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**EXCHANGE OF VIEWS ON THE DRAFT UNITED NATIONS
DECLARATION ON THE RIGHTS OF THE
INDIGENOUS PEOPLE**

(Item Proposed by the Republic of Botswana)

(Concept Paper)

EXCHANGE OF VIEWS ON THE DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF THE INDIGENOUS PEOPLE

1.0 INTRODUCTION

1.1 During the 61st Regular Session of the United Nations, the General Assembly considered, *inter alia*, the Report of the Human Rights Council. The Report contained the outcome of the First Session (19-20 June 2006), First Special Session (5-6 July 2006) and Second Special Session (11 August, 2006). On 29th June 2006, the Council had adopted by a recorded vote of 30 votes to 2 with 12 abstentions a draft United Nations Declaration on the Rights of Indigenous Peoples.

1.2 When the Report was considered in the Third Committee of the United Nations General Assembly, it was clear that the Declaration as adopted by the Human Rights Council did not enjoy consensus. It was observed that it would have been appropriate for a Declaration such as this one to enjoy the broadest possible consensus amongst Member States. Even if it was not possible to have unanimity, it was considered important that if the Declaration were to be adopted by vote, it should be by the largest number of Member States voting in favour.

1.3 The Declaration posed a number of fundamental constitutional and political problems to several Member States and in particular Member States of the African Union. In this regard, the African Group of States at the United Nations in New York presented an Aide Memoire to other regional groups outlining the nature of the problems that would make it difficult to implement the provisions of the Declaration. The African Group went further to propose a way out of this situation by suggesting that the General Assembly defer consideration and action on the Declaration to allow time for further consultations.

1.4 A copy of the Aide Memoire prepared by the African Group at the United Nations in New York is attached to this Concept Paper as Annex 1.

2.0 Issues of Concern

2.1 The main issues of concern which the African Group articulated in the Aide Memoire were as follows:

- the meaning of the concept of indigenous peoples;
- the meaning of self-determination;
- the exclusive ownership of land and natural resources;
- the implications of Articles 3, 4, 5, 6 and 7 on existing boundaries and territorial integrity of States; and
- conferring upon a tribal group or community within a State the powers to veto laws passed by a democratic legislature as implied by Article 19 of the draft Declaration.

2.2 On the basis of the issues substantiated in the Aide memoire, the African Group requested that the General Assembly defer consideration and action on the Declaration to allow time for further consultations. A number of consultations **and negotiations** were undertaken, under the leadership **of the African Group** Chairman for the Month of November 2006, the Ambassador and Permanent Representative of the Republic of Namibia to the United Nations, with the representatives of countries that strongly felt that the draft Declaration should be adopted without further delay. Those who supported the draft Declaration argued that the negotiations on the document had been going on for more than two decades. In this respect, it was stated that it was impossible to reach agreement **on all issues**. The African Group insisted that whilst negotiations might have been carried out over a long period, that was not sufficient justification to adopt a document which had many imperfections especially those that presented serious political and constitutional problems to African States. Over and above this, the draft Declaration was adopted by the Human Rights Council which is not a universal body. The United Nations General Assembly therefore had the right to decide as it deemed appropriate including deferring consideration and action on the draft Declaration.

2.3 The Third Committee could not reach agreement or consensus on the proposal to defer action on the Declaration. Consequently, the African Group presented amendments to the draft resolution which was intended to adopt the Declaration. The amendments of the African Group were that the General Assembly:

- a) “Decides to defer consideration and action on the United Nations Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon;
- b) Also decides to conclude its consideration of the Declaration before the end of its Sixty-first Session.”

2.4 The amendments **and resolution presented** by the African Group **to defer action on the Declaration was adopted by resolution 61/178**. This decision by the General Assembly opened the way for Member States and in particular African States to present specific proposals on how they wish to see their concerns addressed.

3.0 Conclusion

3.1 A fundamental weakness of the Declaration is that it seeks to address a problem that is very specific to particular regions of the world in a universal way. It does not take into account the reality of Africa and the fact that the vast majority of the populations of Africa are indigenous to the continent. The experience in Africa is different from that in, for instance, North and South America, Australia and New Zealand where populations of Europeans occupied land belonging to the indigenous peoples of these territories.

3.2 Africa is alive to the problems of communities in the continent who were historically disadvantaged for a variety of reasons. However, the solution is not

to address such situations by creating new problems or creating conditions in which there may be unintended consequences. The solution to these issues should not be defined on the basis of perception of individuals or countries that either have preconceived ideas of or have lack of knowledge of Africa.

3.3 The challenges which the people of Africa face are primarily those of poverty, lack of access to education, health facilities, portable water and the general comfort and conveniences brought about by advances in science and technology. Such problems cannot be effectively and fully addressed by dividing people on the basis of tribe or ethnicity. The provision of social amenities is at the centre of promoting and respecting the human rights of such communities.

3.4 In view of the foregoing, it is proposed that Africa maintain a strong and united position during the negotiations **aimed at amending the Declaration**. The objective should be to find a solution that can ensure that the issues of concern to Africa are addressed on the basis of the unique circumstances and experience of Africa. Africa must define itself and seek the support, partnership and cooperation of the wider international community in addressing African problems.

3.5 There should be no doubt that Africa firmly supports the rights of indigenous peoples of the world. Africans have themselves been subjected to grave injustices and the most egregious human rights violations by foreign occupying powers over the centuries. Africa's solidarity with indigenous peoples should therefore be principled and unequivocal. But such solidarity and support should be at the expense of unintended consequences to Africa's own peoples.

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Annex

DRAFT AIDE MEMOIRE

AFRICAN GROUP

**UNITED NATIONS DECLARATION ON THE RIGHTS
OF INDIGENOUS PEOPLE**

DRAFT AIDE MEMOIRE

AFRICAN GROUP UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE

1.0 Introduction

- 1.1. It is noted that the Declaration was adopted by vote at the Human Rights Council. It would have been desirable for a document as important to the international community as this one to be adopted by consensus. We should as a matter of principle and solidarity with indigenous peoples of the world aim for the adoption by the General Assembly of a document that enjoys broad support of all Member States of the United Nations.
- 1.2. It is clear that the current text does not enjoy consensus. For some Member States the Declaration as it stands poses fundamental constitutional and political problems that would prove impossible to implement. However, we believe that there is still room for consensus.
- 1.3. The concerns of the African Group relates to the following provisions of the United Nations Declaration on the Rights of Indigenous Peoples.

2.0 Definition of “Indigenous Peoples”

- 2.1 The absence of a definition of indigenous peoples in the text creates legal problems for the implementation of the Declaration. It is therefore important that the Declaration’s jurisdictional clause defining the rights holder should be included in the text.
- 2.2 It is equally important to bear in mind that Africa is still recovering from the effects of ethnic based conflicts. Allowing the Declaration to be adopted by the General Assembly without a definition of what is or who is indigenous would not only be legally incorrect, but can also create tensions amongst ethnic groups and instability within sovereign States. A policy document which imposes responsibilities must also define the nature and scope of such obligations.

3.0 Self-Determination

- 3.1 The principle of self-determination only applies to peoples under colonial and/or foreign occupation that is people residing in territories or areas which fall within the jurisdiction of the UN Trusteeship System, as enumerated in Article 77 of the United

Nations Charter as well as those non-self governing peoples within the purview of Article 3 of the UN Charter. Implicitly recognizing the rights of indigenous peoples to self-determination in preambular paragraph 13 and Articles 3 and 4 of the Declaration can be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity and the territorial integrity of any country.

- 3.2 The African Group is concerned that as presently drafted, the Declaration may be misunderstood as embracing and promoting self-determination within national States. Its very basis and content, namely ethnicity, culture and language could easily become a rationale for other groups seeking exclusivity within nation States. The United Nations has the responsibility to protect the integrity of nation States, it cannot be seen as abetting and promoting dynamics that are contrary to the Charter of the United Nations and that can unravel unity and territorial integrity of Member States. It is therefore important that a document adopted by the General Assembly should be watertight to leave no room for misinterpretation.
- 3.3 The right to self-determination as stated in Article 3 of the Declaration is lifted wholesale from the United Nations Declaration on Principles of International Law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations which was adopted on 24 October 1970 by Resolution 2625 (XXV). It is essential to provide balance in the text by including Articles 6 and 7 of the 1960 Declaration. Without those paragraphs the Declaration would not only bring new meaning to the concept of self-determination but would contradict other international instruments adopted before it.

Articles 6 and 7 of the 1960 Declaration

6. ***Any attempt aimed at the particular or total disruption of the national unity and territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations; and,***
7. ***All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.***

- 4.0 Article 5 of the Declaration States that *Indigenous peoples have the right to maintain and strengthen their political, legal, economic, social and cultural institution, while retaining their rights to participate fully, if they choose to do so, in the political, economic, social and cultural life of the State.*** This article contradicts constitutions of a number of African countries and if adopted would therefore create constitutional problems for African countries.
- 5.0 Article 9 of the Declaration “*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 nations concerned. No discrimination of any kind may arise from the exercise of such a right*”.** The current borders of African countries were artificially drawn by colonial powers. The borders cut across or divided members of the same tribal communities. There is a real danger therefore that this clause can be interpreted to mean that tribal communities can choose to belong to one country whilst they are inhabitants of another.
- 6.0 Article 19 of the Declaration provides that “*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*”.** The African Group is concerned that this can be interpreted to confer upon a sub-national group a power of veto over the laws of a democratic legislative. The Declaration must be explicitly clear that this is not the intended objective.
- 7.0 Article 26 of the Declaration provides that “Indigenous Peoples have the right to the lands, territories and resources which they have traditionally owned, occupied, or otherwise used or acquired”.** This provision will be unworkable in the context of the countries concerned. In accordance with the constitutional provisions of these countries, control over land and natural resources is the responsibility of the State.
- 8.0 Article 37 of the Declaration provides that “Indigenous people 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”.** The right of recognition, observance and enforcement of treaties and agreements is the responsibility of the State. The African Group has serious reservations regarding the implications of this Article.
- 9.0 Conclusion**
- 9.1 It is against this background that the African Group is seeking deferment on the adoption of this Declaration. The African Group is

very sensitive to the concerns that this document has been on the negotiating table for a long time. It not our intention to prolong negotiations of the text but as we have stated at the beginning we are committed to ensuring that the United Nations adopts a document that enjoys broad support and that gives real meaning to the right of the Indigenous People of the World.

- 9.2 Others have raised the point that the Declaration is not a legally binding document therefore we can just choose to ignore some of the concerns the Group has with this document. It must be appreciated that for the common people in the streets of Africa, there is no difference between a politically non-binding Declaration and a Treaty. What is important to them would be the fact that Governments or the United Nations have committed themselves to specific actions.
- 9.3 Moreover, after adoption the Declaration would form part of international customary law and Member States would be expected to abide by it. Political Declarations are in themselves important because Member States should make political pronouncements which they intend to implement. In this respect, it would be inappropriate to adopt the Declaration with its shortcomings simply because it is considered to be a Declaration and therefore not legally binding. Member States must be concerned about how they can give concrete meaning to the Declaration. If it is envisaged that there would be legal and constitutional implications arising from the adoption of the Declaration then the time to address such matters is before and not after adoption.
- 9.4 The African Group is proposing that we seek deferment on action on the Declaration for one year to allow the time to address the concerns raised. We propose that we introduce a resolution containing the following language for action at the Third Committee. We request your understanding and cooperation by giving us an opportunity to address potential problems inherent in this Declaration.

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