



PEACE BRIGADES INTERNATIONAL

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The Honorable Barack H. Obama
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

October 10, 2014

Dear President Obama,

We noted with great interest your September 24 announcement at the Open Government Partnership that the United States will produce a National Action Plan on responsible and transparent business conduct. We applaud your leadership in this area, because, as you noted in the announcement, both businesses and societies benefit when companies act in accordance with standards and rules for responsible conduct. If done well, developing a National Action Plan will help strengthen the U.S. government's role in promoting business practices that respect human rights.

Peace Brigades International is a human rights organization with over 30 years of field and advocacy experience protecting and promoting the work of human rights defenders around the world, including those working in the context of business related human rights violations. As this is one of our priorities, and given our on-going engagement with the United Nations Working Group on Business and Human Rights (UNWG) and European governments on this issue, we hope to contribute to your Administration's development of a comprehensive and responsive National Action Plan (NAP). In addition to noting that the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights have published a toolkit for developing a National Action Plan that contains useful guidelines for establishing an inclusive and multi-stakeholder process, we lay out below our additional recommendations.

- 1. The U.S. National Action Plan should include a comprehensive plan for consultation with, support for, and protection of human rights defenders.***

In our decades of field work in the countries in which we maintain permanent field presence – currently Colombia, Guatemala, Honduras, Kenya, Mexico and Nepal - PBI has found that business-related human rights violations against individuals, communities, and the human rights defenders who represent them, continue largely unabated. Human rights defenders (HRDs) continue to be the victims of extrajudicial killings, abductions, surveillance, and intimidation due to their efforts to put an end to human rights abuses linked to business activities. Criminalization of HRDs and their work is particularly troublesome for the way it has been used as a strategy to infringe on individuals rights to freedom of association, assembly, and peaceful protest.

We believe that there is a strong case for States to use their diplomatic capacity in a more robust and proactive way to prevent human rights violations committed by businesses within their jurisdiction. Consultation, protection, enforceable sanctions and monitoring mechanisms have a strong potential to prevent and deter human rights violations. For redress, an effective and well

communicated access to remedy is crucial. Furthermore, it is essential that the U.S. makes its NAP fully coherent with existing policies and programs to support and protect defenders, and enhance those policies and programs in order to address the particular problem of violations against HRDs working on business and human rights issues. Specifically, we recommend the following:

- ❖ The current situation of risk for HRDs indicates that stronger and more effective **protection and prevention mechanisms** need to be put in place for HRDs working in this area and should thus be mentioned in the NAP. The NAP should also reiterate the primary responsibility of States to ensure a **safe and enabling environment** for HRDs; the responsibility of all business enterprises to respect the rights of HRDs including by not interfering with their exercise of the rights to freedom of expression, association, and protest; and should detail the measures that the U.S. will take to protect and support HRDs and communities according to their specific situation of risk.
- ❖ Moreover, full and effective implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs) depends on **meaningful engagement with all stakeholders** concerned. Therefore, the U.S. NAP should create and/or refer to legally enforceable mechanisms regulating that engagement, guaranteeing free, prior and informed consent of all representatives of the community, as well as consultation during operational phases of large scale economic projects, with measurable indicators for engagement and participation of HRDs and communities. The NAP should also list the steps and measures that the U.S. will take to promote consultation with HRDs at home and in third states, and to encourage businesses to fully consult with civil society organizations in the design and implementation of projects.
- ❖ The U.S. should strongly consider **facilitating specific consultation and/or dialogue mechanisms at a local level** in countries in which U.S. companies operate, whereby HRDs and communities are given a space to voice their concerns to business (if they choose to) in the presence of Embassy officials. Such a mechanism should include assurances that all representatives are invited and consulted, not only those most sympathetic to the project. It is important that such dialogues are sensitive to the particular vulnerabilities of and risks facing participating HRDs, and maintain contingency protection plans in the event of reprisals carried out against HRDs. These processes should include a monitoring mechanism to assess if the consultations are fair and effective. Also, the issue of divergent capacities of transnational corporations and communities to enter into dialogue needs to be addressed in order to avoid unconstructive power imbalances.
- ❖ HRDs are essential in promoting economic, environmental, and social justice, and they have a unique vantage point when it comes to asserting the protection and respect of human rights in the context of the advancement of large scale economic projects, as they are stakeholders in any context in which businesses operate. Therefore the U.S. NAP should explicitly **recognize** this particular position, as well as HRDs' vital role in monitoring the implementation of the UNGPs and acknowledge the particular risks they often face by consequence of this work.

- ❖ All government officials working across departments to implement the NAP should receive mandatory **training** regarding human rights, in particular regarding human rights defenders. Such training should be conversant with human rights and international humanitarian law mechanisms to support, protect, and guarantee participation of HRDs and communities, and also include clear practical guidance for diplomats on how to support HRDs.
- ❖ Embassies should **publicize** the NAP among government officials, businesses within U.S. jurisdiction, and civil society organizations, in order for all actors to know their rights, duties and responsibilities.
- ❖ Also concerning is the high level of impunity that perpetrators and those responsible for violations, be they agents of the State, illegal groups, or business and other non-state actors, continue to enjoy at both national and international level across the world. There needs to be a greater focus on implementation of the third pillar of the UNGPs, **Access to Remedy**, both via judicial and non-judicial means as well as more effective regulations and mechanisms to guarantee reparation for direct and indirect victims of business-related human rights violations. The NAP should also give specific instruction to improve judicial investigations that deal with attacks on HRDS working to end impunity.

2. General recommendations

- ❖ The NAP should as much as possible refer or encourage the creation of hard law mechanisms and should be as clear as possible concerning the implementation of the Plan.
- ❖ A genuine monitoring mechanism should be included in the NAP, and be revised some years after the NAP's publication in order to provide for greater accountability.
- ❖ The NAP should make clear that peaceful protest against any kind of business enterprises should be respected.
- ❖ The NAP should reiterate the responsibility of businesses to respect human rights exists independently of States' abilities (and/or willingness) to fulfil their own human rights obligations.
- ❖ Inclusion in the NAP of measures that could be taken if companies are unwilling to meet the standards set for conflict-affected situations.

3. Examples of good practice

- ❖ **Access to remedy for lack of prior consultation**

We believe it is crucial that civil society can file a complaint when a specific principle, such as free, prior and informed consent, is not respected. If this does not work at the national level, the

international community should be able to intervene. This was the case in Colombia with the Mandé Norte Project. Thanks to a complaint filed with the Constitutional Court and precautionary measures granted by the Inter-American Commission on Human Rights, the exploratory drilling of a project that did not carry out proper consultations was suspended until proper impact studies and consultation are conducted.

Case details: In 2005, the Colombian government awarded nine mining titles to the U.S. company Muriel Mining Corporation for a period of 30 years for the exploitation of gold, copper and molybdenum for the so-called Mandé Norte project. These titles represent 16,000 hectares located in the Lower and Middle Atrato regions (north-western part of Colombia) where there are ancestral territories of Embera people and Afro-descendants communities.¹

The affected communities reported the project did not respect the principle of free, prior and informed consent as the consultation was made fraudulently. Said one community member, "They invited some leaders to a meeting where they were given drink and food, but not told about the exploration they would do. This procedure was validated by the government and they started the exploration drilling soon after."² They also made sure that the government accepted as spokesmen people who were representing neither the 12 Embera peoples nor the two Afro-Colombians communities who live there.³

Given this situation, the communities decided to conduct a survey in order to answer the following question "Do you or do you not want exploration and mining of the Mandé Norte project in our territory?" Between 24 and 28 February 2009, 12 indigenous communities from Uradá, Jiguamiandó, Chageradó, Turriquitadó, and Murindó, as well as Afro-descendant communities from the Pueblo Nuevo Humanitarian Zone in Jiguamiandó participated in the survey. The mining project was unanimously rejected.⁴

In response to a complaint filed by the communities in October 2009, the Constitutional Court issued a decision, T 769, which ordered the suspension of the exploration phase until studies on social, environmental and cultural impact were made and a consultation was properly conducted, ensuring the free, prior and informed consent of the affected communities.⁵

Communities reported that people who opposed the mining project in the area were accused of being members of the guerrillas; they were stigmatized and their lives were threatened.⁶ In January 2010, after a bombing of the Army in the area that wounded two indigenous people, the Inter-American Commission on Human Rights granted precautionary measures to 87 families

¹ Constitutional Court of Colombia, Decision T-769 of 2009, October 2009.

² PBI Colombia, "A Struggle for the Good of Humanity': Indigenous peoples reject mining project", *Informational Newsletter #11*, May 2009.

³ *El Tiempo*, "Corte Constitucional ordena suspender explotación en complejo minero más importante del país", 24 March 2010.

⁴ PBI Colombia, *Op. Cit.*

⁵ Constitutional Court of Colombia, *Op. Cit.*

⁶ Regional Indigenous Council of Cauca, "La grave situación de los pueblos indígenas no contó para la UE a la hora de rubricar el TLC con Colombia", 22 June 2011, <http://www.cric-colombia.org/portal/la-grave-situacion-de-los-pueblos-indigenas-no-conto-para-la-ue-a-la-hora-de-rubricar-el-tlc-con-colombia>.

because of the risk provoked by the presence of armed groups in their territory, and recognized their territory as a humanitarian zone.⁷

Unfortunately the Constitutional Court decision regarding the consultation and the necessary studies has still not been implemented by the government. The Interior Ministry and the Ministry of Justice even asked the Constitutional Court to nullify the Court's decision.⁸

❖ **The role of embassies**

We believe embassies officials have an important role to play when it comes to the implementation of NAPs. We have observed some good practices from European and Canadian embassies in Mexico, which visited projects where HRDs have been threatened, met with civil society organizations as well as representatives of companies, and discussed and advised the Mexican government about the design and importance of a NAP.

Case details:

In December 2013, the German, Norwegian and Swiss embassies visited a region in the State of Oaxaca where communities are opposed to the construction of wind farms at a moment when the situation of risk (threats and attacks) for human rights defenders had increased.⁹ They met the communities and HRDs, and visited the wind farms and the affected areas. The visit was publicized on the embassies' websites and incorporated in the reports to their respective Foreign Affairs Ministries. The risk decreased momentarily after the visit. The Canadian Embassy also visited the region during the spring of 2014, and then organized a meeting with the responsible companies of those wind farms in Mexico in order to listen to them and express their concern for the human rights defenders who work on this case.

In the last round of the Human Rights Dialogues between Mexico and the European Union in March 2014, Netherlands and Spain shared with Mexico their experience with the design of their respective National Action Plans. The European Union is currently supporting Mexico with technical assistance the field of Business and Human Rights, including support for design of a NAP.

Between May and July 2014, the UK and Dutch embassies in Mexico met with human rights organizations to explain their NAPs, listen to their concerns and discuss possible follow up in Mexico. During the meeting with the Dutch officials, were also present representatives from the Mexican Government and from Dutch companies.

⁷ Inter-American Commission on Human Rights, Precautionary Measures for the Community of Alto Guayabal-Coredocito of the Emberá People, Colombia, 2010.

⁸ Colombian Ministry of the Interior and Justice, "Nulidad sentencia T-769-09", 15 April 2010.

⁹ PBI Mexico, "Wind Farms and Concerns about Human Rights Violations in Oaxaca", March 2014, http://www.peacebrigades.org/fileadmin/user_files/projects/mexico/files/PBI_Publications/1403BriefingWindFarmsPBI.pdf.



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Peace Brigades International welcomes the Administration's efforts to develop a comprehensive National Action Plan, as long as its mandate allows it to explore the types of issues outlined above and in the ICAR and Danish Institute NAP template. We would be more than happy to work with those within the Administration who will be tasked with carrying out the development of a NAP, and in contributing views and input on specific issue areas, in particular with regard to HRDs. We also would be happy to facilitate communication with affected communities and HRDs who work on these issues in the countries where PBI works.

Sincerely,

Moira Birss, on behalf of the International Advocacy Working Group
Peace Brigades International