**CONCEPT NOTE**

**Barriers (structural, political, economic and social) to, and the enabling conditions necessary to promote, constructive dialogue between states and indigenous peoples for the *establishment* of treaties, agreements and other constructive arrangements, including peace accords and reconciliation initiatives, and their constitutional recognition**

**Introduction**

Indigenous Peoples account for most of the world’s cultural diversity. Throughout the world, approximately 370 million Indigenous Peoples occupy 20 per cent of the earth’s territory. It is also estimated that they represent as many as 5,000 different indigenous cultures. The Indigenous Peoples of the world therefore account for most of the world’s cultural diversity, even though they constitute a numerical minority. In September 2007, the United Nations general assembly adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP). The declaration accorded specific fundamental rights to Indigenous Peoples, specifically, rights to their lands, territories, natural resources, culture, identity and language, including health and education, and to determine freely their political and economic development.

Against the provisions of UNDRIP, the rights of Indigenous Peoples continue to be violated in various regions of the world by States and non-state actors, and as a result Indigenous Peoples continue to face physical, and psychological violence, as well as discrimination, exclusion, forced evictions, illegal expropriation of their resources and traditional knowledge. Article 8 of UNDRIP provides that States shall provide effective mechanisms for prevention and redress for acts that undermine Indigenous Peoples rights; article 13 provides that States shall take effective measures to ensure that Indigenous Peoples right to transmit their cultures and languages is protected and to ensure that Indigenous Peoples can understand and be understood in political, legal and administrative proceedings; article 19 provides that States shall consult in good faith with Indigenous Peoples through representative institutions to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measure that may affect them. Article 26 provides the right to land, territories and resources.

Whereas human rights treaties recognize the rights of Indigenous Peoples and provide that States must consult Indigenous Peoples in good faith in order to obtain their free, prior and informed consent pertaining to projects that can have an impact on their traditional ways of life, that may threaten the natural resources they have traditionally cultivated, and continue to depend upon, or that can lead to the displacement of their populations; whereas such consultations should take place before legislative and administrative measures are adopted or applied, in accordance with the right to self-determination of Indigenous Peoples, which implies their right to own, use, develop and control their lands, territories, waters, coastal ways and other resources; whereas Indigenous Peoples have a right to freely determine their political status, freely pursue their economic, social and cultural development and freely use their natural wealth and resources, and in no case are to be deprived of their means of subsistence; they remain greatly marginalized and impoverished in different parts of the world.

Apart from State repression, contemporarily issues, particularly of climate change- deforestation, pollution and loss of biodiversity presents serious threats to Indigenous Peoples due to their dependence on the environment and the resources of the lands and territories. In light of the above, there is a well-founded concern as to how States and Indigenous Peoples can reach mutually constructive agreements and treaties, and also establish mechanisms (policies and strategies) that will recognize, respect, protect and preserve Indigenous Peoples’ rights and ways of life. I believe that this concern informed the choice of the EMRIP 2021 study.

**Barriers to Constructive Dialogue Between States and Indigenous Peoples**

1. **Recognition**: This is a fundamental challenge facing Indigenous Peoples, particularly those of African descent. African government have failed to recognize the existence of Indigenous Peoples in their territories, claiming that all African are indigenous and therefore no particular ethnic identity or group should be accorded special recognition and rights as Indigenous Peoples. In December 2010, the Republic of Congo became the first and yet, the only African country that has promulgated national legislation recognizing and protecting the rights of the country’s Indigenous Peoples through Section 4 (6) of the national Constitution which provides for the protection of minorities. In Burundi, the government has been applauded for giving the Batwa Indigenous People a representative seat in parliament, however, their representation in parliament is based on the provisions of Section 16 of the 2005 Burundi Constitution, which provides for the representation of minority groups in the parliament and not necessarily because of their peculiarity as Indigenous Peoples. In South Africa, the government and the representatives of the National Khoi-San council have been ‘negotiating’ for the recognition of South Africa’s Indigenous Peoples for about two decades, yet the issue remain unresolved. Without recognition, it is impossible to promote and/ or strengthen any form of constructive dialogue between States and Indigenous Peoples for the establishment of treaties, agreements and other constructive arrangements.
2. **The misconception of Indigenous Peoples Right to Self-determination:** The reason why most African States refused to recognize Indigenous Peoples within their territories is due to misconceptions on the issue of “right to self-determination” (article 3 of UNDRIP). Some African governments hold the incoherent view that giving recognition to Indigenous peoples will be a prelude to self-determination and emancipation. In 2006, the African group within the United Nations challenged the Draft Declaration on the Rights of Indigenous Peoples on the basis that indigenous rights as contained in the declaration would affect the territorial integrity of African States - a position that is held by many African States and governments to date. The assumption is that recognizing the Karamojang and Batwa in Uganda, the Endorois in Kenya, the Ogoni in Nigeria, the Bushmen in Botswana, the Twa in Burundi, Rwanda, DRC and many other Indigenous groups and communities in Africa will escalate the self-determination race in the continent. This position favors States belligerency against Indigenous Peoples and their decision to relegate Indigenous peoples and their concerns outside of the dominant state systems.
3. **Land Laws and Regulations:** Indigenous Peoples’ have an exceptional attachment to land, which is the reason why the rights to lands, territories and resources are at the heart of Indigenous Peoples’ struggles around the world. Indigenous Peoples’ relationships to ancestral lands are the source of cultural, spiritual and social identity, and form the basis of their traditional knowledge systems. Only a few countries recognize Indigenous Peoples’ land rights, but even in those countries, land titling and access procedures are not very fair to Indigenous Peoples. In most African States, access to land is the prerogative of the government, as a result Indigenous Peoples lands have been encroached and forcefully taken by the government. Laws concerning access to land in most African States provides that “land belongs to the government”, a caveat that empowers governments and broaden their appetite for Indigenous peoples’ land. Such obnoxious laws on land rights have propelled the eviction of Indigenous Peoples from their ancestral land in places like Uganda, Kenya, Zambia among others.

**Enabling Environment for Constructive Dialogue Between States and Indigenous Peoples**

It is difficult to ascertain an enabling environment for constructive dialogue between States and Indigenous Peoples without States recognizing the existence of Indigenous Peoples within their territory. Every constructive engagement (dialogue, negotiation and agreement) between States and Indigenous People, particularly in Africa must seek recognition as the starting point. However, in the year 2000, the African Commission on Human and Peoples’ Rights (ACHPR) inaugurated the Working Group of Experts on Indigenous Populations/ Communities. The mandate of the working group was to assess and determine the situation of Indigenous peoples within the African continent. The working group report documented different levels of abuse and rights violations by States against Indigenous Peoples and call for redress. Observably, nothing much has actually changed in terms of State belligerency against Indigenous Peoples of Africa, particularly their right to lands, territories and resources. Howbeit, the move provides an opportunity that can be constructively utilized at regional level to pressure States to recognize the existence of Indigenous Peoples in their territories, which can then pave way for constructive engagement between the State and Indigenous Peoples.

**Conclusions**

Indigenous Peoples face a lot of challenges ranging from non-recognition by governments, to marginalization and poverty. However, lack of recognition seem to be the basis for violation of the provisions set out in UNDRIP by African States and governments. Therefore, any form of constructive engagement batten States and Indigenous Peoples must first seek the recognition of the existence of Indigenous Peoples and an acknowledgement of their uniqueness and rights. In Africa, efforts should be channeled on using the AU and its organs to compel member States to recognize and respect the rights of Indigenous Peoples within their territories. Similarly, the ambiguity surrounding the right to self-determination should be demystified, while the clash between the provisions of UNDRIP and national laws on land rights (access and control) should be harmonized in a way that recognizes the poignant attachment that Indigenous Peoples have for land.

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