

**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:  
OL TZA 1/2017

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Excellency,

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 the attention of your Excellency's Government information we have received concerning **the potentially adverse human rights impacts of the Southern Agricultural Growth Corridor of Tanzania (SAGCOT) project on the indigenous pastoralist peoples in the project area and concerns raised in relation to your request for waivers to the application of the World Bank's Operational Policy on Indigenous Peoples (OP. 4.10 of 2005) in Tanzania.**

According to the information received:

On March 10, 2016, the World Bank Board of Executive Directors approved the \$70 million SAGCOT Investment Project to support Tanzania's agriculture sector by linking smallholder farmers to agribusinesses. The World Bank's Executive Board approved two policy waivers requested by your Government 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).

The stated aim of the SAGCOT project is the promotion of agribusiness investments by expanding partnerships and integrating smallholder farmers through "inclusive commercialization". According to information received, the planned expansion of commercial agribusiness operations is expected to have large-scale, cumulative and significant impacts on water, land, biodiversity and community systems, in particular for pastoralists in the region. Bringing large portions of land into commercial production without due respect for the rights of indigenous pastoralist communities may result in the blocking, or even closing, of crucial livestock migratory corridors and inhibit pastoralists' mobility in search for pasture and water.

It is reported that this project may have a significant impact on nomadic and semi-nomadic pastoralist groups that could be considered as indigenous according to

international standards and that self-identify as such, 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. As the former Special Rapporteur on the rights of indigenous peoples has pointed out in his previous communications to your Government, 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,”<sup>1</sup> 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.”<sup>2</sup>

The situation of indigenous pastoralist and hunter-gatherer groups in Tanzania is a long-standing concern of United Nations human rights bodies and mechanisms.<sup>3</sup> The Government’s 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 has been of special concern. 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.”<sup>4</sup>

The Special Rapporteur on the rights of indigenous peoples, as well as several other special procedures mandate holders of the United Nations Human Rights Council have on several occasions raised with your Government 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 Hadzabe<sup>5</sup> and the forced removal of Maasai pastoralist from their traditional grazing lands

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<sup>1</sup> United Republic of Tanzania: Communication on alleged Forced Removal of Pastoralists, in A/HRC/15/37/Add.1 (15 September 2010), Case No. XXIII, para 434.

<sup>2</sup> Ibid, para 431.

<sup>3</sup> 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).

<sup>4</sup> The Committee on Economic, Social and Cultural Rights, Concluding observations on the initial to third reports of the United Republic of Tanzania, E/C.12/TZA/CO/1-3 (13 December 2012), para 22.

<sup>5</sup> United Republic of Tanzania: Allegation letter concerning the Hadzabe community (TZA 1/2007), in 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 A/HRC/9/9/Add.1 (15 August 2008), paras 480-501.

as a result of agricultural land concessions,<sup>6</sup> and more recently, the alleged detention and torture of 51 members of the Maasai community who oppose tourist projects and game reserves on Maasai traditional lands.<sup>7</sup> 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 apparent lack of specific guarantees regarding the rights of indigenous peoples in the SAGCOT project area and your Government's request for waivers to 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.

Tanzania's obligations to safeguard and promote the rights of indigenous peoples arise under a number of international treaties that the State is Party to, including the International Covenant on Civil and Political Rights (Arts.1 and 27), the International Convention on the Elimination of all Forms of Racial Discrimination (Art. 5 (d) (v)) and the African Charter on Human and Peoples' Rights (Arts. 1, 14, 18, 17, 21 and 22). We also wish to recall that Tanzania voted in favour of the UN Declaration on the Rights of Indigenous Peoples at the General Assembly in 2007, and re-affirmed its commitment to implement the Declaration when endorsing the Outcome Document of the World Conference on Indigenous Peoples on 22 September 2014.

### **Non-discrimination**

According to the World Bank Management: "the Government of Tanzania suggested a waiver to the application of the policy [Operational Policy on Indigenous Peoples OP. 4.10 of 2005] as it 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."<sup>8</sup> Allegedly the waiver was granted on the basis of the argument by the Government of Tanzania that OP 4.10 contradicts the provisions of the Tanzanian Constitution.

As many other constitutional texts throughout the world, the Constitution of Tanzania affirms "the unity of the United Republic and the need to promote

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<sup>6</sup> United Republic of Tanzania: Situation concerning the alleged forced removal of pastoralists from Kilosa District (TZA 3/2009), in 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 A/HRC/25/74 (24 February 2014), p. 123, Alleged attack against Maasai in Morogoro municipality, TZA 1/2015 in A/HRC/31/79, p. 28

<sup>7</sup> United Republic of Tanzania: Urgent appeal on the alleged detention and torture of Maasai community members (TZA 2016/1), yet to be made public, (16 September 2016)

<sup>8</sup> 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), para 70.

national unity.”<sup>9</sup> The Constitution further affirms the right of all persons “to protection and equality before the law,” without discrimination.<sup>10</sup> The Constitution commits to provide equal opportunity to all persons and to prohibit discrimination on the basis of tribal adscription.<sup>11</sup>

However, these provisions should not 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.”<sup>12</sup> 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].”<sup>13</sup>

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”.<sup>14</sup>

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.”<sup>15</sup>

From the above it follows that differential treatment may be in accordance with international standards, provided that this differentiation is “reasonable and

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<sup>9</sup> The Constitution of the United Republic of Tanzania, 1977, Art. 8(2).

<sup>10</sup> Ibid Art. 13(1).

<sup>11</sup> Ibid, Arts. 9(g), 13(5).

<sup>12</sup> 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

<sup>13</sup> Ibid.

<sup>14</sup> 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

<sup>15</sup> The Constitution of the United Republic of Tanzania, 1977, Art. 13(5).

objective and the aim is to achieve a purpose which is legitimate” under those standards.<sup>16</sup>

Furthermore, 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 to these peoples vis-à-vis other groups within society. 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.<sup>17</sup>

In this connection, we note that 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) appear legitimate and consistent with the purpose of international human rights standards.

### **Self-identification**

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 criteria” and cannot be dependent “upon a decision” by the State concerned.<sup>18</sup> 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.<sup>19</sup>

### **Land and resource rights**

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<sup>16</sup> Human Rights General Comment No. 18, para 13.

<sup>17</sup> 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.

<sup>18</sup> Human Rights Committee, General Comment No. 23 on Article 27, U.N. Doc. CCPR/C/21/Rev.1/Add.5, (1994), para 5.2.

<sup>19</sup> International Labour Organisation Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) (1989), adopted by the 76<sup>th</sup> 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.

Despite the existence of legal regulations safeguarding customary land tenure in Tanzania, significant challenges have been documented regarding the protection of indigenous land and resource rights in the country, According to the former Special Rapporteur on the rights of indigenous peoples, 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.”<sup>20</sup>

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 (2007), Article 27 “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.” 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.”<sup>21</sup>

### **Free Prior Informed Consent**

We wish to recall that Tanzania has committed to adhering to the principles of the United Nations Declaration on the Rights of Indigenous Peoples, including to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (Article 32(2)).

Furthermore, Tanzania has endorsed the African Union’s Policy Framework for Pastoralism in Africa (2010) which instructs that “pastoralists should always be adequately consulted and/or their consent should be required in case of expropriation of their communal pastoral land for bio-energy production, development of oil and mineral deposits, and construction of basic socio-economic infrastructures e.g. roads, telecommunication lines, power distribution lines, health and education establishments, or any other infrastructure intended to serve public interest.”<sup>22</sup>

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<sup>20</sup> SR Allegation Letter to the United Republic of Tanzania: Alleged Forced Removal of Pastoralists, *op.cit.* para 436.

<sup>21</sup> 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.

<sup>22</sup> African Union, Policy Framework for Pastoralism in Africa, October 2010, Strategy 1.4. at p 26

We observe that 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.<sup>23</sup>

We respectfully urge your Excellency’s Government to ensure an effective consultation process with indigenous pastoralist communities in accordance with applicable international standards, and to ensure their participation in the development of plans and priorities for the long-term management of their traditional lands and resources within the SAGCOT project area. This consultation process should be carried out in accordance with the traditional representative structures of the indigenous peoples, and should be framed upon the premise that they should not be removed from their traditional lands without their free, prior and informed consent.

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.
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;
  - (b) whether a human rights impact assessment of the project has been carried out and if so kindly provide details of the results;
  - (c) measures taken, with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned, 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 be most grateful to receive an answer 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. Additionally, we undertake to ensure that your response will be made available in a report to the Human Rights Council for its consideration. We furthermore wish to inform you that we reserve the right to publicly express our concerns in the future.

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<sup>23</sup> Ibid.

Please accept, Excellency, 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