

**Mandate of the Special Rapporteur on the rights of indigenous peoples.**

REFERENCE: AL Indigenous (2001-8)  
KEN 2/2013

2 April 2013

Excellency,

I have the honour of addressing you in my capacity as Special Rapporteur on the rights of indigenous peoples in accordance with Human Rights Council resolution 15/14.

In this connection, I am writing to you regarding **the alleged possible impacts of the Lamu Port-South Sudan-Ethiopia Transport Corridor (LAPSSET) project on indigenous peoples inhabiting Lamu County and surrounding areas in Kenya**. This was the subject of a communication sent to your Government on 16 August 2012. The communication raised concerns regarding the effects the LAPSSET project would have on the traditional lands, natural resources and livelihoods of indigenous peoples in Lamu County and surrounding areas, as well as concerns about the lack of information and adequate consultation with potentially affected indigenous peoples. I regret that, to this date, there has been no response from your Government with regards to this situation.

In light of the information I have received concerning this situation, I would like to present a series of brief observations outlining areas of special attention and relevant human rights standards that I believe your Government needs to take into consideration with respect to the LAPSSET project.

**Assessing the substantive rights affected, including rights to lands and natural resources**

As was noted in my previous communication, various indigenous groups stand to be affected by the LAPSSET project, including the Bajum, Sanye, Aweer and Orma peoples within Lamu County. Outside Lamu County, indigenous groups that could be potentially affected by the LAPSSET project include the Rendille, Wardei, Samburu, Somali, Borana, Elmolo and Turkana peoples. According to the information received, the lands potentially affected allegedly include areas where these groups have traditionally engaged in hunting, gathering, fishing and grazing.

Because the information received indicated concerns over land tenure insecurity faced by indigenous peoples in the LAPSSET project area, the Government of Kenya should, if it has not already done so, undertake a comprehensive assessment of the land, natural resource and other substantive rights of the indigenous peoples potentially affected in Lamu County and surrounding areas. Other substantive rights that may be implicated by the project include rights to culture, religion, equality and non-discrimination, health and development – rights that are grounded in multiple international human rights instruments ratified by Kenya and that are also articulated in the United Nations Declaration on the Rights of Indigenous Peoples.

In this regard, in my previous communication of 16 August 2012, I noted that the Government of Kenya had taken some steps to address land tenure issues in the region, for example by revoking illegally obtained title deeds in some areas utilized by indigenous peoples, as well as by creating conflict management committees to address conflicts that may arise as the project progresses. I would like to encourage your Government to strengthen and broaden these efforts at addressing the land tenure situation of indigenous peoples within the project area and vicinity and other possible concerns they might have regarding their social, cultural and other rights. Such efforts should be guided by international human rights standards on the rights of indigenous peoples, including the Declaration on the Rights of Indigenous Peoples (especially, articles 10, 25, 26, and 29) as well as Kenya's obligations under the African Charter on Human and Peoples' Rights as reflected in the African Commission on Human and Peoples' Rights decision in the *Endorois Welfare Council v. Kenya*.<sup>1</sup>

### **Adequate safeguards to indigenous peoples' rights**

On the basis of its assessment of the possible resultant impacts on the land, natural resource and other rights of the indigenous groups concerned, the Government of Kenya should implement adequate safeguards to ensure respect for the rights of affected groups. These needed safeguards include, but are not limited to, consultation with indigenous peoples through their representative institutions with the objective to obtain their agreement or consent to the aspects of the LAPSSET project that affect their rights; the undertaking of prior impact assessments that provide adequate attention to the full range of indigenous peoples' rights; the establishment of mitigation measures to avoid or minimize impacts on the exercise of those rights; and benefit-sharing and compensation.<sup>2</sup> These safeguards reflect the precautionary approach that should guide decision-making about any measure that may affect indigenous land and resource rights and other rights that are instrumental to the survival of indigenous peoples. Your Government should keep in mind that the implementation of these safeguards will also help lend legitimacy to its actions and may contribute to the social license necessary for projects of this nature.

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<sup>1</sup> African Commission on Human and Peoples' Rights, 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/ Kenya* [ACHPR Endorois decision].

<sup>2</sup> See A/HRC/21/47, paras. 49, 52.

### *Consultation and consent*

With regards to consultation and consent, the Declaration on the Rights of Indigenous Peoples calls for States 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” (art. 32(2)). The African Commission in its *Endorois* decision stated that participation of indigenous peoples in development matters through good faith and culturally appropriate consultation procedures is an integral component of the right to social, economic and cultural development under article 22 of the African Charter.<sup>3</sup>

The specific requirement of a State’s duty to consult with indigenous peoples and the objective of obtaining consent are a function of the substantive rights implicated and consultation procedures should be devised accordingly. Thus, the particular indigenous peoples or communities that are to be consulted are those that are bearers of the potentially affected rights. As I have stated in my previous reports to the Human Rights Council, the consultation procedures devised should “provide channels through which indigenous peoples can actively contribute to the prior assessment of all potential impacts of the proposed activity, including whether and to what extent their substantive human rights and interests may be affected.”<sup>4</sup> Consultation procedures should also serve as avenues through which less harmful alternatives and appropriate mitigation procedures can be identified, and also through which indigenous peoples can advance their own development priorities.<sup>5</sup>

As part of its efforts to consult with affected indigenous peoples, the Government of Kenya should address any power imbalances that may be faced by the groups concerned. In this regard, it should play a protective role by ensuring mechanisms are in place for sharing information and facilitating adequate negotiation capacity on the indigenous peoples’ side. This may involve the participation of State actors other than those directly involved in the particular project concerned or the inclusion of external advisers that can provide impartial and independent advice to indigenous peoples concerned.<sup>6</sup>

With regards to the principle of consent, where the rights implicated in a particular measure or project activity are essential to the survival of indigenous groups as distinct peoples and there are potential impacts on those rights, then indigenous consent to those impacts is required, beyond being the objective of a consultation.<sup>7</sup> Rights to

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<sup>3</sup> ACHPR *Endorois* decision, paras. 289-291.

<sup>5</sup> Id.

<sup>6</sup> Id.,

<sup>7</sup> Id. para. 65.

traditional lands and resources, including officially recognised or customary land use areas as well as areas of cultural or spiritual significance, have been generally understood to be the kinds of rights that are essential to indigenous peoples' survival. Therefore, indigenous consent would be a requirement where a proposed measure or activity would affect the rights.<sup>8</sup> It must also be emphasized that where consent is obtained, "it should be upon equitable and fair agreed-upon terms, including terms for compensation, mitigation measures and benefit-sharing in proportion to the impact on the affected indigenous party's rights."<sup>9</sup>

#### *Prior impact assessments, mitigation and compensation measures*

Closely related to the above discussion of consultation and consent, is the safeguard of impact assessments in relation to development projects on or around areas inhabited by indigenous peoples. Impact assessments are to look beyond only ecological effects and also assess impacts on the full range of indigenous peoples' rights, including on their traditional lands, resources, spiritual and cultural practices, and social and economic activities. These studies should be carried out by independent technical experts under the supervision of the State, with cooperation from the indigenous peoples concerned.<sup>10</sup>

It is important that impact studies be undertaken in the early stages of the planning of a project in order to guarantee that the indigenous peoples concerned have all the necessary information regarding the nature, benefits and effects of a proposed project as part of the adequate consultation procedures previously discussed. The results of these impact studies should be made available to the respective indigenous peoples and when necessary, be translated to the respective indigenous languages or be made available in a non-technical and easily comprehensible format.

As I have previously noted, the ultimate goal of impact assessment studies "is to ensure that all necessary steps are taken to avoid any negative impact that the planned activities might have on the environment and on the social, economic, cultural and spiritual life of indigenous peoples."<sup>11</sup> If adverse impacts cannot be avoided, indigenous peoples are entitled to just and fair redress from any damages that arise from the development activity in question, as set out in relevant international instruments, including the Declaration on the Rights of Indigenous Peoples (arts. 20(2), 32(3)). In this regard, impact assessments can also play an essential role in the determination of adequate compensation and mitigation measures during consultation proceedings with indigenous peoples.

#### *Benefit-sharing*

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<sup>8</sup> Id.

<sup>9</sup> Id., para. 68.

<sup>10</sup> See, A/HRC/15/37, paras. 71-73.

<sup>11</sup> Id., para. 74.

Indigenous peoples are also entitled to share in the benefits arising from activities affecting their traditional territories. This arises out of the recognition of the right to indigenous communal ownership, which includes the right relating to the use, administration and conservation of natural resources within indigenous territories, independently of private or State ownership of those resources. In this way, benefit-sharing is a means of complying with a right and should not be viewed as a charitable award or means by which to secure social support for a project.<sup>12</sup>

Benefit sharing should also be viewed as something apart from any compensation for the impacts that might be generated by a project, and it is also not to be conditioned or limited by the provisions of domestic law. Furthermore, it should also aim to achieve more than the simple awarding of financial payments, which in some cases may result in division or undue influence of indigenous communities, and should focus instead on genuinely strengthening the capacity of indigenous peoples to establish and follow up their development priorities and also strengthen their own decision-making mechanisms and institutions.<sup>13</sup>

## **Conclusion**

The Lamu Port-South Sudan-Ethiopia Transport Corridor (LAPSSET) project could have potential to provide much needed infrastructural, trade and economic development benefits to the population of Kenya, including the indigenous communities inhabiting the project area and its surroundings. However, at the same time, your Excellency's Government must ensure that all decision-making related to this project is done in the most inclusive and participatory manner possible, with special attention to the social, cultural, environmental and any other concerns that potentially affected indigenous peoples and communities may have with regards to the LAPSSET project. The project should not only avoid undermining indigenous peoples rights, but should also aim to strengthen their own cultures and social, political and economic systems and institutions. In cases where impacts to indigenous peoples are unavoidable, just and fair redress must be provided. To this end, your Government needs to ensure that the rights of indigenous peoples possibly affected by the LAPSSET project are given proper attention and that the necessary safeguards to those rights, as outlined in this communication, are in place.

Excellency, these are initial observations and comments I have concerning the situation of indigenous peoples possibly affected by the LAPSSET project. It is my hope that I can establish a constructive dialogue with your Government regarding this situation. I would be grateful for any comments by your Excellency's Government on the above information and observations, including any information on measures that have

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<sup>12</sup> Id., para. 77.

<sup>13</sup> Id., para. 80.

already been taken to safeguard the rights of the potentially affected indigenous peoples described in this communication.

Please accept, Excellency, the assurances of my highest consideration.

James Anaya  
Special Rapporteur on the rights of indigenous peoples