

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

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(Please use this reference in your reply)

17 November 2021

Ms. Comalie, Mr. Mulunga,

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

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 56 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 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 impacts of **oil and gas exploration and extraction on the lands of the San indigenous peoples in Namibia and Botswana caused by the operations of ReconAfrica and the company's locally registered subsidiaries and joint ventures. 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.**

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

According to the information received:

The Canadian-based company ReconAfrica, through its locally registered subsidiaries and joint ventures, was granted 25-year petroleum exploration licenses (License No. 73 in Namibia) over 34,000km/8.4 million acres of lands traditionally used and occupied by the San peoples in Namibia and Botswana. 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 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.”² 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.”³

The oil exploration licenses cover 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 savannah 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 Governments 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

² <https://reconafrika.com/wp-content/uploads/ReconAfrica-Press-Release-060321.pdf>;
<https://reconafrika.com/wp-content/uploads/ReconAfrica-Press-Release-041521.pdf>

³ <https://africabusinesscommunities.com/oil-and-gas/news/reconafrika-namcor-granted-seismic-permit-for-kavango-basin-onshore-namibia/>

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. 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 has expressed concern over ReconAfrica's oil and gas exploration as being incompatible with World Heritage Status and is monitoring the situation.⁴ The UNESCO World Heritage Centre 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."⁵

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.'*⁶

Experts have raised concern 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."⁷ 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 instances.

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 could release up to 51.6 billion tonnes of CO₂ – the equivalent of one sixth of the world's remaining carbon budget.⁸ It is reported that the oil development directly conflicts with the community-based Natural Resource Management

⁴ <https://whc.unesco.org/en/news/2230>

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

⁶ <https://whc.unesco.org/archive/2021/whc21-44com-7B-en.pdf>

⁷ <https://www.nationalgeographic.com/animals/article/oil-drilling-fracking-planned-okavango-wilderness>

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

Programme, an integral part of the Canadian climate change response funded through the Global Environment Facility under the Paris Climate Agreement. Canada, the country where your company is domiciled, signed on to the Paris Climate Agreement on 22nd 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.”⁹

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. We are particularly disturbed by the petroleum exploration and future extraction, including the possible exposure to radioactive materials, risk of earthquakes, potential draw down of groundwater level, contamination of water resources through accidental oil spills and the impact of the project on climate change. This may cause irrevocable damage to the fragile ecosystem on which San indigenous peoples depend for their physical and cultural survival.

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.

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 detailed information on the human rights due diligence policies and processes established by the National Petroleum Corporation of Namibia, a State Owned company, to identify, prevent, mitigate, and account for how they address the potential negative environmental impacts that the 25-year petroleum exploration license obtained by your subsidiary could cause or contribute to, as set forth in the UN Guiding Principles on Business and Human Rights.
3. Please provide information on any consultations by your company with

⁹ <https://www.un.org/development/desa/indigenouspeoples/climate-change.html>

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 details on the measures taken by your company to undertake environmental and human rights assessments regarding the impacts of the oil and gas exploration activities on the San indigenous peoples in line with international standards, 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.
5. Please clarify whether your company has policies, procedures and training that focus on, and set clear expectations for, respect for human rights.
6. Please provide information on operational-level grievance mechanisms that your company has established, or participated in, to address adverse human rights impacts, including on indigenous communities, caused by your company.
7. 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.
8. 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. Please provide information on any remedial measures that your company has taken, or has 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 explorations of your company's subsidiary.
9. Please describe the measures your company has taken or plans to take to prevent situations like this from recurring in the future.

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

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence.

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

Please accept, Ms. Comalie, Mr. Mulunga, 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 your attention to the United Nations Guiding Principles on Business and Human Rights (A/HRC/17/31), which were unanimously endorsed by the Human Rights Council in June 2011, and which are relevant to the impact of business activities on human rights.

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.”

According to the Guiding Principles, States have a duty to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises. States may be considered to have breached their international human law obligations where they fail to take appropriate steps to prevent, investigate and redress human rights violations committed by private actors. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.

Furthermore, we would like to note that as set forth in the United Nations Guiding Principles on Business and Human Rights, all business enterprises have a responsibility to respect human rights, which requires them to avoid infringing on the human rights of others to address adverse human rights impacts with which they are involved. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. Furthermore, it exists over and above compliance with national laws and regulations protecting human rights.

The Principles 11 to 24 and Principles 29 to 31 provide guidance to business enterprises on how to meet their responsibility to respect human rights and to provide for remedies when they have cause or contributed to adverse impacts. Moreover, the commentary of the Principle 11 states that “business enterprises should not undermine States’ abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes”. The commentary of Guiding Principle 13 notes that business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties.(...) Business enterprise’s “activities” are understood to include both actions and omissions; and its “business relationships” are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or

services”.

The Guiding Principles have identified two main components to the business responsibility to respect human rights, which require that “business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts” (Guiding Principle 13).

Principles 17-21 lays down the four-step human rights due diligence process that all business enterprises should take to identify, prevent, mitigate and account for how they address their adverse human rights impacts. Principle 22 further provides that when “business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes”.

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 or other attempts to influence the outcome (commentary to Guiding Principle 25).

We would like to recall 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) examining the duty of States to protect against human rights abuses involving those business enterprises that they own or control. In particular, we would like to highlight the following conclusions and recommendations:

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.

101. State-owned enterprises should strive to be role models and fully meet their responsibility to respect human rights.

102. To do so, they should adopt appropriate policies and processes to address abuse, including a policy commitment, human rights due diligence and remediation mechanisms when harm occurs, which are integrated throughout their operations.

We specifically wish to highlight the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007, which sets out international human rights standards relating to indigenous peoples’ rights. Article 26 of UNDRIP asserts the right of indigenous peoples to ‘the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired’. Article 32 affirms that indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories

and resources and 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’. UNDRIP furthermore underlines that States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Finally, 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 12, provides that States should ensure the effective enforcement of their environmental standards against public and private actors. Furthermore, the commentary of Principle 12 provides that “In accordance with the Guiding Principles on Business and Human Rights, the responsibility of business enterprises to respect human rights includes the responsibility to avoid causing or contributing to adverse human rights impacts through environmental harm, to address such impacts when they occur and to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships. Businesses should comply with all applicable environmental laws, issue clear policy commitments to meet their responsibility to respect human rights through environmental protection, implement human rights due diligence processes (including human rights impact assessments) to identify, prevent, mitigate and account for how they address their environmental impacts on human rights, and enable the remediation of any adverse environmental human rights impacts they cause or to which they contribute.”