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**WHY A STAND-ALONE INDIGENOUS PEOPLES  
POLICY WITHIN THE AFRICAN DEVELOPMENT  
BANK'S INTEGRATED SAFEGUARDS SYSTEM**

An Assessment by the CSO Coalition on the  
AfDB

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indigenous peoples of africa co-ordinating committee  
comite de coordination des peuples autochtones d'afrique

## **About the Coalition**

**The CSO Coalition on the African Development Bank (AfDB)** is an African-led network of civil society organizations focused on monitoring and engaging the AfDB in order to advocate for greater accountability and influence the Bank to put the continent's needs and problems first and promoting grassroots-based policies for sustainable development. [www.coalitionafdb.org](http://www.coalitionafdb.org)

## **About IPACC**

**The Indigenous Peoples of Africa Coordinating Committee (IPACC)** is a network of over 155 indigenous peoples' organisations in 22 African countries. IPACC was established in 1997 to promote recognition of and respect for indigenous peoples in Africa. [www.ipacc.org.za](http://www.ipacc.org.za)

## **About the authors**

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## Abbreviations

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ADB:	Asian Development Bank
ACHPR:	African Commission on Human and Peoples' Rights/African Charter on Human and Peoples' Rights
AfDB:	African Development Bank
AU:	African Union
CERD:	Convention on the Elimination of all forms of Racial Discrimination/Committee on the Elimination of all forms of Racial Discrimination
CRMU:	Compliance Review & Mediation Unit
EBRD:	European Bank for Reconstruction and Development
EIA:	Environmental Impact Assessment
ESA:	Environmental and Social Assessment
ESIA:	Environmental Social Impact Assessment
ESMP:	Environmental Social Management Plan
FPIC:	Free, Prior and Informed Consent
FPP:	Forest Peoples Programme
ICCPR:	International Convention on Civil and Political Rights
ICESCR:	International Convention on Economic, Social and Cultural Rights
IDB:	Inter-American Development Bank
IFC:	International Finance Corporation
ILO:	International Labour Organisation
IP:	Indigenous Peoples
IPDP:	Indigenous Peoples Development Plan
IPPF:	Indigenous Peoples Planning Framework
IPP:	Indigenous Peoples Policy
IRM:	Internal Review Mechanism
ISS:	Integrated Safeguards System
IWGIA:	International Working Group on Indigenous Affairs
MDB:	Multilateral Development Bank
MFI-WGE:	Multilateral Financial Institutions Working Group on Environment
OD:	Operational Directive
OMS:	Operational Manual Statement
OP:	Operational Policy
OS:	Operational Safeguard
PR:	Performance Requirement
PS:	Performance Standard
REDD:	Reduced Emissions for Deforestation and Degradation
SESA:	Strategic Environmental Social Assessment
UDHR:	Universal Declaration on Human Rights
UNDRIP:	United Nations Declaration on the Right of Indigenous Peoples
UNPFII:	United Nations Permanent Forum on Indigenous Issues

## Summary

The African Development Bank is in the process of developing a new Integrated Safeguards System to guide its future lending in Africa. This paper argues that the measures to protect the rights of indigenous peoples in the proposed draft fall far below accepted international norms and standards and need substantial revision. The African Development Bank needs to adopt a standalone policy on Indigenous Peoples consistent with the rights of peoples and indigenous peoples as set out in the African Charter of Human and Peoples' Rights and the UN Declaration on the Rights of Indigenous Peoples. The current draft text puts the AfDB itself, its borrowers and its clients all at risk of developing projects that are not only contrary to African and international standards, but which are likely to generate social conflict rather than promote sustainable development.

## 1. Background

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The African Development Bank (AfDB) is a public development bank that lends money and gives grants in Africa. Since its formation in 1963, AfDB has increased its profile and lending portfolio for development projects across the continent. In 2010, it announced that it would revise and update its environmental and social safeguard policies. AfDB developed its first environmental and social safeguard policies piecemeal over the past decade, which were designed to protect the environment and local communities from the negative impacts of AfDB-financed projects. Meanwhile, the safeguard policies at most other multilateral development banks (MDBs) have continued to improve and be refined, and AfDB's policies have since become outdated, and AfDB is now seeking to update, expand and consolidate its policies into a single framework.

In March 2012, AfDB published a draft of its new Integrated Safeguards System (ISS) for public consultation. While the draft ISS is largely aligned with positive innovations developed at other MDBs, one glaring difference is the absence of a policy on Indigenous Peoples (IPs). The AfDB continues to be the only MDB without a clear standalone policy on Indigenous Peoples.

This paper argues that the measures to protect the rights of indigenous peoples in the proposed draft fall far below accepted international norms and standards, and that AfDB must develop an operational safeguard on indigenous peoples that recognizes and respects the rights of IPs.

The paper is divided into five main sections: an introduction, which gives a global view of indigenous peoples issues within African and international discourses; a brief overview of who the IPs in Africa are; a discussion of normative frameworks including UN legal instruments protecting IPs; and an examination of the safeguard policies of some key MDBs, including AfDB's draft ISS. The conclusion presents a set of recommendations on how the African Development Bank should handle IPs within the ISS review.

## 2. Evolution of Indigenous Peoples recognition

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There is growing attention to the importance of recognizing and respecting the rights of Indigenous Peoples. This was heightened with the United Nations facilitating a Decade on the Rights of the World's Indigenous Peoples (1994–2004) that culminated in the adoption of the Declaration on the Rights of Indigenous Peoples (UNDRIP) in September 2007 by the United Nations General Assembly, after 23 years of negotiations between nation-states and indigenous peoples' organisations. This decade served as an extraordinary forum for the world's Indigenous Peoples to have their voices heard. Among the most significant assertions within UNDRIP are indigenous peoples' rights to self-determination; to lands, territories, and natural resources; and to free, prior, and informed consent (FPIC). The decade on the rights of IPs also saw the creation of the UN Permanent Forum on Indigenous Issues (UNPFII) in 2002, which is a high-level committee of ECOSOC (the UN's Economic and Social Council) that includes eight indigenous experts from around the world to help monitor the work of the UN agencies and their impact on Indigenous Peoples.

Moreover, there is a growing awareness that indigenous peoples face development challenges that are substantially different from those known by dominant ethnic groups. According to the International Working Group for Indigenous Affairs (IWGIA), there are at least 370 million people worldwide considered to be indigenous, divided into at least 5000 peoples ranging from the forest peoples of the Amazon, the "Pygmies" of the Congo Basin forests, the tribal peoples of India and the Inuit of the Arctic.<sup>1</sup>

While recognition of indigenous peoples has gained traction worldwide, the notion of indigenous peoples remains controversial in Africa because of differences in definitions and criteria. The establishment in 2001 by the African Commission on Human and Peoples Rights (ACHPR) of a Working Group on Indigenous Populations/Communities and the Group's report has brought a new perspective into this debate. This report culminated a nearly two-year discussion on the question of indigenous peoples and their rights at the level of the African Commission that began in 1991. For the first time, there was a unanimous acceptance of the existence of indigenous peoples in Africa and this kicked off discussions on how countries could begin to integrate the rights of indigenous peoples into their national contexts. This report brought to light the discriminations and contempt experienced by these peoples such as dispossession of their land; destruction of their livelihoods, cultures and identities; extreme poverty; lack of access to and participation in political decision-making; and lack of access to education and health facilities.<sup>2</sup>

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<sup>1</sup> ACHPR and IWGIA, "Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities"

<sup>2</sup> ACHPR and IWGIA, "The Indigenous Peoples in Africa: The Forgotten Peoples?" The African Commission's Work on Indigenous Peoples in Africa 2006

These positive trends vis-a-vis the recognition of indigenous peoples and their rights in Africa has witnessed some success in Africa, such as in Central African Republic, which took the lead in ratifying the International Labour Organisation Convention 169 on Indigenous and Tribal Peoples; and the Republic of Congo, which developed a law on Indigenous Peoples; as well as Kenya making progress on policies respecting IPs rights. Many African countries voted for UNDRIP, while countries like Cameroon and the DR Congo are implementing National Indigenous Peoples Development Plans through World Bank-supported programmes.

UNDRIP, the first globally accepted instrument on the rights of indigenous peoples, is complemented by the International Labour Organisation Convention No. 169. Adopted in 1989, ILO 169 places binding obligations on those countries which ratify it and deals explicitly with the rights of indigenous peoples. The evolution of IP recognition in the UN has been reflected in the policies of development financing agencies such as the World Bank, in part because of difficulties experienced when operating in the territories of indigenous peoples that led to serious negative impacts on their livelihoods, cultures and the environment. These peoples in most cases depend on their immediate environment for survival.

The World Bank in 1982 issued a brief operation policy, Operational Manual Statement (OMS) 2.34, which outlined procedures for protecting the rights of tribal people in Bank-financed development projects.<sup>3</sup> The Bank's initiative ,which has witnessed an evolution since then with the adoption of a stand-alone operational policy on indigenous peoples, has since been adopted by other development banks like the Asian Development Bank, the Inter-American Development Bank, the International Financial Corporation, the European Bank for Reconstruction and Development as well as the European Investment Bank. Unfortunately the African Development Bank, despite adopting a series of environmental and social safeguards measures, has no policy on indigenous peoples.

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<sup>3</sup> Shelton H. Davis (1993), 'The World Bank and Indigenous Peoples' Paper prepared for panel discussion on Indigenous Peoples and Ethnic Minorities at the Denver Initiative Conference on Human Rights, University of Denver Law School, Denver Colorado April 16-17 1993

### 3. Profile of Indigenous Peoples in Africa

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None of the international legal instruments, including both the UNDRIP and the ILO Convention 169, provides a definition of indigenous peoples, but instead they provide a practical approach which outlines the major characteristic that can help identify who the indigenous peoples and communities are. This approach is based on the concept of self-identification. This approach is also used by the African Commission on Human and Peoples Rights (ACHPR) on its work on indigenous peoples in Africa.<sup>4</sup>

Various definitions have been proposed for the term “Indigenous Peoples”. In order to identify rather than to define indigenous identities, the working definitions of the International Labour Organisation (ILO) Convention 169 and the UN Special Rapporteur Jose Martinez Cobo are generally used as reference points. These underline the following aspects on indigenous identities:

- Historical continuity with pre-colonial societies;
- Strong link to territory;
- Distinct social, economic or political systems;
- Distinct language, culture and beliefs;
- Form non-dominant sectors of society; and
- Identify themselves as different from national society

ILO Convention 169 emphasizes that self-identification as indigenous shall be regarded as a fundamental criterion.<sup>5</sup> Others asserts that most of these definitions have been largely proposed by non-indigenous people, proceeding from their viewpoints as representatives of colonial powers, as members of societies descended from colonizing powers or as members of development agencies.<sup>6</sup>

The ACHPR Working Group on Indigenous Peoples report that was released in 2003 stated that it was not necessary or desirable to provide a strict definition of indigenous peoples, as such a definition could be exclusive and affect certain groups. The ACHPR report also did address the common argument put forth by some groups that ‘all Africans are indigenous’ and stated that the overall characteristics of groups identifying themselves as indigenous peoples are those whose cultures and ways of life differ considerably from the dominant society and their cultures are under threat in some cases to the point of extinction. This finding by the ACHPR dispersed the aboriginality test that has often been used to evoke the fact that there are no specific people in Africa that could be considered as indigenous. The one major characteristic of indigenous peoples in Africa is that the survival of their

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<sup>4</sup> ACHPR and IWGIA (2003), ‘Indigenous Peoples in Africa: The Forgotten Peoples?’

<sup>5</sup> Feiring, B., 2002, ‘Indigenous people and Poverty: The cases of Bolivia, Guatemala, Honduras and Nicaragua’. Minority Rights Group International.

<sup>6</sup> Barume, K., 2004 « Cadre Juridique de la Protection des Droits des Peuples Indigènes et Tribaux (Autochtones) au Cameroun : Points D’entrée ». Une Etude pour le compte du Bureau International du Travail/Projet ITP Egalité. BIT.

particular way of life depends on access and rights to their traditional lands and the natural resources thereon.<sup>7</sup>

Indigenous peoples in Africa fall into the following groups: farmers, pastoralists, and hunter-gatherers spread across 26 countries. There are already 41 self-identified indigenous peoples groups in Africa with 14 of these self-identified groups found in Kenya. Despite their diversity and the fact that these peoples could be subjected to different treatment in their respective countries, they all face certain common issues such as restricted access to land, discrimination, violation of their cultural rights, denial of the right to justice, non-participation in the country's political and decision-making structures and lack of access to basic social amenities like health and education. In the following section we shall examine the extent to which the rights of these peoples are violated with illustrations from different country perspectives. In Africa, apart from being considered as ethnic minorities, indigenous peoples are also the most vulnerable groups and are easily subjected to exploitation by the other dominant groups.

It can be noted that the environment of these peoples largely determine their main economic activity. Indigenous peoples in the Sahel region (North, and parts of West and East Africa) are largely pastoralists and also engage to an extent in small-scale agriculture, while in Central Africa they are largely hunter-gatherers. For instance the Baka of Southeastern Cameroon and the Bagyeli of Southwestern Cameroon could work for long or short periods for outsiders; they spend most of the period of the year moving through the forest between hunting camps. These people consider their environment to be 'plentiful and benevolent'.<sup>8</sup> The one characteristic that runs across indigenous peoples and which is a self-declared priority is identity, culture and representation.

Throughout Africa, indigenous peoples suffer from a centralist approach which prevents them from fully enjoying their citizenship rights. According to a field country report of the ACHPR to Congo,<sup>9</sup> for example, indigenous peoples do not register their children at birth or their marriages. While it may be easy to attribute this to the fact that these peoples are illiterate, it is also important to note that the existing public services in these countries have not taken their lifestyle into consideration, and even where such services exist accessibility becomes difficult for the IPs as they are situated in distant urban locations, far removed from the communities.

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<sup>7</sup> Ibid

<sup>8</sup> Forest Peoples Programme (2009), 'Land Rights and the Forest Peoples of Africa: Historical, Legal and Anthropological Perspectives' United Kingdom

<sup>9</sup> African Commission's Working Group on Indigenous Peoples/Communities 2009, 'Research and Information Visit to the Democratic Republic of Congo'

## 4. Normative Frameworks for Protection of Indigenous Peoples

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There has been an unprecedented attempt at developing a special regime for the protection of the rights of indigenous peoples. While existing international human rights instruments are purported to have universal application to all human beings, the specific circumstances of indigenous peoples merit special treatment. Opponents of international legal instruments applicable to only indigenous peoples believe that this would give special rights to some ethnic groups over the rights of all other groups. This position is reinforced by many African governments, though indigenous peoples are discriminated in particular ways because of their particular culture, mode of production and marginalized position within the state. According to the ACHPR, it is therefore necessary and legitimate for there to be protection of the rights of these peoples in order to alleviate this particular form of discrimination.

Detailed jurisprudence on the rights of indigenous peoples when faced with interference with their traditional land and territories in the African context has been developed by the ACHPR in the case of the Endorois indigenous people from Kenya.<sup>10</sup> It is crucial that the AfDB's ISS and OS complies with this jurisprudence, in seeking to develop its policy framework governing projects that may interfere with the traditional land and resources of indigenous peoples.

In respect of the right to property (Article 14 ACHPR), the African Commission in the Endorois Case made the following conclusions:<sup>11</sup>

- 1) *traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title;*
- 2) *traditional possession entitles indigenous people to demand official recognition and registration of property title;*
- 3) *the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights*

International law provides for the legitimate subordination of property rights, provided certain conditions are met. Article 14 of the Charter provides a two-pronged test, such that encroachment may take place only “*in the interest of the public need or in the general interest*”

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<sup>10</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, 276/2003 (“the Endorois Case”)

<sup>11</sup> Ibid, see para 209.

of the community” and “in accordance with appropriate laws” (which includes both national and international law). The ‘public interest’ threshold for encroachment on indigenous land is more stringent than for individual private property, due to the fundamental human rights engaged – including the right to self-determination.<sup>12</sup>

It should be noted that forceful evictions are prima facie incompatible with international law and that therefore states who host projects funded by the AfDB have an extremely high burden of proof in order to attempt to justify such evictions as legitimate. As explained by the African Commission in the Endorois decision: “the Committee on Economic, Social and Cultural Rights [...] has provided a legal test for forced removal from lands which is traditionally claimed by a group of people as their property. In its ‘General Comment No. 4’ it state[d] that “instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law. This view has also been reaffirmed by the United Nations Commission on Human Rights which states that forced evictions are a gross violations of human rights, and in particular the right to adequate housing. The African Commission also notes General Comment No. 7 requiring States Parties, prior to carrying out any evictions, to explore all feasible alternatives in consultation with affected persons, with a view to avoiding, or at least minimizing, the need to use force.”<sup>13</sup>

In summary, to guarantee the survival of indigenous peoples, international law requires all the following specific conditions be met by African countries in seeking to take steps to limit the property rights of indigenous peoples:

- a. the measures taken must be necessary and proportionate to a legitimate aim, and, thus, be, *inter alia*, the least restrictive means available;
- b. the measures must be predicated on effective participation of indigenous peoples and with their free, prior and informed consent (FPIC), in accordance with their customs and traditions;
- c. indigenous peoples must receive a reasonable benefit or other suitable compensation;
- d. measures must not be taken without a prior and independent environmental, social and cultural impact assessment.

Though there is the existence at the level of the UN and other regional bodies of human rights treaties, the application of these treaties to IPs has not been sufficient. Below we examine briefly some of the international human rights conventions and their relevance to the protection of indigenous peoples.

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<sup>12</sup> Endorois, para 212.

<sup>13</sup> Ibid, para 200

#### **4.1 The Universal Declaration of Human Rights**

The Universal Declaration of Human Rights (UDHR), adopted in 1948, is “...the basic international pronouncement of the inalienable and inviolable rights of all members of the human family”.<sup>14</sup> This declaration inspired the drafting and adoption of the other international human rights treaties as it sets the common standard of achievement for all peoples and lists numerous rights – civil, political, economic social and culture to which people everywhere are entitled. The central focus of this declaration is on the inherent dignity of all peoples and affirms the equal rights of all people as purported in Articles 1 and 2 of the Declaration. These are the core principles of human rights and entails both rights and obligations from duty bearers and right owners. The UDHR was adopted as an inspirational document, and though it has no inbuilt mechanism for enforcement like the other international human rights treaties that were adopted thereafter, it has been universally accepted by all the member states of the United Nations. It is therefore unacceptable that the indigenous peoples, who in every regard belong to the human family, do not benefit from this declaration simply because their culture, tradition and practices are different from the majority of the dominant society.

#### **4.2 The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Cultural Rights (ICESCR)**

The UN General Assembly’s adoption on 16 December 1966 of both the ICCPR and the ICESCR was a milestone in the protection of human rights. The ICCPR and the ICESCR and the Optional Protocols to the ICCPR together with the UDHR are often referred to as the international bill of rights. Though the conventions do not specifically consider the question of minorities, they however uphold the principle of equality and self-determination – two aspects that dominate the indigenous peoples debate.

In Article 1 of both Conventions, alongside the right of peoples to self-determination, is the collective right to freely dispose of natural resources and to not be deprived of their own means of subsistence. The ICCPR is considered as the only human rights treaty with a specific provision on the rights of minorities. Article 27 of the ICCPR requires states with ethnic, religious or linguistic minorities not to deny the rights of these people in community with the other members of their groups to enjoy their own culture profess and practice their religion, or to use their own language. This provision does not explicitly refer to the notion of indigenous peoples but much of the case law developed under the provision has been related to claims by such groups. The notion of culture in this provision has been interpreted as ‘...affording protection to the nature based way of life, land rights and

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<sup>14</sup> UN Association in Canada [“Questions and answers about the Universal Declaration of Human Rights”](#)

economy of indigenous peoples'.<sup>15</sup> Several African countries are parties to these conventions

#### **4.3 The International Convention on the Elimination of all Forms of Racial Discrimination**

This international human rights treaty seemed to be the only treaty that deals specifically with the problem of indigenous peoples. Article 1 of the Convention prohibits any form of discrimination on the basis of race, color, descent or national or ethnic origin. The Committee on the Elimination of all Forms of Racial Discrimination (CERD) in its General Recommendation XXIII calls on States Parties to ensure that indigenous peoples can effectively participate in public life and that decisions affecting their rights are made with their informed consent. Indigenous Peoples have been able to use the provisions of this treaty to claim their rights. For instance, on the basis of the CERD, the Brazilian Supreme Court in 2009 declared as constitutional the demarcation of indigenous lands in Raposa.<sup>16</sup> Other indigenous peoples have used the CERD provisions to make claims on their rights like the Batwa-Bambutu "Pygmies" in the DRC when the World Bank Inspection Panel used CERD in its concluding observations. Several African countries have ratified this important convention.

#### **4.4 The International Labor Organization Convention No. 169**

The International Labor Organization (ILO) Convention No. 169 is the most concrete international legal instrument that recognizes the rights of the indigenous peoples. This Convention was adopted as a revision to an earlier one adopted in 1957 as Convention No. 107. ILO 169 has been ratified by a significant number of countries in Latin America, and Central African Republic was the first African country to ratify the Convention on 30 August, 2010. The importance of this Convention, which is binding on the ratified countries, is that it clearly highlights those salient aspects of concern to indigenous peoples. For instance, on the principle of non-discrimination, the Convention in Article 3 states that indigenous peoples have the right to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The Convention also promotes the right of consultation and participation of indigenous peoples on issues that affect them and recognizes their cultural and other specificities such as institutions, customary laws, forms of land use and forms of social organization. The Convention also gives these peoples the right to decide priorities of development.

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<sup>15</sup> Martin Sheinin, '[Indigenous People's Land Rights under the International Covenant on Civil and Political Rights](#)' Torkel Oppsahls minneseminar April 28 2004, Norwegian Centre for Human Rights University of Oslo

<sup>16</sup> Forest Peoples Programme, '[Brazilian Supreme Court Judge upholds demarcation of Raposa Serra do Sol](#)'

#### **4.5 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**

After nearly thirty years of lobbying and advocacy for an international human rights treaty that deals specifically with the rights of indigenous peoples, and following the creation within the UN of a UN Permanent Forum for the Indigenous Peoples, the UN through the General Assembly Resolution 61/295 of 13 September 2007 adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This document is considered as a framework document for the protection of the rights of indigenous peoples, especially for its understanding and expansion of collective rights, the right to culture and of self-determination. The support this declaration garnered at the UN General Assembly is unprecedented considering that it was voted by 129 countries with only four votes against and 11 absentee votes. The adoption of this declaration was a culmination of work that began in 1982 with the establishment within the UN of a Working Group on the Rights Indigenous Populations (WGIP). The Declaration enjoyed far reaching support within the UN, including from African countries.

This Declaration marks a turning point in the recognition of the rights of IPs and it is being incorporated as guidance on emerging issues as the climate change policy formulations. A crucial aspect of the Declaration is the central importance of the right of indigenous peoples to free, prior and informed consent (FPIC) in respect of proposed developments affecting their traditional lands and resources.

## 5. Indigenous Peoples policies at Multilateral Development Banks

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Multilateral Development Banks (MDBs) at the global level such as the World Bank, and those at the regional level, remain the most prominent financiers of development in the world. In an effort to ensure that projects they finance do not have adverse effects on the environment or the populations, the MDBs have designed specific policies that have to be respected by the borrowing countries for the effective realization of projects.

In 1982, following criticisms of its projects' impacts on indigenous peoples, especially in Latin America, the World Bank issued a brief operational policy statement outlining the procedures for the protection of the rights of these people in Bank-financed projects. The World Bank became the first MDB to have a policy on indigenous peoples, and since then other MDBs such as the Inter-American Development Bank, the Asian Development Bank, and the International Finance Corporation have developed stand-alone policies on indigenous peoples.

### 5.1 World Bank

The World Bank brief Operational Manual Statement (OMS 2.34) on indigenous and tribal peoples was the Bank's first formal policy on integrating indigenous peoples in the Bank's project financing cycle. The adoption of a specific policy on indigenous peoples was inspired by a finding of a 1981 study by the Bank – *Economic Development and Tribal Peoples: Human and Ecological Considerations*. The study recommended that the Bank should avoid 'unnecessary or avoidable encroachment onto territories used or occupied by tribal groups', ruled out involvement with projects not agreed to by tribal peoples, required guarantees from borrowers that they would implement safeguard measures, and advocates respect for indigenous peoples' right to self-determination. The implementation of the 1982 policy became subjected to severe criticism and an internal evaluation carried out in 1986 by the Bank's Office of the Environmental and Scientific Affairs found that only two of thirty-three projects financed by the World Bank Group substantially complied with this policy.<sup>17</sup>

In 1991, the Bank replaced the OMS 2.34 with Operational Directive 4.20 (OD 4.20) on Indigenous Peoples and this Operational Directive was revised and replaced in 2005 with the Operational Policy 4.10 (OP 4.10). The one notable point of the OD 4.20 was the call for the preparation of an Indigenous Peoples Development Plan (IPDP) in projects that affect indigenous peoples, and that the preparation of this Plan must be carried out with the informed participation of these peoples. The relevance of the IPDPs is to ensure a

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<sup>17</sup> Fergus Mackay: 'The Draft World Bank Operational Policy on Indigenous Peoples: Progress or More of the Same?'

mechanism so that these peoples are not adversely affected by Bank financed projects and also that they receive culturally compatible social and economic benefits.<sup>18</sup>

However, an internal review of the implementation of OD 4.20 found that this directive was only fully or partially applied in 50 percent of projects affecting indigenous peoples, and of those only 14 percent had the required IPDPs.

Considering the shortcomings realized in the application of OD 4.20, the Bank in 2005 revised this directive and adopted the Operational Policy/Bank Procedures 4.10 (OP/BP 4.10) on Indigenous Peoples. This new policy retained the policy requirements of OD 4.20 that Bank-financed projects are designed not only to avoid adverse effects impacts, but also to provide culturally appropriate benefits. The innovation of this policy from the previous ones was that it recognized, amongst other things, that the distinct identities and cultures of Indigenous Peoples remain inextricably linked to the lands they inhabit and the natural resources they depend upon to survive.<sup>19</sup>

This policy establishes certain processing requirements for Bank's financing projects, such as screening, social assessment, consultation with communities, preparation of plan or framework and disclosure. The policy insists that the Bank shall provide project financing only where free, prior, and informed consultation results in broad community support to the project by the affected indigenous peoples. Unlike previously where the Bank financing decisions were determined solely in economic terms, OP 4.10 indicates that Bank financed projects will include measures to avoid potential adverse effects or where avoidance is 'not feasible' to minimize, mitigate, or compensate for such effects. Unlike the IPDP required under the OD 4.20, the OP 4.10 requires the preparation of both an Indigenous Peoples Plan and an Indigenous Peoples Planning Framework (IPP/IPPF) by the borrowing country. An internal review on the implementation of this policy between July 2005 and June 2008 indicate that 12 per cent (132 projects) of the total number of all projects approved by the World Bank triggered the application of OP 4.10.

Just like OMS 2.34 and OD 4.20, OP 4.10 has not been exempted from criticisms especially with regard to its actual application. In 2005, the *Organisations Autochtones Pynees et Accompagnant les Autochtones Pygmees en Republique Democratique du Congo* filed a complaint to the World Bank's accountability mechanism, the Inspection Panel, concerning the impacts of forest sector reforms supported by the Bank. The complaint alleged that the Bank's failure to comply with its safeguard policies in its promotion of forest sector reforms, such as forest zoning and the concession allocation system, was likely to harm indigenous, forest-dependent peoples. The Panel found that the Bank had failed to respect its safeguard policies, including those protecting the rights of indigenous peoples, despite knowing that

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<sup>18</sup> Operations Evaluation Department, 'Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation of Results' Report No. 25754 Washington D.C World Bank April 10, 2003

<sup>19</sup> World Bank, 'Implementation of the World Bank's Indigenous Peoples' Plan: A Learning Review (FY 2006 – 2008)' OPCS Working Paper, August 2011

the financed projects would have serious adverse effects on the indigenous peoples. The Panel's finding was based on OD 4.20, considering that two of the projects were approved before July 2005, as all projects approved on or after July 1, 2005 were supposed to apply OP 4.10.

Despite all the progress in policy development and procedures with respect to the rights of indigenous peoples, there are still challenges in effectively recognizing and upholding the rights of indigenous peoples.

## **5.2 Inter-American Development Bank**

The Inter-American Development Bank (IDB) adopted in 2006 its own policy on indigenous peoples. Despite being considered as a latecomer in developing language on indigenous peoples, initiated by the World Bank (1982) and followed by the Asian Development Bank (1998), the IDB's Indigenous Peoples Policy seemed to afford a broader coverage to the issues of concerns to indigenous peoples than the other international financial institutions at the time. The approach of the IDB can be very comprehensive if one considers that indigenous peoples in the Americas make up about 10 percent of the region's population and the momentum by indigenous peoples in Latin America to assert their rights in the political, social and economic life of the countries. Today some countries in Latin America like Bolivia have an indigenous person as president. These trends may have influenced the drafting of the IDB's IP Policy, which also integrates a strategy for indigenous development, especially after it was severely criticized for financing projects with serious adverse effects on indigenous peoples and the environment like the Camisea Natural Gas Project in Peru in 2002. By adopting a policy on indigenous peoples, the Bank is seeking to support socio-cultural development processes that are appropriate to the economy and governance of indigenous peoples.

The policy's main objective is to support development with identity of indigenous peoples, safeguard indigenous peoples and their rights against adverse impacts and exclusion in Bank-funded projects and prevent or mitigate direct or indirect adverse impacts on indigenous peoples, rights or patrimony, individual or collective. Integrated in the IDB's IP Policy is the Strategy for Indigenous Economic Development. The policy prohibits the involuntary settlement of indigenous peoples without their consent, the financing of projects where there is the exclusion of indigenous peoples on the basis of ethnicity, financing of any operation that fails to comply with the applicable legal norms and safeguards, and the financing of projects that fail to respect the right of uncontacted indigenous peoples to remain in said isolated condition and to live freely according to their culture. The IDB's Policy is conceived to develop a greater visibility for indigenous peoples and their specificity and to contribute in achieving a systematic and relevant mainstreaming of indigenous issues in national development agenda and in its own operations portfolio.

Despite being considered as a well-conceived policy that will afford greater protection to indigenous peoples, the policy according to the Forest Peoples Programme (FPP) still show some critical limitations.<sup>20</sup>

### **5.3 European Bank for Reconstruction and Development**

The European Bank for Reconstruction and Development (EBRD) in May 2008 adopted a new set of environmental and social policy and performance requirements to be applied to the Bank-financed projects. This new policy included a Performance Requirement (PR 7) on Indigenous Peoples. This PR recognizes the role indigenous peoples may play in the process of transition towards open-market economies and managing activities and enterprises as partners in development alongside the private sector and their governmental representatives. PR 7 depends on the following priorities for indigenous peoples: partnership, need for special measures and need for free, prior, informed consent (FPIC). PR 7 was intended to ensure that the transition process fosters full respect for the dignity, rights, aspirations, cultures and the natural resource-based livelihoods of IPs and avoid adverse impacts of projects on these peoples, or when avoidance is not feasible, to minimize, mitigate or compensate for such impacts. PR 7 where applicable shall enable IPs to benefit from projects in a culturally appropriate manner and support the client to establish and maintain an ongoing relationship with the IPs affected by the Bank financed project throughout the life of the project. The policy also ensures to foster good faith negotiation of the client with and the informed participation of, indigenous peoples when projects are to be located on traditional or customary lands used by the indigenous peoples, when customary or non-traditional livelihoods will be affected by the project, or in the case of commercial exploitation of indigenous peoples' cultural resources. This entails the recognition and respect of the laws, customs, preserve the culture, knowledge and practices of these peoples in accordance with their wishes.

All the financial intermediaries of the EBRD are also expected to respect this policy. However some civil society organization such as the Bank Information Center have critiqued the new policy for its vague categorization language especially related to projects falling under categories A and B. Though the policy references UNDRIP, its definition of consent is limited and restricts the implication of the relevant indigenous communities to actively have a say on the project implementation. In a nutshell, like the IFC policy, the EBRD policy can be considered as a watershed in the improvement of investment practice especially by private financial institutions who act as financial intermediaries.

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<sup>20</sup> Forest Peoples Programme, June 2006, 'A Brief Independent Guide to the Inter-American Development Bank's New Operational Policy on Indigenous Peoples (OP-765)

## 5.4 Asian Development Bank

The Asian Development Bank (ADB) was one of the first regional development banks to adopt a specific policy on indigenous peoples in 1998. The ADB's move was in response to the growing pressure of indigenous peoples' groups in Asia following the denial of some of the governments of the existence of indigenous peoples, and their effective participation in international fora such as the UN Working Group on Indigenous Populations. As part of a Bank-wide push between 2007 and 2009 to consolidate safeguard standards, the policy on indigenous peoples was updated and incorporated into a Safeguard Policy Statement, a combined document which included safeguard standards on the environment, resettlement and indigenous peoples' issues.

The ADB's safeguard requirements for projects impacting on indigenous peoples recognize that development projects are often conceived and designed by dominant and mainstream populations and do not necessarily take into account the needs or interests of indigenous peoples. Further, the ADB also recognizes in its revised requirements that indigenous peoples have the right to direct the course of their own development. However the objectives of the policy requirements are a little more narrow, to recognize and respond to the potential vulnerability of indigenous peoples in development processes (safeguard against harm), and to ensure that these peoples have opportunities to participate in and benefit equally from development (proactively support culturally appropriate benefits).

Like the World Bank IP policy, the hallmark of the ADB's policy requirements on indigenous peoples is its efforts to ensure that its interventions are not only consistent with the needs and aspirations of the indigenous peoples, but are compatible with their culture and social and economic institutions and are planned and implemented with their informed participation. The policy indicates that were there are unavoidable negative effects due to its interventions, there should appropriate and acceptable compensation.

Where screening by the ABD confirms the presence of indigenous peoples in the impact areas of a given intervention or project, a full social impact assessment is conducted. Policy requirements also address information disclosure for project documents, the establishment of accessible grievance mechanisms and monitoring and reporting requirements against the required planning documents. Like the World Bank Policy, the ADB policy requires the development of an Indigenous Peoples Development Plan (IPDP) by the borrower country. The ADB policy is applicable both to public and private sector borrowers.

The ADB also differentiates between the standards required for general projects and general impacts (positive or negative) and a different set of standards for projects or interventions expected to impact on specific areas of concern to indigenous peoples. For these specific areas of concern, the standard required for a project to take place is 'consent' of the people concerned, although this consent is defined as a general statement of broad support for the project by the community.

## 5.5 International Finance Corporation (IFC)

The World Bank's private sector arm, the International Finance Corporation (IFC), operates under its Sustainability Framework, which includes a Policy on Environmental and Social Sustainability, the Performance Standards, and Access to Information Policy. First adopted in 2006, IFC revised its Sustainability Framework in 2011. There are altogether eight Performance Standards with a specific standard (Performance Standard 7) on Indigenous Peoples. This specific standard recognizes that indigenous peoples, who in most cases are minority as compared to the mainstream groups, are often marginalized and vulnerable to abuse.

Performance Standard 7 (PS 7) has as objective to foster the respect for the human rights, dignity, aspirations, culture and natural resource-based livelihoods of indigenous peoples, as well as to anticipate and avoid adverse impacts of projects on communities of indigenous peoples, or when avoidance is not possible to minimize and/or compensate for such impacts. PS 7 also envisages to promote sustainable development benefits and opportunities for indigenous peoples in a culturally appropriate manner and to establish and maintain an ongoing relationship based on Informed Consultation and Participation with the IPs affected by a project throughout the project's life cycle. It shall also ensure that the Free, Prior, and Informed Consent (FPIC) of the affected communities of IPs and to respect and preserve the culture, knowledge and practices of IPs.

Like the World Bank's OP 4.10, the IFC Performance Standard on IPs shall apply to only those groups of indigenous peoples who maintain a collective attachment, but it could also apply to IP groups that have lost collective attachment to distinct habitats or ancestral lands because of forced severance, conflict, government resettlement programs, dispossession of their lands, natural disasters or incorporation of such territories into an urban area. The IFC's Performance Standards have served as the benchmark for other private sector financial institutions such as the "Equator Banks," and thus the recently revised set of Performance Standards will likely be reflected in the Equator Principles framework that the Equator Banks pledge to adhere to. This would help in ushering in a harmonization process at the financing of projects that may have adverse impacts on indigenous peoples.

## 6. Indigenous Peoples within AfDB's Integrated Safeguard System

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In March 2012, the African Development Bank released for public consultation its Integrated Safeguards System (ISS), which includes the draft Policy Statement (PS) and Operational Safeguards (OS) to be applied to all the Bank-financed projects. The rationale for the development of the ISS according to the Bank<sup>21</sup> is based upon two main areas of focus:

- As assessment of the Bank's portfolio of relevant policies in light of current priorities, emerging issues and lessons learned from its implementation in recent years; and
- A review of current 'best practice' among MDBs and joint efforts being made to harmonize environmental and social safeguards and their implementation in which the Bank is an active participant.

As the Bank has increasingly become a major source for providing development finance in Africa, particularly in the infrastructure sector, the elaboration of the ISS, according to the Bank, is to address deficits noted in the implementation of the existing operational policies and to ensure a robust framework for assessing mitigating risks.

The ISS has a wide scope of coverage as it extends both to public and private operations and for lending and non-lending activities. In terms of innovation, the ISS, apart from providing integration between social and ecological considerations, includes climate change issues. In terms of structure, the ISS includes a Safeguard Policy Statement which is a declaration of the Bank's commitment to environmental and social sustainability and to reduce potential risk of non-compliance to its operations. The ISS has five Operational Safeguards:

- Operational Safeguard (OS 1): Environmental and Social Assessment
- Operational Safeguard (OS 2): Involuntary Resettlement
- Operational Safeguard (OS 3): Biodiversity and Ecosystem Services
- Operational Safeguard (OS 4): Pollution Prevention and Control, Greenhouse Gases, Hazardous Materials and Resource Efficiency
- Operational Safeguard (OS 5): Labor Conditions, Health and Safety

These operational safeguards are in some cases drawn from existing Bank's policies. For instance, in 2001 the Bank adopted the Environmental and Social Assessment Procedures (ESAP) and the Environmental Social Impact Assessment (ESIA) Policy for the Bank's Public Sector Operations. In 2004, it adopted the Guidelines for the Implementation of the Bank's

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<sup>21</sup> The African Development Bank Group, 'Annex: African Development Bank Integrated Safeguard System: Draft Policy Statement and Operational Safeguards' For Consultation October 2011 available at [www.afdb.org](http://www.afdb.org)

Group's Policy on Population as well as its Policy on the Environment. Apart from these policies, the Bank also has adopted a number of other policies dealing with specific issues related to its financing of projects in the territory of its member countries.

The draft ISS document released for public consultation mentions clearly that the ISS does not replace the existing Bank policies. While this may be a laudable approach, it may however create some level of confusion as to which of the policies is applicable to the Bank's financed projects. Like in the other MDBs and with available 'best practices' it would have been worthwhile if the Bank would adopted specific stand-alone policies in those areas where there are none and strive to review the existing policies taking into consideration the general trend existing within the international financial institutions.

## **6.1 Potential implications of the AfDB's approach on Indigenous Peoples**

### *6.1.1 The non-definition of Indigenous Peoples in the ISS*

Despite the fact that there is no universally accepted definition of indigenous peoples, there are however internationally accepted characteristics of identifying indigenous peoples. While AfDB lays out fairly standard criteria in the identification of IPs, the AfDB considers the definition of indigenous peoples only within the narrow context of vulnerability. While vulnerability is one of the internationally recognized characteristic of identifying indigenous peoples, there are other characteristics posited by both the ILO Convention No. 169 and the UN Special Rapporteur on Indigenous Issues;

- Historical continuity with pre-colonial societies;
- Strong link to territory;
- Distinct social, economic or political systems;
- Distinct language, culture and beliefs;
- Form non-dominant sectors of society; and
- Identify themselves as different from national society

The vulnerability concept used by the AfDB in its ISS in referring to indigenous peoples could be subjected to a narrow interpretation considering the fact that this issue remains problematic in most of the countries in Africa. The Bank could have made reference to the ACHPR report on indigenous peoples which while dispersing the aboriginality test recognizes the existence of IPs in Africa and makes an irrefutable claim to the characteristic of indigenous peoples in Africa in that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon. The Bank's refusal to provide a clear cut definition of indigenous peoples in Africa and allowing for national laws to determine the vulnerability of groups in its financed projects may subjects these peoples to further discrimination. We have seen in the past how certain MDBs have avoided such pitfalls by divorcing their consideration of Indigenous Peoples from the question of whether IPs are recognized as such in their countries. During the construction of the Chad-Cameroon Oil Pipeline, understanding that indigenous peoples were not protected

under national laws in Cameroon, the World Bank's Operational Directive (OD 4.20) on indigenous peoples was applied and it was within this framework that the first Indigenous Peoples Development Plan (IPDP) was developed in Cameroon. It therefore becomes essential for development financing agencies like the AfDB to ensure due identification of indigenous peoples in the absence or inadequacies of national laws.

### *6.1.2 The ISS Operational Safeguards and inadequate consideration of Indigenous Peoples*

The AfDB has been conspicuous in its absence of recognizing the need to adopt an Indigenous Peoples Policy despite the recognition that such peoples exist in Africa, both by the UN and MDBs that have financed projects in the continent. The drafting of the ISS could have been an opportunity for the Bank to come out with a specific policy on indigenous peoples. It could have also been expected that the Bank could at least dedicate one of its operational safeguards to the question of indigenous peoples. Unfortunately the question of indigenous peoples though it is crosscutting is treated as part of the OS 1 on Environmental and Social Assessment (ESA), which is considered as an overarching operational safeguard. One of the six objectives of OS 1 is to ensure that affected communities and stakeholders have timely access to information in suitable forms about Bank operations and are consulted meaningfully about issues that may affect them. This objective is vague and its application could be easily subjected to a wide range of interpretations that may not be of benefit to the protection and respect of the rights of indigenous peoples in Bank-financed projects. This OS states that the borrower shall conduct an appropriate type and level of Environmental and Social Assessment which entails a Strategic Environmental and Social Assessment (SESA), ESIA and ESMP which shall in an integrated manner cover all relevant direct and indirect environmental and social risks and impacts.

It is required that in assessing the potential impacts of the project on the community, the borrower shall identify people and groups that may be directly and/or disproportionately affected by the project because of their recognized vulnerable status. It is at this stage that the ISS brings in the indigenous peoples which the Bank considers as vulnerable. While recognizing the vulnerability of the IPs, it does not go in details to show the peculiarity of IPs in Africa and states that where such groups are identified, the borrower shall implement appropriate differentiated measures so that unavoidable adverse impacts do not fall disproportionately on these vulnerable groups and they are not disadvantaged in sharing development benefits and opportunities. This statement is not specific and the language used is very subjective and runs contrary to the ongoing practices adopted by the other MDBs in their IPPs. For instance, while the OS makes provision for disclosure and access to information, it does not specify the mechanisms and salient concepts such as the free, prior, informed consent are given full consideration. The OS states that based upon a stakeholder analysis that would be produced following the consultation undertaken at the project preparation, the different stakeholders shall be consulted in a manner that is accessible, fully informed as a result of prior disclosure of project information and in an appropriate

language. Even here the OS does not state the mechanism of consultation apart from the mention of appropriate language with the IPs.

The other Operational Safeguards like OS 2 on Involuntary Resettlement, Land Acquisition, Population Displacement and Compensation have also failed to accord any preferential treatment to indigenous peoples. On its requirement for eligibility and entitlements for resettlement and compensation, the ISS focuses on the requirements of formal legal rights to land or other assets. Though it recognizes that those with no formal legal rights to land could be considered but only if they can prove that they have a claim that would be recognized under the customary laws of the country. By focusing on formal legal rights to land, it could be said that the ISS fails to take into the peculiarities of indigenous peoples who are mostly nomadic, hunter-gatherers and pastoralists. Though it considers certain specificities like spiritual and ancestral ties with the land and locally recognized by communities as customary inheritors, it does not take into consideration the fact that in most of the countries in Africa, the law does not protect indigenous peoples and by allowing the task of recognition of the rights of these people to other communities is a wrong calculation. This is because many of the neighboring communities to indigenous peoples are themselves oppressors of these peoples and given an opportunity they will rarely attest the information that the indigenous peoples are customary inheritors of land.

On accompanying measures as a result of resettlement, the language used is as vague and non-specific as in the different OS. It is provided that where the resettlement involves vulnerable groups which will include IPs, special attention shall be given to their needs and concerns and appropriate support provided to them to cope with the resettlement and improve on their status. The OS requires this must be done in line with national laws. This is problematic if one considers that the existing laws in most of the countries in Africa date back to colonial period are incompatible with international human rights standards, and in certain cases do not reflect the events on ground. It would have been more appropriate if the Bank has stated that the undertaking of resettlement and compensation is done in line to respect international standards and international best practices.

The other operational safeguards on biodiversity and ecosystem services; pollution prevention and control, greenhouse gases, hazardous materials and resource efficiency; and on labor conditions, health and safety do not make any reference to indigenous peoples. With the development of projects and financing on climate change such as REDD+, one would have expected reference being made to its impacts on indigenous peoples or the fact that waste can easily be dumped on indigenous peoples' lands as such lands are often considered as uninhabited wasteland in ignorance of the fact that these peoples are natural custodians of most of the natural habitats in Africa. The ISS in its present form can be considered as a step behind the current international trend on the recognition, protection and integration of the rights of indigenous peoples in development planning.

In a response to an article by Professor Micheal Cernea's article on 'Safeguard Social Policies in Africa: A Continent-wide Public Debate' published on March 31, 2012, the Bank attempted to justify its reason for the non-inclusion of an Indigenous Peoples Policy in its ISS. According to the Bank's response, the question of identification of IPs in Africa is not clearly addressed. The Bank, by formulating such a response, fails to take into consideration the enormous work done by the African Commission's Working Group on Indigenous Peoples and its ground-breaking report of the commission adopted by the Commission at its 34<sup>th</sup> Ordinary Session in Banjul in November 2003. This report earlier highlighted in the early stages of this paper clearly identifies who are the IPs in Africa, and which criteria could be used to identify these groups. Another issue raised by the Bank in its response to Professor Cernea's article is that applying social safeguards for indigenous peoples or ethnic minorities in development projects can pose complex operational challenges. This is an unmerited excuse, considering that other MDBs like the World Bank, the ADB or the IDB face the same operational challenges but have developed specific policies in managing such challenges by obliging borrowing countries to develop adapted IPDP and IPPF. The development of such mechanisms has the ability not only to provide a differentiated treatment for IPs in the MDBs financed projects, but also bring them into the mainstream of development projects that have the potential of affecting their livelihoods and provides them the opportunity to take part in decision making. There is therefore an urgent need for the Bank to stay on the same level with the evolution of the problematic of IPPs in Africa as well as consider the UNDRIP which calls for IFIs to 'apply safeguards and strengthen the states' own domestic policies on indigenous peoples'.

### *6.1.3 The ISS Integration of the MFI-WGE Common Framework for Environmental Assessment*

The AfDB in developing the ISS makes reference to trends and best practices among MDBs and cites efforts by development financing institutions to harmonize their environmental and social safeguards. The ISS therefore, according to the AfDB, is developed in accordance with the Multilateral Financial Institutions Working Group on Environment (MFI-WGE) Common Framework for Environmental Assessment. This common framework was intended to serve as a note on good practices, promoting convergence among the MFIs on the institutional requirements, processes, and practices for both public and private sector projects. Unfortunately this "Good Practice Note" is little known to the world outside the MFIs. The paper covers the essential issues common amongst the MDBs social and environmental safeguards such as environmental impact assessments, environmental social and management plans, pollution prevention, affected communities, workers health and safety and vulnerable groups. We shall not attempt in this paper to critique the MFI-WGE Common Framework Paper, but we shall attempt to look at its treatment of indigenous peoples and why it is erroneous for the AfDB to even consider this paper in the development of its own social safeguards. The MFI-WGI for instance does not make mention of indigenous peoples, even when it refers to vulnerable groups in the context of a half-page note. Its definition of vulnerable groups makes it difficult to factor in IPs even though it

makes mention of ethnicity, religion, culture, or way of life. Such broad definition of characteristics of vulnerable groups, especially in Africa, could be exclusive of IPs. Therefore, relying on a paper which the Bank considers as providing benchmarks for good practices in the drafting of its ISS would accord no protection to IPs in the continent. At the same time, this obvious citing of lowest standard amongst all other MDBs suggests AfDB is in fact referencing the lowest common denominator.

## **6.2 Why an Indigenous Peoples Stand-alone Policy in the AfDB is necessary**

The AfDB, by proposing an Integrated Safeguards System and without any specific operational safeguard on indigenous peoples, may be retracting from the progress being made across the continent to accord a better protection for these peoples. It would have been expected that the Bank would have taken into consideration the evolution of the problematic of indigenous peoples at the level of ACHPR with the publication of the Working Group on Indigenous Peoples report, adopted by the Commission at its 28<sup>th</sup> Ordinary Session in Cotonou Benin in October 2000. The Commission highlighted that the report outcome could help provide an instrument to address the problem of indigenous peoples whose existence is often denied, but which remains a festering sore in the African body politic. In addition, other African countries like the Republic of Congo which in 2011 became the first country to enact a law protecting indigenous peoples. This law empowers indigenous peoples and their future generation and would help to break the social and economic barriers that have hindered and discriminated the communities from accessing educational facilities. Other African countries like the Central Africa Republic (CAR) have taken other steps towards higher legal protection of the rights of indigenous peoples, such as the ratification of ILO Convention No. 169 on Indigenous Peoples.

In the Bank's treatment of indigenous peoples in the ISS as one element within the general category of 'vulnerable groups', analogy can be drawn with the legal and policy approaches of many African states in treating indigenous peoples as coming under the category of 'marginalized' or 'minority' populations. An example of this can be seen in Cameroon's stated intention to create a bill on 'marginalized populations'. The UN Committee on the Elimination of Racial Discrimination (CERD) and the African Commission on Human & Peoples Rights were highly critical of this approach, recommending that Cameroon *'refrain from using the term "marginal population groups", which is contrary to the spirit of the Convention, as it stigmatizes the minorities referred to and prevents the special characteristics of indigenous people from being taken into consideration'*.<sup>22</sup> The ACHPR supported this approach, recommending that Cameroon *'[a]bandon the use of the term « marginal populations » to refer to indigenous populations'*.<sup>23</sup> As authoritative interpretations of the

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<sup>22</sup> Para 15, CERD Concluding Observations, 76<sup>th</sup> session, dated 20 March 2010. The situation in Cameroon is by way of example only and is no means unique. There exists a significant number of other examples of international law jurisprudence addressing similar problems relating to the identification and categorization of indigenous peoples in respect of numerous other African and non-African countries.

<sup>23</sup> Para 36, ACHPR Concluding Observations, 47<sup>th</sup> session, 12-26 May 2010.

respective treaties, this jurisprudence is legally binding on state parties, which taken together include a significant majority of African states. It is respectfully averred that the Bank's treatment of indigenous peoples in incorporating them into the broader category of 'vulnerable groups' is equally problematic, amounting to a denial of what it means to be indigenous in terms of their particular and special attachment to traditional land and their right to self-identification. It also fails to address the collective rights of indigenous peoples, notably their right to self-determination. It is suggested that this is a fundamental failing in the Bank's ISS and OS as drafted and that a number of the problems with the text of the ISS flow from the lack of a stand-alone policy on indigenous peoples, including the failure to consistently guarantee the protection of indigenous peoples' rights to free, prior and informed consent. If this is not addressed by the Bank in a stand-alone policy on indigenous peoples, host states of AfDB-funded projects risk being in breach of their international human rights law commitments in regards to indigenous peoples, as enumerated in the Endorois Case referred to above, with all the reputational, legal and commercial risks that flow from this for those states, associated private sector companies and the AfDB itself.

With all the progress being made continent-wide and the evolution of this problematic at the international level with the adoption of the UNDRIP, World Bank Operational Policy on IPs as well as the other MDBs, it is surprising that the AfDB should be the only MDB not to have formulated its own policy framework on indigenous peoples. The Internal Review Mechanism (IRM), which is an independent institution of the Bank and independent of the Bank's Management created to give people a voice to speak out their situations when adversely affected by Bank financed projects, has received requests from indigenous peoples. For instance, a Kenyan organization, Friends of Lake Turkana and indigenous peoples in northwestern Kenya filed a formal request with the Compliance Review & Mediation Unit (CRMU) to investigate and intervene in the Bank's plans to finance the Gilgel Gibe III hydroelectric project in Ethiopia. According to the request, the construction of the dam would have enormous impacts on the environment as well as on the lifestyle of these peoples both in Kenya and in Ethiopia who depend on waters of Lake Turkana. The request was rejected not on the grounds that they would be no potential negative impacts on these peoples, but simply that the Government of Ethiopia finally opted not to seek the Bank's financing. The potential consideration of requests from IPs by the IRM demonstrates that there is an urgent need by the Bank to ensure that the project its finances do not have adverse impacts on them. To reduce the possibility of flooding the IRM with requests for inspections as a result of the Bank's decision to finance projects with potential impacts on indigenous peoples will be through the development of a stand-alone IP policy.

The ISS without a specific OS on indigenous peoples makes it difficult for affected groups to clearly formulate their requests for inspection as such requests have to specify clearly the Bank's policies violated in the implementation of Bank-financed projects in a borrower country. The World Bank policies makes it easier for persons affected to access the Inspection Panel as they can easily determine which Bank policy is violated, the AfDB current ISS does not provide such possibility. The absence of an IPP within the ongoing

discussions on the ISS does not provide the Bank an opportunity to assess the consequences of operating without such a policy. A stand-alone IPP shall not only provide the Bank a leverage in the need to better protect the rights of IPs in Africa, but also enable it to follow the international trend by the other MDBs that already have an IPP.

A stand-alone policy shall also permit the Bank to address some of those salient concepts fundamental in the participation of IPs in development projects in Africa such as the free, prior, informed, consent (FPIC) which is currently not addressed in the ISS. This shall also consider questions concerning protection of sensitive natural habitats that also serve as both source of livelihood and habitat for the IPs, as well as questions surrounding displacement, resettlement and compensation for indigenous peoples not adequately addressed in the ISS.

## 7. Conclusion

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The AfDB, following the ongoing public consultations, plans to adopt the ISS by the end of 2012 through a decision by the Bank's Board. However, in the opinion of the authors, the ISS, though a welcome initiative as it demonstrates some commitment by the AfDB to environmental and social sustainability, is seriously inadequate in its consideration of certain issues like the rights of Indigenous Peoples, forced resettlement and habitat protection. The ISS is expected to serve as the Bank's primary framework governing the responsibility and action of the Bank, yet it fails to take account of the Bank's, borrowers' and clients' obligations under international human rights law. It therefore becomes necessary that the Bank adopt a policy and practice that requires it to not only rely on the due diligence of its clients but also to exercise its own due diligence to review project impacts. It would seem from the ISS that the Bank intends to rely more on country laws and procedures for the effective implementation of the ISS. Unfortunately, the Bank seemed not consider the weak nature of the application of laws in certain African countries and the fact that most of the existing laws apart from being inherited from the colonial powers, they have in many cases become obsolete and unlawful in light of legally binding international human rights law. The Bank needs to seriously consider initiating a stand-alone policy on indigenous people if it is to maintain its position of providing financing for development projects in its member countries especially in Africa. Through a well-crafted IP policy, the Bank would be reassuring not only to its clients but also to the populations who normally should be beneficiaries of such projects, that its development model is tailored to the community's value-based system as one finds in indigenous peoples groups. A stand-alone IPP by the AfDB shall contribute towards reinforcing the debate at the level of the ACHPR and the AU where discussions on the rights of indigenous peoples have evolved.