

# **Complaint to the Canadian Ombudsperson for Responsible Enterprise regarding Reconnaissance Energy Africa Ltd.'s human rights abuses in Namibia**

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April 9, 2024

Office of the Canadian Ombudsperson for Responsible Enterprise

Attention: Sheri Meyerhoffer

Dear Ms. Meyerhoffer:

Re: Complaint regarding Reconnaissance Energy Africa Ltd.'s human rights abuses in Namibia

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Please accept this letter as a Complaint to the Canadian Ombudsperson for Responsible Enterprise ("**CORE**") regarding the conduct of Reconnaissance Energy Africa Ltd. ("**ReconAfrica**" or the "**Company**").

This Complaint is filed by the International Human Rights Program at the University of Toronto Faculty of Law ("**IHRP**") on behalf of harmed communities in Namibia represented by Saving Okavango's Unique Life ("**SOUL**"). SOUL will be referred to in this complaint as the "**Complainant**." The information provided in this complaint is true to the best of the Complainant's knowledge.

## I. OVERVIEW

1. The Complainant files this complaint with the CORE to request that it investigate ReconAfrica for the adverse human rights impacts of their oil and gas exploration activities, as outlined below, in violation of internationally recognized human rights instruments. The Complainant further requests that the CORE make recommendations that ReconAfrica implement the measures requested in this Complaint to cease the human rights abuses and remedy harm arising from such abuses.
2. As further explained below, ReconAfrica committed human rights violations by establishing oil and gas drill sites, executing exploration activities at drill sites, and conducting seismic testing without consultation with or securing consent from appropriate parties, including Indigenous communities, and in a manner that failed to respect the human rights to health, food, water, housing, and a clean, healthy, and sustainable environment, in contravention of international human rights instruments. As a result, local communities have suffered harms such as:
  - Encroachment on and use of land without consultation or consent, and resulting damage to community members' crop fields and homes;
  - Damage to protected conservancies and forests, including to local vegetation and animal populations; and

- Possible contamination of water resources and resulting impact on the health of community members.

## II. PARTIES TO THE COMPLAINT

### A. ReconAfrica

3. ReconAfrica is a Canadian junior oil and gas company engaged in the identification and exploration of assets in Namibia and Botswana.<sup>1</sup> It is headquartered in Calgary, Alberta and publicly listed on stock exchanges in Canada (TSXV), the United States (OTCQX), and Germany (FWB).<sup>2</sup>
4. ReconAfrica was originally incorporated under the *Company Act*, RSBC 1996, c 62 on June 23, 1978 as “Lund Enterprises Corp.” On August 30, 2019, the company completed a reverse takeover transaction with 1163631 B.C. Ltd., a company incorporated under the *Business Corporations Act*, SBC 2002, c 57, and changed its name to “Reconnaissance Energy Africa Ltd.”<sup>3</sup>
5. Through its wholly-owned subsidiaries, Reconnaissance Energy Namibia (Pty) Ltd. and Reconnaissance Energy Botswana (Pty) Ltd., ReconAfrica holds petroleum exploration licenses for more than eight million acres of the Okavango Region, which spans the Namibia-Botswana border.<sup>4</sup>

### B. The Complainant

6. SOUL is an alliance of concerned citizens, local Indigenous peoples, impacted communities, and civil society organizations in Namibia’s Kavango regions. The alliance is the public face of community resistance to ReconAfrica’s activities.
7. SOUL has been authorized by concerned community members in Kapinga Kamwalye Conservancy, Ncaute Community Forest, Ncumcara Community Forest, Likwaterera Community Forest, and Muduva Nyangana Conservancy and Community Forest (the “**Community Members**”) to act as their appointed representatives for Community Members

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<sup>1</sup> Reconnaissance EnergyAfrica, “Amended and Restated Annual Information Form for the Financial Year Ended December 31, 2020” (filed on May 19, 2021), online <[https://www.banktrack.org/download/annual\\_report\\_2020\\_97/amendedaif.pdf](https://www.banktrack.org/download/annual_report_2020_97/amendedaif.pdf)>.

<sup>2</sup> Halifax Examiner, “A Calgary company is drilling for oil in the world’s largest protected international wildlife reserve; these Nova Scotians are trying to stop it” (October 8, 2021), online <<https://www.halifaxexaminer.ca/environment/a-calgary-company-is-drilling-for-oil-in-the-worlds-largest-protected-international-wildlife-reserve-these-nova-scotians-are-trying-to-stop-it/>>.

<sup>3</sup> Reconnaissance EnergyAfrica, *supra* note 1.

<sup>4</sup> *Ibid* at p. 8 and 13.

in this matter. A letter, dated November 20, 2023, confirming the Community Members' consent to SOUL filing this Complaint is attached at **Appendix A**.

### III. BACKGROUND

#### A. The Kavango region and communal land in Namibia

##### *i) The Kavango Region*

8. The Kavango Zambezi Trans Frontier Conservation Area ("**KAZA TFCA**") is located within the Kavango and Zambezi river basins, where Angola, Botswana, Namibia, Zambia and Zimbabwe converge.<sup>5</sup> The international transboundary conservation area promotes a common vision of supporting sustainable livelihoods through coexistence and utilization of resources for the benefit of the local communities. On August 18th, 2011, the governments of the five partner countries signed a treaty outlining their shared commitments to various objectives to, among other things, conserve and manage shared natural resources and cultural heritage, as well as protect wildlife and provide and restore migratory routes.<sup>6</sup>

**Figure 1** below is a map of KAZA TFCA, including Namibian territory falling inside KAZA TFCA.

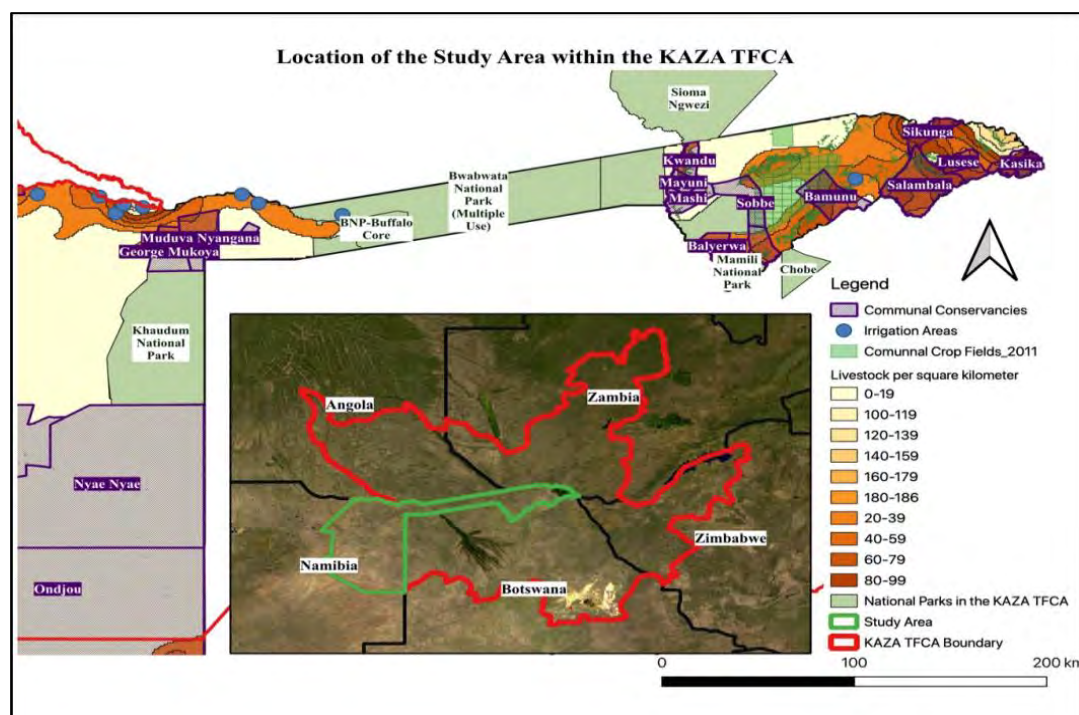


Figure 1: KAZA TFCA Map (Source: Stoldt and Göttert)

<sup>5</sup> KAZA, "Kavango Zambezi Transfrontier Conservation Area", online <<https://www.kavangozambezi.org/>>.

<sup>6</sup> KAZA, "Kavango Zambezi Transfrontier Conservation Area", online <<https://www.kavangozambezi.org/partner-countries/>>.

9. With a total area of around 520,000 km<sup>2</sup>, KAZA TFCA encompasses national parks, community forests, conservancies, wildlife management areas and communal lands, including 3 United Nations Educational, Scientific and Cultural Organization (“**UNESCO**”) World Heritage Sites - Victoria Falls, Okavango Delta, and Tsodilo Hills.<sup>7</sup>
10. The KAZA TFCA is home to the world's largest population of African elephants, as well as significant numbers of buffalo, hippopotamus, lion, giraffe, eland, zebra, spotted hyena, and leopards.<sup>8</sup> The Okavango Delta and its watershed (the area affected by ReconAfrica) harbor various threatened and endangered species, including cheetahs, African wild dogs, and several species of rhinoceros facing extinction.<sup>9</sup> The delicate balance between biodiversity and freshwater supply is crucial for maintaining transboundary ecological connectivity, safeguarding wildlife populations, and ensuring the flow of benefits to communities.<sup>10</sup>
11. The area is traditionally occupied by Indigenous groups such as the San and Bantu Indigenous peoples who live on communal land.<sup>11</sup> The KAZA TFCA also encompasses an array of protected conservancies and community forests. Among these, in the Kavango East region, are the Kapinga Kamwalye Conservancy, Muduva Nyangana Conservancy, George Mukoya Conservancy, Joseph Mbambangandu Conservancy, and Shamungwa Conservancy,<sup>12</sup> as well as Likwaterera Community Forest, Ncaute Community Forest, and Ncumcara Community Forest.<sup>13</sup>
12. As further elaborated below, ReconAfrica’s oil exploration license primarily encompasses the ecologically delicate and safeguarded KAZA TFCA, and the Company’s operations both threaten and have adversely impacted the conservation of wildlife, sustainability of the ecosystem, and the socio-economic welfare of communities in the area.

## ***ii) Communal Land***

13. Thirty-nine percent of the land area in Namibia is communal land.<sup>14</sup>

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<sup>7</sup> WWF, “WWF in KAZA”, online <[https://www.wwfnamibia.org/programmes/wwf\\_in\\_kaza/](https://www.wwfnamibia.org/programmes/wwf_in_kaza/)>.

<sup>8</sup> KAZA, *supra* note 5.

<sup>9</sup> Greenpeace, “5 Reasons to Save the Okavango Delta”(March 31, 2021), online <<https://www.greenpeace.org/africa/en/blogs/13418/5-reasons-to-save-the-okavango-delta/>>.

<sup>10</sup> KAZA, “Kavango Zambezi Transfrontier Conservation Area”, online <<https://www.kavangozambezi.org/wildlife-and-nature/>>.

<sup>11</sup> Minority Rights Group, “Namibia”, online <<https://minorityrights.org/country/namibia/>>.

<sup>12</sup> NACSO Namibian Association of CBNRM Support Organisations, “Registered Communal Conservancies”, online <<https://www.nacso.org.na/conservancies>>.

<sup>13</sup> NACSO Namibian Association of CBNRM Support Organisations, “Community Forests”, online <<https://www.nacso.org.na/community-forests>>.

<sup>14</sup> Other land area consists of freehold title by held individual landowners or companies.

14. Communal land is owned by the state and held in trust for local communities. These customary tenure rights are secured by group membership.<sup>15</sup>
15. Households in communal areas have private tenure rights to their homes, crop fields and livestock pastures. These areas are held as customary land rights under the *Communal Land Reform Act 5 of 2002* (“**CLRA**”). Private rights to communal land do not amount to outright ownership but are defined by the rights to exclude and include others. This type of tenure is informal, and land rights are not recorded in a formal written form. Communal land cannot be sold or held as freehold title, with some exceptions. Transfers of use rights must go through the traditional authorities and the Land Board.<sup>16</sup>
16. Traditional authorities are legal entities led by headmen or headwomen who are empowered to ensure observation of customary law, assist the local government with the development of land-use plans, and confirm that communities are using natural resources sustainably.<sup>17</sup> In most communal areas, traditional authorities control the allocation and use of land, applying customary law under the oversight of the Land Boards. Land Boards control the allocation of customary land rights by the traditional authorities.<sup>18</sup>

### **iii) Community Forests**

17. Communal lands can also contain community forests – areas over which local communities have obtained the rights to manage and develop forests for the purpose of conserving soil and water resources, maintaining biological diversity, and using forest produce in a manner that is compatible with the forest's primary role as the protector and enhancer of the natural environment.<sup>19</sup> Individuals who live within the community forests are referred to as members (“**Members**”). Community forests typically contain an area where Members live and cultivate food (a “**Settlement Zone**”) and an area that is uninhabited but managed for the benefit of the present and future generations of Members (“**Protected Zones**”).
18. Community forests are managed and governed by Village Development Committees (“**VDCs**”) and a Forestry Management Committee (“**FMC**”), respectively. VDCs manage the daily activities of villages within the community forest and assist Members with determining the development needs of each community. They act as a liaison between the Members and the FMC or other third parties.<sup>20</sup> The FMC is a ten-person board elected by Members, governed by the Ministry of Environment, Forestry and Tourism (“**Ministry of**

<sup>15</sup> See: Wolfgang Werner, *Land Governance on Communal Land in Namibia*, (Namibia: Legal Assistance Centre, 2021) at 4 and 13, online: <[https://www.lac.org.na/projects/lead/Pdf/Land\\_Governance\\_on\\_Communal\\_Land.pdf](https://www.lac.org.na/projects/lead/Pdf/Land_Governance_on_Communal_Land.pdf)>.

<sup>16</sup> *Ibid* at p. 4 and 31.

<sup>17</sup> Legal Assistance Centre, “Role of Traditional Authorities in Promoting Sustainable Use of Namibia’s Natural Resources,” online: <[http://www.lac.org.na/news/probono/ProBono\\_46-TAs\\_NATURAL\\_RESOURCES.pdf](http://www.lac.org.na/news/probono/ProBono_46-TAs_NATURAL_RESOURCES.pdf)>.

<sup>18</sup> Werner, *supra* note 14 at p. 4-5.

<sup>19</sup> *Forest Act*, 2001, GN 138/2002, s 10(1) [*Forest Act*].

<sup>20</sup> Affidavit of Paulus Siwegedi Kampanza, sworn on November 9, 2023 at para. 8 [Kampanza Affidavit, Appendix K].

**Environment**”), and empowered by the *Forest Act, 2001* to represent the interests of Members in the daily management and long-term planning of the community forest.<sup>21</sup> Under the legislative framework, the FMC is required to develop a Forest Management Plan, which is a document that provides an inventory of forest produce (i.e. vegetation), states how such forest produce is being used, outlines management objectives and methods for achieving those objectives, and identifies the FMC members.<sup>22</sup> The FMC is authorized to grant permits to companies to allow work in the Settlement Zone after consultation with VDCs and Members. The granting of such a permit primarily depends on whether the company’s proposed activities align with the purpose of the community forest, the goals of the Forest Management Plan and the priorities of affected villages.

#### ***iv) Community Conservancies***

19. Communal lands may also fall under a community conservancy, which is a legal body created by application to the Ministry of Environment under the *Nature Conservation Amendment Act (No. 5 of 1996)*.<sup>23</sup> The aim of a conservancy is to protect the environment and implement measures for the sustainable use of resources by managing natural resources, creating designated zones (such as the settlement zone and wildlife zone - similar to community forests), and working with other bodies, such as traditional authorities, regional councils, directorate of forestries, Namibian police, and other stakeholders, to promote sustainable development. The conservancy also protects a range of animal species.<sup>24</sup>
20. The community or communities that apply for conservancy formation set the conservancy’s boundaries, define the conservancy membership, elect a committee to represent the members, establish a constitution that provides the conservancy’s objectives, develop a benefit distribution plan that indicates the main objectives for community benefit, and develop a game management and utilization plan that outlines how wildlife resources will be managed.<sup>25</sup> Conservancy and local community members engage with the management committee through annual general meetings, interim meetings, a formal complaint process, and informal communications.<sup>26</sup>
21. Conservancies are different from community forests. The focus of a community forest is on the management of natural vegetation. In contrast, conservancies promote community-

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<sup>21</sup> *Ibid* at para. 2.

<sup>22</sup> *Forest Act* at Article 12(1).

<sup>23</sup> Affidavit of Muyemburuko Max Kangwaka, sworn on November 10, 2023 at para. 2 [Kangwaka Affidavit, Appendix E]; Ministry of Environment and Tourism “*Guidelines for Management of Conservancies and Standard Operating Procedures*” at p2, online: <<https://www.meft.gov.na/files/files/Guidelines%20for%20Management%20of%20Conservancies%20and%20SOPs.pdf>>.

<sup>24</sup> Kangwaka Affidavit, Appendix E, *supra* note 23 at para. 4.

<sup>25</sup> Ministry of Environment and Tourism Development, *supra* note 23 at p. 2 & 16.

<sup>26</sup> Affidavit of Hamutenya Thomas Muronga, sworn on November 9, 2023 at para. 5 [Muronga Affidavit, Appendix C].



based management of wildlife and the development of tourism.<sup>27</sup> All residents within a community forest are members of the forest, and have member's rights, whereas not all residents of conservancies are Members thereby limiting their activities and access to forest product.<sup>28</sup> As a result of these differences, communities may apply for dual designations, as both a conservancy and community forest.

## **B. Environmental Protection and the ECC Process**

22. As an initial step, all oil and gas companies operating in Namibia enter into a Petroleum Agreement with the State and obtain a Petroleum Exploration License ("**PEL**").<sup>29</sup> According to the *Petroleum (Exploration and Production) Act*, the Minister of Mines and Energy is responsible for issuing a PEL authorizing the company to conduct exploration activities within specified areas of land.<sup>30</sup>
23. Namibia enshrines environmental protection as a fundamental principle within its constitution and is a State party to several international environmental treaties.<sup>31</sup> Other legislation that make up the framework within which petroleum exploitation must take place include the *Environmental Management Act*<sup>32</sup> and the *Water Resources Management Act*.<sup>33</sup>
24. The *Environmental Management Act* was enacted to enable Namibia to carry out the country's international obligations with respect to the environment. Key principles of environmental management include the sustainable utilization of natural resources for the benefit of both present and future generations, promoting community involvement in natural resource management, and conducting assessments for activities with potentially significant environmental impacts.<sup>34</sup>
25. Under the *Environmental Management Act*, no individual or company is permitted to engage in activities involving land use and transformation, industrial processes, water use and disposal, or resource extraction without holding an Environmental Clearance Certificate ("**ECC**").<sup>35</sup> As a company seeking to perform such activities, ReconAfrica would be required to obtain an ECC using the following process:

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<sup>27</sup> Conservation and the Environment in Namibia, Travel News Namibia, "Community Forestry in Namibia Integrated Forest Management"online: <<https://www.travelnewsnamibia.com/community-forestry-in-namibia-integrated-forest-management/>>

<sup>28</sup> <https://www.nacso.org.na/community-forests>.

<sup>29</sup> *Petroleum (Exploration and Production) Act*, 2 of 1991, Article 13.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Namibian Constitution*, Art. 95.

<sup>32</sup> *Environmental Management Act* 7 of 2007 [*Environmental Management Act*].

<sup>33</sup> *Water Resources Management Act* 11 of 2013 [*WRM Act*].

<sup>34</sup> *Environmental Management Act*, *supra* note 32 at Art. 2.

<sup>35</sup> *Environmental Management Act*, *supra* note 32 at Art. 27.

- a) Depending on the extent of the environmental impact, the Environmental Commissioner (“**Commissioner**”)<sup>36</sup> determines whether an Environmental Impact Assessment (“**EIA**”) is required and informs the Company about the scope and procedure for conducting the assessment.<sup>37</sup> The company would then produce an EIA that contains an assessment of the nature, extent, duration and significance of the impacts on the environment of its proposed activities.<sup>38</sup> The EIA must also include an Environmental Management Plan (“**EMP**”) that stipulates the measures the company will take to address the adverse environmental impacts identified in its EIA and any specific permits or approvals that may be required.<sup>39</sup>
- b) Where an EIA is required and the activities in question involve high-impact developments on communal and conservation land (such as exploratory oil and gas activities), the company applying for the ECC must engage in timely consultation with interested and affected parties, including local and Indigenous communities, experts, scientists and nongovernmental organizations.<sup>40</sup> The consultation process must give these stakeholders an opportunity to review the EIA report and submit written comments. The list of interested and affected parties and their comments on the company’s EIA are included in the company’s application for the ECC.<sup>41</sup>
- c) The final EIA report containing the impact assessment, list of the interested and affected parties consulted, their comments, and the EMP constitutes the total application for an ECC that is provided to the Commissioner.<sup>42</sup> On the basis of this information, the Commissioner decides whether to grant or refuse the ECC application.<sup>43</sup> An ECC becomes effective from the date it is granted with a validity period not exceeding three years.<sup>44</sup>
- d) The Commissioner retains the authority to cancel or suspend an ECC in cases where the ECC or the *Environmental Management Act* are violated.<sup>45</sup> Should the company seek to amend the ECC, they are required to engage in the consultation process again. An amendment cannot be used to cover new exploration projects.<sup>46</sup>

26. Concurrently, under the *Water Resources Management Act*, a company must apply to the Ministry of Agriculture, Water, and Land Reform (“**Ministry of AWLR**”) for a water use and

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<sup>36</sup> *Ibid* at Arts.17 and 32.

<sup>37</sup> *Ibid* at Art.17.

<sup>38</sup> *Environmental Impact Assessment Regulations 2012*, s. 15(2)(h) [*EIA Regulations*].

<sup>39</sup> *Ibid* at s. 8.

<sup>40</sup> *Ibid* at s. 21.

<sup>41</sup> *Ibid* at s.23 and 24.

<sup>42</sup> *Environmental Management Act*, *supra* note 32 at Art. 32.

<sup>43</sup> *Ibid* at Art. 37.

<sup>44</sup> *Ibid* at Art. 40.

<sup>45</sup> *Ibid* at Art. 42.

<sup>46</sup> *Ibid* at Art. 39.

disposal permit prior to the drilling of test wells (also known as boreholes).<sup>47</sup> A company may not abstract or use water without first obtaining these permits.<sup>48</sup> Applying for a water use permit requires conducting an environmental impact analysis of the proposed abstraction on the environment, water users and water resources.<sup>49</sup> Additionally, the process must consider the existing water use by any traditional community and the extent of customary rights and practices in relation to the water resource. Continuous monitoring and testing of the water after usage is required under the water use and disposal permits once obtained.<sup>50</sup>

### C. ReconAfrica's Operations in Namibia

27. ReconAfrica's activities in the region between 2019 to the present, which are the subject of this Complaint, are as follows:

- a) In January 2015, ReconAfrica entered into a Petroleum Agreement with Namibia's Ministry of Mines and Energy, pursuant to which a Petroleum Exploration Licence was granted ("PEL 73").<sup>51</sup> **Figure 2** below is a map showing the region covered by ReconAfrica's PEL 73.<sup>52</sup>

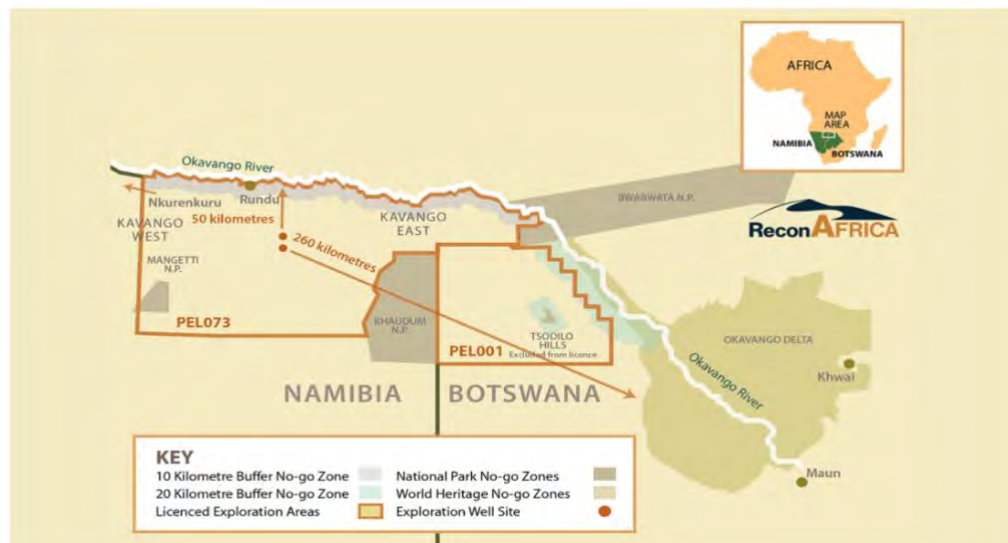


Figure 2: PEL 73 Map (Source: Oil Field Africa)

<sup>47</sup> WRM Act, *supra* note 33 at Art. 44.

<sup>48</sup> *Ibid* at Arts. 44 and 56.

<sup>49</sup> *Ibid* at Art. 45.

<sup>50</sup> *Ibid* at Art. 123.

<sup>51</sup> Ministry of Mines & Energy and NAMCOR, "Hydrocarbon License Map" online: <[https://www.namcor.com.na/wp-content/uploads/2020/06/Lic\\_Map\\_01112019-Received-22012020.pdf](https://www.namcor.com.na/wp-content/uploads/2020/06/Lic_Map_01112019-Received-22012020.pdf)>; See also: Jeffrey Barbee and Laurel Neme, "Oil company accused of drilling in African wildlife reserve, offering jobs for silence," *National Geographic* (13 December 2021) online: <<https://www.nationalgeographic.com/animals/article/oil-company-reconafrika-accused-of-drilling-in-african-wildlife-reserve>>.

<sup>52</sup> ReconAfrica, Kavango Basin, online: <<https://reconafrika.com/operations/kavango-basin>>.

- b) In order to commence drilling on the land licensed under PEL 73, ReconAfrica needed to obtain an ECC from the Ministry of Environment.<sup>53</sup> According to the Company, it began conducting its 2019 EIA process for the drilling of test wells in September 2018 (the “**2019 EIA**”).<sup>54</sup>
- c) In June 2019, ReconAfrica submitted its 2019 EIA, which included an EMP (the “**2019 EMP**”), as part of its application for an ECC.<sup>55</sup> Notably, ReconAfrica neglected to consult with local communities or include an interested and affected parties list in its final ECC application.

**Figure 3** below is a map identifying ReconAfrica’s initially proposed drill locations near Kawe (6-1) and Mbambi (6-2).

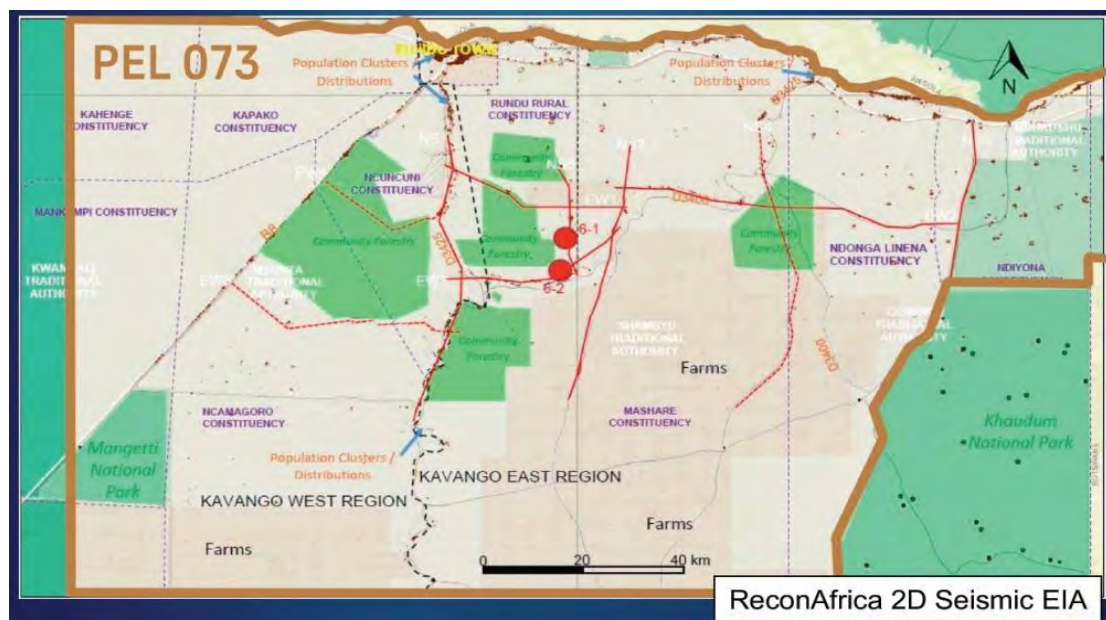


Figure 3: Proposed locations of Kawe and Mbambi drill sites

- d) The Minister granted ReconAfrica an ECC for well drilling - despite the deficiencies in ReconAfrica’s EIA process - in August 2019, which was valid until August 2022 (the “**2019 ECC**”).<sup>56</sup> The 2019 ECC authorized ReconAfrica to drill test wells in the Kavango region, on the condition that the Company obtain land rights from the

<sup>53</sup> *Environmental Management Act*, *supra* note 32 at Arts. 27 and 32.

<sup>54</sup> ReconAfrica letter to the United Nations Human Rights Special Procedures, January 14, 2022, online: <<https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=36756>>.

<sup>55</sup> Risk-Based Solutions (RBS), 2019. Environmental Management Plan (EMP) Report Vol. 3 of 3 to Support the Application for Environmental Clearance Certificate (ECC) for the Proposed Petroleum Exploration Operations (Drilling of Stratigraphic Wells) in Petroleum Exploration License (PEL) 73 Covering Blocks 1719, 1720, 1721, 1819, 1820 and 1821, Etosha Basin, Kavango West and East Regions, Northern Namibia [2019 EMP Vol. 3].

<sup>56</sup> Environmental Clearance Certificate for the Proposed Petroleum Exploration Operations, issued by the Ministry of Environment, Forestry and Tourism, August 26, 2019.

communal Land Board and water use and disposal permits from the Ministry of AWLR before commencing drilling operations.<sup>57</sup> The 2019 EIA indicated that the drill sites would be situated beyond the boundaries of the Kapinga Kamwalye Conservancy (the “**KKC**”). However, following the approval of their 2019 ECC, ReconAfrica’s drill site was relocated inside the conservancy.<sup>58</sup>

- e) Also in August 2019, the Company began conducting seismic surveying in Mbambi, located in the KKC.<sup>59</sup> Seismic surveying uses sound energy to map geological structures and involves large trucks pounding weighted plates into the ground.<sup>60</sup> ReconAfrica did not have an ECC to commence seismic surveying in the region and had not conducted consultations nor received consent from Indigenous peoples in the area.
- f) In November 2020, ReconAfrica began clearing land and vegetation in the village of Kawe, situated within the Ncaute Community Forest (“**NCF**”), for its first drill site, under the 2019 ECC (the “**First Drill Site**”).<sup>61</sup> The Company did not have the land rights required from the communal Land Board to commence these activities, and had not consulted with Indigenous peoples.<sup>62</sup>
- g) In January 2021, ReconAfrica began drilling at the First Drill Site, under the 2019 ECC.<sup>63</sup> At the time of commencing drilling activities, ReconAfrica did not have the land rights required from the communal Land Board and had not conducted consultations.<sup>64</sup> The Company also did not receive water use and disposal permits until June 2021 in violation of laws mandating prior authorization for water extraction and wastewater disposal.<sup>65</sup> ReconAfrica also failed to follow the standard procedure of lining drilling waste pits with an impermeable plastic liner to prevent groundwater contamination.<sup>66</sup>

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<sup>57</sup> *Ibid* at pg. 5.

<sup>58</sup> Risk-Based Solutions (RBS), 2019. Environmental Impact Assessment (EIA) Report, Vol. 2 of 3 Report to Support the Application for Environmental Clearance Certificate (ECC) for the Proposed Petroleum Exploration Operations (Drilling of Stratigraphic Wells) in Petroleum Exploration License (PEL) 73 Covering Blocks 1719, 1720, 1721, 1819, 1820 and 1821, Etosha Basin, Kavango West and East Regions, Northern Namibia [2019 EIA Vol. 2]. See section 4.3.2 Important Areas (Habitats) which fails to mention the Kapinga Kamwalye Conservancy.

<sup>59</sup> Muronga Affidavit, Appendix C, *supra* note 26 at para 11.

<sup>60</sup> American Petroleum Institute, “Seismic Surveys 101”, November 8, 2016, online: <<https://www.api.org/news-policy-and-issues/blog/2016/11/08/seismic-surveys-101>>.

<sup>61</sup> ReconAfrica, ReconAfrica begins 450 km 2D seismic program; Kavango Basin, Kalahari Desert, January 18, 2021, online: <<https://www.newswire.ca/news-releases/reconafrika-begins-450-km-2d-seismic-program-kavango-basin-kalahari-desert-838154304.html>>; See also Barbee and Neme, *supra* note 51.

<sup>62</sup> *Ibid*.

<sup>63</sup> Kangwaka Affidavit, Appendix E, *supra* note 23 at para. 13.

<sup>64</sup> *Ibid*.

<sup>65</sup> Barbee J., “Parliamentary Report on Petition to Stop Oil drilling in the Okavango” at pg. 19 online: <<https://www.documentcloud.org/documents/22082077-parliamentary-report-on-petition-to-stop-oil-drilling-in-the-okavango-1>> (see 3.14 Hearing with the Ministry of Agriculture, Water and Land Reform).

<sup>66</sup> Jeffrey Barbee and Laurel Neme, “Test drilling for oil in Namibia’s Okavango region poses toxic risk,” *National Geographic* (March 12, 2021) online: <<https://www.nationalgeographic.com/animals/article/test-drilling-oil-namibia-poses-water-risk>>.

- h) Also in January 2021, ReconAfrica began clearing land for a second drill site in Mbambi, situated within the KKC, under the 2019 ECC (the “**Second Drill Site**”).<sup>67</sup> However, drilling at the Second Drill Site contravened the 2019 EIA, which indicated that the Second Drill Site would lie outside the boundaries of the KKC.<sup>68</sup> Additionally, the Company did not have the land rights required from the communal Land Board to commence these activities, and had not consulted with Indigenous peoples.
- i) In March 2021, ReconAfrica applied for another ECC by submitting an EIA for seismic surveying (the “**2021 EIA**”)<sup>69</sup> and associated EMP (the “**2021 EMP**”)<sup>70</sup>, although it had already begun conducting seismic surveying in August 2019 without the required ECC.<sup>71</sup> In July 2021, the Commissioner issued the ECC permitting seismic surveying in July 2021, with validity until July 2024 (the “**2021 ECC**”).<sup>72</sup> The ECC was granted without adequate consultation of affected parties directly impacted by seismic surveying.
- j) Under the 2021 ECC, ReconAfrica conducted a number of seismic surveys between 2021 and 2023 in the following areas: Likwatera Community Forest, Ncaute Community Forest, Ncumcara Community Forest, Khaudum North Complex Conservancy, and Kapinga Kamwale Conservancy, including the villages within their respective boundaries.<sup>73</sup> However, these operations were conducted in violation of the 2021 ECC that restricts seismic activities to existing roads to prevent damage to communal land, crop fields and vegetation, and implements a buffer zone to prevent damage to sensitive infrastructure.<sup>74</sup>

**Figure 4** below is a map of the conservancies, community forests and villages impacted by ReconAfrica’s exploration activities.

<sup>67</sup> Affidavit of [REDACTED] sworn on November 9, 2023 at para 6 [Witness 7 Affidavit, Appendix O].

<sup>68</sup> 2019 EIA, Vol 2, *supra* note 58. See also Barbee & Neme, *supra* note 61.

<sup>69</sup> Risk-Based Solutions (RBS), 2021. Final Environmental Impact Assessment (EIA) Report to Support the Application for Environmental Clearance Certificate (ECC) for the Proposed 2D Seismic Survey covering the Areas of Interest (AOI) in the Petroleum Exploration License (PEL) No.73, Kavango Sedimentary Basin, Kavango West and East Regions, Northern Namibia, online: <[https://www.documentcloud.org/documents/20690901-2250\\_vol\\_2\\_of\\_3\\_eia\\_report\\_for\\_the\\_proposed\\_2d\\_seismic\\_survey\\_of\\_aoi\\_in\\_pel\\_73\\_kavango\\_east\\_and\\_west\\_regions\\_march\\_2021](https://www.documentcloud.org/documents/20690901-2250_vol_2_of_3_eia_report_for_the_proposed_2d_seismic_survey_of_aoi_in_pel_73_kavango_east_and_west_regions_march_2021)> [2021 EIA].

<sup>70</sup> Risk-Based Solutions (RBS), 2021. Final Environmental Management Plan (EMP) Report to Support the Application for Environmental Clearance Certificate (ECC) for the Proposed 2D Seismic Survey covering the Areas of Interest (AOI) in the Petroleum Exploration License (PEL) No. 73, Kavango Sedimentary Basin, Kavango West and East Regions, Northern Namibia [2021 EMP].

<sup>71</sup> Muronga Affidavit, Appendix C, *supra* note 26 at para 11.

<sup>72</sup> Environmental Clearance Certificate for the Proposed Seismic Survey, issued by the Ministry of Environment, Forestry and Tourism, July 2, 2021 [2021 ECC].

<sup>73</sup> Affidavit of [REDACTED] sworn on November 8, 2023 at para 5 [Witness 1 Affidavit, Appendix D]; Kangwaka Affidavit, Appendix E, *supra* note 23 at para 19; Affidavit of [REDACTED] sworn on November 8, 2023 at paras 8, 9 and 10 [Witness 2 Affidavit, Appendix H]; Kampanza Affidavit, Appendix K, *supra* note 20 at paras 12, 13, 16, 22 and 26; Affidavit of [REDACTED] sworn on November 9, 2023 at para 6 [Witness 5 Affidavit, Appendix L]; Affidavit of [REDACTED] sworn on November 9, 2023 at para 12 [Witness 6 Affidavit, Appendix M].

<sup>74</sup> 2021 ECC, *supra* note 72.

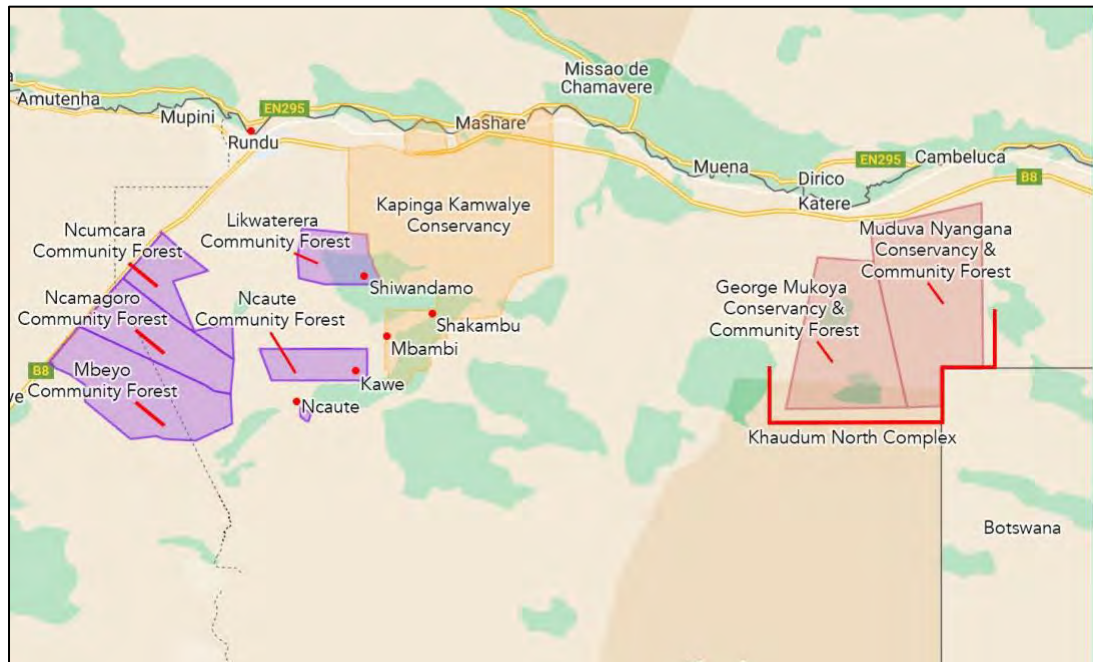


Figure 4: Conservancies, Community Forests, and villages affected by ReconAfrica operations

- k) In May 2021, ReconAfrica began drilling at the Second Drill Site, under the 2019 ECC.<sup>75</sup> The Company did not have the necessary land rights, water use and disposal permits, or permission from the KKC management committee, and the Company had not conducted consultations with local communities, nor received consent from affected Indigenous peoples. Moreover, the drilling waste pit located on the Second Drill Site also lacked the plastic liner required to prevent drilling waste fluid from contaminating the soil and water.<sup>76</sup>
- l) In June 2022 ReconAfrica filed an amendment to their 2019 ECC to commence an additional 12-well drilling project.<sup>77</sup> According to the *Environmental Management Act*, such an amendment cannot be used to cover new drilling projects and ReconAfrica was required to apply for a new ECC.<sup>78</sup> Furthermore, in filing an amendment to the 2019 ECC, the Company excluded communities near the drill sites from registering

<sup>75</sup> ReconAfrica, "First section of the second well provides further confirmation of a working petroleum system", June 3, 2021, online: <<https://recon africa.com/wp-content/uploads/ReconAfrica-Press-Release-060321.pdf>>.

<sup>76</sup> Halifax Examiner, "A Calgary company is drilling for oil in the world's largest protected international wildlife reserve; these Nova Scotians are trying to stop it", October 8, 2021, online: <<https://www.halifaxexaminer.ca/environment/a-calgary-company-is-drilling-for-oil-in-the-worlds-largest-protected-international-wildlife-reserve-these-nova-scotians-are-trying-to-stop-it/>>.

<sup>77</sup> Windhoek Observer, "Recon Namibia to hear fate this month...as local organisation claims violation of rights", online: <<https://www.observer24.com.na/recon-namibia-to-hear-fate-this-month-as-local-organisation-claims-violation-of-rights/>>.

<sup>78</sup> *Environmental Management Act*, *supra* note 32 at s. 39.



as interested and affected parties, which is a requirement for amendment applications.<sup>79</sup>

- m) On June 15, 2022, the Commissioner issued an amended 2019 ECC ("**2022 Amended ECC**"), despite the above-mentioned deficiencies.<sup>80</sup> ReconAfrica commenced drilling on June 25, 2022 in Makandina,<sup>81</sup> a town in the Kavango region (the "**Third Drill Site**") but notably this drill site was also established without land rights and proper consultation with Indigenous peoples prior to drilling.<sup>82</sup>
- n) On August 11, 2022, the Commissioner granted a three-year extension to the 2019 ECC valid until August 2025,<sup>83</sup> authorizing ReconAfrica to continue drilling test wells in the Kavango region.<sup>84</sup>
- o) Following the public outcry regarding ReconAfrica's amendment process<sup>85</sup> - which should not have been used to cover new drilling projects - ReconAfrica applied for a new ECC, despite the Company already having commenced activities under the 2022 Amended ECC. This new ECC for its 12-well drilling project was granted on July 4, 2023 with validity until July 2026 ("**2023 ECC**").<sup>86</sup>

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<sup>79</sup> Namibia Economist, "Judgement reserved in ReconAfrica's environmental clearance certificate vs environmentalists case" (May 2, 2023) online: <<https://economist.com.na/78947/headlines/judgement-reserved-in-reconaficas-environmental-clearance-certificate-vs-environmentalists-case/>>

<sup>80</sup> Namibia Economist, "Economic and Social Justice Trust appeals against Canadian oil drillers in Kavango East and West" (March 8, 2023) online: <<https://economist.com.na/77648/environment/economic-and-social-justice-trust-appeals-against-canadian-oil-drillers-in-kavango-east-and-west/>>. See also New Era Publication Corporation, "Recon ready to oppose appeal of clearance certificate" (March 9, 2023) online: <<https://neweralive.na/posts/recon-ready-to-oppose-appeal-of-clearance-certificate>>.

<sup>81</sup> ReconAfrica, ReconAfrica provides update on drilling and new seismic results (November 9, 2022) online: <<https://reconafrika.com/wp-content/uploads/ReconAfrica-Press-Release-110922.pdf>>.

<sup>82</sup> Namibia Economist, *supra* note 79; Muronga Affidavit, Appendix C, *supra* note 26 at para 18.

<sup>83</sup> Mining and Energy, "ReconAfrica secures ECC three-year extension" (August 17, 2022) online: <<https://miningandenergy.com.na/reconafrika-secures-ecc-three-year-extension/>>.

<sup>84</sup> ReconAfrica, "ReconAfrica announces extension of Environmental clearance certificate to August 26, 2025" (August 17, 2022) online: <<https://www.newswire.ca/news-releases/reconafrika-announces-extension-of-environmental-clearance-certificate-to-august-26-2025-864074362.html>>.

<sup>85</sup> ReconAfrica, "ReconAfrica provides update on complaint" (July 19, 2022) online: <<https://reconafrika.com/wp-content/uploads/ReconAfrica-Press-Release-071922.pdf>>; See also: *Ncumcara Community Forest Management Association v The Environmental Commissioner* (HC-MD-CIV-MOT-GEN-2022/00289) [2022] NAHCMD 380 (29 July 2022), online: <[https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://media.namibii.org/files/judgments/naahcmd/2022/380/2022-naahcmd-380.doc&ved=2ahUKEwj4hcTc\\_q2FAxXnFDQIHW8dC\\_4QFnoECCYQAQ&usg=AOvVaw3FopKGeoZYm5OCHUDQvAp1](https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://media.namibii.org/files/judgments/naahcmd/2022/380/2022-naahcmd-380.doc&ved=2ahUKEwj4hcTc_q2FAxXnFDQIHW8dC_4QFnoECCYQAQ&usg=AOvVaw3FopKGeoZYm5OCHUDQvAp1)>.

<sup>86</sup> ReconAfrica, ReconAfrica receives environmental clearance certificate to drill 12 new wells in the Kavango basin, Namibia" (July 12, 2023) online: <<https://www.newswire.ca/news-releases/reconafrika-receives-environmental-clearance-certificate-to-drill-12-new-wells-in-the-kavango-basin-namibia-854222522.html>>; See also ReconAfrica, "ReconAfrica announces the filing of quarterly financial reports and an operational update" (November 29, 2023) online: <<https://reconafrika.com/wp-content/uploads/RA-Announces-the-Filing-of-Quarterly-Financial-Reports-and-an-Operational-Update.pdf>>.



28. At the time of filing this Complaint, ReconAfrica continues to operate in the Kavango region and has begun clearing additional land, with a multi-well drilling program planned for June 2024.<sup>87</sup> The Company's PEL 73 was extended on January 30, 2024 and continues to be valid until January 29, 2026.<sup>88</sup> ReconAfrica has also applied to the Commissioner for an amendment to the well locations in its 2023 ECC.<sup>89</sup>

**Figure 5** below is a chart containing the most up-to-date list of proposed ReconAfrica drill locations from the Company's application for its 2023 Amended ECC.<sup>90</sup>

No.	Well Reference No.	Latitude	Longitude	Description	Status and Priority Rating
1.	D1	18°16'44.8394"S	19°31'53.6353"E	Ncamagoro Community Forest	Proposed Well Priority No. 3
2.	D2	18°19'36.1605"S	19°33'25.2871"E	Mbeye Community Forest	
3.	D3	18°26'12.2958"S	19°41'37.2901"E	Gcaru Village Well Site	Proposed Well Priority No. 2
4.	D4	18°33'19.6969"S	19°42'43.7835"E	Naingopo Village Well Site	Proposed Well Priority No. 3 Alternative to D5 (Priority No. 1)
5.	D5	18°35'54.6514"S	19°44'37.8243"E	Gwatjinga Community Forest	Proposed Well Priority No. 1
6.	D6	18°35'32.4710"S	19°54'10.1501"E	Farm 1529	
7.	G1	18°14'37.5326"S	19°44'30.2843"E	Hamwiyi Village Well Site	Proposed Well Priority No. 3
8.	G2	18° 27' 21.9731"S	19° 57' 33.3907"E	Farm 1562	
9.	G3	18°24'18.2999"S	20°0'39.7775"E	Farm 1564	Proposed Well Priority No. 2
10.	G4	18°26'37.2785"S	20°4'52.2771"E	Farm 1565	Proposed Well Priority No. 3
11.	G5	18°26'35.5441"S	20°10'27.7691"E	Farm 1567	Proposed Well Priority No. 1
12.	G6	18°26'24.1417"S	20°18'33.8072"E	Farm 1572	
13.	G7 (New)	18° 22' 37.1943" S	19° 49' 58.9914" E	Ncaule Settlement	Proposed Well Priority No. 1
14.	G8 (New)	18° 21' 59.4882" S	19° 47' 16.7852" E		

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*Figure 5: Prospective ReconAfrica drill locations identified in its 2023 Amended ECC Application*

<sup>87</sup> ReconAfrica, Multi-well Drilling Portfolio in the Kavango Basin Namibia (March 2024), slide 4 online: <<https://recon africa.com/wp-content/uploads/ReconAfrica-Corporate-Presentation-031424.pdf>>.

<sup>88</sup> ReconAfrica, "ReconAfrica announces a licensing update" (December 21, 2023) online: <<https://recon africa.com/wp-content/uploads/ReconAfrica-Announces-Operational-Update-Licensing-Update-Filing-Update-Update-On-NAMCOR-Transaction.pdf>>.

<sup>89</sup> Risk- Based Solutions (RBS), 2023. Updated Background Information Document (BID) for Updated Environmental Impact Assessment (EIA) and Updated Environmental Management Plan (EMP) to Support the Application for Amendment of the Environmental Clearance Certificate (ECC) No.2300571 for Drilling of the Proposed Multiple Exploration and Appraisal Wells with Supporting Infrastructures such as Borrow Pits, Access Roads, and related Services in Kavango Sedimentary Basin (KSB), Petroleum Exploration License (PEL) No.73, Kavango East and West Regions, Northern Namibia.

<sup>90</sup> Risk- Based Solutions (RBS), 2023. Updated Background Information Document (BID) for Updated Environmental Impact Assessment (EIA) and Updated Environmental Management Plan (EMP) to Support the Application for Amendment of the Environmental Clearance Certificate (ECC) No.2300571 for Drilling of the Proposed Multiple Exploration and Appraisal Wells with Supporting Infrastructures such as Borrow Pits, Access Roads, and related Services in Kavango Sedimentary Basin (KSB), Petroleum Exploration License (PEL) No.73, Kavango East and West Regions, Northern Namibia, pg.8.

29. Experts have expressed strong criticism of ReconAfrica's operations in the Kavango region, citing concerns of inadequate evaluations of the ecosystem and the possible socioeconomic and environmental effects on local communities, archaeological sites, and ground and surface water.<sup>91</sup>
30. Furthermore, international organizations such as the International Union for the Conservation of Nature<sup>92</sup> and UNESCO have warned against allowing ReconAfrica to continue its operations within the region. Most recently, UNESCO adopted the following decision during its 45<sup>th</sup> session of the World Heritage Committee, calling for an EIA that corresponds to international standards.

“The advancement of the oil and gas exploration activities within the Okavango River Basin in Botswana and Namibia is of great concern given the significant risks the expansion of these activities and any eventual exploitation of reserves would pose to the interconnected water system and the ecosystem.”<sup>93</sup>

31. As will be further elaborated in this Complaint, ReconAfrica's activities have caused or contributed to damage to the environment, communal land, and homes, and has potentially contaminated potable water sources. Such conduct by ReconAfrica has threatened and/or prevented access to adequate food, water, income, and housing for local communities, as well as adversely affected the right to a clean, healthy and sustainable environment. The Company's activities were conducted without consultation and consent from affected Indigenous communities, contrary to the principle of free, prior and informed consent.

#### IV. THE CORE MANDATE

32. The CORE mandate, as established by the Order in Council 2019-1323 (“**Order in Council**”), provides that the Ombudsperson reviews complaints concerning alleged human rights abuses by Canadian companies operating abroad in the garment, mining, and oil and gas sectors.<sup>94</sup>
33. “Human rights abuse” is defined in section 1(1) of the Order in Council as “an adverse impact on an *internationally recognized human right* — including any of the human rights that are referred to in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and*

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<sup>91</sup> The Globe and Mail, “Canadian oil firm’s consultant sparks controversy by attacking African environmentalists”, February 2, 2021, online: <<https://www.theglobeandmail.com/business/article-canadian-oil-firms-consultant-sparks-controversy-by-attacking-african/>>.

<sup>92</sup> IUCN World Conservation Congress motion, “Protecting the Okavango from oil and gas exploitation” (October 4, 2021) online: <<https://www.iucncongress2020.org/motion/136>>.

<sup>93</sup> UNESCO Decision 44 COM 7B.80, Okavango Delta (Botswana) (N 1432), online: <<https://whc.unesco.org/en/decisions/7796/>>; See also: UNESCO State of conservation of properties inscribed on the World Heritage List at p. 9, online: <<https://whc.unesco.org/document/199654>>.

<sup>94</sup> Order in Council P.C. 2019-1323, s. 4 [Order in Council].

*Cultural Rights*” (emphasis added).<sup>95</sup> Moreover, the Operating Procedures for the Human Rights Responsibility Mechanism of the CORE (the “**Operating Procedures**”) defines “internationally recognized human right” as including, but is not limited to, the rights included in the aforementioned human rights instruments and the *United Nations Declaration on the Rights of Indigenous Peoples*. The Operating Procedures clarifies that a “human rights abuse” is “an adverse impact on an internationally recognized human right includes an action that removes or reduces the ability of an individual or community to claim their human rights.”<sup>96</sup>

34. The CORE was created to, amongst other things, promote the implementation of the United Nations Guiding Principles on Business and Human Rights (“**UN Guiding Principles**”) and the Organisation for Economic Cooperation and Development’s OECD Guidelines for Multinational Enterprises (“**OECD Guidelines**”).<sup>97</sup> The Order in Council provides that these documents must guide the CORE in discharging its mandate.<sup>98</sup>
35. As discussed below, the Complainants submit that ReconAfrica is a Canadian company operating abroad in the oil and gas sector and the Company has engaged in conduct that constitutes a human rights abuse as defined by the Order in Council and Operating Procedures. Thus, as per section 4 of the Order in Council, it is within the CORE mandate for the Ombudperson to review such a complaint.<sup>99</sup>

## V. RECONAFRICA’S HUMAN RIGHTS VIOLATIONS

36. As stated above, ReconAfrica received its PEL 73 in 2015, and began its oil exploration activities in 2019. Despite the various safeguards in place in Namibian law to protect the environment and local communities in the context of extractive activities, ReconAfrica not only violated such requirements imposed by domestic laws and regulations but also violated international human rights law in the course of its operations in the Kapinga Kamwalye Conservancy (including Mbambi and Shakambu villages), Ncaute Community Forest (including Kawe and Ncaute villages), Ncumcara Community Forest, Likwaterera Community Forest (including Shiwandamo village), Khaudum North Complex (composed of George Mukoya Conservancy and Muduva Nyangana Conservancy), and surrounding areas.

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<sup>95</sup> *Ibid* at s. 1(1).

<sup>96</sup> Operating Procedures for the Human Rights Responsibility Mechanism of the Canadian Ombudsperson for Responsible Enterprise (CORE) at s. 2 [CORE Operating Procedures].

<sup>97</sup> Order in Council, *supra* note 94 at s. 4(a).

<sup>98</sup> *Ibid* at s. 5.

<sup>99</sup> *Ibid* at s. 4.

## A. ReconAfrica has a responsibility to respect human rights.

37. Under the UN Guiding Principles and OECD Guidelines, ReconAfrica has a responsibility to respect human rights and should address adverse human rights impacts that it is involved in.
38. The scope of the UN Guiding Principles and OECD Guidelines are intended to include businesses like ReconAfrica. The UN Guiding Principles apply to “all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”<sup>100</sup> The OECD Guidelines specify that the recommendations contained therein are addressed to “multinational enterprises,” a term that is applied broadly.<sup>101</sup>
39. Both instruments provide that business enterprises should “respect human rights” contained in the International Bill of Human Rights – consisting of the *Universal Declaration of Human Rights* (“UDHR”), the *International Covenant on Civil and Political Rights* (“ICCPR”), and the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”) – and the principles concerning fundamental rights set out in the International Labour Organization’s *Declaration on Fundamental Principles and Rights at Work*.<sup>102</sup> Business enterprises may need to consider additional standards where the rights of individuals belonging to specific groups or populations are at risk, such as Indigenous peoples. In this respect, both the UN Guiding Principles and the OECD Guidelines point to UN instruments that have elaborated on the rights of Indigenous peoples such as the *UN Declaration on the Rights of Indigenous Peoples* (“UNDRIP”).<sup>103</sup>
40. Respecting human rights under both the UN Guiding Principles and OECD Guidelines means that business enterprises “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>104</sup> Business enterprises have a responsibility to “[a]void causing or contributing to adverse human rights impacts” through their own activities and “prevent or mitigate adverse human rights impacts”

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<sup>100</sup> United Nations Human Rights Office of the High Commissioner, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework,” (United Nations: New York and Geneva, 2011), at p. 1 [UN Guiding Principles].

<sup>101</sup> OECD, “OECD Guidelines for Multinational Enterprises on Responsible Business Conduct”, Chapter I at 12 [OECD Guidelines].

<sup>102</sup> UN Guiding Principles, *supra* note 100 at Principle 12 and Commentary on Principle 12 at 13-4 and OECD Guidelines, *supra* note 101 at Commentary on Chapter IV: Human Rights at 25-6.

<sup>103</sup> UN Guiding Principles, *supra* note 100 at Commentary on Principle 12 at 14 and OECD Guidelines, *supra* note 101 at Commentary on Chapter IV: Human Rights at 26.

<sup>104</sup> UN Guiding Principles, *supra* note 100 Principle 11 at 13 and OECD Guidelines, *supra* note 101 at Chapter IV. Human Rights at 25.

that are linked to their operations, such as through third parties.<sup>105</sup> Business “activities” include both actions and omissions.<sup>106</sup>

41. Addressing adverse human rights impacts requires taking adequate measures for the identification, prevention, mitigation and remediation of the impact.<sup>107</sup>
42. ReconAfrica’s responsibility to respect human rights endures regardless of whether its operations conform to Namibian laws or are otherwise supported by the Government of Namibia or other entities. Respect for human rights is a global standard of expected conduct that exists “independently of States’ abilities and/or willingness to fulfill their [own] human rights obligations”<sup>108</sup> and “over and above compliance with national laws and regulations protecting human rights.”<sup>109</sup> The Commentary on Chapter IV: Human Rights in the OECD Guidelines further provides that:

“A State’s failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights.”

43. Even where the Government of Namibia’s actions directly or indirectly support or sanction ReconAfrica’s activities, such as issuing environmental clearance certificates or providing express approvals by government Ministries, ReconAfrica remains responsible for its violations of human rights.

## **B. ReconAfrica’s activities violated Indigenous peoples’ right to provide or withhold free, prior and informed consent**

### ***i) UNDRIP and the Principle of Free, Prior, and Informed Consent***

44. The UNDRIP is a human rights instrument that affirms rights of Indigenous peoples which “constitute the minimum standards for the survival, dignity and well-being of the [I]ndigenous peoples of the world.”<sup>110</sup> As stated above, ReconAfrica has a responsibility to respect the

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<sup>105</sup> UN Guiding Principles, *supra* note 100 at Principle 13 at 14 and OECD Guidelines, *supra* note 101 at Chapter IV: Human Rights at 25.

<sup>106</sup> UN Guiding Principles, *supra* note 100 at Commentary on Principle 13 at 15 and OECD Guidelines, *supra* note 101 at Commentary on Chapter IV: Human Rights at 26.

<sup>107</sup> UN Guiding Principles, *supra* note 100 at Commentary on Principle 11 at 13 and OECD Guidelines, *supra* note 101 at Commentary on Chapter IV: Human Rights at 26.

<sup>108</sup> UN Guiding Principles, *supra* note 100 at Commentary on Principle 11 at 13 and OECD Guidelines, *supra* note 101 at Commentary on Chapter IV: Human Rights at 25.

<sup>109</sup> UN Guiding Principles, *supra* note 100 at Commentary on Principle 11 at 13 at 13.

<sup>110</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, A/RES/61/295, 2 October 2007 at Art. 43, online:

rights enshrined in international human rights instruments, including UNDRIP, where its operations affect Indigenous peoples. Former Special Rapporteur on the rights of Indigenous peoples, James Anaya, noted that:

**“...the Guiding Principles apply to advance the specific rights of indigenous peoples in the same way as they advance human rights more generally when those rights are affected or potentially affected by business activities, including extractive industries.”<sup>111</sup> (emphasis added)**

45. Moreover, Canada affirmed the applicability and implementation of UNDRIP in its domestic law by passing the *United Nations Declaration on the Rights of Indigenous Peoples Act* in June 2021.<sup>112</sup> Among other things, the Government of Canada is obligated to take all measures necessary to ensure that the laws of Canada are consistent with the UNDRIP.<sup>113</sup> This imposes a duty upon CORE to consider the UNDRIP in carrying out its mandate and reviewing this complaint as the CORE is an organization created by an Order in Council, a statutory instrument.
46. Exploration and extractive activities undertaken can implicate Indigenous peoples’ rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development, including the development of natural resources, as part of their fundamental right to self-determination.<sup>114</sup>
47. The means by which Indigenous peoples exercise these substantive rights is through the principle of free, prior and informed consent (“**FPIC**”).<sup>115</sup> The requirement of FPIC is found in Articles 10, 19, 29 and 32 of UNDRIP. Specifically:
  - FPIC is required when Indigenous peoples are relocated from their lands, which includes agreement on just and fair compensation and, where possible, the option of return for the Indigenous peoples concerned.<sup>116</sup>

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<[https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf)> [UNDRIP].

<sup>111</sup> U.N., Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/HRC/21/47 (July 6 2021) at para. 55.

<sup>112</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14, online: <<https://www.canlii.org/en/ca/laws/stat/sc-2021-c-14/latest/sc-2021-c-14.html>> [UNDRIP Act].

<sup>113</sup> *Ibid* at s. 5.

<sup>114</sup> Anaya, *supra* note 111 at para 135.

<sup>115</sup> *Ibid* at para 49. See also: OHCHR, Free, prior and informed consent: a human rights-based approach, Study of the Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/39/62 (August 10, 2018) at p. 13, online: <<https://www.ohchr.org/en/documents/thematic-reports/free-prior-and-informed-consent-human-rights-based-approach-study-expert>>.

<sup>116</sup> UNDRIP, *supra* note 110 at Art. 10.

- Consultation with the objective of consent is required before adopting legislation or administrative policies that affect indigenous peoples.<sup>117</sup>
  - FPIC is required when hazardous materials are stored or disposed of on Indigenous peoples' lands.<sup>118</sup>
  - Consultation with the objective of consent is required before undertaking projects that affect indigenous peoples' rights to land, territory and resources, including mining and other utilization or exploitation of resources.<sup>119</sup>
48. Where the principle of FPIC is violated - either by taking Indigenous peoples' cultural, intellectual, religious and spiritual property or confiscating, taking, occupying, using or damaging Indigenous peoples' lands, territories and resources without their free, prior and informed consent - UNDRIP requires redress for such harms.<sup>120</sup>
49. The specific requirements of FPIC are a function of the rights implicated and the potential impacts upon them,<sup>121</sup> but in any event must be conducted in good faith,<sup>122</sup> and encompass the following elements.
- **The ability to grant or withhold consent must be free.** The consultation process should not include intimidation, coercion and pressure, including harassment and violence.<sup>123</sup> Indigenous peoples should have the freedom to be traditionally represented in accordance with their own laws, customs, institutions, and protocols, and be able to direct the consultation process through those representatives.<sup>124</sup> Private companies that are engaged in extractive projects should defer to these Indigenous decision-making processes without attempting to influence or manipulate the consultation process.<sup>125</sup> Indigenous peoples should be free to set expectations and contribute to the selection of methods, timelines, locations and evaluations.<sup>126</sup>

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<sup>117</sup> *Ibid* at Art. 19.

<sup>118</sup> *Ibid* at Art. 29.

<sup>119</sup> *Ibid* at Art. 32(2).

<sup>120</sup> *Ibid* at Arts. 11 and 28.

<sup>121</sup> Anaya, *supra* note 111 at para. 64.

<sup>122</sup> U.N., "Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People," James Anaya, A/HRC/12/34 (July 15, 2009) at para. 46.

<sup>123</sup> Jessie Hohmann and Marc Weller, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (2016) at 250.

<sup>124</sup> OHCHR, *supra* note 115 at para. 20.

<sup>125</sup> Anaya, *supra* note 111 at para. 67.

<sup>126</sup> OHCHR, *supra* note 115 at para. 20.

- **Consultations should occur prior to the authorization or start of the activities.** Involving indigenous peoples as early as possible in the process should provide the time necessary for Indigenous peoples to absorb, understand and analyze the information, and conduct their own decision-making process.<sup>127</sup> In the context of extractive activities, consultation should occur during the planning phase of the project, and development plans should not start before the completion of the process of consultation, as some may produce irreversible damage to the Indigenous peoples concerned.<sup>128</sup>
  - **Indigenous peoples should receive objective, accurate and clear information.** This includes information about the nature, size, pace, reversibility, and scope of the proposed project, the reasons for launching it, its duration, and a preliminary assessment of its economic, social, cultural, and environmental impact. The information must be presented in a manner and form understandable to Indigenous peoples, including translation into a language that they understand,<sup>129</sup> and using culturally appropriate procedures that respect the traditions and forms of organization of the Indigenous peoples concerned.<sup>130</sup>
50. The duty to consult under UNDRIP should not be read as requiring mere consultation but as preserving Indigenous peoples' ability to object to and decline the implementation of activities as a means of guaranteeing the effective protection of Indigenous peoples' fundamental rights.<sup>131</sup> While the duty to consult is one that rests with the State, business enterprises that seek to execute projects in extractive industries that affect Indigenous peoples have an independent responsibility to ensure adequate consultation procedures have been undertaken and consent has been obtained under equitable and fair terms that speak to compensation, mitigation measures, and benefit-sharing that is proportionate to the impact on the affected Indigenous party's rights.<sup>132</sup>
51. Consultation and consent are not envisioned as a one-time event but rather a qualitative process of dialogue and negotiation over the course of a project, from planning to implementation, through which Indigenous peoples have the opportunity to influence the outcome of the decision-making process, make different proposals, or suggest a different method of going about the project.<sup>133</sup>

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<sup>127</sup> *Ibid* at para. 21.

<sup>128</sup> Hohmann and Weller, *supra* note 123 at 250.

<sup>129</sup> *Ibid* at 250-1; OHCHR, *supra* note 115 at para 22.

<sup>130</sup> Hohmann and Weller at 251.

<sup>131</sup> *Ibid* at 251-4; OHCHR, *supra* note 115 at paras 24-26.

<sup>132</sup> Anaya, *supra* note 111 at para 68.

<sup>133</sup> OHCHR, *supra* note 115 at para 15.



52. Businesses in the extractives industry have a propensity to have a disproportionate, often devastating, effect on the rights of Indigenous peoples. The adverse impact on rights flows not only from individual extractive activities but from the entire business model. The former UN Special Rapporteur, James Anaya, describes this model as follows:

“It is a model in which the initial plans for exploration and extraction of natural resources are developed by the corporation, with perhaps some involvement by the State, but with little or no involvement of the affected [I]ndigenous community or people. The corporation controls the extractive operation and takes the resources and profits from it, with the State gaining royalties or taxes, and [I]ndigenous peoples at best being offered benefits in the form of jobs or community development projects that typically pale in economic value in comparison to the profits gained by the corporation. It is a model of colonial overtones, in which [I]ndigenous peoples see their territories again encroached upon by outsiders who control aspects of their habitats and take from them, even when done with the promise of corporate social responsibility.”<sup>134</sup>

53. Consultation and consent are thus presumptively a requirement for resource extraction projects that take place within officially recognized or customary land use areas of Indigenous peoples, that impact areas of cultural significance, or that have a bearing on natural resources that are traditionally used by Indigenous peoples in ways that are important to their survival.<sup>135</sup>

***ii) ReconAfrica's operations violate the rights of Indigenous Peoples***

**a. Seismic surveying and drilling operations in the Kapinga Kamwalye Conservancy, including Mbambi and Shakambu**

54. The Kapinga Kamwalye Conservancy (the “**KKC**”) is a conservancy in the Kavango-East region. Members of KKC include Indigenous San and Bantu people who have occupied the land for several generations and have customary rights to the land.<sup>136</sup> They practice traditional rituals and depend on traditional healers who use medicine made up of the plant life found within KKC.<sup>137</sup> The KKC is overseen by a management committee that implements decisions made by members of the 27 villages located within the KKC, which include Mbambi and Shakambu, and ensures that decisions and projects undertaken align with the goals of the KKC benefit distribution and game management and utilization plans.<sup>138</sup>

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<sup>134</sup> Anaya, *supra* note 111 at para 74.

<sup>135</sup> *Ibid* at para 65.

<sup>136</sup> Kangwaka Affidavit, Appendix E, *supra* note 23 at paras 2 & 5.

<sup>137</sup> Muronga Affidavit, Appendix C, *supra* note 26 at paras 2-3.

<sup>138</sup> *Ibid* at para 5.

55. In August 2019, ReconAfrica conducted its first seismic survey within the KKC without consultation with or obtaining consent from affected communities, including the KKC management committee.<sup>139</sup> Seismic surveys use sound energy to locate geological structures that may contain energy resources beneath the earth's surface. Often used in oil and gas exploration, seismic surveys use massive thumping trucks to repeatedly pound heavy, accelerated weighted plates into the ground to generate seismic waves.<sup>140</sup> The Chairperson of KKC's management committee, Hamutenya Thomas Muronga ("**Mr. Muronga**"), learned about the seismic surveys upon receiving several complaints from villagers - including Indigenous community members - within the conservancy. Mr. Muronga's visit to the affected areas revealed that ReconAfrica had created new roads within conservancy boundaries (instead of using existing roads), damaged crop fields and other conservancy land, and left seismic beacons along the testing paths.<sup>141</sup>
56. In addition to conducting seismic surveys, ReconAfrica established a drill site on land within the KKC's boundaries in or around May 2021 without consulting or obtaining consent from Indigenous peoples or the KKC management committee.<sup>142</sup> The 2019 EIA for this Second Drill Site in Mbambi indicated that the drilling location would be situated beyond the boundaries of the KKC. However, ReconAfrica moved the drill site five kilometres into this protected conservation area without consulting the KKC management committee or updating the 2019 EIA. The clearing created for this drill site was approximately the size of five football fields and included pits that later held waste liquids without protective lining to prevent ground contamination as per standard practice.<sup>143</sup> To erect the site, ReconAfrica seized and cleared land used by Indigenous villagers to grow crops and raise cattle.<sup>144</sup> The land continues to be cleared and fenced off to date. Photos of the Second Drill Site, taken on November 9, 2023, can be found in the affidavit of Leitago Narib, attached at **Appendix B**.
57. ReconAfrica's seismic survey activities, drilling operations, and disposal of waste liquids engage both Article 32(2) and 29 of UNDRIP, which requires the FPIC of affected Indigenous peoples.
58. On several occasions, the KKC management committee attempted to engage with ReconAfrica about the Company's activities and gather information about the same, but effective consultation that accords with the spirit of UNDRIP was not achieved. Among other things, Mr. Muronga and others attempted to attend multiple meetings hosted by

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<sup>139</sup> *Ibid* at para 11.

<sup>140</sup> An image of ReconAfrica seismic survey machine can be found in Frack Free Namibia's press release, online: <[https://n-c-e.org/sites/default/files/2021-10/FFN\\_press%20release\\_seismic%20surveying\\_5%20October%202021.pdf](https://n-c-e.org/sites/default/files/2021-10/FFN_press%20release_seismic%20surveying_5%20October%202021.pdf)>.

<sup>141</sup> Muronga Affidavit, Appendix C, *supra* note 26 at paras 11-12.

<sup>142</sup> *Ibid* at paras 6-7.

<sup>143</sup> Barbee and Neme, *supra* note 51.

<sup>144</sup> Muronga Affidavit, Appendix C, *supra* note 26 at para. 8.

ReconAfrica in villages throughout the Kavango East region, but the Company postponed, cancelled, or moved several meetings at the last minute. During the meetings that took place, ReconAfrica either refused to answer questions from local community members or did not provide any opportunity to ask questions.<sup>145</sup> For example:

- a) In 2019, Mr. Muronga attended a meeting in Makandina where ReconAfrica was expected to elaborate on the procedures of seismic testing and the impact on the environment and local community. However, rather than discussing these details, ReconAfrica's representatives focused on the benefits of seismic testing and encouraged villagers to cooperate. The presentation lasted 45 minutes and ReconAfrica avoided answering questions thereafter.<sup>146</sup>
- b) In or around September 2019, Mr. Muronga met with ReconAfrica representatives, the Governor, and the Minister of Mines and Energy. Mr. Muronga and his colleagues asked ReconAfrica about the Company's consultation process and the potential negative impacts of the Company's operations on conservancy land and to local communities. ReconAfrica refused to answer these questions at the meeting and did not provide answers at any time thereafter.<sup>147</sup>
- c) On May 28, 2021, Mr. Muronga and his colleagues attempted to speak with ReconAfrica employees at the Second Drill Site in Mbambi about the need for consultation and consent before the site was erected and drilling began. The employees refused to engage in this discussion. Following this visit to the drill site, a lawyer representing ReconAfrica contacted Mr. Muronga with an offer for paid employment. Mr. Muronga understood that accepting the employment offer was conditional upon him discontinuing his inquiry into the lack of consultation and consent.<sup>148</sup>
- d) [REDACTED] ("**Witness 1**"), a member of the Indigenous Bantu community residing on communal Shakambu village, observed seismic survey trucks operating near her home in 2022 and the subsequent damage to her home (made of mud and wood) caused by the shockwaves the machinery produced. Consultations for these activities took place after the seismic surveys occurred, denying Witness 1 and other affected Indigenous residents the opportunity to engage in the decision-making process.<sup>149</sup>
- e) On June 18, 2022, Mr. Muronga attended a meeting in Rundu during which a member of the ReconAfrica team showed Mr. Muronga private electronic communications

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<sup>145</sup> *Ibid* at paras. 19-20.

<sup>146</sup> *Ibid* at para 18.

<sup>147</sup> *Ibid* at paras 15-16.

<sup>148</sup> *Ibid* at paras 9-10.

<sup>149</sup> Witness 1 Affidavit, Appendix D, *supra* note 73 at para. 10

between Mr. Muronga and a member of an ally organization that the Company had intercepted. The ReconAfrica representative refused to clarify for Mr. Muronga how ReconAfrica came to possess these communications, causing Mr. Muronga to fear for his privacy and safety.<sup>150</sup>

Affidavits from Mr. Muronga and Witness 1 are attached at **Appendix C and Appendix D**, respectively.

59. As contemplated by UNDRIP, the lack of consultation and FPIC contributed to an adverse impact on the right to land, territory, and resources of the Indigenous peoples located in the KKC. Over 65% of the people who live in or near Mbambi are part of the San community. These Indigenous communities practice traditional rituals as part of their culture and daily life, and depend on plant-based medicine and traditional healers when they are ill. ReconAfrica's activities hindered the KKC's ability to protect villagers' crops and the native vegetation used for food and traditional medicines that ReconAfrica uprooted to clear land. These activities removed the only source of food and traditional medicine of the Indigenous villagers, threatening their survival, and disrupting their traditional lifestyle.
60. Where attempts at consultations were organized by ReconAfrica, incomplete and inaccurate information was provided, the meetings often occurred after activities commenced, and tactics such as intimidation and bribery were used to prevent Indigenous villagers from making inquiries. These meetings lacked the cooperative nature consultations must embody. It follows from this evidence and the fact that ReconAfrica did not explicitly request consent that obtaining consent was not the true objective of these meetings. Consent was also not provided with respect to the waste liquids, as required under Article 29 of UNDRIP.
61. The adverse impact on rights contained in Article 29 (right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources) and Article 32 (right to approve projects affecting their lands or territories and other resources) calls for redress under Articles 28 and 32. Namely, ReconAfrica should provide just, fair and equitable compensation in the form of monetary compensation and/or other sufficient redress. Further, ReconAfrica should undertake appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impacts.

**b. Seismic surveying and drilling operations in Ncaute Community Forest, including Kawe and Ncaute**

62. In early January 2021, ReconAfrica initiated drilling operations at the First Drill Site on communal land in the village of Kawe - located inside NCF - which entailed clearing native vegetation, drilling test wells, and storing contaminated waste liquid in inground drill pits.<sup>151</sup>

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<sup>150</sup> Muronga Affidavit, Appendix C, *supra* note 26 at paras. 23-25.

<sup>151</sup> Kangwaka Affidavit, Appendix E, *supra* note 23 at para 13.

63. After drilling operations started, ReconAfrica held its first meeting with local communities and stakeholders on January 22, 2021 (the “**January 2021 Meeting**”) in Rundu.<sup>152</sup> Holding the meeting in Rundu, approximately 100 kilometers away from the First Drill Site, prevented many community members from attending since many Indigenous villagers lack transportation to urban centers. Those who attended could not effectively participate because the meeting was conducted in technical English rather than a native language, in contravention of the requirements of informed consent. Further, ReconAfrica did not provide objective, accurate and clear information about the scope of the project or its potential impact on Indigenous land. When asked directly, the Company did not answer questions about how the project would impact the livelihood of Indigenous villagers and benefit local communities.<sup>153</sup>
64. To request further information after the January 2021 Meeting, Muyemburuko Max Kangwaka (“**Mr. Kangwaka**”), contacted Dr. Sindila Mwiya, a consultant hired by ReconAfrica. Mr. Kangwaka is an Indigenous member of the Kawe community and, at the time, was the Chairperson of the Kavango East and West Regional Conservancy and Community Forest Association, an organization representing conservancies and community forests throughout the region where ReconAfrica was drilling. According to Mr. Kangwaka, Dr. Mwiya’s response not only evaded his questions but also disparaged his Indigenous identity, calling him “ignorant, utterly blind and stupid.” A copy of this correspondence is attached as Exhibit “B” to the affidavit of Mr. Kangwaka found in **Appendix E**.
65. Mr. Kangwaka also recounts attempts by ReconAfrica to thwart his efforts to raise awareness about the Company’s activities and engage with the predominantly Indigenous community residing near the First Drill Site and Second Drill Site:<sup>154</sup>
- a) In 2021, ReconAfrica offered Mr. Kangwaka employment, implying that it was contingent upon his agreement to discontinue consultation efforts. Mr. Kangwaka declined this offer.
  - b) On March 25, 2022, police officers interrupted a meeting Mr. Kangwaka organized for community members to discuss ReconAfrica. The officers searched Mr. Kangwaka, seized his phone, and detained him without cause for eight hours. Mr. Kangwaka now fears that the police are surveilling him and other community members who oppose ReconAfrica’s activities on behalf of ReconAfrica and he is concerned for his safety.

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<sup>152</sup> *Ibid* at para 13.

<sup>153</sup> *Ibid* at para 14.

<sup>154</sup> *Ibid* at para 18.

- c) In June 2022, Mr. Kangwaka was denied access to a meeting organized for Kawe community members despite being a farmer in the Kawe community and a member of a conservancy management committee.
  - d) Beginning in December 2022, Mr. Kangwaka was the victim of four break-and-enters in his home in Rundu. Mr. Kangwaka believes these incidents are connected to his ReconAfrica activism work.<sup>155</sup>
66. Notably, ReconAfrica did not include an interested and affected parties list (“**I&AP List**”) when applying for its 2019 ECC - under which the Company commenced operations at the First Drill Site. In June 2022, a group of interested parties asked ReconAfrica for a copy of the I&AP List that should have been included with the Company’s 2019 ECC Application. The list sent in response by ReconAfrica consultant, Dr. Mwiya, was identical to a list of politicians and locals (including an individual who was deceased at the time<sup>156</sup>) contained in registers for two meetings held by ReconAfrica in the towns of Rundu and Nkurenkuru in May 2019. Given that Rundu and Nkurenkuru are over 100 kilometers away from the First Drill Site, it is clear that ReconAfrica did not meet with locals who were in fact interested and affected by the drill site, and instead the Company retroactively and improperly created an I&AP List two years later. A copy of the purported I&AP List provided by ReconAfrica in 2022 is attached at **Appendix F**. Copies of the registers of meetings held in Rundu and Nkurenkuru by ReconAfrica, which contain the same list of names as the I&AP List, are attached at **Appendix G**.
67. Concurrent with ReconAfrica’s operations at the First Drill Site, ReconAfrica also trespassed on and damaged the lands and homes of Indigenous peoples in the village of Ncaute, located in NCF, without engaging in consultation or obtaining FPIC, contributing to a violation of the rights enshrined in UNDRIP. For example:
- a) [REDACTED] (“**Witness 2**”) is a member of the Indigenous Shambyu community living on communal land in Ncaute. She observed ReconAfrica performing seismic surveys on her land during five separate incidents in 2022 without her consent.<sup>157</sup> The succession of surveys resulted in damage to the witness’s home, destruction of her fruit plants and trees, and a severe reduction in available grass for raising cattle, representing the only food source for her and her family. Prior to the seismic surveys, Witness 2 attended a meeting held by ReconAfrica in the summer of 2021. During this meeting, ReconAfrica informed attendees that they were conducting oil exploration activities but did not state that they would be accessing and using communal land. ReconAfrica also assured attendees that their operations would

<sup>155</sup> Jeffrey Barbee, “Canadian oil company pauses controversial drilling in Namibian wilderness,” *National Geographic* (June 27 2023), online: <<https://www.nationalgeographic.com/animals/article/canadian-oil-company-reconfrica-pause-drilling-namibia>>.

<sup>156</sup> The Namibian, “Shambyu leader Queen Ribebe has died,” *The Namibian* (June 16 2015), online: <<https://www.namibian.com.na/shambyu-leader-queen-ribebe-has-died/>>.

<sup>157</sup> Witness 1 Affidavit, Appendix D, *supra* note 73 at para. 8-10.

not cause damage to the village or harm the community. Witness 2 was not given an opportunity to ask questions during the meeting, and when community members tried to ask questions, ReconAfrica ended the Meeting. A copy of Witness 2's Affidavit is attached at **Appendix H**.

- b) Indigenous San community member [REDACTED] ("**Witness 3**") also occupies land in the village of Ncaute. In April 2023, ReconAfrica built roads across his land to provide access to the Kawe and Mbambi drill sites. ReconAfrica did not seek to obtain FPIC as required by Article 32(2) but provided an English consent form to Witness 3, which the Company presented as an offer of compensation in exchange for permitting the Company to build these roads. ReconAfrica did not explain that the Company would use the land for seismic testing and that such testing would damage the land. Nor did the Company provide the promised compensation for its use of the land. The inaccuracy of the information provided, in a language that the witness did not understand, falls short of meeting the information requirements of FPIC. As a result of these actions, Witness 3 lost land that was vital to his traditional way of life.<sup>158</sup> A copy of Witness 3's Affidavit is attached at **Appendix I**.
- c) [REDACTED] ("**Witness 4**") is a farmer from the Nyemba community in Ncaute. He and his family live on land that has been passed down via customary tradition through generations of his family. In early 2021, he observed ReconAfrica trespassing and damaging his land without his permission. Thereafter, he attended meetings hosted by ReconAfrica for his village, but he was not provided with accurate information that detailed the extent of the project activities or the land damage that would be caused. ReconAfrica told the witness that the use of his land would be temporary and not cause any damage. At the time he was asked to sign a document in English seeking his consent for use of his land and promised compensation in return. Witness 4 was not advised of how much compensation he would receive. Today, this witness has a permanent public road running through his land instead of the temporary passageway discussed. Consequently, this witness's crop yield has decreased, leaving his family with insufficient food for the foreseeable future. The compensation that the Company provided afterwards was merely \$N1,116 (\$81 CAD), and was not just, fair, equitable or equal to the value of the land lost and the sustenance it provided as required by Article 28 of UNDRIP.<sup>159</sup> A copy of Witness 4's Affidavit is attached at **Appendix J**.

68. In most of the instances outlined above, ReconAfrica did not engage Indigenous community members in a consultative process in accordance with UNDRIP. Where ReconAfrica spoke with individuals, the Company did not provide the time, information and space required to make an informed decision. In these cases, the absence of FPIC and consultation undermines Indigenous peoples' rights of self-determination, land use and land ownership,

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<sup>158</sup> Affidavit of [REDACTED] sworn on November 9, 2023 at para. 7-11 [Witness 3 Affidavit, Appendix I]

<sup>159</sup> Affidavit of [REDACTED] sworn on November 9, 2023 at para. 8-11 [Witness 4, Affidavit, Appendix J].

and the unique nature of Indigenous peoples' connection with their land. Moreover, ReconAfrica's attempts to stifle, subvert, and circumvent FPIC demonstrates blatant disregard for the vulnerable Indigenous populations that will feel the greatest adverse effect of the Company's activities on their rights.

### c. Seismic surveying in the Ncumcara Community Forest

69. In the Kavango-West region, Ncumcara Community Forest aims, amongst other things, to preserve the land and natural resources within the forest for present and future generations of registered community members. Indigenous San and Bantu people are Members who have lived in the Settlement Zone of Ncumcara Community Forest for several generations. Migration into these communities is not permitted.<sup>160</sup> Members typically build homes, cultivate crops, practice traditional rituals, and maintain a cemetery where their forefathers and recently deceased Members are buried.<sup>161</sup> Traditional healers also practice in the Ncumcara Community Forest, using leaves and roots from plant life found in the settlement zone and protected area to prepare medicines.<sup>162</sup> Companies in the oil and gas sector have not been permitted to work in Ncumcara Community Forest because their activities contravene the aims of the Forest Management Plan and provisions 24(1) and (2) of the *Forestry Act, 2001*.<sup>163</sup>
70. Between 2021 and 2023, ReconAfrica conducted three rounds of 2D seismic surveys inside Ncumcara Community Forest without consulting and obtaining consent from Members of the FMC.
71. ReconAfrica conducted its first set of seismic surveys in Ncumcara Community Forest in November 2021. The Company conducted this initial seismic survey along forest "cutlines," commonly known as "fire breaks," which are thirty-meter-wide strips of forest cleared of all vegetation to act as a natural fire management system. This was an invasion of communal land historically occupied by the Indigenous Members that dwell in Ncumcara Community Forest. Before commencing the seismic survey, ReconAfrica did not: i) consult with or receive consent from the FMC or affected Indigenous communities; ii) contact the Ministry of Environment, Forestry and Tourism or the FMC to inform these governing bodies of their intended activities; or iii) apply for or receive the harvest permit required for activities that uproot plant life.<sup>164</sup>

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<sup>160</sup> Kampanza Affidavit, Appendix K, *supra* note 20 at paras 3 & 4.

<sup>161</sup> *Ibid* at para 6.

<sup>162</sup> *Ibid* at para 7.

<sup>163</sup> *Ibid* at para 9. See also: *Forest Act*, *supra* note 19 at s. 24(1) and (2): "(1) Forests and forest produce shall, in Namibia, subject to the permission of the owner of the land or the management authority of a classified forest and to the terms of a licence issued under this Act, be used in accordance with an applicable management plan. (2) No person shall (a) destroy or damage vegetation or harvest forest produce; (b) carry out any activity for the purpose of mining minerals; (c) build a road, building or structure; (d) disturb or remove soil; or (e) carry out agricultural activities or graze animals; in a classified forest unless he or she has been authorised to do so by a management plan, a forest management agreement or a licence issued under this Act."

<sup>164</sup> Kampanza Affidavit, Appendix K, *supra* note 20 at para. 11-13.



72. According to the Vice Chairperson of the FMC, Paulus Siwegedi Kampanza (“**Mr. Kampanza**”), following the first seismic survey, he saw that ReconAfrica cut down plants and trees along a wide path, which they lined thereafter with beacons for seismic testing (“**Seismic Lines**”). These Seismic Lines cut across Indigenous peoples’ crop fields, harming young crops that farmers use for food. ReconAfrica had also cut into the protected area of the Community Forest to create a gravel road to access the beacons laid along the Seismic Lines.<sup>165</sup> A map depicting the Seismic Lines, including those that cut across the Community Forest, is attached as Exhibit “C” to the Affidavit of Mr. Kampanza at **Appendix K**. Exhibit “D” to Mr. Kampanza’s affidavit includes photos depicting the Seismic Lines in the forest, including across two crop fields, and the beacons laid across the Seismic Lines.
73. ReconAfrica conducted the second set of seismic surveys in the Ncumcara Community Forest in April 2022. The Ministry of Environment, Forestry and Tourism permitted ReconAfrica to engage in seismic activities within the thirty-meter-wide firebreaks, primarily because doing so would also help maintain the existing cutlines.<sup>166</sup> However, ReconAfrica cut through protected areas of the forest - not along existing cutlines, as required by the ministry - and created new paths through virgin forests.<sup>167</sup>
74. Neither the FMC nor Indigenous communities were consulted before the second set of seismic surveys occurred, and neither group consented to ReconAfrica’s activities.<sup>168</sup> Rather, ReconAfrica attempted to obtain consent from the FMC after the second round of seismic surveys had already begun. During a meeting in October 2022, members of the FMC met with a ReconAfrica representative to ask questions about ReconAfrica’s past, current and future activities, details of the seismic surveys and results, the short- and long-term impact on the forest and the approximate amount of oil and gas ReconAfrica anticipated extracting based on their preliminary research of the area.<sup>169</sup> Rather than answer these questions, the representative discussed the benefits of seismic testing and presented the FMC with a consent form for approval without providing any opportunity for the FMC to absorb, understand, and analyze the information, and conduct their own decision-making process. Notably, the consent form was back-dated to October 18, 2020.<sup>170</sup> The FMC refused to sign the consent form because ReconAfrica had already conducted the seismic surveys and because these activities conflicted with the goals of the Forestry Management Plan and the purpose of the community forest scheme.<sup>171</sup> A true copy

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<sup>165</sup> *Ibid* at para 23.

<sup>166</sup> *Ibid* at para 14

<sup>167</sup> *Ibid* at para 15.

<sup>168</sup> *Ibid* at para 16.

<sup>169</sup> *Ibid* at para 19.

<sup>170</sup> *Ibid* at para 15.

<sup>171</sup> *Ibid* at para 21.

of the back-dated consent form is attached as Exhibit “A” to the affidavit of Mr. Kampanza at **Appendix K**.

75. ReconAfrica conducted the third round of seismic surveys in 2023. These surveys were conducted inside the community forest, and the Company again disregarded the requirement of consulting with the FMC, VDCs, and Indigenous members and the principle of FPIC.
76. ReconAfrica pursued and executed its surveys in a manner that denied Indigenous peoples their right to “determine and develop priorities and strategies for the development or use of their lands or territories and other resources,” as per Article 32(1) of UNDRIP. ReconAfrica chose not to engage Indigenous communities and VDCs in designing and implementing a plan for exploring their resources that would cause the least destruction to their lands, including herbs and plants vital to sustenance and cultural practices. Instead, the Company conducted seismic surveys without regard for Indigenous residents, their representatives and their decision-making processes, which is a clear violation of their rights to own and use their lands and their right to self-determination.

d. Seismic surveying in the Likwaterera Community Forest, including Shiwandamo

77. In early 2022, ReconAfrica cleared land and conducted seismic surveys in Likwaterera Community Forest, which includes the village of Shiwandamo, without the consultation and consent of the Indigenous occupants.
78. XXXXXXXXXX (“**Witness 5**”), a member of both the Indigenous San and Bantu communities, occupied farmland located in Likwaterera Community Forest that ReconAfrica cleared to create roads for the seismic surveys. ReconAfrica did not consult Witness 5 or inform him that the Company would be occupying, using, and damaging his land. After clearing the land of native vegetation, ReconAfrica organized a meeting with the community, during which Witness 5 attempted to obtain information about the impact of seismic surveys on underground water, community trees, and resources. ReconAfrica informed Witness 5 that their activities will not negatively impact groundwater, but did not provide environmental assessments or explain how they arrived at that conclusion. Moreover, Witness 5 has received reports of damage to neighbouring water basins and the death of fish populations in nearby water sources. He has also observed a drastic increase in cattle deaths. These stories and observations lead him to believe that the information provided by ReconAfrica is inaccurate.<sup>172</sup> In an August 2023 meeting with the Likwaterera Community Forest Management Committee, ReconAfrica falsely stated that no harm arose from previous seismic testing, which further supported Witness 5’s suspicions that the information received was not truthful.<sup>173</sup> A copy of Witness 5’s Affidavit is attached at **Appendix L**.

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<sup>172</sup> Witness 5 Affidavit, Appendix L, *supra* note 73 at paras 6-11 and 14.

<sup>173</sup> *Ibid* at para 11.

79. In February 2022, [REDACTED] (“**Witness 6**”), a member of the Indigenous San community, attended a meeting organized by ReconAfrica for the residents of Shiwandamo village, which is situated inside the Likwaterera Community Forest. Although ReconAfrica informed villagers that they would drill additional boreholes and conduct seismic surveys, potentially damaging their homes and farmland, the Company prevented any meaningful dialogue and denied requests for further information. When Witness 6 asked questions at the meeting, ReconAfrica’s representatives threatened legal action against him.<sup>174</sup> A copy of Witness 6’s Affidavit is attached at **Appendix M**.

e. Seismic surveying in Khaudum North Complex

80. Khaudum North Complex Conservancy is comprised of Muduva Nyangana Conservancy and Community Forest and George Mukoya Conservancy and Community Forest in the Kavango East region. In October or November 2022, ReconAfrica conducted seismic thumping in the Khaudum North Complex without permission from the conservancy committees and forest management committees. These activities required the removal of native vegetation and threatened the well-being of protected animal species found within the area.<sup>175</sup> Local and Indigenous communities inhabiting and surrounding the area were excluded from the consultation process and did not provide permission, violating the requirements of both the ECC Process and UNDRIP.

**C. ReconAfrica’s activities violated the right to an adequate standard of living**

81. Article 11 of the ICESCR recognizes the right of everyone to an adequate standard of living for themselves and their family.<sup>176</sup> The Committee on Economic, Social and Cultural Rights (“**ESCR Committee**”) has explained that the right to an adequate standard of living as found in the ICESCR is intentionally expansive and specifies “a number of rights emanating from, and indispensable for, the realization of the right,” including:

- The right to safe and clean drinking water and sanitation;
- The right to adequate housing; and
- The right to adequate food.<sup>177</sup>

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<sup>174</sup> Witness 6 Affidavit, Appendix M, *supra* note 73 at paras 8-11

<sup>175</sup> Kangwaka Affidavit, Appendix E, *supra* note 23 at para 19.

<sup>176</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966, Art. 11, online: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>> [ICESCR].

<sup>177</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The right to water: Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights* (20 January 2003) at para 3 [General Comment No. 15].

82. As will be explained further below, ReconAfrica’s activities have adversely impacted each of these rights and the Company has not adequately addressed such impacts nor have they provided adequate remedy.

***i) ReconAfrica’s activities violate the right to adequate and safe drinking water***

**a. The right to water**

83. The UN General Assembly has recognized that all persons have a “right to safe and clean drinking water and sanitation that is essential for the full enjoyment of life and all human rights.”<sup>178</sup> The right to water is also intricately connected to the right to the highest attainable standard of health<sup>179</sup> and the rights to adequate housing and adequate food under ICESCR.<sup>180</sup> The ESCR Committee has also stated that the right to water should be seen in conjunction with the right to life and human dignity, as “one of the most fundamental conditions for survival.”<sup>181</sup>
84. Safe water is crucial for preventing dehydration-related deaths, reducing the risk of water-related diseases, and meeting essential needs such as consumption, cooking, and personal hygiene. Priority must be given to personal and domestic uses of water (e.g. drinking, personal sanitation, washing of clothes, food preparation, and personal and household hygiene) to prevent starvation and disease, as well as water required to meet the core obligations of each of the rights in ICESCR.<sup>182</sup> Safe water for personal or domestic use must be free from microorganisms, chemical substances, and hazards that could endanger human health. Water must also be sufficient, safe, physically accessible, affordable, and have an acceptable colour, odour and taste.<sup>183</sup>
85. The ESCR Committee’s *General Comment No.15 on the Right to Water* clarifies that the obligation outlined in Article 1 of the Covenant, which prohibits depriving a people of their means of subsistence<sup>184</sup>, encompasses adequate access to water for both subsistence

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<sup>178</sup> General Assembly Resolution 64/292, The Human Right to Water and Sanitation, (July 28, 2010) at para 1.

<sup>179</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health: Art. 12 of the International Covenant on Economic, Social and Cultural Rights* (11 August 2000) at paras 11, 12 (a), (b) and (d), 15, 34, 36, 40, 43 and 51 [General Comment No. 14].

<sup>180</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing: Art. 11 of the International Covenant on Economic, Social and Cultural Rights* (13 December 1991) at para 8 (b) [General Comment No. 4]; See also: Report by Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kothari (E.CN.4/2002/59), submitted in accordance with Commission resolution 2001/28 of 20 April 2001. In relation to the right to adequate food; See also: Report by the Special Rapporteur of the Commission on the right to food, Mr. Jean Ziegler (E/CN.4/2002/58), submitted in accordance with Commission resolution 2001/25 of 20 April 2001.

<sup>181</sup> General Comment No. 15, *supra* note 177 at para 3.

<sup>182</sup> *Ibid* at para 6.

<sup>183</sup> *Ibid* at para 12.

<sup>184</sup> ICESCR, *supra* note 176 at Art. 1.

farming and for securing the livelihoods of Indigenous peoples.<sup>185</sup> Given that sustainable access to water resources is essential for agriculture and the right to adequate food, attention should be given to ensure that disadvantaged and marginalized farmers have equitable access to water and water management systems.<sup>186</sup>

86. Indigenous peoples face numerous other challenges that undermine their access to clean water and proper sanitation. Such challenges stem from the pollution of available water resources due to the lack of consultation regarding policies and projects affecting their water and sanitation rights, as well as land and water grabbing caused by mining operations and deforestation. Moreover, illnesses caused by a lack of access to safe drinking water and sanitation continue to increase among Indigenous peoples, particularly among children, including respiratory, skin, invasive bacterial and intestinal infections, dental diseases and reproductive health problems.<sup>187</sup>
87. Necessary means must be implemented to ensure that Indigenous peoples enjoy their human rights to safe drinking water and sanitation, including intercultural dialogue that is respectful of their ancestral worldviews, knowledge, and practices.<sup>188</sup> According to the UN Special Rapporteur on the human right to safe drinking water and sanitation, effective participation of Indigenous peoples in the management of water in large territorial spaces, including river basins or aquifers that extend beyond the boundaries of their territories, requires Indigenous representation in decision-making bodies on an equal footing with the non-Indigenous populations involved.<sup>189</sup>
88. Businesses have an impact on the enjoyment of the right to water. The UN Special Rapporteur on Safe Drinking Water and Sanitation explains that in order to “identify, prevent, mitigate and account for how businesses address their adverse impacts on human rights, business enterprises should carry out human rights due diligence as per principle 17 of the UN Guiding Principles.<sup>190</sup> Steps involve establishing internal monitoring and evaluation systems to assess and report on performance, including through dialogue with stakeholders (such as affected communities and Indigenous populations).<sup>191</sup> Additionally,

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<sup>185</sup> General Comment No. 15, *supra* note 177 at para 7.

<sup>186</sup> Report of the Special Rapporteur on the human rights to safe drinking water and sanitation: Human rights to safe drinking water and sanitation, 16 July 2018, A/73/162 ¶39

<sup>187</sup> Report of the Special Rapporteur on the human rights to safe drinking water and sanitation: Human rights to safe drinking water and sanitation for Indigenous Peoples: state of affairs and lessons from ancestral cultures A/HRC/51/24

<sup>188</sup> Report of the Special Rapporteur on human rights to safe drinking water and sanitation: Human rights to safe drinking water and sanitation of Indigenous Peoples: state of affairs and lessons from ancestral cultures A/HRC/51/24

<sup>189</sup> Report of the Special Rapporteur on human rights to safe drinking water and sanitation: Human rights to safe drinking water and sanitation of Indigenous Peoples: state of affairs and lessons from ancestral cultures A/HRC/51/24

<sup>190</sup> Report of the Special Rapporteur on the human rights to safe drinking water and sanitation: Human rights to safe drinking water and sanitation, 16 July 2018, A/73/162 ¶39

<sup>191</sup> Report of the Special Rapporteur on the human rights to safe drinking water and sanitation: Human rights to safe drinking water and sanitation, 16 July 2018, A/73/162 ¶39

preserving natural water resources from harmful contamination requires stringent controls on the use of water for industrial purposes, with a particular focus on extractive industries in rural areas.<sup>192</sup>

89. Strategies to ensure sufficient and safe water for present and future generations may include:
- (a) reducing depletion of water resources through unsustainable extraction, diversion and damming;
  - (b) reducing and eliminating contamination of watersheds and water-related ecosystems;
  - (c) monitoring water reserves;
  - (d) ensuring that proposed developments do not interfere with access to adequate water;
  - (e) assessing the impacts of actions that may impinge upon water availability and natural ecosystem watersheds;
  - (f) reducing water wastage in its distribution;
  - (g) response mechanisms for emergency situations; and
  - (h) establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programs.<sup>193</sup>

b. ReconAfrica failed to obtain necessary water use and disposal permits and potentially exacerbated water scarcity in the region

90. ReconAfrica failed to obtain the necessary water use and disposal permits required by law prior to drilling. As stated in ReconAfrica's summary of drilling permit requirements in its 2019 EIA, Vol. 2<sup>194</sup> and mitigation measures in its 2019 EMP, Vol. 3,<sup>195</sup> the drilling of boreholes requires licences from the Ministry of AWLR, as well as permission from affected communities. However, Namibia's Minister of AWLR, Calle Schlettwein, explicitly stated that ReconAfrica failed to secure the required permits for water use and disposal prior to drilling.<sup>196</sup> Specifically, ReconAfrica began drilling operations in Kawe in January 2021, but

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<sup>192</sup> Report of the Special Rapporteur on the human rights to safe drinking water and sanitation: Human rights to safe drinking water and sanitation of indigenous peoples: state of affairs and lessons from ancestral cultures, 27 June 2022, A/HRC/51/24 ¶69 See also Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries operating within or near indigenous territories, July 11, 2011, A/HRC/18/35 ¶¶30, 31 and 33.

<sup>193</sup> General Comment No. 15: The right to water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 20 January 2003, U.N. Doc. E/C.12/2002/11 at para 28.

<sup>194</sup> 2019 EIA, Vol. 2, *supra* note 58 (See Section 2.4 and Table 3.3).

<sup>195</sup> 2019 EMP, Vol 3, *supra* note 55 (See Table 3.11).

<sup>196</sup> Neme, L., & Barbee, J., "Members of Congress urge investigation into Okavango Oil Exploration", National Geographic (June 23, 2021) online: <<https://www.nationalgeographic.com/animals/article/us-concerns-grow-over-oil-exploration-in-the-okavango-region/>>; Shihepo, Timo, "Namibia: ReconAfrica's water drilling illegal – Schlettwein," *The Journal of African Elephants* (December 15 2021), online: <<https://www.africanelephantjournal.com/namibia-reconaficas-water-drilling-illegal-schlettwein/>>; Shihepo, Timo, "Canadian company exploring for oil in Namibia in

did not receive permission to use water until June 2021<sup>197</sup> - six months after commencing operations - in violation of laws mandating prior permits for water extraction.<sup>198</sup>

91. Schlettwein confirmed that his ministry had initially not issued the water permit and that ReconAfrica was not supposed to drill without it:<sup>199</sup>

“They did it illegally. We had called them in. We reiterated that the rule is they should not drill for water without any permit. We threatened not to issue a permit anymore if they carried on like that.”<sup>200</sup>

92. Officials from the Ministry of AWLR were denied entry to the ReconAfrica drill sites, which further demonstrates the company’s lack of compliance with securing the necessary water permits prior to drilling.<sup>201</sup>
93. Since ReconAfrica commenced its operations, witnesses in Shiwandamo attested that village dams responsible for water collection sustained damage from the impact of heavy thumping. As a result, the time required to fill these dams has increased to three days, compared to the previous duration of just five hours.<sup>202</sup> This has heightened concerns about the depletion of water resources, especially given the region’s existing water scarcity.<sup>203</sup>
94. ReconAfrica has failed to implement strategies aimed at ensuring sufficient water availability, as indicated in the company’s 2021 EMP for seismic surveying, such as monitoring water reserves and implementing safeguards including implementing buffer zones to prevent activities like seismic testing from causing damage to sensitive

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*battle for credibility*”, *News 24* (December 16 2022), online:

<<https://www.news24.com/fin24/companies/amabhungane-canadian-company-exploring-for-oil-in-namibia-in-battle-for-credibility-20221215>>.

<sup>197</sup> Barbee, *supra* note 65; See also: National Geographic Interview with Minister C. Schlettwein, online:

<<https://www.documentcloud.org/documents/20521755-media-response-page1-national-geographic-oil-exploration-in-the-kavango-basin-17-march-2021-final-1>>.

<sup>198</sup> *WRM Act*, *supra* note 33 at Art. 44.

<sup>199</sup> Chairperson of the Parliamentary Standing Committee on Natural Resources, Tjekero Tweya, adjourned a presentation at a public hearing for 15 minutes after the Agriculture Ministry failed to provide proof of when it received an application and granted water permits to ReconAfrica, video available online:

<<https://www.facebook.com/watch/?v=414973063332287>>.

<sup>200</sup> Shihepo, *supra* note 196.

<sup>201</sup> Parliament of Namibia National Assembly Standing Committee on Natural Resources, Report of the petitions by the Okavango’s Unique Lifestyle (SOUL), civil society organizations in Namibia and Friday’s for Future of Windhoek to stop oil drilling in the Okavango at 26, online: <<https://www.documentcloud.org/documents/22082077-parliamentary-report-on-petition-to-stop-oil-drilling-in-the-okavango-1>>; Shihepo, *supra* note 196.

<sup>202</sup> Witness 6 Affidavit, Appendix M, *supra* note 73 at para 14.

<sup>203</sup> Witness 7 Affidavit, Appendix O, *supra* note 67 at para 15.

infrastructure (such as water collection dams), impeding water availability and disrupting natural watersheds.<sup>204</sup>

95. ReconAfrica's conduct not only violates national laws, but also fails to respect internationally recognized human rights, contrary to its responsibilities under the UN Guiding Principles.<sup>205</sup>

c. ReconAfrica failed to properly line mud pits, potentially resulting in hazardous fluids contaminating water sources

96. A mud pit (or pond) is a pit in the ground used to hold discarded drilling fluid - used in the process of drilling boreholes - and waste materials. As these fluids can be harmful, Canadian oil companies face stringent regulations governing mud pits, including where such pits can be constructed and how drilling fluid must be stored and disposed of.<sup>206</sup> An important method of protecting water sources from contamination from drilling fluids is the use of mud pit lining. ReconAfrica's 2019 EMP submitted in support of its application for its 2019 ECC states that mitigation measures shall be taken to prevent hazardous substances soaking into the soil<sup>207</sup> and explicitly states that ReconAfrica's procedures will include "...scrap[ing] all waste that has collected in the pond and dispose of these and the pond lining at a suitable site."<sup>208</sup> Furthermore, in October 2020, ReconAfrica's spokesperson claimed that "toxic drill cuttings from the oil test wells will be managed in lined pits, cleaned, and disposed of offsite as per company and regulatory requirements."<sup>209</sup>
97. Despite ReconAfrica's obligations to protect water sources and the Company's stated methods for doing so, ReconAfrica has neglected to line its drill mud pits.<sup>210</sup> This deficiency was exposed in a National Geographic article published on February 23, 2022 containing photos of unlined mud pits from the First Drill Site.<sup>211</sup> A copy of this article is attached at **Appendix N**. In response, ReconAfrica claimed that their drilling fluids were "100% organic and biodegradable" and therefore no liner was required.<sup>212</sup> However, regardless of the fluid's composition, it remains essential for the Company to line their mud pits with impermeable layers as water injected into the formation during well drilling resurfaces as a

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<sup>204</sup> 2021 EMP, *supra* note 70 at 70 (Table 3.11: Mitigation measures for protection of surface and groundwater and water supply infrastructure protection).

<sup>205</sup> UN Guiding Principles, *supra* note 100 at Principle 23.

<sup>206</sup> *Oil and gas Conservation Rules*, Alta Reg 151/1971, online: <<https://canlii.ca/t/562jc>> and Alberta Energy Regulator Directive 050, pdf: [<https://static.aer.ca/prd/documents/directives/Directive050.pdf>].

<sup>207</sup> 2019 EMP, Vol. 3, *supra* note 55 (See Table 3.11: Mitigation measures for surface and groundwater protection as well as general water usage).

<sup>208</sup> *Ibid* at 41, s. 4.1 (Rehabilitation and Monitoring).

<sup>209</sup> Barbee J. & Neme L., "Test drilling for oil and gas begins in Namibia's Okavango region", *National Geographic* (January 28, 2021), online: <<https://www.nationalgeographic.com/animals/article/oil-gas-test-drilling-begins-namibia-okavango-region>>.

<sup>210</sup> Also referred to as "waste pits" or "reserve pits"

<sup>211</sup> Barbee and Neme, *supra* note 66.

<sup>212</sup> Drilling mud (or drilling fluid) is the common term for the fluid used in the process of drilling a well.



hypersaline brine<sup>213</sup> containing rock cuttings, volatile compounds, heavy metals, and naturally occurring radioactive materials.<sup>214</sup> To date, ReconAfrica has not released test results that show that the wastewater is safe nor has the Company provided the name of the product used to allegedly seal the pits.

98. Numerous individuals residing near ReconAfrica's drill sites have raised concerns that the Company has contaminated groundwater sources used for drinking, cooking, sanitation, watering crops and raising livestock.<sup>215</sup> Specifically, since ReconAfrica began its drilling activities, changes have been observed in the water extracted from local boreholes. The water has developed a distinctly salty taste, potentially caused by salinization. In addition, the water appears cloudy, and exhibits an unnaturally warm temperature.<sup>216</sup> This demonstrates an alteration of the water's composition and raises concerns about its safety and suitability for consumption. As a result, Indigenous communities have legitimate concerns that ReconAfrica is releasing toxic waste into the underground water supply, compromising the integrity of water sources and endangering human health.

## ***ii) ReconAfrica's activities violated the right to food***

### **a. The right to food**

99. As stated above, the right to food is derived from the right to an adequate standard of living established under Article 11 of the ICESCR. The ESCR Committee underscores that the human right to adequate food is paramount for the enjoyment of all rights and applies to everyone without discrimination. Adequate food, as outlined by international standards, must first and foremost be sufficient, nutritionally adequate, and safe to ensure freedom from hunger.<sup>217</sup> This entails both availability and accessibility of food.<sup>218</sup> Available food must meet dietary requirements, be free from harmful substances, and align with cultural norms.<sup>219</sup> Furthermore, availability extends to feeding oneself directly from productive land or other natural resources.<sup>220</sup> Accessibility implies sustainability and physical accessibility

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<sup>213</sup> "Brine" refers to all saline geological formation water resulting, obtained, or produced in connection with the exploration, drilling, or production of oil or gas.

<sup>214</sup> Saving the Okavango's Unique Life, "ReconAfrica fails to place a leak proof lining system in the drilling fluid containment pond", online: <<https://savetheokavango.com/wp-content/uploads/2021/05/DRILLING-MUD.pdf>>.

<sup>215</sup> Witness 1 Affidavit, Appendix D, *supra* note 73 at paras 11-13; Witness 5 Affidavit, Appendix L, *supra* note 73 at paras 12-14; Witness 6 Affidavit, Appendix M, *supra* note 73 at paras 13-16; Witness 7 Affidavit, Appendix O at para 15-17.

<sup>216</sup> Witness 6 Affidavit, Appendix M, *supra* note 73 at para 13.

<sup>217</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food: Art. 11 of the International Covenant on Economic, Social and Cultural Rights* (May 12, 1999) at para 8 [General Comment No. 12].

<sup>218</sup> *Ibid* at para 8.

<sup>219</sup> *Ibid* at para 10 and 11.

<sup>220</sup> *Ibid* at para 12.

to food for all, including marginalized and vulnerable groups and present and future generations.<sup>221</sup>

100. In realizing the right to adequate food, key concepts such as food security and food sovereignty must be considered. Food security entails ensuring sustainable access to food for present and future generations, while food sovereignty emphasizes the right of peoples to define their own food and agriculture systems.<sup>222</sup> According to the Special Rapporteur on the right to food, every individual, alone or in community with others, has a right to physical and economic access at all times to sufficient, adequate and culturally acceptable food that is produced and consumed sustainably, preserving access to food for future generations.<sup>223</sup> Individuals can secure access to food through various means, including by earning incomes from employment or self-employment, through social transfers, or by producing their own food, provided they have access to land and other productive resources.
101. The adoption of UNDRIP marked a significant milestone in acknowledging the collective right to food on a global scale.<sup>224</sup> This recognition is evident in the preamble, which emphasizes the importance of collective rights for Indigenous Peoples' existence, well-being, and integral development, with the right to food being among these essential rights. Indigenous peoples' right to food holds a significant cultural dimension relevant in terms of food choices, preparation and means of acquisition.<sup>225</sup> Culturally appropriate foods, such as those obtained through agriculture, hunting, and fishing, are integral to cultural identity. Subsistence relies heavily on Indigenous peoples' rights to lands, territories and resources, which are often held collectively.<sup>226</sup> Violations of the right to food occur when access to land, fishing or hunting areas is denied, when there is a lack of access to adequate and culturally acceptable food, or when food sources are contaminated.<sup>227</sup>
102. Addressing discrimination in access to food involves securing ownership rights to land and property, safeguarding access to natural resources, and respecting and protecting sources of income that enable access to food.

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<sup>221</sup> *Ibid* at paras 7 and 13

<sup>222</sup> *Ibid* at para 7.

<sup>223</sup> *Ibid* at paras 6 and 7.

<sup>224</sup> UNDRIP, *supra* note 110.

<sup>225</sup> UN, "The Right to Food and Indigenous Peoples, Joint Brief", online: <[https://www.un.org/esa/socdev/unpfii/documents/Right\\_to\\_food.pdf](https://www.un.org/esa/socdev/unpfii/documents/Right_to_food.pdf)>.

<sup>226</sup> *Ibid*.

<sup>227</sup> Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria. Cited as: Communication No. 155/96.

b. ReconAfrica's activities damaged land and impeded food sovereignty and security

103. In the Kavango region, the availability of food depends upon inhabitants being able to sustain their livelihood through cultivation<sup>228</sup>, raising livestock,<sup>229</sup> and the gathering of veld food.<sup>230</sup> These agricultural activities provide access to food for sustenance and generate income. Approximately two-thirds of all rural households rely on farming as their primary source of subsistence.<sup>231</sup>
104. The activities carried out by ReconAfrica have directly impacted Indigenous communities' ability to access sufficient, adequate and sustainable food by impeding their access to land and other vital resources, such as water. Indigenous communities have reported cases of ReconAfrica clearing land for seismic testing without prior and informed consent.<sup>232</sup> Seismic thumping machines repeatedly pounded heavy, accelerated weights into the ground, causing damage to topsoil and vegetation that serve as a food source for local farmers.<sup>233</sup> Since the passage of ReconAfrica's machinery, locals have reported dry soil conditions and a significant decline in their crop yields. Moreover, ReconAfrica's damage to bushes and vegetation has limited cattle's access to grazing.<sup>234</sup> Witness 4, a farmer belonging to the Indigenous Nyemba community, stated that after ReconAfrica performed seismic testing on his farmland in Ncaute, he could no longer harvest groundnuts and his mahango yield had reduced significantly. Given that his crops and animals are the only source of food for him and his family and they do not have sufficient income to buy food, they have not had adequate food to consume.<sup>235</sup>
105. Additionally, by clearing vegetation, fruit trees and native plants for the purposes of drilling boreholes and creating roads encased in cement in areas traditionally used for farming and animal grazing, ReconAfrica has further disrupted cultivation.<sup>236</sup> Witness 3, a farmer belonging to the Indigenous San community, had his land in Ncaute cleared by ReconAfrica to build a crossroad, spanning approximately six to eight kilometers and consisting of three

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<sup>228</sup> Crops cultivated in the Okavango include: maize, groundnuts, fruit, pumpkin, sugar cane, and beans. Mahangu (also known as pearl millet) is the dominant crop, planted on about 95% of all cultivated land.

<sup>229</sup> Livestock raised includes cows, goats, sheep, chicken, and donkeys.

<sup>230</sup> Africa Synthesis Report: People in Lockdown, Extractives in Business, Namibia: Case study on oil and gas exploration by Frack Free Namibia: Dispossession and violations in Recon Africa's Kavango Oil and Gas exploration, online: <<https://miningpandemic.org/wp-content/uploads/2022/06/Case-Study-Namibia-Fracking-English.pdf>>

<sup>231</sup> Mendelson J., Land Use in Kavango. February 2009 RAISON (Research and Information Services of Namibia), online: <<https://www.raison.com.na/sites/default/files/Land%20use%20in%20Kavango%20past%2C%20present%20and%20future.pdf>>.

<sup>232</sup> Witness 4 Affidavit, Appendix J, *supra* note 159; Witness 2 Affidavit, Appendix H, *supra* note 73; Witness 7 Affidavit, Appendix O, *supra* note 67.

<sup>233</sup> Frack Free Namibia, Press Release (October 5 2021), online: <[https://n-c-e.org/sites/default/files/2021-10/FFN\\_press%20release\\_seismic%20surveying\\_5%20October%202021.pdf](https://n-c-e.org/sites/default/files/2021-10/FFN_press%20release_seismic%20surveying_5%20October%202021.pdf)>.

<sup>234</sup> Witness 7 Affidavit, Appendix O, *supra* note 67 at para 8.

<sup>235</sup> Witness 4 Affidavit, Appendix J, *supra* note 159 at para 11.

<sup>236</sup> Witness 7 Affidavit, Appendix O, *supra* note 67 at para 9.

roads.<sup>237</sup> These roads created by ReconAfrica without Witness 3's permission are now used by both the Company and the public and cannot be used for farming, thus resulting in reduced crops.<sup>238</sup> Given that his crops and animals are the only source of food for Witness 3 and his family, their access to adequate food has been impaired by ReconAfrica's activities.

106. Finally, there have been concerns that the potential impact of ReconAfrica's activities on water sources are harming cattle. [REDACTED] ("**Witness 7**"), a farmer living in Mbambi within the KKC, has reported that although he previously used water from a borehole drilled by ReconAfrica, he stopped collecting water from this borehole after learning from his neighbor that six cows had passed away since consuming water from that borehole. Furthermore, as his home is located only 2.5 kilometers from the borehole, Witness 7 fears that ReconAfrica's borehole will contaminate his water supply.<sup>239</sup> Food security is highly dependent on the availability of water resources that are free from harmful substances and contamination.<sup>240</sup> Contamination of topsoil and water would endanger the land's long-term sustainability, impeding future generations' ability to engage in sustainable agricultural practices and disrupting traditional means of food production and livelihoods.<sup>241</sup> A copy of Witness 7's affidavit is attached at **Appendix O**.

### ***iii) ReconAfrica's activities violate the right to adequate housing***

#### **a. The right to housing**

107. Article 11(1) of the ICESCR provides that individuals have a fundamental right to "an adequate standard of living for himself and his family, including adequate ... housing, and to the continuous improvement of living conditions."<sup>242</sup> According to the ESCR Committee, the right to adequate housing should not be interpreted in a narrow or restrictive sense. The right applies to everyone and entitles every woman, man, youth, child and family to live somewhere in "security, peace and dignity" regardless of age, economic status, group or other affiliation or status and other such factors.<sup>243</sup> More specifically, it consists of the right to gain and sustain a safe and secure home and community in which to live in peace and dignity.<sup>244</sup> The right not to be subjected to arbitrary or unlawful interference with one's

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<sup>237</sup> Witness 3 Affidavit, Appendix I, *supra* note 158 at para 7.

<sup>238</sup> *Ibid* at para 11.

<sup>239</sup> Witness 7 Affidavit, Appendix O, *supra* note 67 at para 17.

<sup>240</sup> Witness 5 Affidavit, Appendix L, *supra* note 73 at para 15.

<sup>241</sup> Esterhuysen S., "Potential groundwater contamination from oil drilling in the Okavango", Science Direct, October 2023, online: <<https://www.sciencedirect.com/science/article/pii/S1474706523000748#bib2>>.

<sup>242</sup> ICESCR, *supra* note 176 at Article 11.

<sup>243</sup> General Comment No. 4, *supra* note 180 at paras 6-7.

<sup>244</sup> Kothari, M., "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living" (7 February 2008) UN Doc A/HRC/7/16 at para 4.

privacy, family, home or correspondence also constitutes an important dimension in defining the right.<sup>245</sup>

108. To determine whether housing is “adequate,” consideration must be given to seven factors<sup>246</sup> – three of which are particularly relevant to the present case:

- **Legal security of tenure:** Legal security of tenure guarantees legal protection against forced eviction, harassment and other threats. All persons should possess a degree of security of tenure regardless of which form of tenure applies, including occupation of land or property or living in an informal settlement.<sup>247</sup> While States have a responsibility to take immediate measures aimed at conferring legal security of tenure upon persons, business enterprises should refrain from infringing upon such security of tenure in their dealings and operations.
- **Availability of services, materials, facilities and infrastructure:** An adequate house must contain specific facilities that are essential for health, security, comfort and nutrition including sustainable access to safe drinking water.<sup>248</sup> Thus, it is important for business enterprises to not impede access to clean drinking water by contaminating the water source.
- **Location:** Housing is not adequate if it is cut off from certain essential services and facilities or located in polluted or dangerous areas. Specifically, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.<sup>249</sup> Thus, businesses have a responsibility to ensure their activities do not cause such pollution, especially where the adverse consequence negatively affects residents’ health.

109. The UN Special Rapporteur on Adequate Housing explains that:

“[w]hile States retain the primary responsibility for ensuring that private actors respect human rights, [...] **business enterprises have a responsibility to respect all human rights, including the right to adequate housing**. This responsibility is the basic expectation society has of business, and it is recognized in a broad range of soft law instruments.” (emphasis added)<sup>250</sup>

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<sup>245</sup> General Comment No. 4, *supra* note 180 at para 9.

<sup>246</sup> *Ibid* at para 8.

<sup>247</sup> *Ibid* at para 8(a).

<sup>248</sup> *Ibid* at para 8(b).

<sup>249</sup> *Ibid* at para 8(f).

<sup>250</sup> OHCHR, *Fact Sheet No. 21 (Rev.1): The Right to Adequate Housing*, (November 1 2001) at 36, online: <<https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-21-rev-1-human-right-adequate-housing>>.

110. Business enterprises engaged in development projects, especially those involved in the oil and gas sector, can have a negative impact on the right to adequate housing, “especially those involving resource extraction such as gas and oil, which may force residents to move or cause environmental degradation.”<sup>251</sup>

**b. ReconAfrica’s activities have adversely impacted housing by damaging land and homes, and possibly contaminating water resources**

111. As stated previously, ReconAfrica’s activities have caused damage to farmland and homes when clearing land and conducting seismic testing. These activities have affected local farmers’ ability to cultivate land necessary for food and subsistence<sup>252</sup> and damaged their homes.<sup>253</sup> These impacts have the potential to drive individuals away from their homes, in the event the damage worsens or the land becomes uncultivable (assuming affected individuals have somewhere to relocate). If relocation is not possible, affected persons may lose access to the materials and infrastructure necessary for adequate housing.

112. Additionally, ReconAfrica’s failure to line mud pits may be contaminating water sources and harming the environment through the release of hazardous materials. Possible contamination of water sources means residents lack a key facility necessary to meet the standard of adequate housing. It may also mean that residents are located in or near polluted or dangerous areas, further undermining the adequacy of their housing.

**D. ReconAfrica’s activities violated the right to health**

***i) The right to health***

113. Article 12 of ICESCR recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>254</sup> The right to health embraces a wide range of socio-economic factors that promote the conditions in which people can lead a healthy life and extends to the underlying determinants of health, including access to safe and potable drinking water.<sup>255</sup> According to the ESCR Committee, the right to health in all its forms and at all levels contain four interrelated and essential elements: availability, accessibility, acceptability, and quality. Underlying determinants of health, such as safe and potable water and adequate sanitation facilities, must be: available in sufficient quantity; be

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<sup>251</sup> *Ibid* at 36.

<sup>252</sup> Witness 4 Affidavit, Appendix J, *supra* note 159 at paras 10-11; Witness 2 Affidavit, Appendix H, *supra* note 73 at para 11-1; Witness 7 Affidavit, Appendix O, *supra* note 67 at paras 6-10.

<sup>253</sup> Witness 2 Affidavit, Appendix H, *supra* note 73 at paras 11-12; Witness 1 Affidavit, Appendix D, *supra* note 73 at paras 6-7.

<sup>254</sup> ICESCR, *supra* note 176 at Art. 12.

<sup>255</sup> General Comment No. 14, *supra* note 179 at para 4.

within safe physical reach (including in rural areas); be respectful of the culture of individuals, minorities, peoples and communities; and be of good quality.<sup>256</sup>

***ii) ReconAfrica violated the right to health by potentially adversely impacting water sources***

114. As stated above, numerous community members in the Kavango region have complained of possible contamination of groundwater sources used for drinking, cooking, sanitation, watering crops and raising livestock. Since ReconAfrica began its activities, changes have been observed in the water extracted from local boreholes, including changes to the taste, look, and temperature.<sup>257</sup> The seriousness of the impact to water quality is evident, as testimonies point to adverse effects on human health and livestock well-being.<sup>258</sup> There has been an increase in livestock deaths following consumption of water from ReconAfrica's borehole located in the villages of Mbambi and Likwaterera.<sup>259</sup> Moreover, the health of Indigenous communities is increasingly at risk, with locals falling ill after drinking water from local boreholes. Reports indicate cases of sickness among community members, including symptoms like vomiting, diarrhea, abdominal pain, and weakness, all linked to the consumption of local groundwater.<sup>260</sup>
115. The increase in livestock fatalities and cases of illness among local communities underscores the urgency of investigating the safety and suitability of the water supply. A thorough analysis and remedial action are needed to address any potential consequences associated with water pollution. Despite promising boreholes to local communities, ReconAfrica will have added no benefit regarding access to drinking water if the groundwater is contaminated by ReconAfrica's careless disposal of drilling wastewater.

**E. ReconAfrica's activities violated the right to a clean, healthy and sustainable environment**

***i) The right to a clean, healthy and sustainable environment***

116. The U.N. General Assembly ("UNGA") and Human Rights Council recognized the right to a clean, healthy, and sustainable environment on July 26, 2022.<sup>261</sup> The right to a healthy environment intersects with, and is encompassed within, various rights including the rights

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<sup>256</sup> *Ibid* at para 12.

<sup>257</sup> Witness 6 Affidavit, Appendix M, *supra* note 73 at para 13.

<sup>258</sup> Witness 6 Affidavit, Appendix M, *supra* note 73 at para 15; Witness 5 Affidavit, Appendix L, *supra* note 73 at para 14; Witness 7 Affidavit, Appendix O, *supra* note 67 at para 17.

<sup>259</sup> Witness 7 Affidavit, Appendix O, *supra* note 67 at para 16; Witness 5 Affidavit, Appendix L, *supra* note 73 at para 14.

<sup>260</sup> Witness 5 Affidavit, Appendix L, *supra* note 73 at para 14; Witness 6 Affidavit, Appendix M, *supra* note 73 at para 13.

<sup>261</sup> UNGA, *The human right to a clean, healthy and sustainable environment*, U.N. Doc. A/HRC/RES/48/13 (2021); See also UNGA, *The human right to a clean, healthy and sustainable environment*, U.N. Doc. A/76/L.75 (2022).

to life, health, water, and adequate standard of living. The right to life includes the right to enjoy a life with dignity, which is predicated on a clean, healthy, and safe environment and access to food and water.<sup>262</sup>

117. According to the ESCR Committee, “the right to health embraces a wide range of socioeconomic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as... a healthy environment.”<sup>263</sup> The HRC has recognized that “environmental degradation, climate change, and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”<sup>264</sup> Similarly, the ESCR Committee has recognized that certain enumerated rights, including the rights to food and water, must be protected for both present and future generations.
118. Ensuring preservation of biodiversity and the ecosystem is intricately connected to protecting human rights, according to the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.<sup>265</sup> Biodiversity refers to “the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems,”<sup>266</sup> and involves “plant, animal, and microorganism communities and the nonliving environment interacting as a functional unit.”<sup>267</sup> Biodiversity contributes to the productivity and stability of the ecosystem and thus directly supports the full enjoyment of human rights, such as the rights to life, health, and an adequate standard of living. To safeguard human rights, it is crucial that economic development refrain from exploiting natural ecosystems, and that such activities be sustainable, which means they “protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.”<sup>268</sup>
119. Changes to migratory routes have a direct impact on wildlife movement and, consequently, influence regional biodiversity. For example, the *Convention on the Conservation of*

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<sup>262</sup> UN Human Rights Committee, *General Comment No. 36: Right to life (Article 6)* (September 3 2019) at paras 3, 26 and 62 [General Comment No. 36].

<sup>263</sup> General Comment No. 14, *supra* note 179 at para 12.

<sup>264</sup> General Comment No. 36, *supra* note 262 at para 62.

<sup>265</sup> Knox, John H., *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/34/49 (19 January 2017).

<sup>266</sup> The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69) at Art. 2, online: <<https://www.cbd.int/convention/articles/default.shtml?a=cbd-02>>.

<sup>267</sup> Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Synthesis* (Island Press, Washington, D.C., 2005), at 1.

<sup>268</sup> UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, A/RES/70/1 (21 October 2015) at Goal 15 (Biodiversity and Ecosystems), online: <<https://sdgs.un.org/topics/biodiversity-and-ecosystems>> [UN SDGs].



*Migratory Species of Wild Animals* (“CMS”) State of the World’s Migratory Species Report states that migratory species are of ecological, economic and cultural importance and perform a variety of functions, ranging from regulating ecosystems through predation, to the positive impacts of grazing animals on grassland biodiversity.<sup>269</sup> The changing of migratory routes can therefore have long-term negative effects on the species’ population longevity and on the livelihoods of the surrounding farming communities. For example, barriers, such as border fences, prevent wildlife from moving freely within transboundary protected areas, such as the KAZA TFCA. The UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment stressed that businesses should respect human rights in their biodiversity-related actions, including by complying with the UN Guiding Principles in all actions affecting biodiversity and ecosystems.<sup>270</sup>

120. The right to a healthy environment also requires the adoption of measures against environmental health hazards, including by formulating and implementing policies “aimed at reducing and eliminating pollution of air, water and soil.”<sup>271</sup> Pollution and toxic substances violate a wide range of human rights, including the rights to life, health, water, food, housing, cultural rights, adequate standard of living, the rights of the child and the rights of Indigenous peoples.
121. Procedural obligations in relation to environmental protection include duties to:
  - (a) assess environmental impacts and make environmental information public;
  - (b) facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and
  - (c) provide access to remedies for harm.<sup>272</sup>
122. The ESCR Committee has recognized that Indigenous Peoples are often “disproportionately affected by the adverse impact of business activities ... particularly in relation to the development, utilization or exploitation of lands and natural resources.”<sup>273</sup> UNDRIP affirms the right of Indigenous peoples to their territories and lands, making

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<sup>269</sup> UN Environment Programme, *UN Landmark report: The world’s migratory species of animals are in decline, and the global extinction risk is increasing* (February 12, 2024), online: <<https://www.unep.org/news-and-stories/press-release/landmark-un-report-worlds-migratory-species-animals-are-decline-and>>.

<sup>270</sup> Knox, *supra* note 165 at para 72.

<sup>271</sup> *Ibid* at para 20 and 21.

<sup>272</sup> UN Human Rights Council, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/25/53 (December 30, 2013) at para 29.

<sup>273</sup> UN Committee on Economic, Social and Cultural Rights, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* (August 10, 2017) at para. 8.

protection of the environment part of the minimum standards for their survival, dignity, and well-being.

**ii) ReconAfrica failed to properly assess environmental impacts**

123. Under Principle 18 of the UN Guiding Principles, the corporate responsibility to respect human rights entails due diligence in identifying and assessing any actual or potential adverse impacts.<sup>274</sup> This involves evaluating the human rights situation before undertaking any business activity, identifying affected parties, and paying attention to vulnerable and marginalized groups.<sup>275</sup> Carrying out due diligence consists of conducting environmental impact assessments through consultation with affected groups and relevant stakeholders.<sup>276</sup>
124. ReconAfrica failed to conduct proper human rights due diligence prior to commencing activities. The ECC process in Namibia is one form of due diligence with respect to environmental protection, but as previously stated, there have been serious deficiencies in ReconAfrica's 2019 ECC for the drilling of test wells and its 2021 ECC for seismic testing, including concerns of inadequate EIA evaluations of the ecosystem and the possible environmental effects from its operations. Among other things:
- a) ReconAfrica failed to discuss potential environmental, health, and socio-economic harms during public consultations and denied local and Indigenous peoples the opportunity to provide FPIC.<sup>277</sup>
  - b) ReconAfrica failed to include a list of interested and affected parties for its 2019 EIA, demonstrating a lack of inclusivity and transparency in the assessment process.<sup>278</sup>
  - c) ReconAfrica's 2019 EIA failed to conduct a need and desirability analysis, and did not address how its proposed activities align with the mandate of the KAZA TCFA in the sustainable management of the ecosystem.<sup>279</sup>

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<sup>274</sup> UN Guiding Principles, *supra* note 100 at Principle 18 at 19.

<sup>275</sup> OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, Principle 18 at 36, online: <[https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf)>.

<sup>276</sup> *Ibid* at Principle 18, Q.42 at 43.

<sup>277</sup> Barbee J. & Neme L., "Oil company exploring in sensitive elephant habitat accused of ignoring community concerns," *National Geographic* (May 11 2021), online: <<https://www.nationalgeographic.com/animals/article/oil-company-reconafrika-accused-of-ignoring-communities-concerns>>. See also: Kangwaka Affidavit, Appendix E, *supra* note 23 at para 20; Kampanza Affidavit, Appendix K, *supra* note 20 at para 13; Muronga Affidavit, Appendix C, *supra* note 26 at para 16.

<sup>278</sup> Mayer, L. R., "ReconAfrica is on the defensive in a new case that could help put an end to the company's 'pure exploitation' of Namibia's people and our shared planet," *Re: wild* (March 31, 2023), online: <<https://www.rewild.org/news/reconafrika-is-on-the-defensive-in-a-new-case-that-could-help-put-an-end-to->>.

<sup>279</sup> Natural Justice, "Comments on the Final Environmental Impact Assessment Report to Support the Application for Environmental Clearance Certificate (ECC) for the Proposed 2D Seismic Survey covering the area of interest (AOI) in the Petroleum Exploration License (PEL) No. 73, Kavango Sedimentary Basin, Kavango West and East Regions,

- d) The 2019 EIA failed to identify affected communal conservancies and failed to include mitigation measures needed for biodiversity conservation.<sup>280</sup>
  - e) The 2019 EIA is based on an inadequate environmental baseline survey<sup>281</sup>, as the report does not address the negative impacts on wildlife.<sup>282</sup> For instance, ReconAfrica failed to consider the impact of noise and seismic surveying on various migratory species, such as elephants.<sup>283</sup>
  - f) The 2019 EIA failed to mention how the project will impede Namibia's ability to mitigate and adapt to climate change and lacks assessment of the potential impacts on future generations' ability to manage and benefit from natural resources.<sup>284</sup>
125. ReconAfrica's failure to conduct due diligence, as well as its operations inside conservancies and community forests, not only violated the 2019 ECC and 2021 ECC but also caused damage to the environment:
- a) The Company's decision to clear land in the Khaudum North Complex conservancy, without permission from the conservancy management committee and forest representatives failed to take into consideration the protection of flora, including species of fruit trees and vegetation.<sup>285</sup> This is not surprising given that ReconAfrica's EIA failed to demonstrate how oil and gas exploration supports the conservancy's work in protecting biodiversity.
  - b) By cutting through the Ncumcara Community Forest and creating so-called "firebreaks", ReconAfrica violated the Forestry Management Committee's mandate that prohibits the destruction of vegetation.<sup>286</sup>
  - c) The loud thumping generated by the seismic surveys conducted by ReconAfrica in conservancies threatened protected species found within the conservancy, as well as

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*Northern Namibia*", online: <<https://naturaljustice.org/wp-content/uploads/2021/07/Namibia-Recon-Africa-2D-Survey-Comments-FINAL.pdf>>.

<sup>280</sup> Kihumba L., "An Uncertain Future for the Okavango," Birdlife international, May 4, 2023, online <<https://www.birdlife.org/news/2023/05/04/an-uncertain-future-for-the-okavango-2/>>.

<sup>281</sup> Smit E., "WWF wants no more piecemeal EIAs for ReconAfrica" *Namibian Sun* (February 9 2021), online: <<https://www.namibiansun.com/news/wwf-wants-no-more-piecemeal-eias-for-reconafrika2021-02-09>>.

<sup>282</sup> Natural Justice, *supra* note 279.

<sup>283</sup> Hübschle A. & Rathmell S., "Canadian firm ReconAfrica's quest for Namibian oil and gas poses seismic risk to elephant behaviour", *Save the Elephants* (June 3 2021), online: <<https://www.savetheelephants.org/news/canadian-firm-reconafrika-s-quest-for-namibian-oil-and-gas-poses-seismic-risk-to-elephant-behaviour/#main>>.

<sup>284</sup> Natural Justice, *supra* note 279.

<sup>285</sup> Kangwaka Affidavit, Appendix E, *supra* note 23.

<sup>286</sup> Kampanza Affidavit, Appendix K, *supra* note 20.

disrupted vegetation, undermining conservation efforts.<sup>287</sup> Specifically, elephant migratory routes have been disrupted due to the activities of ReconAfrica causing adverse impacts on the ecosystem and livelihoods of nearby farming communities.

- d) ReconAfrica's failure to line its drilling waste pits with impermeable liner and failure to obtain the necessary water use and disposal permits prior to drilling have potentially contaminated groundwater and topsoil.<sup>288</sup>

**iii) ReconAfrica failed to make environmental information public**

- 126. Businesses must provide information that is sufficient to evaluate the adequacy of mitigation measures.<sup>289</sup> ReconAfrica neglected to provide sufficient answers regarding the impact of their activities on underground water and topsoil.<sup>290</sup> When asked, ReconAfrica representatives stated that their activities do not negatively impact the environment, which contradicts reports from affected communities and conservancy leaders, as discussed above, regarding ReconAfrica's conduct. During meetings, ReconAfrica quickly dismissed any objections and refused to answer questions about how the Company's drilling project will negatively impact and benefit local communities.<sup>291</sup> Moreover, representatives of ReconAfrica have reacted to questions from conservancy leaders in a hostile manner.<sup>292</sup>
- 127. Concerns are further exacerbated by the inconsistency between the information provided by ReconAfrica and the Company's actual actions.<sup>293</sup> As previously stated, ReconAfrica has neglected to line its drill mud pits used for dumping, despite claiming that lining would be used in their 2019 EMP.<sup>294</sup> The company claims that no liner is required because it has been using an 'organic' water-based drilling fluid, but has failed to provide any information regarding how this can be true (given the inherent risks associated with drilling) or the details of the drilling fluid used. A farmer claimed to have seen "trucks with tanks carrying waste material from the Mbambi and Kawe drill sites.... And knows that waste water is mixed with toxic chemicals during the drilling process and has reason to believe that these chemicals are polluting underground water."<sup>295</sup>
- 128. In an attempt to prove that the wastewater is in fact healthy for the environment, ReconAfrica claimed that the water will be donated to local communities as a fertilizer, but

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<sup>287</sup> Kangwaka Affidavit, Appendix E, *supra* note 23.

<sup>288</sup> Shihepo, *supra* note 196; Barbee, *supra* note 277.

<sup>289</sup> UN Guiding Principles, *Supra* note 100 at Principle 17 at 17.

<sup>290</sup> Witness 5 Affidavit, Appendix L, *supra* note 73 at para 10.

<sup>291</sup> Kangwaka Affidavit, Appendix E, *supra* note 23 at para. 14.

<sup>292</sup> *Ibid* at para. 15.

<sup>293</sup> Muronga Affidavit, Appendix C, *supra* note 26 at para 11.

<sup>294</sup> Barbee and Neme, *supra* note 66. See also: 2019 EMP, Vol. 3, *supra* note 55 at 41 (Rehabilitation Commitment and Process, Step 2: Remove all waste and unwanted materials).

<sup>295</sup> Witness 5 Affidavit, Appendix L, *supra* note 73 at para.13.

without any test results released to communities.<sup>296</sup> Furthermore, ReconAfrica claimed that landfarming had been safely conducted on the First Drill Site. However before the growing of crops can take place, a scientific study needs to demonstrate that the soil is uncontaminated and suitable for landfarming and no such study has been disclosed.<sup>297</sup>

129. The company's 2021 EMP for seismic testing also suggests establishing a groundwater monitoring system during and after exploration activities, with results to be shared with the affected communities and landowners.<sup>298</sup> However, the company has failed to share any such information with local and Indigenous communities.<sup>299</sup>

***iv) ReconAfrica neglected to facilitate public participation in environmental decision-making***

130. Businesses should communicate information with affected stakeholders in a manner that is accessible to its audience and consult with them regarding potential projects that may affect them.<sup>300</sup> Communication can be carried out through in-person meetings, formal reports and online dialogues, but it must demonstrate transparency and accountability to impacted groups and stakeholders.<sup>301</sup> As previously stated, ReconAfrica has failed to consult local communities and has instead actively blocked their participation.
131. As mentioned above, the Company neglected to include an I&AP List for the 2019 EIA, despite it being mandated by law, and thereby excluded local and Indigenous communities with knowledge of and interest in environmental issues from the process.<sup>302</sup> Similarly, ReconAfrica did not follow the required consultative process for the additional 12 well drilling project and instead filed an amendment to their 2019 EIA, as a means of avoiding consulting community members and excluding an interested and affected parties list. This is in clear violation of the ECC process, as amendments do not cover new exploration projects.
132. ReconAfrica also refused to communicate with conservancy leaders. In February 2021, Mr. Muronga, Chairperson of KKC asked representatives at the Second Drill Site why they had

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<sup>296</sup> Stop ReconAfrica! "Fact Sheet April 2022", online: <<https://www.nafsan.org/wp-content/uploads/2022/04/ReconAfrica.pdf>>.

<sup>297</sup> NBC Digital News, "ReconAfrica's horticulture and agronomic garden at Kawe Village doing well" (June 29 2022), online: <[https://www.youtube.com/watch?v=RsidVei7U\\_k](https://www.youtube.com/watch?v=RsidVei7U_k)>.

<sup>298</sup> 2019 EMP, Vol. 3, *supra* note 55 (See Table 3.11: Mitigation measures for surface and groundwater protection as well as general water usage, at point 13).

<sup>299</sup> Witness 5 Affidavit, Appendix L, *supra* note 73 at para 12.

<sup>300</sup> UN Guiding Principles, *supra* note 100 at Principle 21 at 23.

<sup>301</sup> UN Guiding Principles, *supra* note Principle 21 at 23.

<sup>302</sup> Barbee J. & Neme L., "Oil drilling, possible fracking planned for Okavango region—elephants' last stronghold", *National Geographic* (October 28 2020), online: <<https://www.nationalgeographic.com/animals/article/oil-drilling-fracking-planned-okavango-wilderness>>; See also: Africa Press, "ReconAfrica operated without land certificate" (November 24 2021), online: <<https://www.africa-press.net/namibia/all-news/reconafrika-operated-without-land-certificate>>;

*Muller v ReconAfrica* (Class Action Complaint for Violation of the Federal Securities Law) at 24, online: at <<https://www.classaction.org/media/muller-v-reconnaissance-energy-africa-ltd-et-al.pdf>> [Class Action Lawsuit].

not been consulted prior to cutting roads through protected land, conducting seismic testing, and drilling, despite these questions the employees refused to talk to him.<sup>303</sup> Similarly, in December 2021, when Mr. Kangwaka, Chairperson of the MNC, requested a meeting with ReconAfrica his request was denied on the basis that the company had “concluded all formal stakeholder engagements for the year.”<sup>304</sup> A copy of this correspondence is attached as Exhibit “C” to Mr. Kangwaka’s affidavit attached at **Appendix E**. This response was surprising given that ReconAfrica had already commenced drilling operations without consulting with the regulatory body tasked with protecting the environment.

133. ReconAfrica has also denied conservancy leaders and villagers access to publicly held meetings. In June 2022, ReconAfrica spokesperson, H. Namudjebo denied Mr. Kangwaka access to a meeting organized by the Farmer’s Union Association. This was done to prevent the Chairperson from sharing his opinion about the proposed extractive activities with other farmers.<sup>305</sup> Where affected individuals are permitted to attend meetings, there is often no opportunity to ask questions and voice opinions and in many cases, the Company fails to disclose the entirety of their projects.

## VI. RIGHTSHOLDERS HAVE NOT RECEIVED ADEQUATE REMEDY

### A. The Right to Remedy

134. The right to an effective remedy is a human right that entails responsibility for businesses as articulated in the UN Guiding Principles.<sup>306</sup> In the case at bar, CORE must consider the remedies expressed in the UN Guiding Principles and, by extension of Principle 12, those called for in the UDHR, ICESCR, and UNDRIP.
135. Article 8 of the UDHR recognizes the right to an effective remedy by national tribunals when an individual’s fundamental rights are violated. With respect to the ICESCR the ESCR Committee has noted that states must provide “appropriate means of redress, or remedies” for aggrieved individuals or groups.<sup>307</sup> Such remedies may be judicial or administrative.<sup>308</sup>
136. Under UNDRIP, the adverse impact on Indigenous peoples’ rights calls for redress under both Articles 28 and 32(3), which includes restitution and/or fair and equitable compensation and mitigation of the enduring adverse environmental, economic, social, cultural or spiritual

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<sup>303</sup> Muronga Affidavit, Appendix C, *supra* note 26 at para 9.

<sup>304</sup> Kangwaka Affidavit, Appendix E, *supra* note 23 at para 16.

<sup>305</sup> *Ibid* at para 18.

<sup>306</sup> UN General Assembly, *Human rights and transnational corporations and other business enterprises: Note by the Secretary-General*, A/72/162 (18 July 2017) at para 14, online: <<https://digitallibrary.un.org/record/1298796?ln=en&v=pdf>>.

<sup>307</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant*, E/C.12/1998/24 (3 December 1998) at para. 2.

<sup>308</sup> *Ibid* at para. 9.

impact. Compensation under Article 28 may materialize in the form of land or resources that are equal “in quality, size and legal status,” monetary compensation, or other appropriate redress.<sup>309</sup>

## **B. Effective Remedy under the UN Guiding Principles**

137. Mitigation of harm and access to effective remedies are core components of the UN Guiding Principles. Business enterprises should have remediation procedures in place to satisfy their responsibility to respect human rights under this instrument.<sup>310</sup>
138. A business at risk of causing or contributing to an adverse human rights impact should cease or change the responsible business activity.<sup>311</sup> Where an actual adverse human rights impact occurs, businesses should provide for or cooperate in their remediation through legitimate processes.<sup>312</sup>
139. Business enterprises should establish or participate in effective grievance mechanisms that identify adverse human rights impacts and enable remediation early and directly.<sup>313</sup> To be effective, grievance mechanisms are:
- Legitimate, whereby the mechanism implements policies and processes required to address the needs of people who may be at heightened risk of vulnerability or marginalization, drawing on, amongst other things, meaningful consultation with rights holders;<sup>314</sup>
  - Transparent, including ongoing and proactive engagement with rights holders using various channels;<sup>315</sup>
  - Accessible, which means the mechanism is known to all stakeholder groups, confidential, user-friendly, and dialogue-based, and rights holders are not at risk of retaliation;<sup>316</sup>

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<sup>309</sup> UNDRIP, *supra* note 110 at Arts. 28 and 32(3).

<sup>310</sup> UN Guiding Principles, *supra* note 100 at Principle 15.

<sup>311</sup> OHCHR, *supra* note 175 at 18.

<sup>312</sup> UN Guiding Principles, *supra* note 110 at Principle 12 at 13 and Principle 22 at 24.

<sup>313</sup> *Ibid* at Principle 29 at 31 and Commentary on Principle 29 at 31-32.

<sup>314</sup> *Ibid* at 33 (Principle 31); OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms: Report of the United Nations High Commissioner for Human Rights*, A/HRC/44/32 (19 May 2020) at para 7.4.

<sup>315</sup> OHCHR, *supra* note 314 at para 11.1 and 11.2.

<sup>316</sup> *Ibid* at para 8.1-8.9

- Predictable whereby rightsholders are provided with comprehensible procedures that clearly state the available outcomes and the means of implementing and monitoring those outcomes;<sup>317</sup>
  - Equitable, seeking to ensure aggrieved parties have reasonable access to information, advice and expertise, such as legal advice, and addressing power imbalances between rights holders and business enterprises so that rights holders can participate fairly and confidently in grievance processes;<sup>318</sup>
  - Rights-compatible, ensuring that outcomes and remedies are adequate, effective, prompt, and accord with internationally recognized human rights, and; (a “**Rights-Compatible Remedy**”);<sup>319</sup>
  - A source of continuous learning;<sup>320</sup> and
  - Focused on engagement, dialogue, and consultation with stakeholder groups where operational-level grievance mechanisms are used.<sup>321</sup>
140. Under the UN Guiding Principles, remedies should aim to counteract or correct any human rights harms that have occurred. Affected groups should be able to seek, obtain, and enforce a range of remedies depending upon the circumstances, since a combination of remedies may be required to fulfill the objective. Further, remedies for human rights abuses serve interrelated purposes under international human rights law and a mix of remedies may be required to address preventive, redressive, and deterrent elements.<sup>322</sup> Businesses should consider the opinion of the affected party about the choice of effective remedy.<sup>323</sup>
141. The substantive form of these remedies will vary and may include apologies, restitution, rehabilitation, financial or non-financial compensation, punitive sanctions, and harm prevention.<sup>324</sup> To be considered effective, each remedy must include specific characteristics, taking into account the circumstance. Restitution must involve restoring the rights-holder to their position before the human rights violation. In the case of a business causing pollution, the enterprise should restore the environment as part of the “polluter pays” principle.<sup>325</sup> Where the rights holder seeks compensation, the award should be fair

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<sup>317</sup> UN Guiding Principles, *supra* note 110 at 33 (Principle 31).

<sup>318</sup> OHCHR, *supra* note 314 at para 10.1

<sup>319</sup> UN Guiding Principles, *supra* note 110 at 34 (Principle 31); OHCHR, *supra* note 314 at para 12.1

<sup>320</sup> UN Guiding Principles, *supra* note 110 at 34 (Principle 31).

<sup>321</sup> *Ibid* at 34 (Principle 31).

<sup>322</sup> *Ibid* at 38-40.

<sup>323</sup> OHCHR, *supra* note 175 at p 64.

<sup>324</sup> UN Guiding Principles, *supra* note 100 at 27 (Commentary on Principle 25).

<sup>325</sup> UN General Assembly, *supra* note 306 at para 44.



and proportional to the magnitude of the pecuniary and non-pecuniary harms.<sup>326</sup> Private compensation agreements should be signed in circumstances where the aggrieved party has access to adequate and objective information about all aspects of the agreement, including the implications of confidentiality and legal waivers, in accordance with Guiding Principle 31(d).<sup>327</sup> Punitive or exemplary compensation may be appropriate when a business engages in wilful and repeated human rights abuses.<sup>328</sup> Rehabilitation can also serve as an effective remedy where, for instance, business operations displace people or damage land beyond restoration. In such instances, a suitable alternative piece of land may be an appropriate remedy.<sup>329</sup> Satisfaction can be awarded in multiple forms, such as stopping ongoing human rights abuses, a public apology, and civil, administrative or criminal sanctions against the business. Many of these remedies will deter other businesses that seek to engage in similar activities. However, it is also important to consider other methods of ensuring non-repetition, such as contractual clauses, regulations and sanctions for non-compliance.<sup>330</sup>

### **C. ReconAfrica has not provided effective remedies**

142. In most cases, witnesses whose rights were impacted by ReconAfrica's drilling activities, seismic surveys, and operations, have not received a remedy for the violations of their human rights.

- a) Witness 1, Witness 2, Witness 3, Witness 5, Witness 6 and Witness 7 have not received any form of compensation or redress for damage to their family-occupied lands and homes.
- b) Mr. Kangwaka states that ReconAfrica has not adequately restored the land to its original condition following the removal of vegetation to create pathways for machinery passage.
- c) Mr. Muronga and Witness 5 state that ReconAfrica did not restore protected species, such as native fruit trees after conducting seismic testing.
- d) Mr. Kampanza states that Recon has failed to provide monetary compensation for the damage caused to Community Forest beneficiaries.
- e) Witness 6 has not received any form of redress for his and his families stomach issues after drinking polluted water, impacting his access to adequate water and standard of health. Similarly, Witness 5 and other members of his village have not received

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<sup>326</sup> *Ibid* at para 45.

<sup>327</sup> *Ibid* at para 46.

<sup>328</sup> *Ibid* at para 47.

<sup>329</sup> *Ibid* at para 48.

<sup>330</sup> *Ibid* at para 53.

compensation after falling ill due to consuming contaminated water, nor have they received compensation for their loss of cattle.

143. Where compensation was offered, such as in the case of Witness 4, he was required by ReconAfrica to sign a document in English, which he did not understand. Witness 4 was not aware of the amount of compensation he would receive prior to signing the document. He eventually received N\$ 1,116 (CAD \$79.80) for permanent roads built on his family's land, but this was wholly inadequate, as it merely paid for about one month's worth of rice for his family and nowhere near covered the losses he and his family have suffered. Witness 4 states that he accepted the inadequate compensation out of fear that it would be the only form of compensation he would receive.
144. The meager compensation provided by ReconAfrica is not a Rights-Compatible Remedy. It does not meet the test of "just, fair, and equitable" compensation equal to the value of the land lost, as required under Article 28 of UNDRIP. This amount of compensation does not meet the standard intended by the UN Guiding Principles of compensation that is fair and proportional to the magnitude of the harm suffered.<sup>331</sup> Further, Witness 4 was not provided with "adequate and objective information" about all aspects of the private compensation agreement as is recommended in such situations.<sup>332</sup> Nor did Witness 4 have reasonable access to information, advice and expertise such as legal advice during this process as called for by Guiding Principle 31(d).

### **C. Complaints and Actions in Other Forums**

145. ReconAfrica's illegal conduct has been the subject of complaints in other forums, such as the Namibian High Court, the US Securities and Exchange Commission, the British Columbia Securities Commission, Namibia's Parliamentary Standing Committee, and the Human Rights Council. However, these forums either cannot or are unlikely to provide effective remedy to the rightsholders for the harms discussed in this complaint.

#### ***i) Complaints to Securities Commissions and Investor Class Action Lawsuits***

146. In a complaint to the US Securities and Exchange Commission and the British Columbia Securities Commission, an anonymous whistle-blower claimed that ReconAfrica violated securities laws by withholding crucial information about its plans to look for oil and gas deposits, in an effort to increase the company's stock price.<sup>333</sup> Following the complaint, three class action lawsuits were filed against ReconAfrica in Brooklyn, New York by shareholders who alleged that ReconAfrica issued misleading statements to investors regarding the

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<sup>331</sup> *Ibid* at para 45.

<sup>332</sup> *Ibid* at para 46.

<sup>333</sup> Barbee J. & Neme L., "Oil exploration company in Okavango wilderness misled investors, complaint to SEC says," *National Geographic* (May 21 2021), online: <<https://www.nationalgeographic.com/animals/article/oil-exploration-company-in-okavango-wilderness-misled-investors-sec-complaint-says>>

viability of their oil and gas wells<sup>334</sup> and their intention to use fracking techniques to extract these resources.<sup>335</sup> The first lawsuit, filed by Eric Muller on behalf of himself and other persons and entities, was voluntarily dismissed in 2021. The remaining two class action cases were consolidated into one suit in 2022 and have since been settled.<sup>336</sup> The consolidated lawsuit sought a remedy for harms endured by investors but did not apply to those who have suffered human rights abuses in the Kavango region as a result of the company's operations.

## ***ii) Parliamentary Standing Committee***

147. Namibia's Parliamentary Standing Committee on Natural Resources (the "PSC") investigated ReconAfrica in 2021 and 2022 in response to a petition, submitted by SOUL and Fridays for Future, calling on the PSC to terminate ReconAfrica's drilling activities.<sup>337</sup> The PSC's investigation found that ReconAfrica was engaged in oil and gas exploration activities without appropriate land-use permits, as required by law.<sup>338</sup> Following its investigation, the PSC reprimanded local Communal Land Boards for not holding ReconAfrica accountable for its illegal actions,<sup>339</sup> and made recommendations about how the project should proceed, highlighting that ReconAfrica's future explorations must be completed with the approval of landowners, communities, and the Traditional Authorities.<sup>340</sup> However, the PSC did not penalize ReconAfrica for violating Namibian law, suspend or terminate the project, or provide a remedy for past harms.

## ***iii) Appeal of the Environmental Clearance Certificate amendment to the Ministry of Environment, Forestry & Tourism***

148. On June 22, 2022, the Legal Assistance Centre ("LAC"), a public interest law centre based in Windhoek, assisted the Forestry Management Committee of the Ncumcara Community Forest, the Muduva Nyangana Communal Conservancy, the Kavango East and West Regional Conservancy and Community Forest Association, and the Katope Community Forest (together referred to as the "Coalition") in filing an appeal of the Environmental

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<sup>334</sup> Sole S. and Shihepo T., "Canadian company exploring for oil in Namibia in battle for credibility" *Ama Bhugane* (December 15 2022), online: <<https://amabhugane.org/stories/canadian-company-exploring-for-oil-in-namibia-in-battle-for-credibility/#:~:text=After%20acquiring%20the,on%20any%20find.%E2%80%9D>>; Class Action Lawsuit, *supra* note 302.

<sup>335</sup> Sole S. & Shihepo T., *supra* note 334.

<sup>336</sup> ReconAfrica, "ReconAfrica announces proposed settlement of class action lawsuits" (February 28 2024), online: <<https://www.newswire.ca/news-releases/reconafrika-announces-proposed-settlement-of-class-action-lawsuits-828479696.html>>.

<sup>337</sup> Barbee, *supra* note 65.

<sup>338</sup> Barbee J. & Neme L., "They ripped through a protected wilderness to find oil. Instead, they found trouble", *National Geographic*, March 28, 2023, online: <<https://www.nationalgeographic.com/animals/article/oil-drilling-reconafrika-okavango-watershed-protected-wilderness>>; See also: Africa Press, *supra* note 302.

<sup>339</sup> Barbee and Neme, *supra* note 338.

<sup>340</sup> Wells, C., NAMPAPR, online: <<http://www.nampapr.com.na/?p=10697>>.

Commissioner's decision to amend ReconAfrica's Environmental Clearance Certificate ("ECC") and extend the company's drilling rights to new areas (the "Appeal").<sup>341</sup> On April 24, 2023, nearly a year after the appeal was filed, a hearing was held to discuss the Appeal during which the Ministry pledged to respond to the Appeal by May 2023. To date, the Coalition has not received a response to the Appeal, and the process remains stalled until the Ministry responds. The remedy sought by the Coalition is a reversal of the decision to amend the ECC concerning ReconAfrica's drilling license; the Appeal cannot provide a remedy to the complainants for past human rights violations.

#### ***iv) Human Rights Council Special Procedures***

149. In 2021, the UN Working Group on Business and Human Rights, the Special Rapporteur on the Rights of Indigenous Peoples, and the Special Rapporteur on the Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, and Healthy Environment (together, "**Special Procedures**") received a complaint from SOUL concerning ReconAfrica's violation of the human rights of Indigenous San people in Namibia and Botswana. The independent experts in Special Procedures have a mandate to bring awareness to human rights issues - such as, sending communications to governments and other actors about alleged human rights violations, engaging in advocacy, monitoring situations via country visits, and providing advice to Governments for technical cooperation - but they are not empowered to administer effective, legally enforceable remedies.<sup>342</sup>
150. In November 2021, the Special Procedures forwarded communications to the governments of Botswana, Namibia, and Canada, as well as the National Petroleum Corporation of Namibia and ReconAfrica, reporting on the allegations received, requesting clarification regarding the allegations, and drawing attention to the international human rights instruments and standards relevant to the allegations (the "**Communications**").<sup>343</sup>
151. In a response dated July 2021, the Government of Canada pointed to the CORE as one of its non-judicial dispute resolution mechanisms explicitly established to review human rights abuses stemming from the operations of Canadian oil and gas companies active abroad and noted that the CORE had not received an admissible complaint about ReconAfrica's activities to date. The Canadian government reiterated its expectation that all Canadian companies working abroad respect human rights, and operate in accordance with internationally recognized guidelines and in consultation with host governments and local communities.<sup>344</sup> To date, the Special Procedures have not publicly documented additional

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<sup>341</sup> Kampanza Affidavit, Appendix K, *supra* note 20.

<sup>342</sup> OHCHR, Submission of information to the Special Procedures, online: <<https://spsubmission.ohchr.org/>>.

<sup>343</sup> OHCHR, Communication Report and Search, online: <<https://spcommreports.ohchr.org/TmSearch/RelCom?code=BWA%203/2021>>.

<sup>344</sup> Permanent Mission of Canada to the United Nations and the World Trade Association, *Responses by the Government of Canada to the Joint Communication from Special Procedures*, AL CAN 7/2021 No GENEV - 7690(17 November 2021), online: <<https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=36757>>

communications or replies, nor have they publicly documented recommendations regarding remedies or the administration of any remedies by the Namibian government, Canadian government, or ReconAfrica.

## **VII. ADMISSIBILITY CRITERIA MET**

152. This complaint and the human rights violations discussed therein meet the CORE admissibility criteria.

153. The CORE admissibility criteria are as follows:

5.7 A complaint will be considered admissible when the Ombud is satisfied there is sufficient information regarding the following admissibility criteria:

5.7.1 What is complained about is allegedly an abuse of an internationally recognized human right;

5.7.2 The alleged human rights abuse arises from the operations abroad of a Canadian company in the garment, mining, or oil and gas sectors; and,

5.7.3 What is complained about allegedly took place after May 1, 2019, or if it allegedly occurred before May 1, 2019, it is continuing at the time of the complaint.<sup>345</sup>

154. As discussed above, ReconAfrica's activities violate several human rights recognized in international instruments embedded in CORE's mandate, which satisfies the first element of the admissibility criteria.

155. Also established above, ReconAfrica is a junior oil and gas company incorporated under the *Business Corporations Act*, SBC 2002, c 57, and the human rights abuses alleged in this complaint arose from ReconAfrica's operations abroad, meeting the second admissibility criteria.

156. Finally, the human rights abuses claimed in the attached affidavits took place after May 1, 2019, and are continuing at the time of the complaint, which satisfies the third criterion.

## **VIII. INVESTIGATION CRITERIA MET**

157. In deciding how to proceed with this complaint, the Ombud may decide to conduct an investigation using independent fact-finding where investigation criteria are met pursuant to section 7(b) of the Order in Council.

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<sup>345</sup> CORE Operating Procedures, *supra* note 96 at s. 5.7.

158. In deciding whether to investigate a complaint, the Ombud considers the overall context of the complaint and relevant factors including whether:

- The complaint is frivolous or vexatious;
- The complaint is being reviewed or has been reviewed, in another forum.
- The Canadian company has already provided a satisfactory response or remedy to the allegations in the complaint;
- Relevant information is likely to be available;
- Effective remedy is likely to be available; and
- An investigation is likely to lead to unacceptable risk to the complainant or others.<sup>346</sup>

159. The complaint meets the investigation criteria as follows:

- a) The information provided above demonstrates that criteria (a) and (d) have been met. The complaint is neither frivolous nor vexatious, and relevant information is likely to be available, demonstrated through the attached affidavits. Additional information is likely available in the public domain.
- b) The complaint is not being reviewed in another forum. As discussed in section VI.(C), the specific abuses alleged in this complaint have not been discussed in another forum.
- c) ReconAfrica has not provided a satisfactory response or remedy to the allegations in this complaint. Individuals who attempted to obtain responses through consultation meetings or by contacting ReconAfrica directly have received no response or received responses that do not address the issues at hand. Where compensation has been promised, the affected parties did not receive compensation or received woefully inadequate compensation for the magnitude of the harm.
- d) An effective remedy is likely to be available as the Ombud may make recommendations to the Minister of International Trade for trade measures, including denial or withdrawal of existing trade advocacy support, and/or refusal of future trade advocacy and financial support.
- e) To prevent recourse to the witnesses by ReconAfrica, the affidavits have been anonymized and their identities concealed. Thus, conducting a review is not likely to

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<sup>346</sup> CORE, *Initial Assessment Report: Walmart Canada Corp.*, File number: 220851 at para 15, online: <[https://core-ombuds.canada.ca/core\\_ombuds-ocre\\_ombuds/activities-walmart-activitie.aspx?lang=eng](https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/activities-walmart-activitie.aspx?lang=eng)>.

lead to unacceptable risk to the Complainant or the community the Complainant represents.

## IX. CONCLUSION AND RELIEF REQUESTED

160. Based on the information provided in this complaint, the Complainant requests that CORE investigate ReconAfrica to determine the extent of their human rights abuses in Namibia. These violations encompass the principles outlined in the UNDRIP, particularly with respect to the duty to consult and the principle of FPIC. Furthermore, they contravene rights enshrined in the ICESCR and UNGA Resolution 48/13, including the right to an adequate standard of living and the right to health, and the right to a safe and healthy environment, respectively.
161. Oil and gas exploration activities in the Kavango region have already resulted in adverse impacts. A copy of a chart providing an overview of affiant testimonies, as referenced throughout this Complaint, attached at **Appendix P**.<sup>347</sup>
162. To effectively prevent further harm and protect the well-being of Namibia's citizens, environment, and resources, we encourage CORE to investigate ReconAfrica's activities in Namibia and to issue a final report containing the following recommendations:
- a) Immediate cessation of ReconAfrica's activities in Namibia.
  - b) Call for ReconAfrica to restore conservancy land and community forests to their original state prior to commencing operations.
  - c) Call for compensation for the damage caused to land and water resources, including the loss of an adequate standard of living for affected communities.
  - d) Call for ReconAfrica to provide compensation for damage to homes, land, and pollution of water.
  - e) Call for ReconAfrica to cover medical treatment to address health concerns.
  - f) Call for compensation for medical conditions resulting from the contamination of underground water resources.
  - g) Any further recommendations deemed necessary by the Complainant or appropriate by CORE.
163. The Complainant reserves the right to include any additional information they shall deem necessary to support this Complaint.

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<sup>347</sup> Chart: Overview of Witnesses Interviewed

The Complainant looks forward to receiving communication from CORE regarding the next steps in addressing this complaint. The IHRP and the Complainant are prepared to offer any additional assistance that may be needed.

Best Regards,

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