

Mandates 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 rights to safe drinking water and sanitation

REFERENCE: UA USA 14/2016:

11 November 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 rights to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 26/22, 28/9, 28/11, 24/5, 25/18, 33/12, and 33/L.19.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **excessive use of force by state law enforcement officials, private security companies, as well as the North Dakota National Guard, in the context of protests against the Dakota Access Pipeline, in particular, over the past two weeks.**

A previous communication UA USA 7/2016 was sent to your Excellency's Government on 21 September 2016, in which Special Procedures raised their concern about the failure to consult the indigenous peoples concerned and to obtain their free and informed consent regarding the Dakota Access Pipeline project. Furthermore, serious concerns were raised in relation to the negative impact this pipeline could have on various aspects: the ecosystem, the right to water and the rights to participate in cultural life, to access cultural heritage and to conduct one's own cultural and religious practices. To date, no answer has been received.

According to the information received:

Since April 2016, thousands of protestors, including Native Americans, have been protesting against the pipeline construction at the site of the Dakota Access Pipeline at the border of North and South Dakota, close to the Standing Rock Sioux Reservation. The protests mainly target the fact that the construction of the pipeline could have a tremendous and profoundly detrimental impact on the local

Native American communities and on the environment (see UA USA 7/2016). They furthermore claim the lack of consultation with the Standing Rock Sioux tribe.

The proposed pipeline construction route will cross the Missouri River and Lake Oahe immediately upstream from the Standing Rock Sioux reservation. The pipeline as currently being built passes through federal and private land bordering the Standing Rock Sioux reservation, which the Sioux leaders describe as unceded Sioux lands, to which the tribe continues to have strong cultural, spiritual, and historical ties. The Standing Rock Sioux Chairman Dave Archambault II has continuously advocated for protests to remain pacific.

Over the past two weeks, and more precisely, since 27 October 2016, tensions have reportedly been escalating; state law enforcement officials, private security companies, as well as the North Dakota National Guard have been employing an increasing militarized response to protests, forcibly moving encampments located near the construction site of the Dakota Access Pipeline. Some violence from protestors has been reported and it has been alleged that, among them were infiltrated agents provocateurs. A minority of them allegedly threw rocks, bottles and logs at police officers and set fire to vehicles, to some of the Dakota Access Pipeline equipment and to a bridge. A lack of presence and action by the United States Federal Government has been reported.

More than 400 people have allegedly been arrested in the last two weeks, about 9% of them being from the Standing Rock Sioux tribe, including Chairman Dave Archambault II. Civil society organizations have reported use of violence and humiliations during arrests including the use of “billy clubs”. Those arrested allegedly had their hands tightly bound with plastic zip ties and were allegedly strip searched, and marked with numbers.

On 28 October 2016, clashes allegedly occurred between security forces and the protestors. Local police officers allegedly used excessive force against protestors to clear the camps and remove them from federal property. Police have reportedly responded to protesters with rubber bullets, tear gas, mace, compression grenades and bean bags, and in one instance, private security staff used guard dogs. Those recently arrested have reported being strip searched and forced to pay bail for minor offenses. Members of the media and legal observers have also been arrested or charged with minor offenses.

On 2 November 2016 local enforcement officials reportedly clashed again with protestors that were demonstrating against the North Dakota oil pipeline. Officers using riot gear from the Morton County Sheriff’s Department made a second attempt to clear the camp that was settled by protestors, among them Native Americans from across the United States.

Conditions of detention were reported to be inadequate, men were detained with women and some were placed in cages located inside the garage of the Morton Country jail on a bare concrete floor with up to 25 people in each cage. Insufficient medical assistance was provided to the many injured demonstrators and to those having specific conditions, in particular, suffering from diabetes. After being processed at this site, many detainees were later sent to other prisons, some over 4 hours away, for further processing.

Individuals arrested were allegedly charged with misdemeanour and/or felony offences including maintaining a public nuisance, trespass on private property of the pipeline builder, engaging in a riot, criminal conspiracy and endangerment by fire. Upon release, with bond payment, some amounting to 1,500 USD , many were left without means to return to their camp. The police allegedly confiscated vehicles, and “chanupas” (sacred pipes and medicine bundles) as well as other private property, such as horses.

Moreover, continuous aerial surveillance by drones, airplanes and helicopters, and on-the-ground surveillance by officers in vehicles stationed on the high points of land adjacent to the south camp and on a nearby hill known by tribal members as a sacred burial site, has been reported.

On 9 October 2016, the Federal Government (the Department of the Army, the Department of Justice and the Department of the Interior) publicly announced a temporary suspension of the construction of the Dakota access pipeline on Army Corps land stating ‘that construction of the pipeline on Army Corps land bordering or under Lake Oahe will not go forward at this time’ and called on the Pipeline Company to voluntarily pause all construction activity within 20 miles east or west of Lake Oahe. The announcement acknowledged that there is need to hold ‘government-to-government consultations’ to better ensure meaningful tribal input into infrastructure-related reviews and decisions. Despite this announcement, construction of the pipeline has continued unheeded seven days a week and several sacred sites have allegedly been bulldozed and destroyed.

On 8 November 2016, the Dakota Access pipeline operator announced that the final phase of the construction project would begin in two weeks, despite requests by federal agencies to delay the project as the US government is currently reassessing permits and considering possible reroutes.

While condemning the violence of some protestors and *agents provocateurs*, we express concern at the allegation of excessive use of force by security forces during protests, as well as the arbitrary detentions of more than 400 individuals and human rights defenders for exercising their legitimate right to peaceful assembly. We are further alarmed at the criminalization of indigenous peoples in their attempts to safeguard their

fundamental freedoms, exerting their right to be consulted and to express their opinion freely and take part in peaceful protests to protect their cultural heritage and environment. We reiterate the concern expressed by the Special Rapporteurs in the previous communication regarding the impact the construction of the pipeline would have on the environment and on the local indigenous communities' lives.

While we do not wish to prejudge the accuracy of these allegations, we would like to refer your Excellency's Government to the international principles and norms applicable to the present case.

We would like to stress that conditions of detention as described above can amount to inhuman and degrading treatment and even torture, as consistently found by, among others, the Human Rights Committee and the Committee against Torture. In connection with these allegations and concerns, we would like to remind your Excellency's Government of its obligations under international human rights law, in particular the absolute prohibition of torture and other forms of ill-treatment as codified in articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

We would like to refer to articles 7, 9, 19 and 21 of the International Covenant on Civil and Political Rights, which enshrine the prohibition of torture and guarantee the rights to not being arbitrarily detained, freedom of expression and opinion, and freedom of peaceful assembly respectively.

We would also like to refer to the Declaration on the Rights of Indigenous Peoples (2007), endorsed by your Government on 16 December 2010. Article 7 of the Declaration provides that indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. As set out in Article 32(2), "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". Article 28 of the Declaration affirms 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."

We would further like to refer to the joint report of the Special Rapporteur the joint report on the proper management of assemblies he prepared with the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/31/66).

We would like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals,

Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and in particular articles 1 and 2 which state that "everyone has the right individually or in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" and that "each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice".

We further draw your attention to Resolution 33/20 of the Human Rights Council, related to cultural rights and the protection of cultural heritage, which calls for the safety and security of cultural rights defenders involved in the protection of cultural heritage to be protected, including by investigating and, where appropriate, bringing to justice anyone alleged to have harmed them (paragraph 10. See also A/71/417, para. 78 k). In her latest report to the General Assembly, the Special Rapporteur in the field of cultural rights specifically recommended that States respect, protect, promote and facilitate the work of those defending cultural rights, recognizing that those who work to promote access to cultural heritage, and to preserve and safeguard it, in accordance with international human rights norms, should be considered human rights defenders (A/71/417, para. 78 k) and l)).

Furthermore, we would like to draw your attention to the UN Guiding Principles on Business and Human Rights, which were endorsed by the Human Rights Council in its resolution (A/HRC/RES/17/31) in 2011. 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 of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and
- c) "The need for rights and obligations to be matched to appropriate and effective remedies when breached."

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. 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 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.

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 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 any comment you may have on the above-mentioned allegations.
2. Has any complaint been lodged by or on behalf of the alleged victims?
3. Please provide details on how the arbitrary arrests of protestors are in accordance with international human rights law, in particular articles 9, 19 and 21 of the ICCPR.
4. Please provide information on the conditions of detention described above and how they comply with article 7 of the ICCPR and article 2 and 16 of the CAT.
5. Please provide information on the measures that have been taken to ensure that the rights of human rights defenders, especially those involved in the protection of cultural heritage and of the rights of indigenous peoples, are guaranteed, free of any surveillance and harassment by security forces, local police and private security companies.

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.

We intend to reiterate our concerns publicly 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.

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 our highest consideration.

Pavel Sulyandziga
Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Karima Bennoune
Special Rapporteur in the field of cultural rights

John H. Knox
Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Maina Kiai
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst
Special Rapporteur on the situation of human rights defenders

Victoria Lucia Tauli-Corpuz
Special Rapporteur on the rights of indigenous peoples

Léo Heller
Special Rapporteur on the human rights to safe drinking water and sanitation