June 2007

# Indigenous Peoples' Caucus

## *UN Declaration on the Rights of Indigenous Peoples*

## African Group of States' Proposed Revised Text: A Model for Discrimination and Domination

On December 20, 2006, the General Assembly adopted Resolution 61/178, which decided "to defer consideration of and action on the United Nations Declaration on the Rights of Indigenous Peoples to *allow time for further consultations*". It was also decided "to conclude its consideration of the Declaration, as contained in the annex to the present resolution, before the end of its sixty-first session" (mid-September 2007).

On May 15, 2007, the African Group of States submitted its Proposal to the President of the General Assembly to substantially revise the *UN Declaration*. These amendments are not consistent with international human rights law or African regional instruments. In many key instances, the *proposed revisions would violate the peremptory norm that prohibits racial discrimination*. The Proposal does not serve to improve the existing text of the *UN Declaration*.

We urge the African Group to resume the principled position that was declared at the Human Rights Council on June 27, 2006:

> The African Group expresses its concurrence with this Declaration and therefore gives it its full support. … [W]hile recognizing that further improvements to the Declaration have been advocated by some States, we would appeal to them to withdraw their reservations …

1. **African Proposal is inconsistent with African regional instruments.** According to the *Constitutive Act of the African Union*, the objectives of the Union shall be to: "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments". As illustrated below, the Proposal is not consistent with the *Constitutive Act*, the *African Charter* or international instruments, including the two human rights Covenants.

2. **African Proposal is inconsistent with General Assembly Resolution 61/178.** This Resolution highlights parameters that guide the call for "further consultations". These include: the purposes and principles of the *Charter of the United Nations*, in particular the principles of self-determination of peoples, respect for the territorial integrity of States and good faith regarding the fulfilment of the obligations assumed by States in accordance with the Charter. As illustrated below, the Proposal is discriminatory and not consistent with this GA Resolution.

3. **Integrity of the *UN Declaration* severely undermined.** The African Proposal fails to improve a single provision in the *Declaration*. Through more than 30 amendments, the Proposal gravely undermines the integrity of this human rights instrument. In particular, the

human right of self-determination – a core right in the *Declaration* – is deleted. All of the proposed amendments are discriminatory or otherwise inconsistent with international law.

4. **Over 20 years of discussion must not be jeopardized.** There have already been more than 20 years of discussions on the *Declaration* among States and Indigenous peoples in U.N. Working groups. This makes the *Declaration* one of the most discussed and studied declarations in U.N. history.

5. **No consultations with Indigenous peoples on African Proposal.** Despite requests, Indigenous peoples were not afforded democratic input into the process that led to this Proposal. In the 2005 *World Summit Outcome*, all heads of State committed themselves to "consult and collaborate" with Indigenous peoples on the *Declaration*.

6. **Indigenous peoples' human rights inappropriately subjected to "national laws".** The African Proposal seeks to limit the promotion of, and respect for, the inherent international rights of Indigenous peoples contained in the *Declaration* to those that are "in accordance with the national laws" of each State. This type of qualification is inserted in fourteen provisions in the *Declaration* and would create great uncertainty concerning Indigenous peoples' rights. In contrast, *none of the peoples' rights* in the *African Charter* are subjected to this same restriction. Therefore the Proposal creates a double standard, in violation of the prohibition against racial discrimination.

7. **International law prevails over domestic law and not the reverse.** An essential purpose of the *Declaration* is to have a strong and effective international human rights instrument that guides and encourages States to *raise* their domestic standards. The Proposal would radically transform the *Declaration* into an instrument that is controlled by, and subject to the arbitrary discretion of, each State. As determined by the General Assembly in its *Programme of Action for the Second International Decade of the World's Indigenous People*, the *Declaration* "shall not fall below existing international standards."

8. **Provisions on treaties, agreements, etc. are subject to a double standard.** The African Proposal restricts Indigenous peoples' right to enforce treaties and State duties to respect them. Treaty protections would be limited to treaties that already exist. No safeguards would be afforded to treaties concluded in the future. This would be discriminatory because international law requires all treaties to be respected.

9. **Rights of "peoples" wrongly compared to rights of "citizens".** The rights of "peoples" and "citizens" are distinctly different. The collective rights of peoples cannot be compared or equated to the individual rights of "citizens". To do so is a distortion of international law. The principle of "equal rights of peoples" in the *Charter of the United Nations* is reflected both in the *African Charter* and the *UN Declaration*.

10. **Discriminatory approach to defining "Indigenous peoples".** The African Proposal adds a paragraph that would give States the "*prerogative* to define who constitutes indigenous people in their respective countries or regions". This could result in Indigenous peoples in different regions globally being denied all of the rights in the *Declaration*. This approach runs counter to that set out in the Report of the Working Group of Experts on Indigenous Populations/Communities (adopted by the African Commission). The Proposal introduces a double standard; i.e. non-Indigenous peoples are determined by criteria under international law, whereas Indigenous peoples' status as 'peoples' would be made subject to the will of the State.

11. **Deletion of right of self-determination.** The African Proposal eliminates the right of Indigenous peoples to self-determination in Art. 3 of the *Declaration*. The right to freely determine their political status is also deleted. This would create a discriminatory double standard. The right of self-determination in Art. 3 is wholly consistent with the same right in the two international human rights Covenants and in the *African Charter*. African and other States have an affirmative legal obligation to promote and respect the realization of the right of self-determination, in conformity with the *UN Charter*.

12. **Self-government severed from the right of self-determination.** The African Proposal amends Art. 4 of the *UN Declaration* so that the right of Indigenous peoples to self-government may no longer be an exercise of their right of self-determination. In international law, self-government is a political dimension of the right of self-determination.

13. **Forced assimilation and destruction of culture legitimized.** In regard to Art. 8 of the *UN Declaration*, the African Proposal eliminates any effective mechanism for prevention of, and redress for, ways of life imposed on Indigenous peoples "by legislative, administrative or other measures". In addition, prevention of and redress for acts of land and resource dispossession or for forced population transfers could be exempted by the applicable State legal system. These amendments run counter to the central objectives of the *UN Declaration* and are in direct contradiction to the *African Charter*.

14. **Right to belong to an Indigenous community or nation dominated by excessive State limitations.** The African Proposal seeks to subject this right to more limitations than any other right in the *Declaration*. According to the Proposal, the right must be "exercised in accordance with the rule of law, respect for national boundaries and the principle of national and territorial integrity". In the *African Charter*, there is not a single right of "peoples" that has any of these restrictions. Nor is there any international human rights instrument that explicitly limits collective rights in this prejudicial manner.

15. **Proposed changes to rights to lands and resources legitimize ongoing dispossession.** The African Proposal suggests that Indigenous peoples' rights to lands, territories and resources in Art. 26 of the *Declaration* exist to the extent recognized in "provisions of national laws". This approach serves to legitimize the dispossession of such Indigenous land and resources rights. It is inconsistent with Art. 21 of the *African Charter* and thus creates a discriminatory double standard. The Proposal wholly ignores the ample jurisprudence of the UN Committee on the Elimination of Racial Discrimination. In Africa and all other regions of the world, traditional or customary occupation and use of land and resources is a basis for legal rights, contrary to the African Proposal.

16. **Military activities allowed to take place on Indigenous lands even if not justified by public interest.** The African Proposal deletes para. 1 of Art. 30 of the *Declaration*, which prohibited such activities "unless justified by a significant threat to relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned". The effect of this deletion is to legitimize military activities on Indigenous lands against the will of the Indigenous peoples concerned, regardless of the circumstances. This would allow gross violations of human rights and impunity associated with military use to continue.

17. **"Sovereignty" and "territorial integrity" puts emphasis on State dominance and not human rights.** In relation to the balancing provision in Art. 46, the African Proposal adds "sovereignty" and "territorial integrity". These two terms are not explicitly used in any

international human rights instrument or the *African Charter* to balance the rights of *peoples* with the rights of others. Consistent with the two international Covenants, Art. 46 provides that nothing in the *Declaration* "may be interpreted as implying … any right to engage in any activity or to perform any act contrary to the Charter of the United Nations". The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, highlighted in June 2006:

> In response to the concerns of some states regarding issues of *sovereignty* and *territorial integrity* … no country has ever been diminished by supporting an international human rights instrument; rather the contrary is the case.

18. **Principle of "territorial integrity" unjustly exploited to oppose *Declaration*.** The African Proposal deletes the right of Indigenous peoples to self-determination, yet inserts three references to "territorial integrity". This approach squarely contradicts the two human rights Covenants and the *African Charter of Human and Peoples' Rights*. In relation to the rights of *peoples*, none of these instruments include any specific reference to "territorial integrity". The *Declaration* goes beyond the *African Charter* in affirming that the right of self-determination must be exercised "in conformity with international law" (PP17). **In other words, "territorial integrity" *and any other principle* in international law can be invoked by States in relation to the exercise of the right of self-determination by Indigenous peoples – to the full extent recognized in international law.**

19. **Regional concerns require regional processes of implementation.** It is inappropriate for the African Proposal to address regional concerns by insisting upon increased State powers over Indigenous peoples and rights in the *UN Declaration*. The *Declaration* is a living instrument that has universal application to countless contexts in over 70 countries. It must be broadly crafted so as to be capable of addressing a wide range of circumstances both now and in the future. Regional concerns are most effectively addressed at the implementation stage, through regional processes. Consistent with the objective of harmonious and cooperative relations, these processes must ensure the full and effective participation of the Indigenous peoples concerned.

20. **Regional bloc voting exploited for political purposes.** The African Group may vote as a regional bloc to undermine the *UN Declaration* or prevent its adoption. Regrettably, this harmful strategy is being encouraged by Canada, New Zealand, Australia and United States. When used to prevent the advancement of human rights, regional bloc voting in the UN is highly damaging to the international human rights system. Such actions do not respect the purposes and principles of the *UN Charter* or the objectives of the *Constitutive Act of the African Union*.

21. **Politicization of human rights has political costs.** At the Human Rights Council, no African State voted against the *UN Declaration*. At the General Assembly, should African States choose not to support the *Declaration, this would be the first time that they have voted against an anti-discrimination instrument.* Such an unconscionable politicization of human rights against the most marginalized peoples in the world would carry huge political costs, especially for those States that would be violating their commitments as Human Rights Council members.

22. **No mandate to undermine the human rights of Indigenous peoples worldwide.** As has been demonstrated, the amendments in the African Proposal undermine the human rights of Indigenous peoples. According to the *UN Charter*, the United Nations, its member States and the General Assembly have no mandate or authority to undermine human rights. GA

Resolution 61/178 emphasizes this aspect, by underlining the purposes and principles of the *UN Charter*.

23. **Limitations of the AU Decision on the *UN Declaration*.** The "Decision on the United Nations Declaration on the Rights of Indigenous Peoples" made at the African Union's Assembly in January 2007 can only be interpreted in a manner that respects the *Constitutive Act of the African Union*, the *African Charter* and international human rights obligations of African States. The Decision expresses "full support and solidarity with indigenous peoples of the world". Thus, the decision to "maintain a united position" and "constructively work alongside other Member States" cannot compel African States to vote as a bloc against a human rights instrument.

24. **Importance of African States to play a supportive lead role.** In light of Africa's own history of colonization and discrimination, African States are in a position to play a lead role in the struggle to eliminate debilitating poverty and human rights abuses among the world's Indigenous peoples. A major historic step would be the adoption of the *Declaration* by the General Assembly. All African States are encouraged to collaborate with the *African Commission* in ensuring a strong positive voice in favour of Indigenous peoples' human rights. As emphasized by the Chairperson of the African Commission's Working Group on Indigenous Populations/Communities, Commissioner M. Kamel Rezag Bara:

> We firmly believe that the UN Declaration on the Rights of Indigenous Peoples as adopted by the Human Rights Council is essential for the survival, dignity and well being of Indigenous Peoples. The Declaration promotes equality and non-discrimination for all and is based on core international principles and values that embrace tolerance, peace and respect for the dignity of all cultures and peoples. Undoubtedly, this new international instrument will strengthen the international human rights system as a whole and will support the vital work that the African Commission on Human and Peoples Rights is undertaking for the promotion and protection of indigenous peoples rights. (Letter, dated November 20, 2006, to the Ambassador of the Republic of Namibia to the United Nations, acting for the African Group in New York)