the factory that requires Unilever to clean up the contaminated site.

According to critics, Unilever refused to clean up the site for 15 years, and when they finally agreed to do so, this was the result of public pressure and outrage, not corporate responsibility. It is reported that millions of people shared the viral music video 'Kodaikanal Won't', and more than 150,000 people in over 100 countries petitioned and tweeted to hold Unilever accountable.

According to Unilever, the settlement agreement was made on humanitarian grounds and represents an end to a longstanding matter that had been pending in the Madras High Court, is in accordance with the suggestion of that court that the parties seek an out-of-court resolution and that HUL is fully committed to upholding the UN Guiding Principles of Business and Human Rights.

Unilever also states that it requires the consent from the statutory authority Tamil Nadu Pollution Control Board (TNPCB) to proceed with remediation. The TNPCB was constituted in 1982 pursuant to the Water (Prevention and Control of Pollution) Act 1974, and enforces the rules made under the Environment (Protection) Act 1986, which includes inter alia, the Environment (Protection) Rules 1986; the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules 2008; and the Manufacture, Storage and Import of Hazardous Chemical Rules 1989 as amended. The TNPCB is the statutory authority in the state of Tamil Nadu, India to set soil remediation criteria.

Controversially, Unilever has chosen to use a standard of 20 to 25 milligrams of mercury per kilogram of soil to remedy the situation. Unilever claims that this is the remediation standard set by the TNPCB based on an approved scientific methodology of site specific risk assessment by the National Environment Engineering Research Institute (NEERI) validated by the Central Pollution Control Board (CPCB). Unilever is confident that the use of such a standard would reduce the present mercury contamination level to one that is safe for human health.

Unilever also claims that this standard will protect the environment as independent studies have found that a lower standard would lead to greater soil evacuation and the uprooting of more trees. According to Unilever there has been no impact on the environment outside the factory premises, with the exception of a small area, on the perimeter of the factory, where rain water and entrained soil used to run off the slope from the factory site to the Pambar valley on the southern side, away from the lake. As a matter of precaution, silt traps were allegedly used to mitigate any environmental risk in 2001. Unilever claims that HUL is committed to remediate this and has included it in the Detailed Project Report submitted in 2015 to the TNPCB.

Unilever maintains that the ceasing of their operations in March 2001, the removal of all mercury-bearing material in 2003 and the subsequent decontamination and safe disposal of plant, machinery and materials used in thermometer manufacturing in 2006 have removed the risk of any run-off from the site causing further mercury contamination.

However, it has also been brought to my attention that Unilever's proposed standard of remediation (20 mg of mercury per kg of soil) has been contested by a range of actors.

First, critics allege that Unilever's insistence of a risk assessment study based upon a 'residential' standard, indicates its refusal to acknowledge the ecological sensitivity and geographical proximity of the contaminated site with Pambar Shola Reserve Forest, which requires the highest level of protection to the millions of water users and fish consumers downstream.

Second, critics allege that Unilever's proposed standard will leave behind a site that will leach mercury into the soil and surface waters of the forest for decades to come. Based on Unilever's remediation standard, one third of the 366 kg of mercury that is conservatively reported as contaminating the soil on site will allegedly remain, once the remediation is completed. In addition it is also alleged that additional mercury at concentrations between 0.1mg and 10mg/kg have been deposited at shallow depth across the site (75kg) and to the north and south of the site (30 kg) primarily from airborne mercury emitted from the factory.

Third, critics also question the non-transparent and secretive process by which the remediation standard was arrived at with the TNPCB, and point out that the TNPCB did not conduct independent studies, but allowed Unilever to engage its own consultants. For instance, it is alleged that Unilever paid for the NEERI study (\$52,000USD) to give the company an opinion on site remediation and to fix the site specific target level for clean up. It is alleged that NEERI recommended a clean up standard of 25mg/kg whereas it had proposed a standard of 10mg/kg at the Local Area Environment Committee (LAEC) meeting on 3 May 2005. (LAEC was set up by the Tamil Nadu Pollution Control Board in line with the directions of the Supreme Court Monitoring Committee on Hazardous Wastes).

Finally, it is alleged that there has been a failure to conduct an adequate and site-specific risk assessment. General concern has been raised by Unilever's downplaying of the dangers of residual mercury onsite, including the ongoing leaking of mercury from the factory to the Pambar Shola forest. There has been no ecological study of the impact of 1.3 tonnes of mercury that has already entered the forest habitat.

While I do not wish to prejudge the accuracy of these allegations, concern is expressed that the remediation plan proposed by Unilever for Kodaikanal would not mitigate future environmental and human right impacts to the greatest extent possible. Concern is also expressed regarding the failure to realize an effective remedy for worker and community victims in a timely manner. Grave concern is expressed about the dangers of residual mercury onsite including the ongoing leaking of mercury from the factory to the Pambar Shola forest. Particular concern is expressed that chronic exposure to mercury by young children during critical periods of development, directly or through their mother, can have severe and irreversible impacts on their right to the highest attainable standard of health. Concern is also expressed regarding the right to adequate housing, as the remediated site is planned for residential use.

In connection with the above alleged facts and concerns, please refer to the **Reference to International Human Rights Law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention. I would therefore 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 provide the details of any site-specific risk assessment or ecological study in relation to this case including the methodologies and used and results obtained. Is it true that Unilever paid for the NEERI study?
3. Please provide details as to when Unilever expects remediation will begin, and what measures of protection are being taken in the interim to identify, prevent and mitigate against continued harm to human health and the environment.
4. Even though a single clean-up standard for mercury contamination does not exist, as highlighted in the UN Guiding Principles, “where a business enterprise causes an adverse human rights impact, it should take the necessary steps to cease or prevent the impact” and “use its leverage to **mitigate any remaining impact to the greatest extent possible**”¹. Given the ecological sensitivity and geographical proximity of the contaminated site with Pambar Shola Reserve Forest, please explain why you would chose a risk assessment study based on a ‘residential’ standard rather than a higher protection standard.
5. How is Unilever meeting its responsibility to respect human rights in a way that complies with international human rights standards? Does it have a policy commitment (approved at the most senior level of the company) that is reflected in its operational policies and procedures?
6. Please explain what Unilever is doing to carry out its human rights due diligence in order to identify, prevent, mitigate and account for how it addresses adverse human rights impacts. How does the company track the effectiveness of its measures to prevent and mitigate adverse human rights impacts, including through consultation with affected stakeholders?
7. What operational-level grievance mechanisms has Unilever established or participated in to address the grievances identified above early and remediate them directly? What is Unilever doing to ensure that the

¹ Guiding Principles on Businesses and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, p26

allegations raised in this letter are being addressed in a way that is compatible with human rights and puts the safety, concerns and rights of the workers first?

8. Please indicate if the Government has provided any guidance to business enterprises in India, including in particular to Unilever, on their corporate responsibility to respect human rights, specifically on the expected due diligence process, in line with the UN Guiding Principles on Business and Human Rights?

I would appreciate receiving a response within 60 days.

I would like to inform you that a letter addressing similar allegations and concerns as those mentioned above has also been sent to Government of India.

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

Your response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Mr. Polman, the assurances of my highest consideration.

Baskut Tuncak

Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

Annex

Reference to international human rights law

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

- The Universal Declaration of Human Rights;
- The International Covenant on Economic, Social and Cultural Rights;
- The International Covenant on Civil and Political Rights;
- The Convention on the Rights of the Child, and;
- The UN Guiding Principles on Business and Human Rights.

Since Unilever was the first company to adopt the United Nations Guiding Principles Reporting Framework, you are fully aware that a private actor and business enterprise has certain responsibilities as outlined in the UN Guiding Principles on Business and Human Rights. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. Furthermore, it exists over and above compliance with national laws and regulations protecting human rights.

The Universal Declaration on Human Rights proclaims that every organ of society shall strive to promote respect for human rights and fundamental freedoms and to secure their universal and effective recognition and observance. The UDHR (article 3) and the International Covenant on Civil and Political Rights (article 6.1) also guarantee the right of every individual to life and security and not to be arbitrarily deprived of life.

Following years of consultations that involved Governments, civil society and the business community, the Human Rights Council unanimously adopted in June 2011 the Guiding Principles on Business and Human Rights (contained in A/HRC/17/31).

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:

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

The corporate responsibility to respect human rights covers the full range of rights listed in the UDHR, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. It also includes the respect of the eight International Labour Organization core conventions, also envisaged in Principle 4 of the UN Global Compact, which states that business enterprises should uphold the elimination of all forms of forced and compulsory labour. The Guiding Principles 11 to 24 and 29 to 31 provide guidance to business enterprises on how to meet their responsibility to respect human rights and to provide for remedies when they have caused or contributed to adverse impacts.

Business enterprises 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. 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.

The Guiding Principles require that “business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts” (Guiding Principle 13). This dual-requirement is further elaborated by the requirement that the business enterprise put in place:

1. A policy commitment to meet their responsibility to respect human rights;
2. A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights. The business enterprise should communicate how impacts are addressed; and
3. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute (Guiding Principle 15).

Each of these is elaborated below.

Policy Commitment:

The first of these requirements, a policy commitment, must be approved by the company's senior management, be informed by human rights expertise (internal or external) and stipulate the human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services. The statement of policy must be publicly available and communicated internally and externally and reflected in operational policies and procedures necessary to embed it throughout the business enterprise (Guiding Principle 16).

Human Rights Due Diligence:

The second major feature of the responsibility to respect is human rights due-diligence, the procedures for which have been deemed necessary to 'identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships' (Guiding Principle 18). Adequate human rights due diligence procedures must include 'meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation' (Guiding Principle 18).

To prevent and mitigate against adverse human rights impacts, the findings of the human rights impact assessment should be effectively integrated across the relevant internal functions and processes of a company (Guiding Principle 19). Responsibility for addressing such impacts should be assigned to the appropriate level and function within the business enterprise, and internal decision-making, budget allocations and oversight processes should enable effective responses to such impacts.

Any response by a company to address its adverse human rights impacts should be tracked to ensure that it is effective. Tracking should be based on appropriate qualitative and quantitative indicators, and drawing on feedback from internal and external sources including affected stakeholders (Guiding Principle 20). In addition, information about activities taken to address any adverse human rights impacts, and how effective those actions have been, should be communicated externally (Guiding Principle 21).

Remediation:

The Guiding Principles acknowledge that "even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent". Where a company identifies that it has "caused or contributed to adverse impacts" it "should provide for or cooperate in their remediation through legitimate processes" (Guiding Principle 22).

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).

Business enterprises should establish or participate in operational-level grievance mechanisms “to make it possible for grievances to be addressed early and remediated directly” (Guiding Principle 29). Operational-level grievance mechanisms should reflect eight criteria to ensure their effectiveness in practice, as outlined in Guiding Principle 31: (a) Legitimate, (b) Accessible, (c) Predictable, (d) Equitable, (e) Transparent, (f) Rights-compatible, (g) A source of continuous learning, and (h) Based on engagement and dialogue.

Lastly, operational-level grievance mechanisms must not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access by individuals and communities to judicial or other non-judicial grievance mechanisms (Guiding Principle 29).

In connection to the above concerns regarding the clean - up standard for mercury contamination, even though a single clean-up standard does not exist, “where a business enterprise causes an adverse human rights impact, it should take the necessary steps to cease or prevent the impact” and “use its leverage to **mitigate any remaining impact to the greatest extent possible**²”. Companies need to respect the right of everyone to the enjoyment of the highest attainable standard of physical and mental **health** enshrined by Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights describes the normative content of article 12 and the legal obligations undertaken by the States parties to the Covenant to respect, protect and fulfill the right to health. In paragraph 11 of General Comment No. 14, the Committee interprets the right to health as “an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable 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”.

Moreover I would like to draw your attention to article 7 of the ICESCR, enshrining the right of everyone to the enjoyment of just and favourable conditions of work, including **safe and healthy working conditions**. The above-mentioned General Comment No.14 holds that the improvement of all aspects of environmental and industrial hygiene comprises, inter alia, “preventive measures in respect of occupational accidents and diseases [and] the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health”. I would also like to stress that the right to work is a fundamental right, recognized in the ICESCR. As specified in General Comment No. 18 (2005) on article 6 of the Covenant, work must

² Guiding Principles on Businesses and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, p26

be “decent work”, that is, “work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration.”

I also wish to draw your attention to article 6.1 of the International Covenant on Civil and Political Rights (ICCPR), which states that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” We would also like to call your attention on General Comment No. 6 (1982) of the Human Rights Committee on the **right to life**. According to the Human Rights Committee, the expression “inherent right to life” should not be interpreted in a restrictive manner. The protection of the right to life therefore requires States to adopt positive measures to implement this right, including measures to reduce infant mortality and increase life expectancy.

Additionally, I would also like to refer to article 19 of ICCPR, which stipulates the right to “seek, receive and impart **information**”. In this context, I call your attention to the importance of the right to information about hazardous substances to the general public, as outlined in my report to the Council (A/HRC/30/40).

In addition, article 6 of the Convention on the Rights of the Child (CRC), recognizes that every child has the inherent right to life and that requires that States Parties ensure to the maximum extent possible the survival and development of the child. It further requires State Parties to take all effective and appropriate measures to diminish infant and child mortality. Moreover, the Article 24 of the CRC recognizes the right of the child to the enjoyment of the highest attainable standard of **health** and to facilities for the treatment of illness and rehabilitation. The article 24, paragraph 2 (c) of the Convention specifically requires States to pursue the full realization of the right of the child to the enjoyment of the highest attainable standard of health taking into consideration the dangers and risks of environmental pollution.