RESPONSE NOTE

TO

“THE DRAFT AIDE MEMOIRE OF THE AFRICAN GROUP ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES”

Presented by an African group of experts

21 March 2007

1.0 Introduction

1.1. Africa has developed its own understanding of the concept of ‘indigenous peoples or communities’, whose history and demands are different from those of similar communities in other countries such as Australia, Canada or the USA. The African Group failed to make this distinction and therefore expressed unfounded concerns that the Declaration would, on the African continent, exacerbate inter-ethnic tensions, question territorial integrity, compromise states’ control over natural resources and conflict with national legislations.

1.2. The Declaration does not create new rights. On the contrary, it reaffirms rights that are already recognised by virtually all African constitutions and the African Charter. These rights are not, unfortunately, enjoyed by indigenous peoples or communities on an equal footing with the rest of their fellow citizens.

1.3. This Note responds to the African Group's concerns one by one. Each concern is highlighted in grey and followed by a corresponding response. The terms ‘peoples’ and ‘communities’ are used interchangeably, in accordance with the language of the African Commission on Human and Peoples’ Rights.

2.0 The African Group states that the absence of definition of the term ‘indigenous peoples’ would create problems for the implementation of the Declaration in Africa and could lead to inter-ethnic tension

2.1. A formal definition of the term ‘indigenous peoples’ is not essential for implementation of the Declaration in Africa for two major reasons:

2.2. Firstly, in Africa indigenous communities are clearly identified or identifiable by the rest of their fellow citizens and governments. These peoples or communities are largely hunter-gatherers and nomadic pastoralists whose methods of occupation and use of the land have not been legally recognised and protected. They include,

among others, the 'Pygmies' of the African tropical forests, the San or 'Bushmen' of southern Africa, the Hadzabe, Akie, Ogiek, Yaaku, Sengwer and other hunter-gatherer groups in East Africa, various pastoralist groups in eastern, western and northern Africa such as the Maasai, Samburu, Turkana, Barabaig, Mbororo, Toubou, Tuareg etc.[1]. Since colonial times, these communities have remained in a disadvantaged position, primarily because of the prejudice and negative stereotyping to which they are victim, their geographical isolation, their high levels of poverty twinned with illiteracy, and their ways of life considered to be uneconomic, uncivilised and unproductive for national economies.

2.3. In Africa, therefore, indigenous peoples' demands have the sole aim of obtaining equal enjoyment of rights and freedoms on the part of certain communities who have been long forgotten or overlooked for the sake of post-colonial development programmes and projects relating to, among other things, nature conservation, exploitation of natural resources, public infrastructure and industrial agriculture.

2.4. Furthermore, in Africa, the term 'indigenous peoples' does not mean first inhabitants as opposed to foreigners or communities that came from elsewhere. This specific meaning distinguishes Africa from other continents such as America and Australia, where native communities were virtually exterminated by foreigners who took their lands. Consequently, African states do not have any heavy past on their consciences that might justify reticence with regard to the Declaration.

2.5. The African Commission for Human and Peoples' Rights makes an important distinction to clarify two meanings of the term 'indigenous' in Africa. On the one hand, the Commission presents a general or strict understanding of this term, on the basis of which ***all Africans are indigenous to the continent***. On the other, the Commission gives a human rights-related definition of indigenous, which refers to sections of various African ***populations that remained behind after colonisation and continue not to enjoy all rights on the same footing with the rest of their fellow citizens***:

> *"[use of the term indigenous] is by no means an attempt to question the identity of other groups or to deny any Africans the right to identify as indigenous to Africa or to their country. In a strict sense all Africans are indeed indigenous to Africa… it is a term fighting for rights and justice for those particular groups who are perceived negatively by dominating mainstream development paradigms...One of the misunderstandings is that to protect the rights of indigenous peoples would be to give special rights to some ethnic groups over and above the rights of all other groups within a state. This is not the case. …the issue is that certain marginalised groups are discriminated against in particular ways because of their particular culture and mode of production. ..... The call of these marginalised groups to protection of their rights is a legitimate call to*

[1] The African Commission on Human and Peoples' Rights**.** 2006. *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's Work on Indigenous Peoples in Africa:* pp 14-16

alleviate this particular form of discrimination"[2]

2.6. Secondly, consistent practice reveals that African states do not use a formal definition of their indigenous communities or peoples in order to correct the historical injustices affecting them:

- Before Parliament, in 1999, President Thabo Mbeki stated: "*We must no longer permit those who have been refused their identity, such as the Khoi and the San, to continue living in the shadows, as historical vestiges on the verge of extinction".* Since then, encouraging measures have been taken, including a restitution of more than 20,000 hectares of the San's traditional lands.
- The Cameroon Constitution stipulates that: "*the State shall ensure the protection of minorities and preserve the rights of indigenous populations in accordance with the law"* and, without defining the word 'indigenous', this country has elaborated an Indigenous Peoples' Development Plan (IPDP) and a Plan for Indigenous and Vulnerable Peoples in the context of implementation of its Poverty Reduction Strategy Paper (PRSP).
- In the Republic of Congo, the draft law on indigenous 'Pygmy' peoples, currently under discussion, contains no definition of 'indigenous'. Nor does the call for the first international conference on indigenous peoples in Central Africa, organised by the government of the Republic of Congo, define who are indigenous.
- In Burundi, the Constitution guarantees a representation of indigenous Batwa 'Pygmies' in the Senate and Parliament without formally defining the word 'indigenous'. Article 7 of Protocol I of the Burundi Peace Agreement, on the basis of which the new Constitution was elaborated, called for an "*energetic promotion of marginalised groups, particularly the Batwa, in order to correct the imbalances existing in all sectors"*.
- Nor is there a felt need to define indigenous peoples in the Democratic Republic of Congo, where the forestry sector is undergoing reforms within which the indigenous 'Pygmy' communities enjoy a special place.
- There was also no need for a definition of indigenous in Kenya, where the Ogiek indigenous community was consulted in the context of a constitutional review.
- Nor in Morocco when a Royal Institute for Amazigh Culture (IRCAM) was established.

2.7. The African Commission on Human and Peoples' Rights confirms this pragmatic approach on the part of African states:

> *"A strict definition of indigenous peoples is neither necessary nor desirable. It is much more relevant and constructive to try to outline the major characteristics, which can help us to identify who the indigenous peoples and communities in Africa are."*[3]

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[2] The African Commission on Human and Peoples' Rights. 2005. *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*: pp 86-88

[3] The African Commission on Human and Peoples' Rights. 2005. *Report of the African Commission's*

2.8. In Africa, the term 'indigenous peoples or communities' is not aimed at protecting the rights of the '*first inhabitants that were invaded by foreigners'*. Nor does the concept aim to create hierarchy among national communities or set aside special rights for certain people. On the contrary, within the African context the term 'indigenous peoples' aims to guarantee equal enjoyment of rights and freedoms to some communities that have been left behind. This particular feature of the African continent explains why the term 'indigenous peoples' cannot be at the root of ethnic conflicts or of any breakdown of the Nation State, as emphasised by the African Commission on Human and Peoples' Rights:

> *"[It is not accurate to state that] talking about indigenous rights will lead to tribalism and ethnic conflicts. On the contrary, [the indigenous notion] should be welcomed as an interesting and much needed opportunity in the African human rights arena to discuss ways of developing African multicultural democracies based on the respect and contribution of all ethnic groups. Democracies where the breeding ground for ethnic violence and conflict will most likely be diminished."*[4]

2.9. The content of a recent mission report by the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people following a visit to Kenya in December 2006 constitutes further evidence that there is no need for a formal definition of the term 'indigenous' in Africa in order to resolve problems facing indigenous communities, who are generally easily identifiable in each country.[5]

3.0 The African Group states that the use of the term 'right of self-determination' in preambular paragraph 13 and articles 3 and 4 of the Declaration could be misrepresented as conferring a right of secession on indigenous peoples.

3.1. The African Commission on Human and Peoples' Rights specifies that the right to self-determination, as guaranteed by the African Charter, can be exercised by entities other than states, provided that such enjoyment is undertaken in perfect harmony with the territorial integrity of African Nation States.[6] This adaptation of the right to self-determination to the multicultural reality of the continent has been upheld in numerous communications, particularly 75/92 introduced by a community from Katanga Province in the Democratic Republic of Congo. What the Commission meant was that the Katanga peoples were obliged to exercise variants of the right to self determination that were compatible with the sovereignty and territorial integrity of Zaire.[7]

Working Group of Experts on Indigenous Populations/Communities: p 87

[4] The African Commission on Human and Peoples' Rights. 2005. *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*: pp 88-89

[5] A/HRC/4/32/Add.3, 26 February 2007

[6] Case of the Katanga People

[7] African Commission on Human and Peoples' Rights, Communication No. 75/92 (1995), *Katangese Peoples' Congress* v. *Zaire*, Eighth Activity Report 1994-1995, Annex VI, para. 6

3.2. The 2003 report of the African Commission's Working Group on Indigenous Populations/Communities takes the same line of reasoning and refers to aspects of the right to self determination that are no threat of any kind to the existing territorial integrity of African states:

> *"Collective rights, formulated as rights of 'peoples', should be available to sections of populations within nation states, including indigenous peoples, but that......the right to self-determination as entrenched within the provisions of the OAU Charter as well as the African Charter, cannot be understood to sanction secessionist sentiments. Self-determination of peoples must therefore be exercised within the inviolable national boundaries of the State with due regard for the sovereignty of the nation-state."*[8]

3.3. A large number of African states share this modern and functional understanding of the right to self-determination:

> This is, for example, the case of Section 235 of the South African Constitution, which states:
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> "*The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation"*.
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> Article 39 of the Ethiopian Constitution on the 'rights of nationalities and peoples' states also:
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> *"…A 'Nation, Nationality or People' for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory"*.

3.4. Furthermore, there is no one single indigenous community in Africa that is claiming statehood or threatening its country with secession. On the contrary, these peoples or communities are claiming aspects of the right to self-determination that do not threaten national boundaries, including the right to full participation in national life, the right to local self-government, the right to be consulted and to participate in the making of certain laws and programmes, the right of recognition and appreciation of their traditional structures along with the freedom to enjoy and promote their cultures. These variant aspects of the right to self-determination are different from secessionist demands that threaten the territorial integrity of states. Quite the contrary, the majority ***of Africa's indigenous communities consider dialogue with their States and Governments to be the most practical and harmonious way of addressing their concerns***. This option also justifies the

[8] The African Commission on Human and Peoples' Rights. 2005. *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*: p79 and pp 74-75

importance that Africa's indigenous communities give to the United Nations system and African human rights mechanisms.

4.0. The African Group states that the right of indigenous peoples or communities to maintain their traditional political, cultural, social and economic institutions, as guaranteed in Article 5 of the Declaration, is in contradiction with a number of African constitutional provisions.

4.1. Article 5 of the Declaration on the rights of indigenous peoples or communities to maintain their traditional political, cultural, social and economic institutions reaffirms another right that is already guaranteed by more than 80% of African constitutions, in the context of restoring traditional cultural values lost during colonial times. Numerous African countries recognise and indeed protect traditional institutions. These countries include Cameroon, the Democratic Republic of Congo, Uganda, Botswana, South Africa, Burundi, Niger, Zambia, Namibia and a number of other African countries[9]. It is therefore unjustified to fear that reinstating the right of indigenous peoples and communities to maintain traditional institutions would be in contradiction with African constitutions.

4.2. Despite these constitutional guarantees, and unlike other communities, indigenous peoples do not fully enjoy the right to traditional institutions. In Cameroon, for example, villages of the indigenous 'Pygmy' communities are considered as integral parts of the majority neighbouring villages and consequently 'Pygmies' have no right to a village chief, to a share in forest royalties or other benefits. In order to correct this injustice, the Cameroon government recently decided to promote the creation of 'Pygmy' villages in the context of its National Participatory Development Programme (PNDP). The commitment of the Cameroon government to rehabilitating its indigenous communities was further demonstrated by its hosting of the first indigenous-focussed seminar by the African Commission on Human and Peoples' Rights in September 2006. In the Democratic Republic of Congo, efforts are underway to ensure that indigenous 'Pygmies' enjoy the right to traditional institutions on an equal footing with other Congolese communities. It is the same case in Burundi and several other countries, such as Morocco.

4.3. Article 5 of the Declaration should thus be understood as supporting states' efforts to correct the historic injustices that continue to affect Africa's indigenous communities, by restoring their traditional political, legal, social and cultural institutions.

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[9] Part III of the Constitution of Botswana, article 207 of the new Constitution of the Democratic Republic of Congo, article 164 of the Constitution of Burundi, article 1(2) of the Constitution of Cameroon, sections 36 and 37 of the Constitution of Uganda, Sections 211 and 212 of the South African Constitution, article 102(5) of the Constitution of Namibia, part XIII of the Constitution of Zambia, article 55 of the Constitution of Niger.

5.0 The African Group is concerned that the right of indigenous people, as peoples and as individuals, to belong to an indigenous community or nation in accordance with the traditions and customs of the community or nation could endanger the inviolability of African borders

5.1. The right of indigenous peoples or individuals to belong to a community or a nation is an African reality that **coexists in perfect harmony** with the principles of territorial integrity and unity of African states. It is inaccurate to argue that some cross-border cultural activities by indigenous communities could endanger the national unity and territorial integrity of African countries, as guaranteed by the African Charter and the 1960 Declaration.

5.2. A practice that is currently emerging on the part of states in Africa reveals sub-regional or inter-State initiatives aimed at coordinated and concerted management of cross-border activities by indigenous peoples. Such is the case, for example, of the rights of indigenous 'Pygmies' living in the African tropical rainforests and who sometimes move through several different countries. States in the Congo Basin (Cameroon, Gabon, Central African Republic, Republic of Congo, Equatorial Guinea, Rwanda, Burundi, Democratic Republic of Congo, Sao Tomé and Principe) are in the process of regionalising the issue of indigenous 'Pygmies' in the context of the sub-regional management of Africa's tropical rainforests. Thus, for example, a representative of all the indigenous 'Pygmies' of Central Africa is the only non-state signatory of the statutes of the *Conférence sur les Ecosystèmes des Forêts Denses et Humides d'Afrique Centrale* (Conference on Ecosystems of the Dense and Humid Forests of Central Africa / CEFDHAC). In April 2007, the Government of the Republic of Congo will organise the first international conference on the indigenous 'Pygmy' peoples of Central Africa, with the wide participation of other governments and international organisations.

5.3. Sacred Maasai sites located on Tanzanian territory are regularly visited by thousands of Kenyan Maasai and yet this practice has never caused any concern for territorial integrity and national unity in these countries, who regularly consult on the issue. The Cameroon, Chadian and Central African governments regularly consult with each other on the seasonal migration (transhumance) of Mbororo indigenous communities, who cross national borders in search of livestock pasture and then quietly return to their countries of origin at the end of the season. Within the Economic and Monetary Community of Central Africa/CEMAC (Cameroon, Chad, Central Africa, Gabon, Equatorial Guinea and the Republic of Congo), there is a sub-regional committee that meets each year to define seasonal migration (transhumance) routes for nomadic pastoralist communities.

6.0 The African Group is concerned that if indigenous peoples were to enjoy the right to participate meaningfully in decision-making with regard to measures that may affect their rights, their way of life or their future, as provided by Article 19 of the Declaration, this could confer on them a power of veto over the laws of a democratic African legislature

6.1. Reality and the practice of states show that consultation of indigenous communities or peoples by their states on certain laws and regulations would not turn into a power of veto over national legislative processes.

6.2. Article 19 of the Declaration reaffirms the right of indigenous communities to participate effectively in the public affairs of their states and on the same footing with others groups or communities. This right is also guaranteed by all African constitutions and article 19 of the African Charter, which specifies:

> *"All peoples shall be equal; they shall enjoy the same respect and shall have the same rights."*

6.3. The African Commission on Human and Peoples' Rights also emphasizes the states' obligation to take measures of positive discrimination on behalf of disadvantaged groups and communities:

> "*Many structural factors are at the root [of the non-participation of indigenous people in Africa in the running of public affairs], particularly their lack of own educated professionals….their representation is in many cases either minimal or ineffective, hence the issues that concern them are not adequately addressed."*[10]

6.4. The need for positive special measures on behalf of certain vulnerable groups or communities was also upheld in the recent Botswana High Court ruling on the San/Basarwa (Bushmen) case against the Botswana government by Madame Justice Dow:

> *"I note the [Botswana government]'s position that it does not discriminate on ethnic lines, but equal treatment of un-equals can amount to discrimination"* [11]

6.5. Practice reveals once more that many African states are aware of this *de facto* exclusion of indigenous communities and have initiated different actions aimed at redressing the situation and guaranteeing indigenous peoples' participation in the decision-making process. A few examples are:

- **Burundi,** where article 164 of the Constitution sets aside three posts for the indigenous Batwa 'Pygmies' in the Senate and in Parliament,

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[10] The African Commission on Human and Peoples' Rights. 2005. *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*: p 46

[11] *Sesana, Setlhobogwa et al.* v. *Botswana (Att'y General)*, High Court of Botswana, Misca. No. 52 of 2002, judgment rendered 13 December 2006, at pp. 246-247, para. 33.

- **Republic of Congo** where the government is currently consulting the indigenous peoples on a draft law concerning them,
- **Cameroon** where the chapter of the Poverty Reduction Strategy Paper (PRSP) specifically devoted to indigenous peoples was submitted to them for comments,
- **Democratic Republic of Congo** where the indigenous 'Pygmy' peoples form a specific component within the Steering Committee for the implementing measures of the new Forest Code,
- **The Central African Republic** where the indigenous Aka and Mbororo communities were represented on the National Transition Council (CNT),
- **Mali** where various mechanisms have been established to guarantee the participation of the indigenous Tuareg peoples in public affairs,
- **Kenya** during the recent constitutional consultations and where, in a landmark decision, the Constitutional Court ordered the Electoral Commission of Kenya (ECK) to ensure political representation of the Ilchamus indigenous community, regardless of its numerical insignificance.

6.6. The terms 'free, prior and informed consent' used by the Declaration are aimed at preventing, respectively, a situation of *fait accompli*, of forced consent or of an agreement based on the ignorance of the indigenous communities concerned. These mechanisms are aimed at establishing a balanced dialogue, given the inequality of powers between states and one of the most vulnerable sections of their populations, namely indigenous communities.

6.7. The term 'consent' means that indigenous peoples must be involved in all aspects of planning, from beginning to end, and that there must be consultation at all stages. Indigenous peoples must be consulted and their participation must be continuous. Consent must be informed in terms of the nature, size, scope, duration, location, impact, reasons, purpose and specific procedures for the intended development project. Indigenous communities need to have an exact view of the project before it is adopted.

6.8. The UN Committee on the Elimination of Racial Discrimination (CERD) calls on states to :

> *"ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent"* [12]

6.9. The principle of 'free, prior and informed consent' should therefore be understood as a guiding principle for an effective dialogue between indigenous

[12] Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, (adopted at the Committee's 1235th meeting on 18 August 1997), para. 4d.

communities and states, within a context of "partnership and mutual respect", as stated by the last preambular paragraph of the Declaration.

7.0 The African Group is concerned that the customary land rights of indigenous peoples over their lands and territories, as provided by Article 26 of the Declaration, would be unworkable and even unconstitutional in Africa.

7.1. The aim of Article 26 of the Declaration is to correct another historic injustice suffered by Africa's indigenous communities or peoples, namely the lack of recognition of their customary land rights and their lack of compensation in cases of expropriation for public purposes.

7.2. Reaffirming the customary land rights of indigenous peoples or communities would not be in conflict with the constitutional principle of control and management of lands and natural resources by African states. Quite the contrary, this recognition will uphold the constitutional principle of equality before the law, given that identical rights are generally recognised to other communities or traditional chieftaincies in virtually all African states. In fact, in nearly all African countries, land management comes under both written law and customary law. The peaceful co-existence of the *imperium* of states over the lands and customary rights of traditional communities is functional thanks to a number of legal mechanisms, such as the rule of compensation in case of expropriation for public purposes, that of consultation and prior participatory socio-economic impact assessments which, unfortunately, are often not effective for indigenous communities or peoples.

7.3. A number of African constitutions and land laws or codes recognise the customary land rights of traditional communities:

- Article 51 of the Constitution of the Democratic Republic of Congo stipulates that: *"The State guarantees the right to individual or collective property, obtained in accordance with the law or custom*".
- Chapter IX of the Kenyan Constitution establishes 'Trust Lands' or land traditionally used and occupied by communities, which can be held by County Councils.
- The Cameroon Constitution provides that: « *The Republic of Cameroon … shall recognise and protect traditional values that conform to democratic principles, human rights and the law"*[13]. The 1974 Land Law of Cameroon specifies that customary occupation of the land may be converted into a land title under written law.
- The Constitution of Uganda provides that: *"(1) Land in Uganda belongs to the citizens of Uganda and shall vest in them …*[14] *…Land in Uganda shall be owned in accordance with the following land tenure systems- (a) customary; (b) freehold; (c) mailo; and (d) leasehold …"*[15] *and that: "all*

[13] Article 1(2) of Law No. 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972.
[14] Article 237 (1)
[15] Article 237 (3)

Uganda citizens owning land under customary tenure may acquire certificates of ownership".[16]

- Chapter 2 of the South African Constitution states that: *" A person or community dispossessed of property after 19 June 1913, as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress*".[17]
- In the same vein, the Ethiopian Constitution provides that: *"…Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by law*".[18]
- Section 14(3)c of the Botswana Constitution specifies that restrictions may be imposed "…*on entry into residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen…*".
- The Mozambican Land Law of 1997 also recognises land rights deriving from customary occupation and use of land by communities.
- The 1978 Nigerian Land Use Act recognises customary use and occupation of lands as a source of legal and binding rights/
- Benin's land law recognises and protects the same principle, as do the land laws of Burkina Faso, Mali, Morocco and various other West and North African countries.

7.4. Despite this constitutional protection of customary land rights by African countries, a number of indigenous peoples or communities on the continent, such as the 'Pygmies' and other nomads, are virtually the only groups that do not enjoy this right. This injustice is the result of a principle, included in the majority of African land laws inherited from the colonial period, by which lands not visibly occupied or used (clearings or houses) belong to no-one (*terra nullius*). This colonial rule of 'empty land' never took into consideration the fact that some communities, particularly hunter-gatherers and nomadic pastoralists, occupied and used land without leaving many visible signs. In this way, agriculture - linked to a sedentary lifestyle - was accepted as the only way of life compatible with post-colonial policies and within which other ways of life had to be subsumed.

7.5. The African Commission on Human and Peoples' Rights has also confirmed this lack of understanding of indigenous customary land use:

> "*promoted by the assumption that the land occupied by the pastoralists and hunter-gatherers is terra nullius or land belonging to no-one"*[19] and that "*large-scale infrastructure projects and company concessions – taking place in the name of national economic development – have displaced and impoverished*

[16] Article 237 (4) a.
[17] Section 7 of the Constitution of South Africa
[18] Article 40.5 of the Ethiopian Constitution
[19] The African Commission on Human and Peoples' Rights. 2005. *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*: p 21

many indigenous communities. In most cases, the affected marginalized indigenous communities are neither consulted nor compensated".[20]

7.6. A growing number of African states have begun efforts to correct the historic land injustice suffered by Africa's indigenous communities. In the Republic of Congo, for example, the draft law on the indigenous 'Pygmies' contains specific provisions on customary land law. South Africa recently returned to the indigenous San several thousand hectares of their ancestral lands. The Central African Republic recently demarcated forested areas traditionally used by certain sections of the Aka indigenous 'Pygmies'. Namibia has also taken land-related bold actions on behalf of its San indigenous peoples. A Botswana High Court recently recognised customary land rights to Bushmen (Basarwa) who had been unlawfully forced off their ancestral lands. Some higher Tanzanian jurisdictions have also taken similar positive decisions regarding the customary land rights of the indigenous Barabaig.

7.7. The practice of states in Africa thus shows that any correction of the historical land injustices that have particularly affected indigenous hunter-gatherer and nomadic pastoralist communities must begin with the states in question recognising the facts, followed by dialogue and mutually agreed corrective measures.

7.8. Several African countries still have large areas of land available. Moreover, indigenous peoples are better at land management, especially in naturally rich and vulnerable environments. Indeed, indigenous peoples or communities constitute an asset for conservation and eco-tourism in African countries.

8.0. The African Group has serious reservations on the implication that indigenous peoples have a right to demand respect for treaties, agreements and other constructive arrangements concluded with states or their successors, as provided by Article 37 of the Declaration.

8.1. The United Nations Study on treaties, agreements and other constructive arrangements between States and indigenous populations demonstrates that, apart from the case of the Maasai whose agreement with the British colonial administration became a matter of legal proceedings, there is no other indigenous community on the African continent that has historically concluded a treaty or agreement with a State. The African Group again seems to ground its fears on the reality of other continents or countries such as New Zealand and Canada.

8.2. This UN Study concluded that:

"In the course of his conceptual reflections, the Special Rapporteur was also led to underscore that, in the African and Asian contexts, the problematique of indigenous communities is rarely coextensive with that of the treaty relationship,

[20] The African Commission on Human and Peoples' Rights. 2005. *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*: p 26

(26) although it may well be that, among others, the case of the Maasai is an exception warranting further scrutiny, given their role in the negotiations leading to Kenya's independence."[21]

9.0 Conclusion

9.1. This Note-Response has shown that the African Group's concerns in relation to the Declaration were founded on a misrepresentation of the meaning and scope of the concept of 'indigenous peoples' in Africa.

9.2. The Note-Response reveals also that the sole objective of the Declaration is protected by and consistent with all African constitutions, the African Charter, and African states' practice, which guarantee equal enjoyment of all rights by all citizens, including disadvantaged groups.

9.3. This Note-Response ***calls upon African governments to reconsider their position and to support unconditionally the Declaration***, as adopted by the Human Rights Council in June 2006.

[21] E/CN.4/Sub.2/1999/20

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