

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 and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

Ref.: AL OTH 118/2024

(Please use this reference in your reply)

12 September 2024

Mr. Raffinetti,

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 in the field of cultural rights and Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, pursuant to Human Rights Council resolutions 53/3, 55/5 and 54/8.

We are independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective. We are part of the special procedures system of the United Nations, which has 60 thematic and country mandates on a broad range of human rights issues. We are sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received. Special Procedures mechanisms can intervene directly with Governments and other stakeholders (including companies) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

In this connection, we would like to bring to your attention information we have received concerning **the planned extension of the seaport in Lüderitz, Namibia by the Namibian Ports Authority and Hyphen Hydrogen Energy, whose main shareholders are Enertrag, domiciled in Germany, and Nicholas Holdings Limited, domiciled in the United Kingdom of Great Britain and Northern Ireland,, that would endanger an important heritage site memorializing the 1904-1908 genocide, without the free, prior and informed consent of the concerned Nama and Ovaherero Peoples.**

Concerns about the involvement of the Ovaherero and Nama Peoples in the efforts to recognize and commemorate the colonial past, as well as the lack of effective reparative measures afforded to them for the genocide committed against these communities in the former German Southwest Africa colony between 1904 and 1908 have been raised by Special Procedures mandate holders in a communication on

Mr. Marco Raffinetti
Chief executive Officer
Hyphen Hydrogen Energy Ltd

23 February 2023 (NAM 1/2023 and GER 1/2023). We acknowledge the responses received from the Governments of Namibia and of Germany to this communication, but remain concerned that the claims for recognition and reparation from the Nama and Ovaherero seem to not have been taken into consideration in this project.

According to the information received:

Historical context

The German colonial empire was present in southern Africa from 1884 to 1915. During that period, it developed numerous strategies and systems to subjugate the native population and assert colonial domination.

On 2 October 1904, the colonial regime issued an extermination proclamation targeting the Ovaherero People. A similar proclamation targeting the Nama People was issued on 25 April 1905. Between 1904 and 1908, an estimated over 100,000 people were directly killed, starved or worked to death on railway lines, plantations or in concentration camps. Nama fighters, women and children were deported to Cameroon and Togo; women and girls were systematically raped. Some human remains of the native peoples were shipped to Germany for scientific research.

The racist system established during German colonialism continued after its end and until the 1990s, through the South African apartheid regime. This regime perpetuated the exclusion of the Nama and Ovaherero Peoples in various dimensions of public life, their land, natural resources and wealth seized during colonial time continued to be transferred to the European descendants, which strengthened the cycle of exclusion and impoverishment.

It is reported that, although some transitional justice and memorialization actions have been taken, the complex repercussions of the German and South African colonialisms on the Nama and Ovaherero Peoples, and in particular the genocidal acts targeting them, have not been adequately acknowledged and addressed. Information about the genocide remains incomplete and not easily accessible to Namibians, including in museums, public spaces and history manuals.

The significance of Shark Island

Shark Island was declared a National Heritage Site in 2019. As such, it is protected under the National Heritage Act (No. 27 of 2004), and the authorities have obligations to protect and conserve this heritage sites from damage and destruction.

Recent forensic studies, conducted with the support of Nama Traditional Leaders Association (NTLA) and the Ovaherero Traditional Authority (OTA), have collected evidence and facts near Lüderitz about the genocide, including on Shark Island, which was one of the most notorious concentration camps of the German colonial empire. The studies highlight the scale of the genocidal acts: some of the detainees of the camp died from the prolonged exposure to the freezing winds that blew in from the Atlantic, while others were worked to death or perished of disease outbreaks due to the unsanitary living conditions.

Their bodies were either thrown in the water or buried in unmarked site of graves across the outskirts of Lüderitz.

The studies also highlight the strong heritage value of the site of Shark Island and the need for more efforts to recognize and provide reparation for the gross violations of human rights and intergenerational trauma caused.

Modern infrastructure, including tourist facilities, monuments dedicated to German colonists, roads, and residential development have already been built over Shark Island, permanently covering or removing some of the material traces of the camp's existence and thereby limiting the space for the recognition of its historical significance.

The expansion plans for the seaport in Lüderitz

The development project in Lüderitz aims to expand the site of the seaport to double its cargo handling capacity, and should include, once completed, a large-scale hydrogen production facility, using wind-powered turbines to generate hydrogen for export. The project is a joint venture with the Namibian Ports Authority (a State-owned enterprise) and Hyphen Hydrogen Energy, whose shareholders are the German-based Enertrag and UK-based Nicholas Holdings Limited.

Construction works for phase one of the project are planned to start in early 2025. The work includes reclaiming 15 hectares of land adjacent to the port and an extension of the quay wall by 700m to the west of the harbour, along the eastern coast of Shark Island. The port's structure is likely to pose a heavy physical and visual presence on the Island and would block the sight of the island from the town center.

It is reported that an environmental impact assessment, including archeological study of the surrounding waters to find artifacts, has been conducted. At the time of writing this letter, that environment impact assessment had not yet been made public. No human rights or other human impact assessment has been conducted, that would have analyzed and taken into consideration the historical, memorial and heritage value of the site for Namibians in general and for the peoples concerned in particular.

The National Heritage Council of Namibia has acknowledged that the expansion of the harbour constitutes a concern for Shark Island, including because of the noise pollution, visual integrity and physical damage it would represent to the recently identified mass graves along the coast. The construction work for the harbour extension would have an impact on the underwater seabed along Shark Island, where prisoners were thrown after they died in the concentration camp, disturbing the "burial" places that should be protected under Namibia's Burial Place Ordinance 27 of 1966.

Concerns are expressed by the Nama and Ovaherero communities that the desecration and destruction of the highly significant heritage site would effectively erase the legitimacy of the victimhood of the communities, which is instrumental to ensure adequate reparation measures and their full and effective participation in public life.

Lack of consultation seeking to obtain free, prior and informed consent

In addition to its high heritage value, the land for that expansion, including Shark Islands and its surroundings, is reportedly ancestral lands of the Nama People. Although the Namibian Ports Authority are committed to obtaining the required approval before starting the work, it is reported that the Government of Namibia has adopted a series of policies paving the way for the expansion project.

In that context, concerns were raised about the lack of consultation mechanisms to adequately inform, consult with and seek the prior consent of the Nama and Ovaherero Peoples and to involve them in the decision-making processes about the planned expansion.

On 13 February 2024, the Ovaherero Traditional Authority and Nama Traditional Leaders Association, together with their forensic partners, sent a letter to the Namibian Ports Authority, raising their concerns about the infrastructural development planed on ancestral Nama land, asking for an immediate and permanent moratorium on all constructions works on and around Shark Island and requesting access to various documents concerning the project.

On 21 June 2024, in absence of a substantive response from the Namibian Ports Authority, a further letter was sent by the legal representatives of the Ovaherero Traditional Authority and Nama Traditional Leaders Association and their partners, reiterating their demands to access relevant documents, for a moratorium and to be included in the decision-making processes.

Without prejudging the accuracy of the above-mentioned allegations, we express grave concerns about the reported process regarding the decision to expand the harbour in Lüderitz, which does not seem to have given sufficient attention to the requests from the concerned Nama and Ovaherero Peoples, in violation of their cultural rights, their right to recognition and to know the truth about the gross human rights violations against them and to fully take part in decision-making processes that affect their land, culture and memory about the violations endured.

We are further deeply concerned about what appears to be a lack of recognition by the authorities and business enterprises involved in the project of the important and painful heritage represented by Shark Island and the need to protect the sensitive site from further damage and destruction, including as a mean to provide redress to the affected communities who continue to suffer today the severe material harm and intergenerational trauma of the crimes inflicted upon them, to ensure reconciliation and sustainable peace. In that context, we are deeply concerned about what appears to be a lack of human rights due diligence by your company to identify, prevent, mitigate and account for adverse impacts on human rights throughout their operations, including the rights of Ovaherero and Nama Peoples.

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

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/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information about the project for the extension of the harbour in Lüderitz, including all measures and steps that have been taken to assess the human rights impacts of the project on the rights of Nama and Ovaherero Peoples and the impacts on the heritage site of Shark Island, including the underwater burial site, and on human rights. With that regard, please provide information on policies and processes your company has in place to conduct effective 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 (UNGPs).
3. Please provide details about all measures and steps that have been taken, or that your company is planning to take, to guarantee meaningful engagement and full participation of the Nama and Ovaherero Peoples in decision-making processes that concern their land and cultural heritage on Shark Island. If such measures have been adopted, please provide details about the type and scope of participation, the representativeness among the Ovaherero and Nama Peoples of the persons or entities involved in the discussions, and how was this participation communicated to the remaining members of the Ovaherero and Nama Peoples. If such measures have not been adopted, please explain why.
4. Please provide information about the measures that your company has taken, or is considering to take, to ensure that affected local communities and Indigenous Peoples have access to effective remedies, including adequate reparation, in line with the UNGPs.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your company 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.

Please note that a letter regarding the aforementioned allegations will also be sent to the Namibian Government, Enertrag, Nicholas Holdings Limited, the Namibian Ports Authority, and the home States of those companies, Germany and the United Kingdom of Great Britain and Northern Ireland.

Please accept, Mr. Raffinetti, the assurances of our highest consideration.

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

Alexandra Xanthaki
Special Rapporteur in the field of cultural rights

Bernard Duhaime
Special Rapporteur on the promotion of truth, justice, reparation and guarantees of
non-recurrence

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your attention to the relevant international norms and standards relevant to this situation.

Article 15 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to take part in cultural life, which includes the right to access and enjoy cultural heritage, the right to take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on one's way of life and on one's cultural rights, as well as the right to claim and receive compensation if their rights have been violated.

Recalling that the Sustainable Development Goals are a voluntary process enshrined in human rights that remain obligations under international law, the Special Rapporteur in the field of cultural rights underlines that no violation of human rights, including cultural rights, may be justified in the name of development or sustainable development (A/77/290, §95).

Article 2 of the Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination as well as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, establish the right of victims to have equal access to an effective judicial remedy and receive adequate, effective and prompt reparation for the harm or discrimination suffered, and to have access to relevant information on reparation mechanisms.

In addition, we would like to refer to the inalienable right of victims and society as a whole to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes, as established in the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (principle 2). Full and effective exercise of the right to truth provides a vital safeguard against the recurrence of violations (principle 5).

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) after years of consultation with governments, civil society and the business community. The guiding principles have been established as the authoritative global standard for all States and businesses to prevent and address business-related adverse human rights impacts. These guiding principles are based on the recognition of:

- a) "The existing obligations of States to respect, protect and fulfil human rights and fundamental freedoms;
- b) The role of business enterprises as specialised bodies or corporations performing specialised functions, which must comply with all applicable laws and respect human rights;

- c) The need for rights and obligations to be matched by appropriate and effective remedies when they are violated".

The guiding principles also make clear that companies have an independent responsibility to respect human rights. Principles 11-24 and 29-31 provide guidance to companies on how to meet their responsibility to respect human rights and to provide remedies where they have caused or contributed to adverse impacts. The guiding principles have identified two main components of the corporate responsibility to respect human rights, which require “business enterprises to:

- a) Prevent their own activities from causing or contributing to adverse human rights impacts and address those impacts when they occur;
- b) Seek to prevent or mitigate adverse human rights impacts directly related to operations, products or services provided through their business relationships, even where they have not contributed to those impacts”. (guiding principle 13)

The commentary to guiding principle 13 notes that companies can be affected by adverse human rights impacts, either through their own activities or as a result of their business relationships with other parties (...) The 'activities' of business enterprises are understood to include both actions and omissions; and their 'business relationships' include relationships with business partners, entities in their value chain and any other non-State or State entities directly linked to their business operations, products or services.

To meet their responsibility to respect human rights, companies should have in place policies and procedures appropriate to their size and circumstances:

- a) A political commitment to uphold their responsibility to respect human rights;
- b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their human rights impact;
- c) Processes to redress any adverse human rights impacts they have caused or contributed to (guiding principle 15).

According to guiding principles 16-21, human rights due diligence involves:

- a) Identifying and assessing actual or potential adverse human rights impacts that the enterprise has caused or contributed to through its activities, or that are directly related to the operations, products or services provided by its business relationships;
- b) Integrate the results of impact assessments into relevant business functions and processes, and take appropriate action in accordance with their involvement in the impact;
- c) Monitor the effectiveness of the measures and processes adopted to address these adverse human rights impacts in order to know whether

they are working;

- d) Communicate how adverse effects are addressed and demonstrate to stakeholders - particularly those affected - that appropriate policies and processes are in place to implement respect for human rights in practice.

This process of identifying and assessing actual or potential adverse human rights impacts should include substantive consultation with potentially affected groups and other stakeholders (guiding principle 18).

Where an enterprise causes or is likely to cause an adverse human rights impact, it should take the necessary steps to end or prevent that impact. “The establishment of operational-level grievance mechanisms for those potentially affected by corporate activities can be an effective means of redress provided they meet certain requirements listed in principle 31 (guiding principle 22).

Furthermore, business enterprises should remedy any actual adverse impact that they cause or to which they contribute. 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 and other attempts to influence the outcome (commentary to guiding principle 25).