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Professor James Anaya
Special Rapporteur on the Situation of Human Rights
and Fundamental Freedoms of Indigenous People
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Re: Status of the Afar People

Dear Professor Anaya:

I have been asked by representatives of the Afar people in Eritrea to express an opinion as to whether the Afar people may be considered an “indigenous people” within the meaning usually ascribed to that term in international law.

1. The Concept of Indigenous People in International Law

There is no single definition of the concept of indigenous people in international law. The United Nations Declaration on the Rights of the Indigenous Peoples, adopted in 2007, does not contain any definition of the peoples to whom it applies. Nevertheless, useful indications may be gleaned from other international instruments, from the decisions of international courts, from the practice of States and from the writings of United Nations rapporteurs and other authors. Moreover, an analysis of the major categories of rights recognized to the indigenous peoples in international law provides an idea of the purpose of the special treatment of the indigenous peoples and such purpose may help to understand how to define the categories of persons to whom those protections apply. Last, but not least, the views of the group concerned must be given special consideration in the exercise.

The most important binding international treaty concerning the indigenous peoples is the International Labour Organization’s Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. Article 1 of that Convention defines the categories of groups to whom it applies:

tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

An influential definition of the indigenous peoples was provided by José Martínez Cobo, the United Nations Special Rapporteur on Discrimination Against Indigenous Peoples:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems¹.

The past Chairperson of the United Nations Working Group on the Indigenous Peoples, Erica-Irene Daes, conducted an in-depth study of the question of the identification of the indigenous peoples. She came to the following conclusions:

69. In summary, the factors which modern international organizations and legal experts (including indigenous legal experts and members of the academic family), have considered relevant to the understanding of the concept of "indigenous" include:

- (a) Priority in time, with respect to the occupation and use of a specific territory;
- (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and

¹ J.R. Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, at p. 379, as cited in E.-I. Daes, *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people"*, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996), at para. 24, online: [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/2b6e0fb1e9d7db0fc1256b3a003eb999/\\$FILE/G9612980.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/2b6e0fb1e9d7db0fc1256b3a003eb999/$FILE/G9612980.pdf) (accessed 19 March 2011).

(d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.

70. The foregoing factors do not, and cannot, constitute an inclusive or comprehensive definition. Rather, they represent factors which may be present, to a greater or lesser degree, in different regions and in different national and local contexts. As such, they may provide some general guidance to reasonable decision-making in practice.²

The definitions put forward by ILO Convention No. 169 and by Mr. Martínez Cobo emphasize subjection to colonialism as one important defining feature of the indigenous peoples. However, as Ms. Daes notes, any definition should be flexible enough to allow for its application in various parts of the world and historical contexts. She rejected any distinction based on geographical proximity between colonizer and colonized:

In the opinion of the Chairperson-Rapporteur, this makes an unjustified distinction between long-distance aggression and short-distance aggression, and it is logically impossible to establish a cut-off distance. Moreover, it assumes that the cultural differences that exist between peoples is a simple linear function of distance, such that mere proximity creates a presumption of shared values. The information provided to the Working Group on Indigenous Populations each year contradicts the validity of that assumption.³

Thus, the definition of indigenous peoples encompasses many forms of marginalization or non-dominance that go beyond the classical case of colonization by an overseas power. In this connection, Professor Kingsbury gives numerous examples of Asian states that recognize rights to groups that are explicitly or implicitly considered to be indigenous.⁴ More specifically, the applicability of the concept of indigenous peoples in Africa is increasingly recognized, in particular by the African Commission on Human and Peoples' Rights, which commissioned an expert report on the subject⁵ and recently rendered a decision recognizing the indigenous status of the Endorois people of Kenya.⁶

One particularly important distinctive characteristic of the indigenous peoples is the importance of their relationship to their lands for their culture, way of life and identity. This explains the importance given to land rights in instruments such as the United Nations Declaration on the Rights of Indigenous Peoples or the International Labour Organization's Convention No. 169. It

² E.-I. Daes, *supra*, note 1.

³ *Ibid.*, at para. 63.

⁴ B. Kingsbury, "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 Am. J. Int'l L. 414.

⁵ Report of the African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities, U.N. Doc. E/CN.4/Sub.2/AC.5/2005/WP.3 (2005).

⁶ Communication 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, online: http://www.achpr.org/english/Decison_Communication/Kenya/Comm.%20276-03.pdf (accessed 19 March 2011), at paras. 146-162.

is interesting to note that the Inter-American Court of Human Rights held that the Saramaka people of Surinam were a “tribal people” having the same rights as an indigenous people, essentially because of their close relationship to their lands.⁷ In the same fashion, the African Commission noted that “there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples – that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture.”⁸

In her working paper, Ms. Daes rightly mentions that racial considerations should play no role in the definition of an indigenous people. However, it may very well be that racial motivations were instrumental in the “experience of subjugation, marginalization, dispossession, exclusion or discrimination” that indigenous peoples have suffered. Thus, the fact that a people was considered “backwards,” “primitive” or “pre-modern” by its oppressors or the colonial power may be a relevant factor in deciding whether that people is indigenous.

Finally, considerable weight should be given to the views of the people concerned. This “indigenous jurisdiction over indigenous identity”⁹ is a corollary of self-determination and is expressly recognized by Article 1, para. 2, of the International Labour Organization’s Convention No. 169, which states that “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.” Moreover, article 33 of the United Nations Declaration on the Rights of Indigenous Peoples states that “Indigenous peoples have the right to determine their own identity [...]”

2. Application to the Afar People

Using the criteria laid out by Ms. Daes as guidelines, I now review the situation of the Afar people. My analysis is based solely on the literature cited herein. I have not conducted any independent factual research.

The first criterion is the prior occupation of a defined territory. In this regard, there is general agreement that “the Afar people have a distinct cultural and linguistic identity of their own and inhabit a well-defined territory in the African Horn; an area commonly referred to as the Afar Triangle which is divided between Ethiopia, Eritrea and Djibouti.”¹⁰ Their presence in the region has been clearly documented since the 13th century,¹¹ and it is asserted that their ancestors “settled farm land in the Ethiopian highlands some time before AD 1000 and primarily raised livestock. Sometime after this they began a gradual transition to a more nomadic lifestyle and

⁷ *Case of the Saramaka People v. Surinam*, 28 November 2007, Series C, No. 172, at para. 86.

⁸ Communication 276 / 2003, *supra*, note 6, at para. 154.

⁹ A phrase that I coined in a different context but that is equally applicable here: S. Grammond, *Identity Captured by Law: Membership in Canada’s Indigenous Peoples and Linguistic Minorities* (Montreal and Kingston: McGill-Queen’s University Press, 2009) at 36.

¹⁰ Y.M. Yasin, “Political History of the Afar in Ethiopia and Eritrea”, (2008) 42 *Afrika Spectrum* 39 at 42; K. Shehim, “Ethiopia, Revolution, and the Question of Nationalities: the Case of the Afar” (1985) 23 *Journal of Modern African Studies* 331 at 332.

¹¹ D. Morin, *Dictionnaire historique Afar (1288-1982)* (Paris: Karthala, 2004) at 11-16.

moved to the area they currently occupy.”¹²

The second criterion is the voluntary perpetuation of cultural distinctiveness. The Afar have their own distinctive language, the origins of which may be traced as far as five millennia ago.¹³ They are nomadic pastoralists, which means that their close connection with the land is an integral part of their identity.¹⁴ They also have distinctive economic pursuits, such as the extraction of salt from the saline lakes of the Afar depression, which they trade around the region.¹⁵ Their religion is a form of Islam combined with more traditional beliefs, in contrast to their predominantly Christian neighbours.¹⁶ They have their own political structures, including clans as well as sultanates that used to exert authority over large parts of their territory.¹⁷

The third criterion is self-identification and identification by others as a distinctive community. Of course, their language, religion and traditional political institutions contribute a long way to the recognition of their distinctive identity. They were never integrated in the Ethiopian mainstream. Renowned jurist Jacques Vanderlinden, who wrote about them in the 1970s, called them “Ethiopians at the margins:” their geographical and cultural isolation meant that they remained for a long time outside the practical reach of the Ethiopian state.¹⁸ It should also be noted that the Ethiopian state viewed them as backwards and in need of adopting a modern way of life, an attitude typical of colonial powers towards the indigenous peoples. More recently, the new Ethiopian federal constitution makes the part of the Afar territory that remains in Ethiopia a self-governing province. Moreover, the report of the African Commission of Human and Peoples’ Rights Working Group of Experts on Indigenous Peoples/Communities mentioned the Afar as an example of pastoralist indigenous peoples.¹⁹

The fourth criterion is a situation of non-dominance. Until the second part of the 19th century, the Afar remained largely independent from outside control. Then, the increasing influence of the colonial powers and the independence movement eventually resulted in the Afar territory being partitioned among Ethiopia, Eritrea and Djibouti.²⁰

¹² B. Coudenys, “The Afar People”, online: Danakil Expeditions <<http://www.xplore360.com/danakil/afar.html>>. See also H. Gamal A-Shami, “Afaraf (Afar language) & its dictionary preparation”, online: Afarfriends.org <http://www.afarfriends.org/Dok%20t%20websida/Afar_lang/Afaraf%20&%20its%20dictionary%20preparation.pdf> at p. 2 : “it is evidently clear that they have lived in it, at least long before the 7th century A.D. that marks the coming of Islam, the religion to which they all belong.”

¹³ D. Morin, *op. cit.*, note 11, at 12.

¹⁴ G. Flood, “Nomadism & Its Future : The ‘Afar’”, (1975) 6 RAIN: Royal Anthropological Institute of Great Britain 5.

¹⁵ J. Vanderlinden, *L’Éthiopie et ses populations* (Brussels: Éditions Complexe, 1977) at 166.

¹⁶ N.H. Kurdi, *L’Érythrée: Une identité retrouvée* (Paris : Karthala, 1994) at 28.

¹⁷ For a discussion, see J.T. Harbeson, “Territorial and Development Politics in the Horn of Africa: The Afar of the Awash Valley” (1978) 77 African Affairs 479.

¹⁸ J. Vanderlinden, *op. cit.*, note 15, at 163-164.

¹⁹ *Supra*, note 5 at 10.

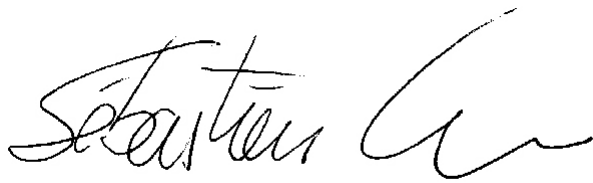
²⁰ Y.M. Yasin, *supra*, note 10, at 43-44.

In the 1960s, the Ethiopian government granted land in the Afar territory for agricultural purposes, despite the fact that those lands were used by Afar pastoralists. This process was described as enabling “the Highlanders of Ethiopia to continue the policy of internal colonization begun under Melenik II (died 1913) and to establish capital-intensive, highly profitable agricultural units in the Awash valley.”²¹ In legal terms, this process was facilitated by the fact that Ethiopian law did not recognize the title of the Afar pastoralists to the land they use for grazing purposes.²²

After the secession of Eritrea from Ethiopia in 1991, “the Afar in the newly born Eritrea were subjected to the authoritarian rule of the EPLF.”²³ The Afar have long been at odds with Eritrea’s president Afewerki, mainly due to their Afar interest in maintaining traditional relations with neighbours and relatives in other States now separated by international borders. Eritrea’s policies also compromised Afar ability to live off of their traditional land and resources. The Afar People are victims of assimilation, through Eritrea’s “one-state” policy, which aims “to create a new-brand of Eritrean nationalism with no or little understanding of diversity.”²⁴ One of the Eritrean government’s strategies to further alienate the Eritrean-Afar from the Afar now in Djibouti and Ethiopia was to change the “Latin-scripts of the Afar alphabets used for decades among the Afar people across the Horn region.”²⁵

As a result, I am of the opinion that the Afar people show all the characteristics usually associated with the concept of indigenous people in international law. Hence, their assertion that they are indigenous and that they are entitled to the rights and to the protection afforded to indigenous peoples in international law should be respected.

Yours sincerely,



Sébastien Grammond, D.Phil.

²¹ G. Flood, *supra*, note 14.

²² J.T. Harbeson, *supra*, note 17, at 488-489.

²³ Y.M. Yasin, *supra*, note 10, at 58.

²⁴ *Ibid.*

²⁵ *Ibid.*