

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES &



ADVISORY OPINION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS ON THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES



African Commission on
Human and Peoples' Rights
(ACHPR)



IWGIA

International Work Group
for Indigenous Affairs

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

ADVISORY OPINION OF THE AFRICAN COMMISSION
ON HUMAN AND PEOPLES' RIGHTS ON THE UNITED
NATIONS DECLARATION ON THE RIGHTS OF
INDIGENOUS PEOPLES



African Commission on Human
and Peoples' Rights
(ACHPR)



International
Work Group
for Indigenous Affairs

2010

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES
adopted by the United Nations General Assembly
13 September 2007, document A/61/295

ADVISORY OPINION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
ON THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES
adopted by the African Commission on Human and Peoples' Rights
at its 41st Ordinary Session held in May 2007 in Accra, Ghana

© **Copyright:** ACHPR and IWGIA - 2010

Typesetting and Layout: Jorge Monrás

Prepress and Print: Eks-Skolens Trykkeri, Copenhagen,
Denmark

ISBN: 978-87-91563-85-0



**AFRICAN COMMISSION ON HUMAN
AND PEOPLES' RIGHTS (ACHPR)**

No 31 Bijilo Annex Layout - Kombo North District,
Western Region - P.O.Box 673, Banjul, The Gambia
Tel: +220 441 05 05/441 05 06 - Fax: +220 441 05 04
achpr@achpr.org - www.achpr.org



**INTERNATIONAL WORK GROUP
FOR INDIGENOUS AFFAIRS**

Classensgade 11 E, DK-2100 Copenhagen, Denmark
Tel: +45 35 27 05 00 - Fax: +45 35 27 05 07
iwgia@iwgia.org - www.iwgia.org

*This document has been produced with financial support from
the Danish Ministry of Foreign Affairs*

TABLE OF CONTENTS

Fo r e w o r d	8
United Nations Declaration on the Rights of Indigenous Peoples	10
Article 1	13
Article 2	13
Article 3	13
Article 4	14
Article 5	14
Article 6	14
Article 7	14
Article 8	14
Article 9	15
Article 10	15
Article 11.....	15
Article 12	16
Article 13	16
Article 14	16
Article 15	17
Article 16	17
Article 17	17
Article 18	18
Article 19	18
Article 20	18
Article 21	19
Article 22	19
Article 23	19
Article 24	19
Article 25	20
Article 26	20

Article 27	20
Article 28	21
Article 29	21
Article 30	22
Article 31	22
Article 32	22
Article 33	23
Article 34	23
Article 35	23
Article 36	24
Article 37	24
Article 38	24
Article 39	24
Article 40	25
Article 41	25
Article 42	25
Article 43	25
Article 44	25
Article 45	26
Article 46	26

Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples	28
Introduction	28
On the lack of a definition of indigenous populations.....	30
On the question of self-determination and territorial integrity	31
On the right of the indigenous people to land, territories and resources.....	34
On the right of indigenous peoples to establish separate political and economical institutions	36
Conclusion	37

FOREWORD

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) constitutes a landmark in the struggle of indigenous peoples worldwide, including in Africa. The Declaration is the culmination of a more than 20-year-long multi-stakeholder debate and negotiation process within the United Nations, in which the representatives of indigenous peoples participated actively. It is a key instrument that addresses the historical and recurrent injustices facing indigenous peoples with comprehensive provisions to guarantee the enjoyment of their rights under universal norms and best practices.

The UNDRIP is the most comprehensive international human rights instrument to explicitly address the rights of indigenous peoples, including economic, social, cultural, civil, political, spiritual and environmental rights, along with the universally-established principle of the duty to protect these rights, which is borne by all states.

The wide spectrum of rights and freedoms that it covers, including most notably the right to self-determination, the right to their traditional lands and natural resources, the right to their traditional way of life and political institutions, the right to their identity, the right to preserve and maintain their cultural heritage, freedom from forcible relocation, the right to establish and control their educational systems and the right to participate in decision-making bodies, makes the UNDRIP a unique instrument that sets new universal legal standards for the protection of the rights of indigenous peoples.

In the words of the UN Secretary-General Ban Ki-moon, the UNDRIP “sets out a framework on which States can build or rebuild their relationships with indigenous peoples. The result of more than two decades of negotiations, it provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not repeated”.¹

1 UN Secretary General, Ban Ki-Moon, “Protect, Promote Endangered Languages, Secretary General urges in message for International Day of World’s Indigenous Peoples”, 23 July 2008

In a similar vein, during its 42nd session, the African Commission on Human and Peoples' Rights welcomed the adoption of the Declaration, stating that "with the adoption of the UN Declaration a giant step has been taken towards securing the survival of indigenous peoples and their unique cultures based on their own needs and visions".²

Long before the adoption of the UNDRIP, the African Commission on Human and Peoples' Rights had already taken several bold steps aimed at better protecting the human rights of indigenous communities living in Africa. Among others, it set up the Working Group on Indigenous Populations/Communities in 2001, which has since then been conducting promotional and protection missions to different countries, undertaking research and publishing reports on the rights of indigenous peoples. More specifically, the African Commission played an active role in the debate surrounding the adoption of the UNDRIP. At its 41st Ordinary session held in May 2007, in Accra, Ghana, the African Commission adopted an "Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples", in which it stated that the rights enshrined in the UNDRIP were consistent with the African Charter on Human and Peoples' Rights and the jurisprudence of the African Commission on Human and Peoples' Rights.

As a testimony to the continuing support and advocacy of the UNDRIP, the African Commission's Working Group on Indigenous Populations/Communities has produced this combined publication of the UNDRIP and the Advisory Opinion. It is our hope that this publication will be widely used by all relevant stakeholders in Africa, including regional institutions, governments, civil society, indigenous peoples' organization, the judiciary, academia and donors, in a concerted effort to promote and protect the rights of indigenous peoples in Africa.

Commissioner Musa Ngary Bitaye
Chairperson of the African Commission's Working Group
on Indigenous Populations/Communities

2 ACHPR Res.121 (XXXXII) 07: Resolution on the United Nations Declaration on the Rights of Indigenous Peoples

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Adopted by General Assembly Resolution 61/295 on 13 September 2007

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in

particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in

some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights³ and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action,⁴ affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

3 See resolution 2200 A (XXI), annex.

4 A/CONF.157/24 (Part I), chap. III.

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights⁵ and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

5 Resolution 217 A (III).

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:

- a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- d) Any form of forced assimilation or integration;
- e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous

peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, *inter alia*, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation

of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transpar-

ent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health

of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall 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.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

ADVISORY OPINION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS ON THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Introduction

At its 1st Session held on the 29th June 2006 in Geneva, the United Nations Human Rights Council (UNHRC) adopted the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). This Declaration is the result of a process of negotiation which began in March 1995, under the auspices of the former United Nations Commission for Human Rights (UNHRC), during which an inter-session working group had prepared the draft.

During its consideration by the 3rd Committee of the United Nations General Assembly (UNGA) in New York, the adoption of this resolution had been brought before a certain number of countries as well as the group of African States which expressed a number of concerns which had been submitted to the State Parties in the form of an aide-memoire of the African Group dated 9th November 2006.

Having been seized of the issue, the Assembly of Heads of State and Government (AHSO) of the African Union (AU), meeting in Addis Ababa in January 2007, took a decision aimed at requesting the deferment of the consideration by the UNGA of the adoption of the said Declaration with a view to opening negotiations for making amendments, in order to take into consideration the fundamental preoccupations of the African countries, namely:

- a) The definition of indigenous populations;
- b) The issue of self-determination;
- c) The issue of land ownership and the exploitation of resources;
- d) The establishment of distinct political and economic institutions
- e) The issue of national and territorial integrity

Seized of this matter during its 41st Ordinary Session (Accra, Ghana, 16 – 30 May 2007), the African Commission on Human and Peoples' Rights (ACHPR), deliberated on the issue and on the recommendation of its Working Group on Indigenous Populations/Communities (WGIP), passed a Resolution which underlined the fact that the concept of indigenous populations in the African Continent had been the subject of extensive study and debate resulting in a report adopted by the ACHPR in November 2003 at its 34th Ordinary Session. [Report of the African Commission's Working Group of Experts on Indigenous Populations /Communities, adopted at the 34th Ordinary Session in November 2003, which fact was included in the 17th Annual Activity Report of the African Commission later noted and authorized for publication by the 4th Ordinary Session of the AHSG of the AU held in January 2005 in Abuja, Nigeria (Assembly/AU/Dec.56(IV))]

Following its adoption of the said report, the ACHPR in its jurisprudence has interpreted and shed some light on matters similar to the concerns voiced by the AHSG of the AU on the draft UN Declaration and to that end, decided to ask, at its 41st Ordinary Session held in Accra, Ghana its WGIP to draft an Advisory Opinion on the various concerns expressed by the African States on the UN Declaration for submission to and discussion with key AU organs concerned with the matter before and during the AU Summit scheduled to take place in Accra, Ghana from 1st to 3rd July 2007.

The ACHPR has interpreted the protection of the rights of Indigenous Populations *within the context of a strict respect for the inviolability of borders and of the obligation to preserve the territorial integrity of State Parties*, in conformity with the principles and values enshrined in the Constitutive Act of the AU, the African Charter on Human and Peoples' Rights (the African Charter) and the UN Charter.

Within this context, the present Advisory Opinion is being submitted on the basis of the relevant provisions of Article 45(1)(a) of the African Charter which gives mandate to the ACHPR to: *"Collect documentation, carry out studies and research on African problems in the field of Human and Peoples' Rights... and, if need be, submit opinions or make recommendations to the Governments."*

In providing this Advisory Opinion, the ACHPR also relies on its well established jurisprudence in interpreting the provisions of the African

Charter, which is one of its mandates under Article 45 (3) of the African Charter: *“Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU.”*

On the lack of a definition of indigenous populations

The lack of a definition of the notion of indigenous populations in the draft UN Declaration is considered as likely to create major juridical problems for the implementation of the Declaration. As such, the document representing the aide-memoire of the African Group of November 2006 even indicates that this: *“would be not only legally incorrect but could also create tension among ethnic groups and instability between sovereign States”*.

From the studies carried out on this issue and the decisions it has made on the matter, the ACHPR is of the view that, a definition is not necessary or useful as there is no universally agreed definition of the term and no single definition can capture the characteristics of indigenous populations. Rather, it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa.

Thus, the major characteristics which allow the identification of Africa’s Indigenous Communities is the favored approach adopted and it is the same approach at the international level. [See the Report of the ACHPR’s WGIP, adopted by the ACHPR]

The concept in effect embodies the following constitutive elements or characteristics, among others [See page 93 of the Report of the ACHPR’s WGIP, adopted by the ACHPR]:

- a) Self-identification;
- b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;
- c) A state of subjugation, marginilisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways

of life or mode of production than the national hegemonic and dominant model;

Moreover, in Africa, the term indigenous populations does not mean “first inhabitants” in reference to aboriginality as opposed to non-African communities or those having come from elsewhere. This peculiarity distinguishes Africa from the other Continents where native communities have been almost annihilated by non-native populations. Therefore, the ACHPR considers that any African can legitimately consider him/herself as an indigene on the Continent.

On the question of self-determination and territorial integrity

In its preamble, the UN Declaration on the Rights of Indigenous Populations states *«the fundamental importance of the right of all persons to self-determination and considers that no provision of the present Declaration can be invoked to deny a people, whatever they may be, of their right to self-determination exercised in conformity with international law »*.

Article 3 of the Declaration specifies that Indigenous Populations *«freely determine their political status and freely pursue their economic, social and cultural development»*. Article 4 states that *«in the exercise of their right to self-determination, the indigenous populations have the right to autonomy or self-government in everything that concerns their internal and local affairs as well as ways and means to finance their autonomous activities »*.

In reaction to these provisions, the aide-memoire of the African Group of November 2006 re-affirms: *“To implicitly recognize the rights of indigenous populations to self-determination in paragraph 13 of the preamble and in Articles 3 and 4 of the Declaration may be wrongly interpreted and understood as the granting of a unilateral right to self-determination and a possible cessation to a specific section of the national population, thus threatening the political unity and territorial integrity of any country”*.

The ACHPR advises that articles 3 and 4 of the Declaration should be read together with Article 46 of the Declaration which guarantees the inviolability of the integrity of Nation states. Article 46 of the Declaration specifies *“that nothing in this Declaration may be interpreted as implying for*

any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the UN”.

In the opinion of the ACHPR, Articles 3 and 4 of the Declaration can be exercised only in the context of *Article 46 of the Declaration which is in conformity with the African Commission’s jurisprudence on the promotion and protection of the rights of indigenous populations based on respect of sovereignty, the inviolability of the borders acquired at independence of the member states and respect for their territorial integrity.*

In Africa, the term indigenous populations or communities is not aimed at protecting the rights of a certain category of citizens over and above others. This notion does not also create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups which have been historically marginalized.

In this context, Article 20(1) of the African Charter is drafted in similar terms: *“all peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen”.*

It is true that the decision of the AU Summit of January 2007 on the subject re-affirms in its preamble the reference to the UNGA Resolution 1514(XV) of 14 December 1960 which recognizes the rights to self-determination and the independence of the populations and territories under colonial domination or under foreign occupation.

The fact remains however that the notion of self-determination has evolved with the development of the international visibility of the claims made by indigenous populations whose right to self-determination is exercised within the standards and according to the modalities which are compatible with the territorial integrity of the Nation States to which they belong.

In its jurisprudence on the rights of peoples to self-determination, the ACHPR, seized of Communications/Complaints claiming for the enjoyment of this right within State Parties, has constantly emphasized that these populations could exercise their right to self-determination in accordance with all the forms and variations which are compatible with the territorial integrity of State Parties. [See Communication 75/92 of 1995 - the Katangese People Congress vs. Zaire, reported in the 8th Annual Activity Report of the ACHPR].

In this respect, the report of the ACHPR's WGIP states that, "the collective rights known as the peoples' rights should be applicable to certain categories of the populations within Nation States, including the indigenous populations but that...the right to self-determination as it is outlined in the provisions of the OAU Charter and in the African Charter should not be understood as a sanctioning of secessionist sentiments. The self-determination of the populations should therefore be exercised within the national inviolable borders of a State, by taking due account of the sovereignty of the Nation State" (Experts' Report of the ACHPR p. 83/88).

Several States in Africa and elsewhere share this meaning of the right to self-determination taken either from its perspective of identity for the preservation of the cultural heritage of these populations, or from its socio-economical perspective for the enjoyment of their economic and social rights within the context of the specificities of their way of life.

However, if it is taken from the political perspective, the right of Indigenous Populations to self-determination refers mainly to the management of their « internal and local affairs » and to their participation as citizens in national affairs on an equal footing with their fellow citizens without it leading to a total territorial break up which would happen should there be violation of the territorial integrity of the State Parties. Therefore this mode of attaining the right to self-determination should not at all be confused with that which issued from the Resolution 1514(XV) of the 14th December 1960 which is applicable to the populations and territories under colonial dominance or foreign occupation and to which the UN Declaration, which is the objective of this Advisory opinion, does not refer to at all.

In consequence, the ACHPR is of the view that the right to self-determination in its application to indigenous populations and communities, both at the UN and Regional levels, should be understood as encompassing a series of rights relative to the full participation in national affairs, the right to local self-government, the right to recognition so as to be consulted in the drafting of laws and programs concerning them, to a recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their culture. It is therefore a collection of variations in the exercise of the right to self-determination which are en-

tirely compatible with the unity and territorial integrity of State Parties.

From another angle, the question is also raised in terms of determining the exact meaning and scope of Article 9 of the UN Declaration, which stipulates: *“Indigenous populations and individuals have the right to belong to an indigenous community or nation, in conformity with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.”*

On this point, the document representing the aide-memoire of the African Group of November 2006 states that there is: *“a real danger that the tribal communities may interpret this clause as meaning that they can chose to belong to a country whilst they live in the territory of another”*.

The ACHPR observes that trans-national identification of indigenous communities is an African reality for several of the socio-ethnic groups living on our Continent and which co-habit in perfect harmony with the principle of territorial integrity and national unity. Furthermore it would be erroneous to think that certain trans-border cultural activities anchored in the ways of life and the ancestral productions of these communities can imperil the national unity and integrity of the African countries.

In this regard, trans-border identification of indigenous communities or nations has not resulted in any challenge to the question of citizenship or nationality being governed by the internal laws of each country.

On the right of the indigenous people to land, territories and resources

The UN Declaration states in its preamble that: *“the control by the indigenous people of events which concern themselves, their lands, their culture, territory and resources will enable them to consolidate their institutions, their culture and traditions and to promote their development according to their aspirations and needs.”*

In the comment relating to the provision contained in the draft aide-memoire of November 2006 by the African Group, it is stated that the said provision “is impracticable within the context of the countries con-

cerned. In accordance with the constitutional provisions of these countries, the control of land and natural resources is the obligation of the State”.

On this issue, Article 21(1) of the African Charter states that: “*all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*”

Similar provisions are contained in many other instruments adopted by the AU such as the African Convention on the Conservation of Nature and Natural Resources whose major objective is: “to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour” (preamble) and which is intended “to preserve the traditional rights and property of local communities and request the prior consent of the communities concerned in respect of all that concerns their access to and use of traditional knowledge,” which is similar to the provisions of Article 10, 11(2), 28(1) and 32 of the UN Declaration.

With regard to Article 37 of the UN Declaration on the rights of indigenous populations, it states: “the indigenous populations have a right to the effect that treaties, agreements and other constructive arrangements signed by the States or their successors be recognized, honored, respected and applied by the States”. In the aide-memoire of the African Group of November 2006, it is stated that “serious reservations on the possible repercussions of this article”.

On this point, the UN report on treaties and agreements signed between the States and indigenous peoples shows that apart from the case of the Massai in East Africa where the agreement with the British Colonial administration went through a judicial procedure, there is nowhere on the African continent where other indigenous communities have signed a historic agreement or treaty with a State. Moreover, these agreements have never resulted in the emergence of entities that have the characteristics of international sovereignty.

Consequently, it seems that this concern is predicated on fears relating to the reality of other continents, eg. North America, where countries recognize its validity and implement agreements signed with indigenous communities and people living on their territories.

On the right of indigenous peoples to establish separate political and economical institutions

This concern was expressed by referring to Article 5 of the UN Declaration on the rights of indigenous peoples which states that: “indigenous peoples have the right to maintain and consolidate their separate political, legal, economic, social and cultural institutions, by maintaining the right, if that is their choice, to fully participate in the political, economic and cultural life of the State”.

In its comments on the issue, the aide-memoire of the African Group of November 2006 is of the view that this article: “contradicts the constitutions of a number of African countries which, if adopted, would create constitutional problems for the African Countries”.

In this context, it is pertinent to reiterate the provision of Article 46 of the UN Declaration which guarantees the inviolability and integrity of Member States: “that nothing in this Declaration may be interpreted as implying for any State, people or group or person any right to engage in any activity or to perform any act contrary to the Charter of the UN.”

Moreover, Articles 5 and 19 of the Declaration appears to merely restate the right to culture and development and the duty of the state to take into account cultural rights while fulfilling its obligations to guarantee the right to development similar to the provisions of Article 22(1) and (2) of the African Charter.

It is appropriate in this regard to recall the definition given to the notion of culture by the Southern African Development Community (SADC) which means “...The totality of a people’s way of life, the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or a social group, and include not only arts and letters, but also modes of life, the fundamental rights of the human being, value system, traditions and beliefs”, as well as the pertinent provisions of the African Cultural Charter that make reference to it as “a balancing factor within the nation and source of enrichment among the different communities.”

Conclusion

On the basis of this Advisory Opinion, the ACHPR recommends that African States should promote an African common position that will inform the United Nations Declaration on the rights of indigenous peoples with this African perspective so as to consolidate the overall consensus achieved by the international community on the issue.

It hopes that its contribution hereof could help allay some of the concerns raised surrounding the human rights of indigenous populations and wishes to reiterate its availability for any collaborative endeavor with African States in this regard with a view to the speedy adoption of the Declaration.

