

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and the Special Rapporteur on the rights of indigenous peoples

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Excellency,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolutions 44/15, 46/7 and 42/20.

In this connection, we would like to bring to the attention of your Excellency's Government information **we have received concerning the impacts of oil and gas exploration and extraction on the lands of the San indigenous peoples of southern Africa. The San, who were previously evicted from their traditional territory within the Central Kalahari Game Reserve,¹ have strongly objected to petroleum exploration and any future extraction that may cause irrevocable damage to the fragile ecosystem and protected areas on which they depend for their physical and cultural survival.**

According to the information received:

Canadian-based Reconnaissance Oil and Gas (ReconAfrica), through its locally registered subsidiaries and joint ventures, has been granted a petroleum exploration license (License No. 73) in Namibia over 34,000km²/8.4 million acres of lands traditionally used and occupied by the San peoples.

Licence No 73 was issued for an initial period of three years from 2015 to 2018. On 22 October 2018, ReconAfrica was reportedly granted a one-year extension of the initial exploration licence. Discovery of a commercially viable oil and gas reservoir has entitled ReconAfrica to a 25-year exclusive oil and gas production licence until 2024, with a possibility for a 10-year renewal.²

ReconAfrica owns 90 percent of the Namibian side of the deposit, with the government-run National Petroleum Corporation of Namibia owning the remaining 10 percent.

On 7 October 2019, ReconAfrica announced that it had received its Environmental Clearance Certificate – the permit to commence drilling in the Kavango region – from the Office of the Environmental Commissioner at the Ministry of Environment and Tourism in Namibia. The permit authorised

¹ Roy Sesana and Others v. The Attorney General, High Court of Botswana, Misc. No. 52 of 2002, Judgement of 13 December 2006.

² <https://reconafrika.com/wp-content/uploads/ReconAfrica-Investor-Presentation.pdf>

ReconAfrica to drill several wells to any depths until 26 August 2022.

In April and June 2021 ReconAfrica publicly announced “the first two wells have successfully established an active conventional petroleum system in the Kavango basin.”³ In July 2021, the company announced that it will commence logging and coring operations designed to maximize hydrocarbon recovery and that it is “moving to the next phase of the exploration process; acquisition, and processing....with the goal of commercializing this potential major source of energy for Namibia.”⁴

The oil exploration license No. 73 covers an area of the Kalahari Desert upstream of the Okavango Delta in Namibia and Botswana. There are concerns that drilling vibrations, gas flares, noise pollution and fencing may disrupt animal migration or bring them into fatal conflict with humans. The drilling area is a historic migratory route for the largest free roaming elephant population on the planet. Reports indicate that drill rights and other infrastructure could displace villages, impede eco-tourism and livelihoods, threaten food security and restrict access to traditional farming, hunting and gathering grounds, and to traditional medicines and sacred spaces.

Water resources are also at risk. The Okavango Delta is a fragile ecosystem of great ecological significance that provides water to millions of people and animals, including threatened and endangered species like the African savanna elephant. It is the largest wetland protected under the Ramsar Convention that requires it to be conserved and sustainably managed. The drilling area borders three national parks, eleven community conservancy concessions, the Kavango–Zambezi Transfrontier Conservation Area, which is the largest protected area in southern Africa, and the Tsodilo Hills.

According to information received, the Government and the company have failed to carry out appropriate consultations with the San to seek their free, prior and informed consent and their participation in the environmental assessment process. The limited measures undertaken to inform the community have allegedly not been undertaken in a language spoken by the communities and attendance was limited because of pandemic restrictions on large gatherings. Concerns have also been raised over the objectivity and impartiality of the environmental assessment process.

The Okavango Delta and Tsodilo Hills are designated as UNESCO World Heritage sites and Namibia has made commitments to protect the sites under the *Convention Concerning the Protection of the World Cultural and Natural Heritage*. According to UNESCO, the archaeological record of human activities in the Tsodilo Hills dates back at least 100,000 years and the area has 4,500 rock paintings. The UNESCO World Heritage Centre has expressed concern over ReconAfrica’s oil and gas exploration as being incompatible with World Heritage Status and is monitoring the situation.⁵

³ <https://reconafrika.com/wp-content/uploads/ReconAfrica-Press-Release-060321.pdf>;

<https://reconafrika.com/wp-content/uploads/ReconAfrica-Press-Release-041521.pdf>

⁴ <https://africabusinesscommunities.com/oil-and-gas/news/reconafrika-namcor-granted-seismic-permit-for-kavango-basin-onshore-namibia/>

⁵ <https://whc.unesco.org/en/news/2230>

UNESCO has recognized that indigenous peoples are stakeholders and caretakers of World Heritage sites and should be acknowledged as key actors in the effective management and sustainable development of a property. After meeting with government officials, UNESCO announced publicly in December 2020 that the government of Namibia “pledged to ensure that all relevant stakeholders are be consulted on the results of any Environmental Impact Assessment conducted.”⁶

The report on ‘The state of conservation of properties inscribed on the World Heritage List’ for the forty-fourth session of the WHC in July 2021 (WHC/21/44.COM/7B, p. 214), notes that *‘the granting of oil exploration licenses in Botswana and Namibia is of significant concern. While the licensed areas do not overlap with the property or its buffer zone, they are situated in environmentally sensitive areas with a potential negative impact on the property in case of spills or pollution. The areas are also important dispersal routes for elephants and other wildlife...this might be a first stage towards a larger project with significant risks to the interconnected water system of the delta and the OUV, in case reserves are found. Furthermore, IUCN and the World Heritage Centre identified some gaps and concerns with the EIA, such as the need for a more detailed spatial distribution assessment of species and to ascertain the connectivity of the ecosystems. Therefore, great caution should be applied in proceeding with any stage of this project’.*⁷

Experts have raised concerns over the “lack of physical assessments of fauna and flora and to the possible effects on local communities and other people, on archaeological sites, and on groundwater and surface water.”⁸ It is alleged that the project does not comply with section 44 of Namibia’s Water Resources Management Act 11 of 2013, Atomic Energy and Radiation Protection Act 5 of 2005, Environmental Management Act 7 of 2007, the Forestry Act 12 of 2001 and the Nature Conservation Ordinance 4, of 1975. Furthermore, Article 95 of Namibia’s Constitution mandates the “maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of the Namibians, both present and future.”

According to the information received, ReconAfrica is using water obtained from a borehole drilled without a water use permit from the Ministry of Agriculture, Water and Forestry. The company has also allegedly neglected to install an impervious lining system beneath the containment pond. According to information received, seismic testing could cause damage to mud homes and shallow drinking water wells and impact water availability in the villages as has happened in other similar projects.

Further concerns relate to the impact of the project on climate change. Information indicates that based on the company’s projections of 120 billion barrels of oil equivalent, if all the extracted fuel is processed and used, it

⁶ <https://whc.unesco.org/en/news/2230>

⁷ <https://whc.unesco.org/archive/2021/whc21-44com-7B-en.pdf>

⁸ Jeffrey Barbee and Laurel Neme, “Oil drilling, possible fracking planned for Okavango region—elephants’ last stronghold,” NATIONAL GEOGRAPHIC, 28 Oct. 2020 <https://www.nationalgeographic.com/animals/article/oil-drilling-fracking-planned-okavango-wilderness>

could release up to 51.6 billion tonnes of CO₂ – the equivalent of one sixth of the world’s remaining carbon budget.⁹ It is reported that the oil development directly conflicts with the community-based Natural Resource Management Programme, an integral part of the Namibian climate change response funded through the Global Environment Facility under the Paris Climate Agreement. Namibia signed on to the Paris Climate Agreement on 21st September 2016.

Southern Africa is already experiencing the extreme weather events associated with climate change and is warming at twice the rate of the global average. The San, who were displaced from game-rich areas to create wildlife preserves now occupy some of the most inhospitably hot and dry regions of southern Africa. Indigenous peoples are especially vulnerable to the impacts of climate change because of their relationship with the lands and natural resources. The United Nations Department of Economic and Social Affairs (DESA) has noted that “Indigenous peoples in Africa’s Kalahari Desert are forced to live around government drilled bores for water and depend on government support for their survival due to rising temperatures, dune expansion and increased wind speeds which have resulted in a loss of vegetation, and negatively impacted traditional cattle and goat farming practices.” DESA further recognized that “[c]limate change poses threats and dangers to the survival of indigenous communities worldwide, even though indigenous peoples contribute the least to greenhouse gas emissions.”¹⁰

While we do not wish to prejudge the accuracy of these allegations, we express our serious concern regarding the alleged impacts of oil and gas exploration and extraction on the lands of the San indigenous peoples of southern Africa. The above-mentioned allegations appear to be violations of international human rights standards, and non-compliance with previous recommendations of the UN Special Rapporteur on the rights of indigenous peoples urging Namibia to carry out consultations with indigenous communities adversely affected by development projects and natural resource exploitation with the aim of obtaining their free, prior and informed consent.¹¹

We would like to underline that on 23 July 2021, in its extended forty-fourth session, the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Committee (WHC) adopted a draft decision which expressed concern about the granting of oil exploration licenses in environmentally sensitive areas within the Okavango river basin in north-western Botswana and north-eastern Namibia that could result in potential negative impact on the UNESCO site in case of spills or pollution.¹²

The World Heritage Committee urged Namibia to ensure that potential further steps to develop the oil project are subject to rigorous and critical prior review, including through Environmental Impact Assessment (EIA) that corresponds to international standards, including an assessment of social and human rights impacts and a review of potential impacts on the World Heritage site, in line with the IUCN World Heritage Advice Note on Environmental Assessment ; requested

⁹ <https://www.greenpeace.org/africa/en/blogs/13411/fridays-for-future-reconaficas-kavango-oil-and-gas-play-is-carbon-bomb-with-projected-1-6-of-worlds-remaining-co2-budget/>

¹⁰ <https://www.un.org/development/desa/indigenouspeoples/climate-change.html>

¹¹ A/HRC/24/41/Add.1.

<https://whc.unesco.org/archive/2021/whc21-44com-7B-en.pdf>

furthermore the State Party to submit to the World Heritage Centre, by 1 February 2022, an updated report on the state of conservation of the site and the implementation of the above, for examination by the World Heritage Committee at its 45th session in 2022.

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

In light of the information and allegations contained in this communication, we would be interested in knowing your Excellency's Government's views on the accuracy of the information contained in this letter, and we would be grateful to receive any additional information your Government may deem relevant. 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 therefore be grateful for your observations on the following matters:

1. Please provide any additional information and any comments that you may have on the above-mentioned allegations.
2. Please provide information on the legal basis of the oil exploration activities, including compliance with the Namibia Water Resources Management Act 11 of 2013, Atomic Energy and Radiation Protection Act (Act No. 5 of 2005), Environmental Management Act 7 of 2007, the Forestry Act, 12 of 2001 and the Nature Conservation Ordinance 4, 1975, Article 95 of Namibia's Constitution and Namibia's obligation pursuant to the UN Declaration on the Rights of Indigenous Peoples, the Ramsar Convention, the Paris Climate Agreement and the Convention Concerning the Protection of the World Cultural and Natural Heritage.
3. Please provide information on any consultations with the affected indigenous communities prior to the approval of the project, and whether their free, prior and informed consent was sought and received, particularly concerning any potential relocation and social, cultural and environmental impacts. We would appreciate information regarding safety measures put in place to hold consultations during the global pandemic.
4. Please provide information on the measures taken to ensure that impacted residents have adequate access to basic social, medical, food, safe drinking water and sanitation and other services. Information on any remedial measures planned for the community members which will be subject to relocation, or forced to relocate due to the loss of access to livelihood sources caused by the oil exploration.
5. Please indicate measures taken to ensure human rights based approach to conservation in the areas potentially affected by oil exploration activities and measures envisaged to prevent negative environmental and human rights impacts in these specific areas, including the eleven neighboring community conservancy

concessions.

6. Please provide information on any plans to permit hydraulic fracturing (fracking) for this project and if so, what measures are being taken to mitigate risk of exposure to radioactive materials, earthquakes triggered by the injection process, potential draw down of groundwater levels and contamination of water resources through accidental oil spills.
7. Please provide details on the measures taken by your Government to undertake environmental and human rights assessments in line with international standards regarding the impacts of the oil and gas exploration activities on the San indigenous peoples, and any plans to adopt appropriate mitigation and protections measures including the installation of impermeable pond liners, leak detection systems, curtailment of surface runoff, and groundwater monitoring for the exploratory wells that are drilled.
8. Please highlight the steps that your Excellency's Government has taken, or is considering to take to protect against human rights abuses by business enterprises domiciled in its territory and/or jurisdiction, including conducting human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights throughout their operation, as set forth by the UN Guiding Principles on business and human Rights (UN Guiding Principles)
9. Please provide information on additional steps taken by your Excellency's government to protect against human rights abuses by the National Petroleum Corporation of Namibia as a state owned enterprise, including by requiring human rights due diligence.
10. Please indicate specific initiatives taken to ensure that those affected by business-related human rights abuse within your jurisdiction and/or territory have access to effective remedy.

We would appreciate receiving a response within 60 days. Past this time, 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.

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(s) responsible for the alleged violations.

Please be informed that a letter on this subject matter has been also sent to the Governments of Botswana and Canada and to Recon Africa Canada and the National Petroleum Corporation of Namibia with regard to the allegations raised above.

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

José Francisco Cali Tzay
Special Rapporteur on the rights of indigenous peoples

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

David R. Boyd
Special Rapporteur on the issue of human rights obligations relating to the enjoyment
of a safe, clean, healthy and sustainable environment

Annex

Reference to international human rights law

In relation to the above-mentioned facts and concerns, we would like to draw the attention of your Excellency's Government to its obligations under binding international human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination. Your Excellency's government also voted in favor of adopting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and has obligations under the UN Guiding Principles on Business and Human Rights.

We wish to appeal to your Excellency's government to take all necessary steps to secure the right to culture under Article 27 of the ICCPR. Article 27 of the Covenant provides that, "In those states in which ethnic, religion or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." The Committee recognized that culture can manifest itself in many forms including use of lands and resources. (General Comment No. 23 (50) CCPR/C/21/Rev.1/Add.5 26 April 1994 para. 7). In its concluding observations on the second periodic report of Namibia, the Human Rights Committee urged Namibia to "seek the free and informed consent of indigenous communities and give primary consideration to their opinions and decisions prior to granting licences to extractive industries." (CCPR/C/NAM/CO/2, 22 April 2016, para. 44).

Article 1 of the ICCPR and ICESCR recognize the right of all peoples to self-determination, including the right to manage their own resources. General Comment No. 12 of the Committee on Economic Social and Cultural Rights defines the obligations of States to implement the right to adequate food and water including "The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food." (E/C.12/1999/5 12 May 1999, para. 15.) Moreover, the Committee stated that "corporate activities can adversely affect the enjoyment of Covenant rights", including through harmful impacts on the right to health, standard of living, the natural environment, and reiterated the "obligation of States Parties to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities." (E/C.12/2011/1, para. 1).

Article 5 of the ICERD establishes that "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law. In its General Recommendation No. 23 (1997) on indigenous peoples, the Committee on the Elimination of Racial Discrimination calls on States to "Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent." (para. 4(d)) The Committee further urges States to "protect the rights of Indigenous peoples to own, develop, control, and use communal lands, territories, and resources." (para. 5)

By its very nature, the Declaration on the Rights of Indigenous Peoples is not legally binding, but it is nonetheless an extension of the commitment assumed by United Nations Member States – including Namibia – to promote and respect human rights under the United Nations Charter, customary international law, and multilateral human rights treaties to which the Namibia is a Party. As a universal framework setting out the minimum standards of protection of indigenous peoples' rights, the Declaration reflects existing legal obligations sourced in international human rights treaties. The Declaration recognizes the right of indigenous peoples to self-determination. "By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.," (Art. 3) and "have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." (Art. 4)

Article 10 of UNDRIP states that indigenous peoples shall not be forcibly removed from their lands or territories and that relocation shall not take place without their free, prior and informed consent.

The Declaration also establishes, at Article 18 that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions." Article 19 provides 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, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Article 23 states that "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development."

The Declaration underlines the importance that indigenous peoples give their free, prior and informed consent before the development of extractive industries or other development project on their ancestral homelands. Specifically, article 29(2) provides that "States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent." Article 32(2) recognizes the right of indigenous peoples "to determine and develop priorities and strategies for the development or use of their lands or territories and other resources" and to be consulted in good faith "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."

The Framework Principles on Human Rights and the Environment, presented to the Human Rights Council in March 2018 (A/HRC/37/59) set out basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment. Principle 4 provides, specifically, that "States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence." Principle 8 provides comprehensive guidance on the required elements of environmental and human rights impact assessments (including effective and equitable public

participation as outlined in Principle 9). Principle 12, provides that States should ensure the effective enforcement of their environmental standards against public and private actors. As per principle 14, States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.

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) following years of consultations involving Governments, civil society and the business community. 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:

- a. “States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b. The role of business enterprises as specialized organs or society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- c. The need for rights and obligations to be matched to appropriate and effective remedies when breached.”

The obligation to protect, respect, and fulfill human rights, recognized under treaty and customary law, entails a duty on the part of the State not only to refrain from violating human rights, but to exercise due diligence to prevent and protect individuals from abuse committed by non-State actors (see for example Human Rights Committee, General Comment no. 31 para. 8). In accordance with these legal obligations, Guiding Principle 1 reiterates that the State has a duty “to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.” Moreover, Guiding Principle 3 reiterates that States must take appropriate steps to “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” In addition, this requires, inter alia, that a State should “provide effective guidance to business enterprises on how to respect human rights throughout their operations”. Lastly, in accordance with the right recognized in treaty and customary international law (see for example ICCPR Article 2 (3)), Guiding Principle 25 reiterates that States must ensure that victims have access to effective remedies, also in instances where adverse human rights impacts linked to business activities occur.

We would like to refer to the thematic report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (ref. A/HRC/32/45) and recommendations contained therein elaborating on the duty of States to protect against human rights abuses involving those business enterprises that they own or control. This includes the following considerations:

88. All business enterprises, whether they are State-owned or fully private, have the responsibility to respect human rights. This responsibility is distinct but complementary to the State duty to protect against human rights abuses by business enterprises. This duty requires States to take additional steps to protect against

abuses by the enterprises they own or control. This goes to the core of how the State should behave as an owner and the ways in which its ownership model is consistent with its international human rights obligations.

94. States, as primary duty bearers under international human rights law, should lead by example. To show leadership on business and human rights requires action and dedicated commitment on many fronts. It also includes using all the means at the disposal of States to ensure that the enterprises under their ownership or control fully respect human rights throughout their operations. There is untapped potential for State-owned enterprises to be champions of responsible business conduct, including respect of human rights. The Working Group calls on States and State-owned enterprises to demonstrate leadership in this field.