

AFRICAN UNION

الاتحاد الأفريقي

**African Commission on
Human & Peoples' Rights**



UNION AFRICAINE

UNIÃO AFRICANA

**Commission Africaine des
Droits de l'Homme et des Peuples**

48, Kairaba Avenue, P.O.Box 673, Banjul, The Gambia,
Tel: (220) 4377721 - Fax: (220) 4390 764 - achpr@achpr.org - www.achpr.org

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**

2007

INTRODUCTION

1. 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 prepared the draft.
2. During its consideration by the 3rd Committee of the United Nations General Assembly (UNGA) in New York, the adoption of this resolution was 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.
3. Having been seized of the issue, the Assembly of Heads of State and Government (AHSG) 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 peoples;
 - 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

4. 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))]
5. 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.
6. 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.
7. 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.”

8. 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.”

I. ON THE LACK OF A DEFINITION OF INDIGENOUS POPULATIONS

9. 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. 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”.
10. 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.**
11. 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]

12. 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, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model;
13. 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 indigene to the Continent.

II. ON THE QUESTION OF SELF-DETERMINATION AND TERRITORIAL INTEGRITY

14. In its preamble, the UN Declaration on the Rights of Indigenous Peoples 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."*
15. Article 3 of the Declaration specifies that Indigenous Peoples *"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 peoples 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.”

16. In reaction to these provisions, the aide-memoire of the African Group of November 2006 re-affirms: *“To implicitly recognize the rights of indigenous peoples 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”.*
17. 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”.*
18. 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.*
19. **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.
20. 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”.

21. 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.
22. 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.**
23. 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].
24. 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).

25. 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.
26. 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.
27. 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 entirely compatible with the unity, and territorial integrity of State Parties.
28. 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 peoples 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.”

29. 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”*.
30. **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.
31. **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.**

III. ON THE RIGHT OF INDIGENOUS PEOPLES TO LAND, TERRITORIES AND RESOURCES

32. The UN Declaration states in its preamble that: *“the 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 according to their aspirations and needs.”*

-
33. 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 concerned. In accordance with the constitutional provisions of these countries, the control of land and natural resources is the obligation of the State".
 34. 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."*
 35. 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.
 36. With regard to Article 37 of the UN Declaration on the rights of indigenous peoples, 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 its aide-memoire the African Group states having "serious reservations" on the possible repercussions of this article.
 37. 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.

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

IV. ON THE RIGHT OF INDIGENOUS PEOPLES TO ESTABLISH SEPARATE POLITICAL AND ECONOMIC INSTITUTIONS

39. 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".
40. 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".
41. 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."**

-
42. 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.
 43. 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

44. 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.
45. 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.

