

Mandates of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights and the Special Rapporteur on the rights of indigenous peoples

REFERENCE:
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Dear Dr. Kim,

We have the honour to address you in our capacities as Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, and Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolutions 25/16 and 33/12.

In this connection, we would like to bring to your attention some information we have received regarding the **granting of waivers to the application of the World Bank's Operational Policy on Indigenous Peoples (OP. 4.10 of 2005) in relation to Tanzania.**

According to the information we have received, the World Bank's Executive Board approved two policy waivers to the Bank's indigenous peoples policy (OP 4.10) in relation to two projects in Tanzania: the (1) Southern Agricultural Growth Corridor of Tanzania (SAGCOT) Investment Project (waiver granted on 10 March 2016), and (2) to the additional financing to the Tanzania Productive Social Safety Net (PSSN-III) project (waiver granted on 10 June 2016).

The SAGCOT project may have a significant impact on nomadic and semi-nomadic pastoralist groups that self-identify as indigenous peoples, including the Barbaig, the Datoga the Hadzabe and the Maasai, who depend on lands in the project areas for their daily livelihood and survival, including by raising livestock. Similarly, we think that it is essential that projects aimed at improving the social safety net in Tanzania are designed in such a manner that Indigenous People can benefit from them in a non-discriminatory manner similar to other groups and individuals and that Indigenous People are fully consulted in the further implementation of this important project aimed at improving the enjoyment of the right to social security in Tanzania. We therefore think that there is no justification, why PSSN-III should be excluded from being reviewed against the World Bank's Operational Policy on Indigenous Peoples in order to ensure that this project meets international standards and best practices and respects fully the rights of Indigenous Peoples.

As the former Special Rapporteur on the Rights of Indigenous Peoples has pointed out in his previous communications with the Government of Tanzania (GoT), these groups "fall properly within the scope of the international concern for indigenous peoples

as it has developed throughout the United Nations and regional human rights systems,”¹ and whose grievances, “stem from their distinct cultural identities and dependence on their traditional territories, can be identified as the types of problems faced by other indigenous peoples worldwide with regards to the effects of development and other projects within their traditional lands.”²

The situation of indigenous pastoralist and hunter-gatherer groups in Tanzania is a long-standing concern of United Nations human rights bodies and mechanisms.³ Of special concern has been the GoT’s practice of forced evictions of indigenous communities from their traditional lands as a result *inter alia* of the expansion of large-scale farming or creation of game reserves and expansion of national parks. In this regard, the Committee on Economic, Social and Cultural Rights has signalled that “these practices have resulted in a critical reduction in their access to land and natural resources, particularly threatening their livelihoods and their right to food.”⁴

The Special Rapporteur on the Right of Indigenous Peoples, as well as several other special procedures mandate holders of the United Nations Human Rights Council have repeatedly raised with the GoT allegations of human rights violations against indigenous pastoralist and hunter-gatherer communities. Reported abuses include the forced eviction and intimidation as a result of the granting of a hunting licence in the traditional lands of the Hadzabe⁵ and the forced removal of Maasai pastoralist from their

¹ United Republic of Tanzania: Alleged Forced Removal of Pastoralists, in *Report of the Special Rapporteur on The Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Addendum: Cases Examined by the Special Rapporteur (June 2009 – July 2010)*, A/HRC/15/37/Add.1 (15 September 2010), Case No. XXIII, para 434.

² *Ibid*, para 431.

³ Public letter under the early warning and urgent action procedure of Committee on the Elimination of Racial Discrimination on allegations of arrests and intimidation as well as threat of forced evictions, of persons belonging to the community of the Maasai indigenous people (3 October 2016), Concluding observations of the Committee on the Elimination of Racial Discrimination, United Republic of Tanzania, CERD/C/TZA/CO/16 (27 March 2007), para. 16 (noting the difficulties faced by “certain vulnerable ethnic groups, notably nomadic and semi-nomadic populations, and Hadzabe” due to “their specific way of life”); Concluding Observations of the Human Rights Committee, United Republic of Tanzania, CCPR/C/TZA/CO/4 (6 August 2009), para. 26 (noting that “that the State party does not recognize the existence of indigenous peoples and minorities in its territory” and recommending that the Government “as a matter of urgency... adopt specific legislation and special measures to protect, preserve and promote their cultural heritage and traditional way of life” of these groups).

⁴ Concluding observations on the initial to third reports of the United Republic of Tanzania, adopted by the Committee at its forty-ninth session (12–30 November 2012), E/C.12/TZA/CO/1-3 (13 December 2012), para 22.

⁵ United Republic of Tanzania: Allegation letter concerning the Hadzabe community (TZA 1/2007), in *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Addendum: Summary of cases transmitted to Governments and replies received*, A/HRC/6/15/Add.1 (20 November 2007), paras 359-375; United Republic of Tanzania: Allegation letter concerning the Hadzabe indigenous community and the detention of Mr. Richard Baalow, in *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya. Addendum Summary of cases transmitted to Governments and replies received*, A/HRC/9/9/Add.1 (15 August 2008), paras 480-501.

traditional grazing lands as a result of agricultural land concessions.⁶ Several of these cases refer to the Morogoro region, which is located in the SAGCOT investment project area.

Against this backdrop of documented allegations of human rights violations, the granting of the waivers to the GoT regarding the Bank's Operational Policy on Indigenous Peoples generates a number of concerns from the perspective of the international standards that protect the rights of indigenous peoples, as well as for the discharging of the due diligence responsibilities that pertain to Bank Management in this regard.

In this context, and in a spirit of constructive dialogue and cooperation with the Bank, we would like to present the following preliminary observations based on allegations received from credible sources, which summarise our main areas of concern.

Kindly note that, as independent experts appointed by the Human Rights Council, our position does not necessarily represent those of the United Nations Office of the High Commissioner for Human Rights, which serves as the Secretariat of the Council and its subsidiary bodies and mechanisms. For the same reason, as independent experts, our activities are not covered by the 1947 Agreement between the United Nations and the World Bank.⁷

1. The waivers were allegedly granted in the absence of “clearly delineated individual circumstances”

The Bank's Policy on Operational Policy Waivers (OPCS5.06-POL.01) (2014) expressly allows for the granting of policy waivers by the Executive Board, or, in some limited cases, by Management, provided that a number of procedural requirements are met. Among these requirements, the policy stipulates that a “Waiver may be granted only in response to *clearly delineated individual circumstances*, so as to allow staff to proceed with processing or implementation steps that are pending at the time the Waiver is requested” (Sec III, para 3, emphasis added).

⁶ United Republic of Tanzania: Situation concerning the alleged forced removal of pastoralists from Kilosa District (TZA 3/2009), in *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Addendum: summary of communications transmitted and replies received*, A/HRC/12/34/Add.1 (18 September 2009), para 440-447; Alleged forced removal of pastoralists, A/HRC/15/37/Add.1 (15 September 2010), paras 421-455 ; Alleged forcible eviction and other human rights issues affecting indigenous Maasai pastoralists in the area of Sukenya Farm, Arusha Region (TZA 3/2013), in *Communications report of Special Procedures Communications sent, 1 June to 30 November 2013; Replies received, 1 August 2013 to 31 January 2014*, A/HRC/25/74 (24 February 2014), p. 123, Alleged attack against Maasai in Morogoro municipality, TZA 1/2015 in *Communications report of Special Procedures Communications sent, 1 June to 30 November 2015; Replies received, 1 August 2015 to 31 January 2016*, A/HRC/31/79, p. 28

⁷ In this regard, it should be noted that the agreement applies to the two organisations, its “organs” (“organs”) and “subsidiary bodies” (“organismes subsidiaires”). Agreement between the United Nations and the International Bank for Reconstruction and Development, 16 UNTS (1948) 346 (entered into force on 15 November 1947, in accordance with Article XII), Article IV, paras 2-3.

However, the waivers that were granted by the Board in relation to SAGCOT and to the additional financing in the PSSN-III project did allegedly not respond to “clearly delineated individual circumstances,” but, rather, to country-wide considerations that do not appear to be sufficiently substantiated nor individualised in relation to the specific projects. Thus, in the case of SAGCOT, according to Management:

In regard to the application of the Indigenous Peoples Policy (OP 4.10), the Government of Tanzania suggested a waiver to the application of the policy in Tanzania as this policy is *considered* inconsistent with the Tanzanian Constitution, which emphasizes unity among its citizens and calls for an equal treatment of all ethnic groups by not giving special preference to individual ethnicities.⁸

Similarly, in relation to PSSN-III, Management has argued that:

Since the project was approved, however, the GoT has *subsequently* requested a waiver to the application of the policy in Tanzania as this policy is *considered* inconsistent with the Tanzanian Constitution, which emphasizes unity among its citizens and calls for an equal treatment of all ethnic groups by not conferring any right, status, or special position on the basis of lineage, tradition, or descent.⁹

From the above it would appear clear that the request for the waivers, which are almost identical in the two cases, did not stem from a detailed assessment of the elements of each project and how the safeguards requirements of OP 4.10 would negatively affect the development objectives of the specific projects or contradict the achievement of the Bank’s goals.

Most importantly, OP 4.10 has been applied in the past in relation to the initial phase of the Productive Social Safety Net (PSSN) project in Tanzania (where an Indigenous Peoples Planning Framework was developed). Moreover, OP 4.10 has been applied to similar pastoralist groups as those found in Tanzania in other countries of the region, including Kenya (e.g. Transforming Health Systems for Universal Care Project, and the National Agriculture and Rural Inclusive Growth Project) and Uganda (e.g. the Regional Communication Infrastructure Program).

2. The waivers fail to recognise objective criteria

It is a basic tenet of international indigenous and minority rights protection that the existence of indigenous or minority groups should be established “by objective

⁸ Project Appraisal Document on a Proposed Credit in the Amount of (SDR50.8) Million (US\$70 Million Equivalent) to the United Republic of Tanzania for a Southern Agricultural Growth Corridor of Tanzania (SAGCOT) Investment Project, Report No: PAD345 (17 February 2016) [hereinafter SAGCOT PAD], para 70.

⁹ Proposed Additional Credit and Restructuring in the Amount of SDR 141.2 Million (US\$200 Million Equivalent) to the United Republic of Tanzania for a Productive Social Safety Net (PSSN) Report No: PAD1500 (20 May 2016), para 45 (emphasis added).

criteria” and cannot be dependent “upon a decision” by the State concerned.¹⁰ This is particularly true in relation to indigenous peoples, where international standards provide that, together with objective criteria, special consideration should be given to indigenous peoples’ self-identification as part of one of the defying characteristics of these peoples.¹¹

The same approach is taken by the Bank’s policy on indigenous peoples, which uses the term “Indigenous Peoples” as a generic term to refer to socially and culturally distinct groups that meet a number of objective criteria in varying degrees, including self-identification (OP 4.10, para 4). The Bank’s policy further provides for the objective screening of the project area in order to identify indigenous groups potentially affected by the project, based on “the technical judgment of qualified social scientists” and in consultation with the groups concerned (OP 4.10, paras 6(a), 8). The role of the technical judgement of qualified social scientists alongside consultation with the project affected communities to ascertain whether these communities are indigenous peoples has been further underscored by the Bank’s independent accountability mechanism, the Inspection Panel, in its consideration of the Colombia Cartagena Water Supply, Sewerage and Environmental Project¹² and the Pakistan National Drainage Program Project.¹³

3. The waivers are not in accordance with an international legal standards

The waivers to the two projects were granted on the basis of the argument by the Government of Tanzania that OP 4.10 contradicts the provisions of the Tanzanian Constitution affirm national unity and the equal treatment of all ethnic groups in the country. This argument however is not compatible with international human rights standards, including standards specifically applicable to indigenous peoples.

As many other constitutional texts throughout the world, the Constitution of Tanzania affirms “the unity of the United Republic and the need to promote national unity.”¹⁴ The Constitution further affirms the right of all persons “to protection and equality before the law,” without discrimination.¹⁵ The Constitution commits to provide equal opportunity to all persons and to prohibit discrimination on the basis of tribal ascription.¹⁶

¹⁰ Human Rights Committee, General Comment No. 23 on Article 27, U.N. Doc. CCPR/C/21/Rev.1/Add.5, (1994), para 5.2.

¹¹ International Labour Organisation Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) (1989), adopted by the 76th Session of the International Labour Conference on 7 June 1989 (entered into force on 5 September 1991, in accordance with Article 38 para 3) [ILO Convention 169], Article 1.1.2.

¹² Inspection Panel. Colombia: Cartagena Water Supply, Sewerage and Environmental Project Investigation Report. Washington DC: World Bank, 2004

¹³ Inspection Panel, Pakistan: National Drainage Program Project Investigation Report. Washington DC: World Bank, 2004

¹⁴ The Constitution of the United Republic of Tanzania, 1977, Art. 8(2).

¹⁵ Ibid Art. 13(1).

¹⁶ Ibid, Arts. 9(g), 13(5).

However, these provisions cannot be construed in a way that excludes the recognition and differentiated treatment of groups that qualify as indigenous peoples under international law. It is a long-established principle of international human rights law that the principle of equality does not necessarily entail uniform treatment of all individuals and groups. In this regard, the Human Rights Committee has affirmed that “not every differentiation of treatment will constitute discrimination.”¹⁷ Furthermore, the Human Rights Committee has clarified that “[i]n a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions,” and that “as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the [International] Covenant [on Civil and Political Rights].”¹⁸

In an analogous manner, the Committee on the Elimination of Racial Discrimination has stated that “the term “non-discrimination” does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination.” Furthermore, “[the] Committee has observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration”.¹⁹

It is of note that a similar approach is present in the Tanzanian Constitution, which explicitly provides that “the word ‘discrimination’ shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society.”²⁰

From the above it follows that differential treatment may be in accordance with international standards, provided that this differentiation is “reasonable and objective and the aim is to achieve a purpose which is legitimate” under those standards.²¹ In this context, the application of differentiated safeguards under OP 4.10, which aim at ensuring that “the development process fully respects the dignity, human rights, economies and cultures of Indigenous Peoples” (para 1) are legitimate and consistent with the purpose of international human rights standards.

Secondly, it should be recalled that the recognition of specific standards applicable to indigenous peoples in international law and practice, including the World Bank’s operational policy on indigenous peoples, does not entail granting *special* rights

¹⁷ General Comment of the Human Rights Committee No. 18: Non-Discrimination, reproduced in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), p. 195

¹⁸ *Ibid.*

¹⁹ General Recommendation of the Committee on the Elimination of Racial Discrimination No. 32; The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, UN Doc. CERD/C/GC/32, 2009, para. 8

²⁰ The Constitution of the United Republic of Tanzania, 1977, Art. 13(5).

²¹ Human Rights General Comment No. 18, para 13.

to these peoples vis-à-vis other groups within society. As put by the former Special Rapporteur on the rights of indigenous peoples:

The Declaration [on the Rights of Indigenous Peoples] does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples. These include the basic norms of equality and non-discrimination, as well as other generally applicable human rights in areas such as culture, health or property, which are recognized in other international instruments and are universally applicable.²²

The same reasoning applies to the status of indigenous peoples in the African context. In this regard, the African Commission on Human and Peoples' Rights has noted that:

One of the misunderstandings is that to protect the rights of indigenous peoples would be to give special rights to some ethnic groups over and above the rights of all other groups within a state. This is not the case. The issue is not special rights....[T]he issue is that certain marginalized groups are discriminated in particular ways because of their particular culture, mode of production and marginalized position within the state. A form of discrimination that other groups within the state do not suffer from.²³

Last, but no least, the argument that the enforcement of specific safeguard mechanisms in relation to indigenous peoples contradicts the principles of equality and national unity fails to consider the difference between the formal prohibition of discrimination and discrimination *in fact*.²⁴ In this regard, the application of differentiated safeguard requirements to indigenous peoples aims precisely at addressing the historical discrimination faced in fact by these peoples. This is acknowledged by OP 4.10: "As social groups with identities that are often distinct from dominant groups in their national societies, Indigenous Peoples are frequently among the most marginalized and vulnerable segments of the population. As a result, their economic, social, and legal status often limits their capacity to defend their interests in and rights to lands, territories, and other productive resources, and/or restricts their ability to participate in and benefit from development" (para 2, emphasis added).

4. The Bank's policy on indigenous peoples provides sufficient flexibility

²² Report to the Human Rights Council by the Special Rapporteur on the Rights of Indigenous Peoples, UN. Doc. A/HRC/9/9, para 40

²³ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, Submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa," adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session (2005), p. 88.

²⁴ Human Rights General Comment No. 18, para 13.

International standards concerning the rights of indigenous peoples recognise that “the situation of indigenous peoples varies from region to region and from country to country,” and hence that the “national and regional particularities and various historical and cultural backgrounds should be taken into consideration” when applying these standards.²⁵

Consistent with this approach, the Bank’s Operational Policy on Indigenous Peoples OP. 4.10 provides sufficient room for flexible implementation. In this regard, OP 4.10 recognises that there is “no universally accepted definition of ‘Indigenous Peoples’” (para. 3) and that the term “is used in a generic sense to refer to a distinct, vulnerable, social and cultural group” possessing a number of characteristics.

On the basis of this understanding, OP 4.10 has been in operation for over a decade, and has been applied without major problems in all regions, including Sub-Saharan Africa. Actually, as shown by the experience of cases before the Bank’s Inspection Panel, the challenges arising from project implementation in the region have rather been associated to Management’s failure to trigger the policy.²⁶

5. The alternative mechanisms put in place in relation to the SAGCOT project allegedly fail to meet the Bank’s policy requirement

The Bank’s documentation regarding the SAGCOT project indicates that, in return for not triggering OP 4.10, Management will prepare a “social assessment to analyse needs of Vulnerable Groups (VGs) and propose measures for engagement and participation in project supported sub-projects.”²⁷ However, it has been alleged that these mechanisms fall short of providing the same level of protection to indigenous groups that would have been otherwise afforded under OP 4.10.

The definition of Vulnerable Groups

In contrast to indigenous peoples’ plans and planning frameworks previously prepared under OP 4.10 in the African region, the VG planning framework’s definition of “vulnerable groups” is not restricted to indigenous communities, but is widely defined on the basis of three criteria: (1) being “below the food poverty line”; (2) lack of access to “basic social services,” and (3) lack of integration “with society at large and its institutions due to physical or social factors.”²⁸ Based on these criteria, Management have identified that the following groups qualify as vulnerable within the SAGCOT project area: “women-headed households, the elderly, disabled, youth, children, refugees, persons with HIV/AIDs and disadvantaged communities.”²⁹ It seems evident that, while acknowledging that all these groups may require special protection, the characteristics

²⁵ United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly resolution 61/295 on 13 September 2007, U.N. Doc. A/RES/61/295, Annex (2007) [UNDRIP], preamb para 23

²⁶ The Inspection Panel, *Indigenous Peoples*, Emerging Lessons Series No. 2 (2016), pp 5-6.

²⁷ SAGCOT PAD, para 70.

²⁸ *Ibid.* para 71.

²⁹ *Ibid.*

and needs of these groups and, thus the nature of the measures required to protect them, are very different.

Indeed, as has been pointed out by the Bank's inspection Panel, " while indigenous peoples, in general, may be characterized as vulnerable groups, the reasons for their vulnerability differ from that of other groups, e.g. street children or the disabled, and are historically rooted in their attachment to ancestral land and territories."³⁰ This wide definition of "vulnerable groups" casts doubt about the capacity of the Vulnerable Groups Planning Framework (VGPF) to address the specific social, economic and cultural characteristics of indigenous peoples in the project area.

Consultation

The Project Appraisal Document (PAD) for the SAGCOT project states a requirement for "free, prior and informed consultation leading to broad community support," as well as specific benefit sharing arrangements in relation to indigenous groups.³¹ While the inclusion of these procedural safeguards is welcome, they appear to fall short of the specific consultation and participation requirements set forth in OP. 4.10.

According to the Bank's Operational Policy on Indigenous Peoples OP.4.10 , Borrowers bear the responsibility of establishing specific consultation mechanisms that are "appropriate to the social and cultural values of the affected Indigenous Peoples' communities and their local conditions" (para 10.b). This may include specific consultation methods, such as "using indigenous languages, allowing time for consensus building, and selecting appropriate venues" in order to facilitate the articulation by Indigenous Peoples of their views and preferences" (fn 11). As currently described in the SAGCOT Project Appraisal Document, there is no indication that the consultation mechanisms established to consult with indigenous groups in the area meet these criteria.

In addition, OP 4.10 clearly indicates that the objective of consultations with indigenous peoples should be to "fully identify their views and ascertain their broad community support for the project" (para 6.c). The Borrower is required to document this "broad community support" as part of the project's social assessment (para 9). While the PAD for the SAGCOT project does recognise that "broad community support," should be the objective of consultations with "Vulnerable Groups" in the project area, there is no indication of how this would be documented during project implementation, monitoring, and evaluation. Moreover, and most importantly, there seems to be no indication of whether indigenous communities have actually been consulted, and whether their broad community support has been sought, prior to the approval of the project, as explicitly called for in OP 4.10 (paras 9, 11).

³⁰ Inspection Panel. 2012. Ethiopia Protection of Basic Services Program Phase II Additional Financing and Promoting Basic Services Phase III Project Investigation Report (paragraph 208). Washington DC: World Bank.

³¹ Ibid.

For the additional financing to the Tanzania Productive Social Safety Net (PSSN-III) project, and according to credible information received, the consultation to convert the Indigenous Peoples Planning Framework that had been prepared for the first phase into a Vulnerable Groups Planning Framework for the additional financing to the project seems to have been reduced to a meeting where a very limited number of indigenous representatives were informed of the altered approach by a significant number of Bank management and Government Representatives who constituted the majority of the participants during the meeting.

Customary land tenure

Of particular concern is that specific protective measures regarding indigenous land and resource rights seem to be lacking in the SAGCOT Project Appraisal Document, which simply stipulates that:

[t]o mitigate any potential risks resulting from a waiver of OP 4.10, the GoT ensures that the project components are designed and implemented in a manner that does not adversely affect the land rights / use of any of the people in the project area, including the disadvantaged communities referred to in the VGPF.³²

While these commitments are appreciated, they remain far from the requirements set forth in the Bank's operational policy on indigenous peoples. In this regard, OP 4.10 stipulates that special considerations should be given whenever indigenous peoples' close ties to "land, forest, water, wildlife, and other natural resources" may be affected by project implementation (para 16). This requires paying particular attention to "the customary rights of the Indigenous Peoples, both individual and collective, pertaining to lands or territories that they *traditionally owned, or customarily used or occupied and where access to natural resources is vital to the sustainability of their cultures and livelihoods*" (ibid, emphasis added).

The requirements set forth in OP 4.10 are particularly relevant in the specific case of Tanzania, in view of the problems documented regarding the protection of indigenous land and resource rights in the country, notwithstanding the existence of legal regulations safeguarding customary land tenure. According to the former Special Rapporteur on the rights of indigenous peoples, Prof. S. James Anaya, existing legal guarantees "have been inadequate to protect indigenous pastoralists and hunter-gatherers groups from removals from their traditional lands" and these groups "continue to experience a lack of legal certainty over the lands they have occupied and over the natural resources they have sought to access for traditional substance activities."³³ This had led to several well-documented instances of forced evictions of indigenous communities as well as of restricted access to resources they rely on for their traditional lifestyles, including as a result of the establishment of conservation or wildlife areas.³⁴ This situation has been

³² Ibid, para 72.

³³ SR Allegation Letter to the United Republic of Tanzania: Alleged Forced Removal of Pastoralists, *op.cit.* para 436.

³⁴ Ibid, paras 440-454.

brought to the fore by several other international human rights mechanisms, including the Human Rights Committee.³⁵

It is of note that international standards do not only affirm indigenous customary lands, but also impose the positive duty on States to establish a process by which those lands can be legally recognised. Thus, according to the United Nations Declaration on the Rights of Indigenous Peoples, “States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems...including those which were traditionally owned or otherwise occupied or used.”³⁶ Similarly, the African Commission on Human and People Rights has affirmed that indigenous tenure constitutes property under Article 14 of the African Charter on Peoples and Human Rights, and that States have a duty “to establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law.”³⁷ The same logic is actually reflected in the OP 4.10, which requires the Borrower to provide legal recognition of indigenous communities’ “ownership, occupation, or usage” of their traditional lands inter alia in relation to projects involving the acquisition of such lands (para 17).

The lack of specific mechanisms under the SAGCOT project aiming at the legal recognition of the rights of indigenous pastoralist communities over the lands they have traditionally occupied or otherwise used is a matter of serious concern, particularly in light of that one of the project components is precisely the promotion of agribusiness in the project area.

6. The waivers arguably set a negative precedent for the implementation of ESS-7

Over and above the potentially negative impact of policy waivers to the situation of indigenous peoples in Tanzania, we are concerned that the granting of such waivers will set a negative preference for the future application of OP 4.10, and its successor, the recently adopted Environmental and Social Standard No. 7 on Indigenous Peoples (ESS-7), particularly in the African region.

This concern stems especially from the “alternative approach” that was incorporated in earlier versions of the ESS-7, and which expressly allowed the Borrower to “opt-out” from the requirements under ESS-7 in certain circumstances (1st version,

³⁵ *Concluding Observations of the Human Rights Committee, United Republic of Tanzania, CCPR/C/TZN/CO/4* (6 August 2009), para 26 (noting “with concern reports that the traditional way of life of indigenous communities has been negatively affected by the establishment of game reserves and other projects,” and recommending that the Government should “consult indigenous communities before establishing game reserves, granting licenses for hunting, or other projects on ‘ancestral’ or disputed lands”).

³⁶ UNDRIP, Art 27 (emphasis added).

³⁷ African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003 (2010), para. 196.

August 2014, para 9). As we noted in the joint submission by 28 Special Procedures mandate holders of the United Nations Human Rights Council in December 2014:

The ability of borrower countries to effectively choose whether or not to recognise indigenous peoples appears incompatible with the fundamental purpose of the Declaration [on the Rights of Indigenous Peoples], which seeks to redress the wrongful denial of the existence of indigenous peoples and their right to self-determination. The “opt-out” clause may also undermine progress achieved in recognising and implementing the collective rights of indigenous peoples in certain regions of the world. While borrower countries seeking to “opt-out” from the requirements under ESS7 must apply to the Board for approval, the ESSs do not stipulate adequate Safeguards against arbitrary denial of the human rights of indigenous peoples by the borrowers. In case of an opt-out, the remaining ESSs simply cannot give equivalent protection to indigenous peoples since these other ESSs do not take into account the specific protections accorded to indigenous groups under international law.³⁸

Even though the “opt-out” clause was eventually dropped from subsequent drafts, we note that the final ESS-7 has introduced a number of additional flexibilities to address the concerns of African states, such the introduction of new terminology defining the coverage of the standard to include “Sub-Saharan African Historically Underserved Traditional Local Communities.” Moreover, ESS-7 abandons the existing requirement to produce an Indigenous Peoples Plan/Planning Framework (OP 4.10, paras 12-14), explicitly allowing the Borrower to prepare an alternative “broader integrated community development plan” when the proposed activities would affect non-indigenous groups or more than one indigenous peoples (para 17).

Moreover, the granting of the waivers takes place within the broader trend whereby Management has tended to circumscribe the application of the Bank’s safeguards on indigenous peoples in projects by taking a “functional equivalence” approach, characterised by opting for alternative policy frameworks focusing on “vulnerable groups” that do not necessarily meet the level of protection afforded by OP 4.10.³⁹ According to the Bank’s Inspection Panel:

[The] alternative approach of treating indigenous peoples as well as other project affected people undermines the unique needs of the indigenous communities. ...[Indigenous Peoples] have distinct identities and aspirations and are

³⁸ Letter from the Special Rapporteur on extreme poverty and human rights and other 27 special procedures mandate holders of the United Nations Human Rights Council, to Dr Jim Kim, President of the World Bank Group (14 December 2014), Annex: Comments on the draft Environmental and Social Framework, p. 15.

³⁹ See Inspection Panel, Investigation Report: Ethiopia: Promoting Basic Social Services Phase III Project (P128891), Report No. 91854-ET (21 November 2014), [IP Ethiopia PBSS-III], paras 199-252 (discussing the concept of “functional equivalence” put forward by Management in relation to the application of OP 4.10 and concluding that Management failed to apply OP 4.10 to the Anuak communities present in the project area); Investigation Report: Nepal: Power Development Project (P043311), Report No. 93722-NP (12 February 2015), paras 199-252 (noting that Management’s decision to prepare a Vulnerable Communities Development Plan instead of an Inspection Peoples Development Plan was not regulated by OD 4.20).

inextricably linked to the land on which they live and the natural resources on which they depend, as well as distinct institutions and decision-making structures. These characteristics do not apply to other project affected people. It is essential that Bank financed projects are designed taking into account the unique and distinct features of the indigenous communities to avoid harms to their identities and livelihoods, including their land and natural resources.⁴⁰

A recent study on lessons learned through the Inspection Panel investigations of projects involving indigenous peoples has led to the conclusion that “when the Bank applied a ‘functional equivalent’ methodology the approach mostly failed to provide the protections afforded by applying the policy.”⁴¹

In particular, as the SAGCOT and other recent projects in the Eastern Africa region seem to suggest, Management’s ‘functional equivalent’ approach has failed to incorporate specific mechanisms to protect indigenous peoples rights and interests over their traditional land and natural resources.⁴² This does not only represent an evident protection gap in relation to the safeguard requirements under OP 4.10, but also raises concerns in relation to the future application of the ESS-7 policy and the overall respect for international human rights in the context of projects funded by the Bank.

To conclude, our preliminary observations suggest that the granting by the Board of waivers to OP 4.10 in relation to Tanzania is problematic both from a normative and from an operational point of view. By taking for granted the Tanzanian Government’s unilateral contention that OP 4.10 contradicts the provisions of the national constitution and by failing to address the existence of indigenous peoples according to objective criteria, the Bank’s waivers may ultimately contradict not only the provisions of OP. 4.10, but also the very rationale of justifying the existence of a stand-alone policy on indigenous peoples. This generates evident protection gaps in relation to the rights of indigenous groups that may be affected by the SAGCOT investment project as well as other projects in the area, while also raising concern about the Bank’s future implementation of its indigenous peoples’ safeguard in East Africa and in other parts of the world.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on our preliminary observations.

⁴⁰ Inspection Panel Observations on World Bank's Safeguards Review and Update Proposed Environmental and Social Framework (July 2014), p. 4.

⁴¹ Inspection Panel, *Indigenous Peoples*, at 6.

⁴² As defined by Bank’s management, “the core of OP 4.10 is reflected in the concept of functional equivalence, which is based on five principles: free, prior and informed consultation leading to broad community support, mitigation of adverse impacts on people who would trigger the policy, culturally appropriate benefit sharing, grievance redress mechanisms, and monitoring and evaluation of outcomes for indigenous peoples.” IP Ethiopia PBSS-III, para 208.

2. With regards to the SAGCOT project, please provide information on the measures adopted to protect the rights of the indigenous pastoralist groups that are present in the Morogoro region and other areas covered by the SAGCOT project, and especially;

(a) differentiated consultation procedures adequate to their social and cultural values; and

(b) measures to safeguard their rights over the lands and natural resources they have traditionally relied upon for their traditional way of life, including for grazing.

We would appreciate receiving a response within 60 days.

We undertake to ensure that your response will be taken into account in our assessment of the situation and in developing any recommendations that we may make for the World Bank's consideration pursuant to the terms of our mandates.

We intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with you to clarify the issue/s in question.

Your response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Dr. Kim, the assurances of our highest consideration.

Juan Pablo Bohoslavsky
Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Victoria Lucia Tauli-Corpuz
Special Rapporteur on the rights of indigenous peoples