

Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur in the field of cultural rights; 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 rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the rights of indigenous peoples; and the Special Rapporteur on the human right to safe drinking water and sanitation

REFERENCE:
UA USA 7/2016

21 September 2016

Excellency,

We have the honour to address you in our capacity as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur in the field of cultural rights; 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 rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the rights of indigenous peoples; and Special Rapporteur on the human right to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 26/22, 28/9, 28/11, 24/5, 25/18, 24/9 and 24/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received regarding **the construction of an oil pipeline in proximity to the Standing Rock Sioux Reservation, planned to cross under Lake Oahe, the main source of water for the tribe and an area of cultural and spiritual significance. The pipeline construction was initiated by the United States Army Corps of Engineers in conjunction with Energy Transfer LLC Corporation without the free prior and informed consent of the Tribe, who have expressed their strong opposition to the project, and despite serious concerns raised by three separate U.S. Federal Agencies; the United States Department of the Interior, the United States Environmental Protection Agency and the United States Advisory Council on Historic Preservation.**

We note as positive that the Department of the Army, the Department of Justice and the Department of the Interior have jointly announced, on Friday 9 September 2016, a temporary halt to pipeline construction under Lake Oahe and have requested that the pipeline company voluntarily pause all construction activity within 20 miles east or west of Lake Oahe. We welcome the recognition of the need to hold 'government-to-government consultations' on ways to 'better ensure meaningful tribal input into infrastructure-related reviews and decisions and the

protection of tribal lands, resources tribes’ and whether ‘new legislation should be proposed to Congress to alter that statutory framework and promote those goals.’

We urge the US Government to undertake a thorough review of its compliance with international standards regarding the obligation to consult with indigenous peoples in good faith and obtain their free and informed consent. The statutory framework should be amended to include provisions to that effect. We note as important that the United States Environmental Protection Agency and the United States Advisory Council on Historic Preservation participate in such a review of legislation.

According to the information received:

The Standing Rock Sioux Tribe is a federally recognised US tribe whose status as part of the Sovereign Sioux Nation was affirmed with the signing of the 1868 Ft. Laramie Treaty. The Standing Rock Sioux Reservation was established by the federal government through the Act of March 2, 1889. The people of Standing Rock, often called Sioux, are members of the Dakota and Lakota Nations. The Standing Rock Sioux Reservation has a land base of 2.3 million acres and is located on the borders of south central North Dakota and north central South Dakota. Some 8000 Tribal members live on the Reservation.

On 25 July 2016, the United States Army Corps of Engineers, a U.S. Federal Agency under the Department of Defense, gave federal authorisations for the construction of the Dakota Access Pipeline, a 1,172-mile pipeline with the capacity to send 570,000 barrels of crude oil per day. These authorisations include the construction of the pipeline underneath Lake Oahe, less than a mile from the Standing Rock Sioux Tribe’s reservation at known cultural sites directly upstream from the reservation’s drinking water intake, and to make discharges into lands originally secured by the Tribe in the 1851 Fort Laramie Treaty, to which the tribe continues to have strong cultural, spiritual, and historical ties.

Lack of consultation, information and redress

The Standing Rock Sioux Tribe affirms no good faith consultations have taken place since they first learned of the project in 2014 and their consent was never obtained. Although members of the Standing Rock Sioux Tribe have repeatedly requested to be consulted, the Army Corps has reportedly not carried out consultations with any of the tribes while carrying out their cultural and environmental impact studies relating to the pipeline.

The failure to consult tribal governments and consider the impacts on tribal governments is manifested in the Corp's Final Environmental Assessment of the project in North Dakota, which omitted to include impact analysis on any tribal lands or reservations despite the proximity of the Standing Rock Sioux, Ft. Berthold and Cheyenne River Sioux Reservation to the foreseen Dakota Access Pipeline, which would pass upstream within a half-mile of the reservation and run underneath Lake Oahe.

In addition, the Army Corps failed to provide timely and adequate information to the Standing Rock Sioux Tribal leaders, family members, food producers and cultural practitioners to enable them to understand the immediate and long term dangers and risks, including risks to child, maternal, intergenerational and, environmental health associated with this project. In addition, members of the tribe were not informed that construction of the Dakota Access Pipeline would jeopardise and potentially desecrate and destroy sites of religious and cultural significance to the Standing Rock Sioux including traditional burial sites. The authorisation for the construction of the Dakota Access Pipeline by the Army Corps of Engineers was issued in spite of the express opposition of the Standing Rock Sioux Tribe.

Several Federal Agencies have expressly stated their concerns over the Army Corps' lack of consultations with the Standing Rock Sioux Tribe and noted firsthand knowledge of letters from the Tribal Government expressing their objections regarding the project. Notably, serious concerns have been raised by the Environmental Protection Agency (EPA, letter dated 11 March 2016), the Department of Interior (DOI, letter dated 29 March 2016), and the Advisory Council on Historic Preservation (ACHP, letter dated 15 March 2016).

On 9 September 2016, the District Court of Columbia ruled in favour of continuing the construction of the Dakota Access Pipeline the case of *Standing Rock Sioux Tribe v. US Army Corps of Engineers*, stating that the tribe had "not carried its burden to demonstrate that the Court could prevent damage to important cultural resources". The ruling makes no reference to international standards regarding the obligation to consult indigenous peoples in good faith and to obtain their free, prior and informed consent.

Failure to recognise cultural and religious sites

It is alleged that the Corps' cultural survey failed to adequately consider the presence of known and unknown cultural and religious sites in the area of the Dakota Access Pipeline. Faulty cultural surveys ignored historical information presented by the Standing Rock Sioux Tribe and omitted the discovery of a

significant religious and cultural site directly located in the pipeline's proposed route.

The pipeline construction crossing Lake Oahe would take place in an area of known religious and spiritual significance that would likely destroy burial grounds, sacred sites and historically significant areas surrounding the lake. In particular, the confluence of the Cannonball and Missouri Rivers is a site with known and documented cultural significance as a place of religious and historical relevance to the tribe. The Standing Rock Sioux's tribal historic preservation officer made numerous unsuccessful attempts to communicate to the Army Corps the close proximity of culturally significant sites, including burial sites, to the pipeline.

The risk of disruption of unknown burial and cultural sites is considerable and reportedly some burial grounds have already been destroyed. Many of these were not identified due to the Corps' exclusion of tribal experts in any part of the cultural survey process. It is further alleged that the Corps' issued a formal finding of no historic properties on 22 April 2016, despite site visits the previous month where Corps archaeologists agreed more study was required after they were shown places where prehistoric remains such as pottery shards, bone, and tools were visible. This finding led to both formal objections from the ACHP and the Standing Rock Sioux Tribe based on the Corps failure to define the area potentially affected, and inadequate tribal consultation efforts regarding the construction of the pipeline across their culturally significant ancestral homelands.

It is alleged the Corps failed to respond to these formal objections other than providing the tribe with generic information on the permit process. Despite extensive publicly available information on cultural and religious sites, these characteristics and facts were ignored in the Corps decision to proceed with construction as planned at the Lake Oahe crossing.

Negative environmental impact and violation of the right to water

The Army Corps engaged in an environmental assessment process that focused on individual parts of the pipeline, segmenting the project and limiting the scope of the impact studies to smaller geographical areas. In its environmental assessment, the Army Corps failed to analyse the pipeline's projected impacts outside of the segmented areas singled out by the Army Corps. Maps included by the Army Corps in the environment assessment failed to disclose the presence and proximity of tribal lands or reservations.

The pipeline, if completed, would cross many creeks and rivers that could quickly convey a spill into the Missouri River or other water resources and have the

potential to affect the primary source of drinking water for much of North Dakota, South Dakota and Tribal Nations. Potential spills and leaks to the Missouri River and tributaries would quickly affect drinking water intakes and large areas of riparian resources such as wetlands, habitat, and plant resources. The spill planning and emergency response proposed by the Army Corps does not disclose potential impacts to downstream water supplies from leaks and spills nor adequately include the water systems in emergency preparedness planning.

The US Environmental Protection Agency has urged that a thorough 'Environmental Justice' analysis be conducted, in consultation with potentially affected communities, and has underlined that for oil pipeline projects, potential impacts to communities should include the effects of leaks and spills to downstream water supplies (both drinking water quality, agricultural uses, and costs) and aquatic resources such as fish and riparian vegetation used by such populations.

The US Environmental Protection Agency has specifically recommend that the discussion of route alternatives be expanded to discuss how the preferred Missouri River crossing locations were determined and whether there are other available routes or crossing locations that would have reduced potential to water resources, especially drinking water supplies.

It is alleged that since 2010, over 3,300 incidents of crude oil and liquefied natural gas leaks or ruptures have occurred on U.S. pipelines. These incidents have killed 80 people, injured 389 more, and cost \$2.8 billion in damages. They also released toxic, polluting chemicals in local soil, waterways, and air. According to the Pipeline and Hazardous Materials Safety Administration, these spills and ruptures released over 7 million gallons of crude oil into the environment.

Examples of oil spills in the recent past, including the release of 840,000 gallons of oil near Tioga, North Dakota in October, 2013; the 120,000 gallon spill of oil and wastewater near Marmarth North Dakota in May 2016 and the release of more than 25,000 gallons of oil and wastewater in a June 2016 spill in Billings County, all demonstrate the danger oil pipelines pose to downstream communities and the need for comprehensive environmental assessments that accounts for impacts to all potential communities.

In addition to its impact on health, subsistence and the environment, water contamination would deeply sever cultural and spiritual ties as water is considered a sacred source of life for the Standing Rock SiouxTribe.

Harassment and criminalisation of human rights defenders

Tribal leaders, tribal members and their supporters who have turned to peaceful protest to halt the pipeline's construction have reportedly been intimidated, harassed and prosecuted.

Despite continuously urging all protests to remain peaceful, human rights defender and Standing Rock Sioux Tribal Chairman David Archambault II was arrested on 12 August 2016 at a protest rally just north of the reservation boundary. Allegedly, Mr. Archambault II was taken to the Morton County Jail and charged with disorderly conduct before being released. A total of 18 men and women were arrested over the two-day peaceful protest, most for disorderly conduct, and two for a more serious charge of criminal trespass.

The company reportedly sued in federal court on 15 August 2016 to stop protesters from "interfering with the project", alleging the safety of workers and law enforcement are at risk. Furthermore, in an action that the Standing Rock Tribe views as intimidation, on 17 August 2016 Dakota Access LLC filed a lawsuit against Standing Rock Sioux Tribal Chairman David Archambault II and other protesters, seeking a restraining order and unspecified monetary damages. They claim that the peaceful protesters "have created and will continue to create a risk of bodily injury and harm to Dakota Access employees and contractors, as well as to law enforcement personnel and other individuals at the construction site," according to the company's charges in the court papers.

In the afternoon of 3 September 2016, a procession of tribal protesters, consisting of men, women, and children, walked chanting and praying to the protest site where the demonstrations took place in early August and witnessed Dakota Access construction workers bulldozing the earth, destroying graves and sacred sites. In response to calls from the tribal community to stop the construction, private security staff employed by Dakota Access arrived and unleashed attack dogs and used pepper spray on non-violent indigenous protesters. Six people reportedly suffered injuries from dog bites.

While we do not wish to prejudge the accuracy of these allegations, serious concern is expressed as to how the decisions related to this construction project have been taken, particularly in relation to the lack of consultation with affected indigenous people in decision-making and the failure to seek their free, prior and informed consent.

Grave concern is also raised about the negative impact this project will have on the fragile ecosystem, the right to water and the rights to access and participate in cultural life, to access and enjoy cultural heritage, and to conduct one's own cultural and religious practices. The pipeline would cross areas of great historical and cultural, spiritual, ecological, and economic significance to the Standing Rock Sioux Tribe and the potential damage or destruction of which would greatly injure the Tribe and its members. We also

express our concern in relation to the arrest of and charges against human rights defenders, including Tribal Chairman David Archambault II and other community members, for their legitimate exercise of the right to freedom of peaceful assembly, and over the use of dogs against protesters.

We wish to draw the attention of your Excellency's Government to its obligations under binding international human rights instruments. Specifically, in its 28 March 2014 concluding observations to the periodic report presented by your Excellency's Government, the Human Rights Committee, referring to Article 27 of the International Covenant on Civil and Political Rights (ICCPR), expressed its concerns "about the insufficient measures being taken to protect the sacred areas of indigenous peoples against desecration, contamination and destruction as a result of urbanization, extractive industries, industrial development, tourism and toxic contamination. It is also concerned about [...] the insufficiency of consultation with indigenous peoples on matters of interest to their communities" (CCPR/C/USA/CO/4, para 25).

We would also like to refer to the Declaration on the Rights of Indigenous Peoples (2007), endorsed by your Government on 16 December 2010. Recognising the centrality of the traditional lands of indigenous peoples to their lives and cultures, Article 12 of the Declaration affirms that "indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites". Article 32(2) establishes that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

Furthermore, the Declaration provides for the rights of indigenous peoples to redress for actions that have affected the use and enjoyment of their traditional lands and resources. In that regard, Article 28 states that "indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."

The human right to safe drinking water and sanitation derives from the right to an adequate standard of living which is protected under, inter alia, Article 25 of the Universal Declaration of Human Rights, and Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which the United States Government signed on 5 October 1977. Article 15 of the same Covenant and Article 27 of the Universal Declaration of Human Rights guarantee the right to take part in cultural life. While the United States Government has not ratified the Covenant, upon signing

ICESCR, it agreed to bind itself in good faith to ensure that nothing is done that would defeat the object and purpose of the international instrument, pending a decision on ratification.

Furthermore, we would like to refer to Articles 19 and 21 of the ICCPR which guarantee the right to freedom of opinion and expression and freedom of peaceful assembly respectively. Similarly, we wish to refer to OP2 of Human Rights Council resolution 24/5 in which the Council “[r]eminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely... including persons espousing minority or dissenting views or beliefs, human rights defenders... and others... seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law”.

We also wish to refer to the Guiding Principles on Business and Human Rights, which were unanimously endorsed by the Human Rights Council in its resolution (A/HRC/RES/17/4) in 2011. The Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. They set out that business enterprises should exercise human rights due diligence and ensure remediation of adverse human rights impacts that they have caused or contributed to (Guiding Principles 11, 13, 17, 22). They further recognize the important and valuable role played by independent civil society organizations and human rights defenders. In particular, Guiding Principle 18 underlines the essential role of civil society and human rights defenders in helping to identify potential adverse business-related human rights impacts. The Commentary to Guiding Principle 26 underlines how States, in order to ensure access to remedy, should make sure that the legitimate activities of human rights defenders are not obstructed.

Finally, we would like to underline 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 Articles 1, 2 and 5.

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

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency’s Government to safeguard the rights of the above-mentioned person(s) in compliance with international instruments.

As it is our responsibility, under the mandate 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 any comment you may have on the above-mentioned allegations.
2. Please explain your Government's actions following the allegations over the project developers' failure to hold consultations with the Standing Rock Sioux Tribe and provide details of how the United States seeks to comply with international standards regarding the duty to consult in good faith and obtain free prior and informed consent in relation to this specific project, given its significant impact on tribal lands, natural resources and sites of cultural, religious and historic importance.
3. With reference to the joint statement by the Department of the Army, the Department of Justice and the Department of the Interior on Friday 9 September 2016, which recognises the need to hold 'government-to-government consultations', please provide details of:
 - a.) the measures the US Government is undertaking to "better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights";
 - b.) in view of your Government's endorsement on 16 December 2010 of the United Nations Declaration on the Rights of Indigenous Peoples, what steps have been taken to review and amend national legislation to incorporate international standards regarding the obligation to consult indigenous peoples in good faith and to obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources
4. Please provide details of relevant judicial proceedings, including those mentioned above.
5. Please outline what measures are being taken to ensure that environmental impact assessments duly consider the impact projects will have on indigenous peoples and other affected communities.
6. Specifically, what safeguards are in place to ensure that authorisations, approvals, or actions taken by Federal Agencies, like the Army Corps of Engineers, do not threaten the rights of Indian tribes and cause irreparable

damage to locations of religious and cultural significance and risk polluting essential drinking and irrigation waters?

7. What are the potential impacts of leaks and spills from pipelines on downstream water supplies, including on drinking water quality, agricultural uses, and compensation costs? Moreover, what is the nature of the emergency and disaster contingency plans in place – if existing – to respond to leaks, spills or other relevant accidents that risk compromising water supplies and other natural resources?
8. Please indicate the legal basis for the arrest and charges against Mr. Archambault II and other tribal community members, and how these are compatible with international human rights norms and standards.
9. Please indicate whether any investigation will be conducted in relation to the allegations of violence by private security guards against peaceful protesters, including the use of dogs. Please further indicate whether any civil and/or criminal sanctions will be brought against the alleged perpetrators.
10. Please indicate what measures have been taken to ensure that human rights defenders can freely operate in a safe and enabling environment and can carry out their legitimate activities without interference and fear of harassment, stigmatisation or criminalisation of any kind.

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 responsible of the alleged violations.

We intend to publicly express our concerns in the near future as we are of the view that the information upon which the press release is going to be based is sufficiently reliable to indicate a matter warranting immediate attention.

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

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

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