

**Supplementary Report
on the
Democratic Republic of Congo's Periodic Report to the
African Commission on Human and Peoples' Rights**

(State Party Report dated June 2007)

**The rights of indigenous "Pygmy" peoples in the Democratic Republic of
Congo**

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EXECUTIVE SUMMARY

This report has been prepared by the Centre d'Accompagnement des Autochtones Pygmées et Minoritaires Vulnérables and the Forest Peoples Programme to provide the African Commission on Human and Peoples' Rights (the Commission) with information on the human rights of indigenous peoples in the Democratic Republic of Congo (DRC), and observations on DRC's eighth, ninth and tenth periodic reports, dated June 2007, and due to be examined by the Commission at its 43rd Ordinary Session in May 2008 (Periodic Report).

DRC ratified the African Charter on Human and Peoples' Rights (the Charter) on 20th July 1987 and is therefore obliged to respect and guarantee the rights contained therein. However, it has derogated from this duty with regard to indigenous peoples. In its Concluding Observations on DRC in 2003, the Commission strongly advised the State to "*put in place as quickly as possible legislation recognising the rights of the Pygmy/Batwa people.*" However, the State has not implemented this legislation and still does not recognise these rights. As a result, indigenous peoples experience daily violations of their human rights.

Originally, indigenous peoples were semi-nomadic hunter-gatherers living in the high mountainous forests of the Great Lakes region of Central Africa. It is widely accepted that they were the first inhabitants of the region, later joined by farmers and pastoralists. The different groups of indigenous, so called "Pygmy" peoples, in DRC include: the Mbuti (the Basua, Efe and Asua) who live in the east, particularly in Ituri; the Twa, who live along the border with Rwanda and in the Tumba region of Equateur; and the Cwa, who live in the forests and savannah around the Kasai lakes. Other groups living in the DRC's forests include the Aka, who live along the north-west border with the Republic of Congo. The total population of "Pygmy" peoples in DRC is unknown and estimates vary between 250,000 and 600,000 individuals.

"Pygmy" peoples identify as indigenous and the Commission recognises them as indigenous. However, in violation of Article 20 of the Charter, DRC does not recognise "Pygmy" peoples' identity and the Periodic Report makes no mention of it.

Despite a plethora of national laws prohibiting it, "Pygmy" peoples experience systematic discrimination, and to a much greater degree than any other group in DRC. As result, they are subject to persistent violations of their rights guaranteed by Articles 2, 3, 5 and 19 of the Charter. Because of prejudice and stereotyping, the different factions involved in the conflict have perpetrated horrific acts against "Pygmy" peoples. This violence is often linked to perpetrators' prejudiced belief that as inhabitants of the forest, indigenous peoples have special powers. "Pygmy" women and girls experience multiple forms of discrimination and serious violations of their human rights contained within the Charter. For example, because of their ethnicity they are subject to specific sexual attacks which rapists justify by claiming that sexual relations with a "Pygmy" woman can cure backache.

The Periodic Report makes no reference to "Pygmy" peoples' socio-economic situation; however because of discrimination and their lack of resources they do not enjoy equal access to health and education services, and experience daily violations of their rights guaranteed by Articles 16 and 17(1) of the Charter. As a result, they suffer extreme levels of poverty, ill-health and illiteracy compared to the national population.

“Pygmy” peoples depend on their lands and resources for their well-being and their cultural, economic, physical and spiritual integrity. However DRC has neither delimited nor demarcated “Pygmy” peoples’ lands and territories, and Congolese law contains no provisions that guarantee their free, prior and informed consent to activities that concern them, including on their lands. In violation of Articles 14, 20, 21, 22 and 24 of the Charter, protected areas and extractive industry concessions have been created on “Pygmy” peoples’ lands without any consultation or compensation. Ongoing exclusion from protected areas has forced thousands of “Pygmy” peoples to abandon their traditional way of life and culture and they now live in extreme poverty and precarious conditions. Forestry concessions have been installed on “Pygmy” peoples’ lands despite a moratorium introduced by presidential decree.

“Pygmy” peoples’ lands and forests are under continual threat of encroachment by extractive industries and a forestry reform programme being led by the Government with World Bank assistance. These reforms include the adoption of a new Forest Code and a process to re-register forestry concession titles. To date, neither of these has ensured the recognition and protection of “Pygmy” peoples’ rights.

There is a strong risk that through its reforms of the forestry sector, and in the twin push for greater commercial exploitation and conservation of DRC’s forests, the State will repeat and reinforce the exclusion that has already led to the expropriation of “Pygmy” peoples’ lands without consultation or consent. The situation is urgent because of the immediate risk of irreparable harm to the well-being, identity and integrity of the peoples concerned.

It is in this context that we respectfully suggest the following questions:

1. What measures is DRC taking to recognise “Pygmy” peoples as distinct and indigenous peoples?
2. What measures is DRC taking to guarantee “Pygmy” peoples’ rights to non-discrimination, human dignity and equality?
3. What measures is DRC taking to guarantee “Pygmy” peoples’ economic and social rights?
4. What measures is DRC taking to protect the rights, both in law and in fact, of “Pygmy” women and girls?
5. What measures is DRC taking to ratify the Protocol of the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa?
6. What measures is DRC taking to recognise and guarantee “Pygmy” peoples’ land and cultural rights?
7. What measures is DRC taking to delimit and demarcate “Pygmy” peoples’ lands and territories, to ensure that this land covers an adequate area to allow the traditional activities of these peoples, and to issue title to the peoples concerned?
8. What measures is DRC taking to guarantee “Pygmy” peoples’ right to participate in decisions concerning activities on their lands and to guarantee their right to free, prior and informed consent to decisions that concern them?

9. What measures is DRC taking to recognise the rights of “Pygmy” peoples to their lands and resources expropriated for use as protected areas and concessions without their consent? Does it intend to take measures to return this land to the “Pygmy” communities concerned, or to compensate them for the loss of their land, which for factual reasons cannot be returned to them?

10. What measures is DRC taking to ensure that forestry sector reforms recognise and respect the collective rights of “Pygmy” peoples, their right to effective participation, and to free, prior and informed consent?

I. INTRODUCTION

1. On 30 October 2006, the Centre d'Accompagnement des Autochtones Pygmées et Minoritaires Vulnérables ("CAMV"), the Forest Peoples Programme ("FPP") and five other organisations submitted a report to the African Commission on Human and Peoples Rights ("the Commission") regarding the situation of indigenous peoples in the Democratic Republic of Congo ("DRC") and violations of their rights.¹
2. Our report indicated that the rights of indigenous peoples in DRC are neither recognised nor protected in law and are regularly violated in practice. It also indicated that the situation has deteriorated to the point where indigenous peoples' physical and cultural integrity, and even their survival as distinct peoples, is threatened. The report was accompanied by a request that the Commission visit DRC to examine the situation of indigenous peoples and increase its collaboration with other mechanisms to address the human rights situation of indigenous peoples in DRC.
3. Subsequently, in May and November 2007, we submitted two requests to the Commission to issue an Urgent Appeal to the DRC Government regarding serious and ongoing violations of indigenous peoples' rights.² Amongst others, our requests respectfully asked the Commission to urge DRC to suspend all commercial forestry activities until an in-depth study has been carried out on indigenous peoples' land rights and until their rights are recognised and protected under Congolese law.
4. CAMV and FPP have now prepared this report to present the Commission with supplementary information on indigenous peoples in DRC and observations on DRC's eighth, ninth and tenth periodic reports, submitted as one document dated June 2007 ("Periodic Report")³, to be examined by the Commission at its 43rd Ordinary Session in May 2008.
5. DRC ratified the African Charter on Human and Peoples' Rights ("the Charter") on 20th July 1987. DRC is therefore obliged to respect and guarantee the rights contained therein. However, it has derogated from this duty with regard to indigenous peoples.
6. In its 2003 Concluding Observations on DRC, the Commission strongly advised the State to "*to put in place as quickly as possible legislation recognising the rights of the Pygmy/Batwa people.*"⁴ However, the State has not implemented this legislation and still does not recognise these rights. As a result, indigenous peoples experience violations of their human rights on a daily basis.

¹CAMV, FPP and others (30 October 2006), *Persistent and pervasive racial discrimination against indigenous peoples in DRC: NGO Report to the Working Group of Experts on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights*. Available on the FPP website:

http://www.forestpeoples.org/documents/africa/drc_achpr_base_oct06.shtml.

²FPP and others (22 May 2007), *Request for an Urgent Appeal to the Government of DRC*; FPP and others (15 November 2007), *Follow-up request for an Urgent Appeal to the Government of DRC*. These requests are available on the FPP website:

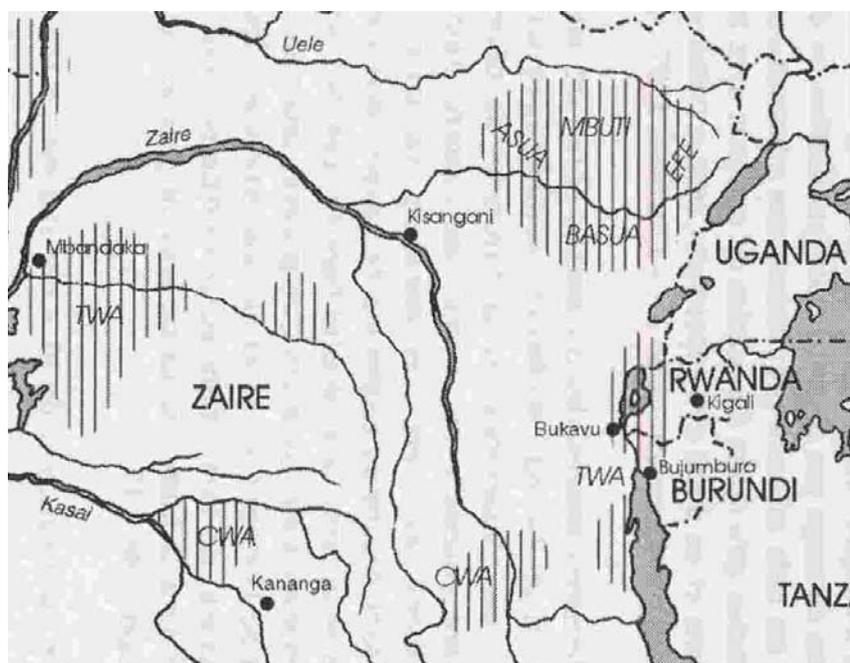
http://www.forestpeoples.org/documents/africa/drc_achpr_urgent_appeal_may07_eng.pdf and

http://www.forestpeoples.org/documents/africa/drc_achpr_fpp_ua_nov07_eng.pdf.

³Democratic Republic of Congo, Ministry of Human Rights (June 2007), *Eighth, ninth and tenth periodic reports to the African Commission on Human and Peoples Rights: Implementation of the African Charter on Human and Peoples Rights (for the July 2003 to July 2007 period)*, Kinshasa, ("Periodic Report").

⁴African Commission on Human and Peoples Rights (2003), *Concluding Observations on the Report of the Democratic Republic of Congo*, page 4, paragraph 3.

II. INDIGENOUS “PYGMY” PEOPLES IN DRC: A BRIEF OVERVIEW



“Pygmy” peoples in DRC⁵

7. Originally, indigenous peoples were semi-nomadic hunter-gatherers living in the high mountainous forests in the Great Lakes region of Central Africa.⁶ It is widely recognised that these peoples were the region’s first inhabitants, later joined by farmers and pastoralists.⁷ The various groups of indigenous peoples in DRC, known as “Pygmies”,⁸ include: the Mbuti (including the Basua, Efe and Asua), who live in the east, particularly in Ituri region; the Twa, who live along the border with Rwanda and in the Tumba Lake region of Equateur; and the Cwa, who live in the forests and savannah around the Kasai lakes. Other groups are found throughout DRC’s forests,

⁵ This map can be found in Dyson, M (1992), ‘Concern for Africa’s forest peoples: a touchstone of a sustainable development policy’, in: Cleaver, K., Munasinghe, M., Dyson M., Egli, N. Peuker, A., and Wenceliscus F., *Conservation of West and Central African Rainforests*, World Bank, Washington D.C., and is reproduced in Barume, A. K. (2003), *Heading Towards Extinction: Indigenous Rights in Africa: the case of the Twa of the Kahuzi-Biega National Park, Democratic Republic of Congo*, IWGIA, Copenhagen, page 57.

⁶ Information on indigenous peoples in Central Africa can be found in many publications, including: Lewis, J (2000), *The Batwa Pygmies of the Great Lakes*, MRG, London; Woodburn, J (1997), *Indigenous discrimination: the ideological basis for local discrimination against hunter-gatherer minorities in sub-Saharan Africa*, in *Ethnic and Racial Studies*, Vol.20, No.2, pp.345-361; Jackson, D (2003), *Twa Women, Twa Rights in the Great Lakes Region of Africa*, MRG, London; Nelson, J. and Hossack, L (Editors) (2003), *Indigenous Peoples and Protected Areas in Africa: from principles to practice*, FPP, Moreton-in-Marsh; African Commission on Human and Peoples Rights and the International Work Group for Indigenous Affairs (2005), *Report of the Working Group of Experts on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights, referred to hereafter “WGIP Report (2005)”*.

⁷ WGIP Report (2005), pages 19-20. Please note that page numbers refer to the French version of this report.

⁸ “Pygmy” is a disputed term that some people consider derogatory, although it is widely used in DRC, including by indigenous peoples themselves. To avoid causing offence the authors use it in this report in its anthropological sense and correct form in inverted commas with a capital “P”. We use this term to describe all hunter-gatherer indigenous peoples in DRC, including the Mbutis, Twa, Cwa and Aka.

in particular the Aka, who live along the north-west border with the Republic of Congo.⁹

8. The total “Pygmy” population in DRC is unknown, and estimates vary a lot. Some commentators have estimated that the number of “Pygmy” peoples is around 250,000.¹⁰ Based on preliminary results from a national census currently underway, the National League of Congolese Pygmies (LINAPYCO), an indigenous organisation, has suggested that indigenous peoples number between 450,000 and 600,000 individuals and live in 47 of DRC’s 144 territories.¹¹
9. Access to their land and secure land tenure are key issues for “Pygmy” peoples. They have close links to the forests and its resources, upon which they depend for their well-being, identity and integrity. However, over the centuries logging by farmers and pastoralists forced many of these peoples to abandon their forests and their way of life based on hunting and gathering. Although some developed new livelihoods as potters, dancers and entertainers, others became dependant on casual work, or were reduced to begging in order to survive.
10. The expulsion of “Pygmy” peoples from their ancestral lands in order to create national parks started during the colonial period, with the 1925 royal decree that created the Virunga National Park. It continued after independence with the Kahuzi-Biega National Park, when between the 1960s and early 1980s around 6,000 Twa were expelled from their ancestral lands.¹² The Kahuzi-Biega Park originally covered 60,000 ha in the Kabara and Kalehe territories of South Kivu, however in 1975 an extension increased its size to 600,000 ha, incorporating more lands belonging to “Pygmy” peoples without their prior consultation or consent.¹³
11. The Congolese authorities prohibit access to forests designated as nature reserves and as a result “Pygmy” peoples evicted from these areas no longer have access to essential sources of food, plants used in traditional medicine, sacred and cultural sites.
12. “Pygmy” peoples’ lands have also been expropriated for extractive industries, often in violation of national law. For example, DRC has admitted that forestry concessions continued to be granted despite a moratorium in place since 2002.¹⁴ Some of these concessions were installed on or beside “Pygmy” peoples’ lands without their prior

⁹ CIFOR, Banque mondiale and CIRAD, (2007), *La Forêt en République Démocratique du Congo post-confit. Analyse d'un agenda prioritaire*, page 10.

¹⁰ For example, Lewis (2000) and Jackson (2004).

¹¹ CIFOR, Banque mondiale and CIRAD (2007), *op. cit.*

¹² Barume, A. K. (2003), , page 17. Please note that page numbers refer to the French version of this publication.

¹³ Busane, R. (2006), *Gestion des aires protégées et conflictualité. Recherche sur l'impact de la domanialité publique sur les activités socioéconomiques des terroirs villageois du Sud Kivu*, UCB, page 10. See also Barume (2003), pages 70-71. The extension was approved by national Law No. 75/238 of 22/7/1975

¹⁴ The Democratic Republic of Congo’s Ministry for Environment and Ministry of Finance, *Press Release, No. 3519, 1/11/2005*. The moratorium was introduced in May 2002 and was extended under presidential decree in November 2005. The Ministry’s press release states that on 29 October 2005 there were 141 forestry concessions in DRC, amongst which at least 103 had been granted before the moratorium. Annex 1 contains a World Bank map indicating the location of concessions and “Pygmy” peoples’ communities/lands.

consultation or consent. This included concessions belonging to SIFORCO and SEDAF in Yemba and Banga, in Equateur province.¹⁵

13. There are still groups of “Pygmy” peoples who live for part of the year in DRC’s forests, including the Mbuti in the Ituri region and the Twa in the Lake Tumba region of Equateur. These communities have managed to maintain their traditional customs and way of life as hunter-gatherers with some success, as far as is possible during the ongoing conflict. However, these peoples are threatened with continual encroachment on their lands by extractive industries and a programme of State forestry reforms.
14. Although the State promised that local communities would play an active role in the forestry sector reforms, to date there has been virtually no public consultation and “Pygmy” peoples only have access to very limited information. The reforms include the adoption of the 2002 Forest Code,¹⁶ but this law makes no mention of indigenous peoples or their rights. The Code contains forestry zoning plans that prioritise commercial exploitation and nature protection, but contains no provisions on how “Pygmy” peoples’ forests will be identified and protected.¹⁷
15. Another aspect of the reforms is the process underway to convert and re-register forestry concession titles. During this process, it has been identified that many of the concessions in question were on “Pygmy” peoples’ lands, but to date DRC has not carried out any in-depth consultations with the communities concerned to ensure that their land is protected and their rights are guaranteed.¹⁸ The lack of consultation poses a serious risk of further expropriation of “Pygmy” peoples’ lands.
16. Without access to their traditional lands and forests, “Pygmy” peoples experience very high levels of poverty and illness. Their lack of access to social services exacerbates the cycle of poverty:

*In DRC, the situation for Batwa people is identical to that for Batwa in Rwanda, Burundi and Uganda. They live in extreme poverty....Children growing up in these conditions remain poor forever.*¹⁹

17. Furthermore, “Pygmy” peoples chased from their forests encounter high levels of discrimination from other sectors of Congolese society, who despise them for their “Pygmy” origins. The Commission has noted that “Pygmy” peoples are:

*marginalised from society and victims of the same discrimination as those in Rwanda and Burundi. They are considered to be immoral, dirty, dishonest and uncivilised and their children are seen as good for nothing*²⁰

¹⁵ Réseau des Associations Autochtones Pygmées (RAPY), in association with MRG, *Les Peuples Autochtones et l’exploitation forestière: Mission d’investigation sur l’impact de l’exploitation forestière sur les communautés autochtones et locales des provinces Orientale et de l’Équateur, République Démocratique du Congo: Témoignages recueillis auprès des communautés autochtones Pygmées et autres communautés locales pour transmettre au Panel d’inspection de la Banque mondiale*, June 2006.

¹⁶ Law 011/2002 from 29 August 2002 establishing the Forest Code, op. cit.

¹⁷ Ibid., Article 15.

¹⁸ The Inspection Panel, *Investigation Report: Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (TSERO) (IDA Grant No. H 1920-DRC) and Emergency Economic and Social Reunification Support Project (EESRSP) (Credit No. 3824-DRC and Grant No. H 064-DRC)*, Report No. 40746-ZR, August 31, 2006, page 121.

¹⁹ WGIP Report (2005), page 40.

18. Discrimination, prejudice and stereotypes have resulted in gross violations of “Pygmy” peoples’ rights. They are subjected to specific physical and sexual attacks because of their ethnic identity, including rape, murder and even cannibalism.²¹

III. OBSERVATIONS ON THE PERIODIC REPORT

A. Violation of “Pygmy” peoples’ right to identity

Article 20: The right to exist as a people

19. Article 20 of the Charter guarantees all people the right to existence.
20. With regard to Article 20, the Periodic Report indicates that the DRC “*has no ambition to dominate other peoples*”.²²
21. Although the Charter does not define the term “people”, the African Commission’s interpretation is that the collective rights set out therein can be applied to different groups within a State. For example, with regard to the 1994 genocide in Rwanda, the Commission expressed its concern over “*the systematic manner in which one group may design the “elimination” of another’s right to “existence”*.”²³ In its resolution on Rwanda, the Commission referred to the “*rights of all the peoples of Rwanda*”.²⁴
22. By accepting the communication claiming the right to self-determination of the Katangais peoples in Zaire, the Commission showed its willingness to examine violations of the rights of different groups within a State.²⁵ In the case of the *Ogoni* people in Nigeria, the Commission noted that there had been a violation of the collective right of people to freely dispose of their wealth and natural resources – as contained in Article 21 of the Charter – when the government had “*facilitated the destruction of the Ogoniland*” by giving “*the green light to private actors, and the oil Companies in particular to devastatingly affect the well-being of the Ogonis*”.²⁶
23. In its 2007 Advisory Opinion on the United Nations Declaration on Indigenous Peoples (“Advisory Opinion”), the Commission cited its Working Group on Indigenous Populations which said: “*the collective rights known as the peoples’ rights should be applicable to certain categories of populations within Nation States,*

²⁰ WGIP Report (2005), page 40.

²¹ MRG and CAMV (2004), “*Effacer le Tableau*” Report of the international research mission into crimes under international law committed against the Bambuti Pygmies in the eastern Democratic Republic of Congo, London.

²² Periodic Report, paragraph 205, page 49. Please note that page numbers refer to the French version of the Periodic Report.

²³ WGIP Report (2005), pages 82-83.

²⁴ African Commission on Human and Peoples Rights (1993-1994), ‘Resolution on the Rwanda Situation’, *The African Commission on Human and Peoples Rights Seventh annual activity report, 1993-1994*. CADHP/APT/7^e, Annex XII, paragraph 2. Emphasis added.

²⁵ WGIP Report (2005), page 82.

²⁶ African Commission on Human and Peoples Rights, ‘Communication 155/96: Social and Economic Rights Action Center and the Center for Economic and Social Rights (NGO) vs. Nigeria, Communication No. 155/96’, in African Commission on Human and Peoples’ Rights, *Fifteenth Annual Activity Report 2001-2002*, paragraph 58, pages 40-41.

*including indigenous populations*²⁷ The Working Group also commented that: “*The African Commission has started to interpret the term “peoples” in a manner that should allow indigenous people to also claim protection under Articles 19-24 of the African Charter*”.²⁸

24. The term “indigenous” is controversial in Africa, including the fact that there is no exact definition of this term. However, the Commission has stated that a definition is neither necessary nor useful. The Commission believe it is “*much more relevant and constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa*”,²⁹ to help to ensure that these “*historically marginalised*”³⁰ groups have access to equal rights.
25. The characteristics identified by the Commission include: self-identification; a specific attachment to and use of ancestral land which is of fundamental importance to their collective physical and cultural survival; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination due to a culture, way of life or mode of production that is different to the dominant model.³¹
26. The principles of self-identification and identification based on objective criteria are well-established. In its General Recommendations VIII, the United Nations Committee on the Elimination of Racial Discrimination (“CERD”) concluded that identifying members of racial or ethnic groups should be based on the self-identification of the individual concerned.³² The United Nations Human Rights Committee (“HRC”) also affirmed that “*The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria*”.³³
27. “Pygmy” peoples in DRC fulfil the characteristics identified by the Commission. For example, they identify as indigenous peoples, and believe that they were invaded and conquered by incoming Bantu and Nilotic groups.³⁴ During the national consultation on the DRC Constitution in 2004-2005, a memorandum by “Pygmy” peoples asked that the new Constitution clearly recognise them as the country’s first inhabitants who enjoy the rights of indigenous peoples, and guarantee indigenous peoples’ land rights as well as the protection of their cultural identity, traditional way of life and knowledge of the forest domain.³⁵

²⁷ African Commission on Human and Peoples Rights (2007), *Advisory Opinion of the African Commission on Human and Peoples Rights’ on the United Nations Declaration on the Rights of Indigenous Peoples*, Adopted by the African Commission on Human and Peoples Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana (“Advisory Opinion”), paragraph 24, pages 6-7. Please note that page numbers refer to the French version of this document.

²⁸ WGIP Report (2005), pages 87-88.

²⁹ Advisory Opinion, paragraph 10, pages 4-5.

³⁰ Ibid, paragraph 19, page 6.

³¹ Ibid, paragraph 12, page 4.

³² CERD, *General Recommendations VIII: Identification with a particular racial or ethnic group (Art. 1, paragraph 1 and 4)*, 22/08/1990, UN document A/45/18.

³³ HRC, *General Observations No. 2: minority rights (Art.27)*, 08/04/94, UN document CPR/C/21/Rev.1/Add.5, paragraph 5.2.

³⁴ CAMV et al (Septembre 2005), *Les Autochtones « Pygmées » et le Code Forestier en RD Congo : vulgarisation du Code forestier et résultat du collecte de l’opinion*, RDC.

³⁵ CAMV (Jan-Mar 2005), *Echos des Pygmées*, No.17, DRC, page 7.

28. “Pygmy” peoples regularly experience discrimination, rejection and scorn from other sectors of Congolese society. Their numbers are far fewer than other communities in DRC, they do not dominate or participate any State institutions, and are marginalised in many ways. According to a report by APRODEPED, due to the dispossession of lands that they had occupied for centuries “Pygmy” peoples are now economically, socially and culturally marginalised.³⁶
29. The importance of their ancestral lands, territories and resources to “Pygmy” peoples is widely recognised. They are the inhabitants of the forest “par excellence” because their identity and existence is based in and around the forest and its resources. They closely associate with the forest, living to a great extent from its wild produce, and place it at the centre of their intellectual and spiritual life. A major part of their income comes from the exchange of forest products with Bantu peoples, and the forest plays an equally important role in maintaining their cultural practices.³⁷
30. Like other commentators, including the United Nations,³⁸ the Commission recognises the indigenous identity of “Pygmy” peoples in DRC:

*The peoples who have identified with the worldwide indigenous peoples’ movement in their struggle for recognition of fundamental human rights are mainly groups of hunter-gatherers and pastoralists ...Among hunter-gatherer communities, the ones that are the best known are the Pygmies of the Great Lakes region...*³⁹

31. Given the Commission’s body of legal opinion, “Pygmy” peoples in DRC should enjoy the right to be recognised as distinct and indigenous peoples and the other collective rights contained within the Charter. However, DRC does not recognise the indigenous identity of “Pygmy” peoples, and the Periodic Report makes no mention of it.⁴⁰
32. DRC also failed to recognise “Pygmy” peoples’ identity in its 2006 Periodic Report to CERD.⁴¹ CERD noted with regret “*the State party’s reluctance to acknowledge the existence of indigenous peoples in its territory*”.⁴² It recommended that DRC “*respect and protect the existence and cultural identity of all the ethnic groups living in its territory ... and in that context ... take into account the way in which such groups perceive and define themselves.*”⁴³

³⁶ Action pour la promotion et la défense des personnes défavorisée (APRODEPED) (Octobre 2003), *Droits des minorités ethniques, des peuples autochtones et des autres personnes victimes de discrimination*, RDC.

³⁷ CAMV (Dec 2007), *Le Forestier No.2 : peuples autochtones, atout négligé dans la gestion durable des forêts congolaises*, Bukavu, RDC, pages 6 et 10.

³⁸ See, for example, CERD, *Concluding Observations, Democratic Republic of Congo: un-edited version*, 17 August 2007. UN document: CERD/C/COD/CO/15, paragraph 14, page 3.

³⁹ WGIP Report (2005), page 17.

⁴⁰ Periodic Report, paragraph 13, page 5. In addition, the Periodic Report indicates that “Pygmy” peoples are only located in the Equator and Oriental provinces. However, “Pygmy” peoples can be found in other parts of DRC: see paragraph 7 above.

⁴¹ CERD, *Fifteenth Periodic Report: Democratic Republic of Congo, (un-edited version)*, 14 September 2006. UN document: CERD/C/COD/15.

⁴² CERD, *Concluding Observations, Democratic Republic of Congo: un-edited version*, 17 August 2007, op. cit. paragraph 14, page 3.

⁴³ *Ibid.*, paragraph 14, page 4.

Suggested question:

1. What measures is DRC taking to recognise “Pygmy” peoples as distinct and indigenous peoples?

B. Discrimination against “Pygmy” peoples and violations of their rights to equality and human dignity

Article 2: Right to non-discrimination

Article 3: Right to equality before the law and to equal protection from the law

Article 5: Right to the respect of the dignity inherent in a human being

Article 19: Right of peoples to equality and dignity

33. Article 2 of the Charter states that every individual is entitled to enjoy the rights and freedoms set out therein without distinction. Article 3 guarantees all individuals the right to equality before the law and equal protection from the law. Article 5 guarantees the right to respect of the dignity inherent in a human being, and Article 19 states that all peoples are equal and that they enjoy the same dignity and rights.
34. The Periodic Report notes that in DRC “*the enjoyment of the fundamental rights and freedoms stipulated in the Charter is recognised for all Congolese...without any distinction*”.⁴⁴ It describes several national laws, including the Constitution, electoral laws, employment laws, family laws, and education laws, which prohibit discrimination and displays of racism or intolerance, and which provide for the right to respect for human dignity.⁴⁵
35. However, despite all these legal provisions, in practice “Pygmy” peoples in DRC are subjected to continual and systematic discrimination. Commentators have noted that discrimination takes the form of violations of their human rights, negative stereotyping and segregation.⁴⁶ Several observers have noted that “Pygmy” peoples who have left their ancestral forests are subject to greater discrimination than those who have not abandoned their traditional way of life, including the Commission.⁴⁷
36. Discrimination against “Pygmy” peoples in DRC is well documented.⁴⁸ The HRC has noted that “Pygmy” peoples experience much greater levels of discrimination than other groups and stated that it was concerned “*about the marginalisation, discrimination and occasional persecution suffered by...the pygmies (article 27 of the*

⁴⁴ Periodic Report, paragraph 40, page 14.

⁴⁵ Ibid., paragraphs 41-49, pages 14-16; paragraph 202, page 48; and paragraph 64, page 19,

⁴⁶ See, for example, Lewis, J (2000), page 13; Woodburn, J (1997); WGIP Report (2005).

⁴⁷ Including the Commission. See: WGIP Report (2005), page 42.

⁴⁸ See note 6 above. Also see: CAMV (2006), *Autochtones Pygmées à l’Est de la RD Congo, Rapport annuel ; APRODEPED (Octobre 2003), Droits des minorités ethniques, des peuples autochtones et des autres personnes victimes de discrimination.*

Covenant)”.⁴⁹ The United Nation’s Special Reporter has observed that “Pygmy” peoples are subject to large-scale discrimination and violations of their human rights.⁵⁰

37. The Commission has observed that discrimination against “Pygmy” peoples gives rise to cruel and degrading treatment, which is strongly linked to their marginalisation:

*Throughout Central Africa, the Batwa/Pymies are victims of discrimination. They can neither eat nor drink with their neighbours, they are forbidden to enter their houses and are not permitted to have sexual partners other than from their own ethnic group. The Batwa/Pygmies live on the outskirts of other people’s settlements. This exclusion is less within towns, although serious prejudice does still persist against the Batwa/Pygmies, particularly in terms of derisory comments.*⁵¹

38. Due to prejudice and stereotyping, “Pygmy” peoples are one of the groups worst affected by the decades of conflict in DRC, and the various armed factions have committed gross violations of their human rights, including murder, summary executions, kidnappings, sexual violence, looting and cannibalism.⁵² This violence is often linked to perpetrators’ prejudiced belief that as inhabitants of the forest, indigenous peoples have special powers.⁵³

Suggested question:

2. What measures is DRC taking to guarantee “Pygmy” peoples’ rights to non-discrimination, human dignity and equality?

C. Violations of “Pygmy” peoples economic and social rights

Article 16: The right to healthcare and medical assistance

Article 17(1): The right to education

39. Article 16 of the Charter guarantees the right to enjoy the best attainable state of physical and mental health, and Article 17(1) guarantees the right to education.
40. The Periodic Report states that Article 47 of the DRC Constitution makes provision for the right to health, and that “*the DRC intends to protect the life of the population through the organisation of a health system which is accessible to all.*”⁵⁴ Article 43 of

⁴⁹ Human Rights Committee (“HRC”) *Concluding Observations: Democratic Republic of Congo (un-edited version)*, 27 March 2006, UN document, CCPR/C/COD/CO/3, paragraph 26, page 8.

⁵⁰ See, for example: *Intermediary report by the Special Reporter on the human rights situation in the Democratic Republic of Congo*, 24 October 2003, A/58/534, paragraph 107; *Intermediary report by the Special Reporter on the human rights situation in the Democratic Republic of Congo*, 26 September 2002, A/57/437, paragraph 66.

⁵¹ WGIP Report (2005), pages 41-42.

⁵² MRG and CAMV (2004), “*Effacer le Tableau*” *Report of the international research mission into crimes under international law committed against the Bambuti Pygmies in the eastern Democratic Republic of Congo*, London.

⁵³ *Ibid.*

⁵⁴ Periodic Report, paragraphs 159 and 161, pages 38 and 30.

the Constitution guarantees the right to a school education and the Periodic Report indicates that primary education is compulsory and free in public institutions.⁵⁵

41. The Periodic Report does not contain any disaggregated data on the socioeconomic situation of “Pygmy” peoples, whose economic and social rights are neither respected nor protected in DRC. They do not enjoy equal access to education and health services, and as a result experience extreme levels of poverty, ill health and illiteracy compared to the national population. The main reasons that indigenous peoples give for their poor access to education and health services are their lack of resources and the discrimination they encounter from other sectors of Congolese society.
42. The health situation of “Pygmy” peoples in DRC is very worrying. Due to the precarious nature of their lives, “Pygmy” peoples are over-exposed to many tropical and endemic illnesses like malaria, intestinal parasites, respiratory diseases, dermatitis and HIV/AIDS. Despite the high level of tropical disease and HIV/AIDS, “Pygmy” peoples’ villages are poorly served by healthcare facilities and they have practically no access to modern medicine. When they are able to access medical centres, “Pygmy” peoples lack the means to pay for healthcare costs and medicine. “Pygmy” peoples are also less able to access traditional medicine as they are no longer allowed to go into forests designated as protected areas to gather medical plants.⁵⁶
43. Traditionally, “Pygmy” peoples’ sustenance comes from products they have gathered, hunted and fished. However, the loss of their ancestral lands due to the creation of national parks and deforestation has brought about food shortages and malnutrition, which is particularly problematic for children under five years old, pregnant women and older people.
44. DRC’s 2004 Poverty Reduction Strategy Paper reveals the extent to which the public education sector has deteriorated, notably through overcrowding, dilapidated infrastructure, lack of teaching materials, and demotivated teaching staff.⁵⁷ In its 2004 sectoral report, the National Network of Human Rights Associations in DRC notes that education is a fundamental right and describes the education system in DRC as follows: little funding for education in the State budget; no education policy; schools that discriminate against children; a high adult illiteracy rate; and dilapidated school infrastructure.⁵⁸
45. Even though Article 43 of the DRC Constitution says that “primary education is obligatory and free in public institutions”, “Pygmy” children often don’t have access to such schools. To date, free education is not available in DRC because parents have to contribute towards teachers’ costs, and “Pygmy” families lack the resources to do so. Furthermore, the majority of “Pygmy” peoples’ villages are located far from public schools, and those that are nearby have often either been destroyed or remain unfinished, or are so poorly equipped that they have to rely on NGO assistance. Commentators have estimated that the Twa primary school attendance rate in DRC is

⁵⁵ Ibid., paragraph 166, page 40.

⁵⁶ CAMV (2006), *Autochtones Pygmées à l’Est de la RD Congo, Rapport annuel*.

⁵⁷ Democratic Republic of Congo, Plan Minister (Feb 2004), *Document de Stratégie de Réduction de la Pauvreté en République démocratique du Congo*, page 23.

⁵⁸ Réseau National des Associations des Droits Humains en RDC (RENADHOC), *Le droit de l’éducation en RDC, DRC*.

only 11 per cent, compared to 54 per cent of the national population, and that around 94 per cent of Twa adults are illiterate, compared to 40 per cent of the national population.⁵⁹

46. In its 2003 Concluding Observations on DRC, the Commission expressed its concern about reports of serious violations of Pygmy/Twa human rights in eastern DRC, including “total deprivation of their basic means of livelihood.”⁶⁰ The Commission previously remarked that for the Twa in DRC:

*The majority live in straw huts, suffer from malnutrition, a lack of hygiene, respiratory infections and malaria, without any access to education or primary healthcare. The infant mortality rate is extremely high.*⁶¹

47. CERD has also recently voiced its concern over the socioeconomic situation of “Pygmy” peoples in DRC:

*The Committee remains concerned that Pygmies are subjected to marginalisation and discrimination with regard to the enjoyment of their economic, social and cultural rights, in particular their access to education and health.*⁶²

48. It has encouraged the State to:

*intensify its efforts to improve the indigenous populations’ enjoyment of economic, social and cultural rights and invites it in particular to take measures to guarantee their rights...to education and health.*⁶³

Suggested question:

3. What measures is DRC taking to guarantee “Pygmy” peoples’ economic and social rights?

⁵⁹ Statistics on the Twa can be found in the WGIP Report (2005), on page 64, which cites the report by Jackson, D (March 2001), *Indigenous Peoples in Central Africa. A desk review for the International Labour Office*. The national data comes from the United Nations Development Programme (“UNDP”) report, *Human Development Report 2007/2008: Fighting climate change: Human solidarity in a divided world*, pages 272 and 232.

⁶⁰ African Commission on Human and Peoples Rights (2003), *Concluding Observations on the Report of the Democratic Republic of Congo*, op. cit., page 3, paragraph 3.

⁶¹ WGIP Report (2005), page 61.

⁶² CERD, *Concluding Observations on the Democratic Republic of Congo: un-edited version*, 17 August 2007, op. cit., page 5, paragraph 19.

⁶³ Ibid.

D. Violations of the rights of “Pygmy” women and girls

Article 18(3): Women’s rights

49. Clearly women have the right to enjoy all the human rights sets out in the Charter, with no distinction. In addition, Article 18(3) of the Charter provides that the State must ensure the elimination of discrimination against women and the protection of women’s rights.
50. The Periodic Report notes that Article 14 of the Constitution provides that the authorities must eliminate all forms of discrimination against women and guarantee that their rights are promoted and protected.⁶⁴ However, “Pygmy” women and girls do not benefit from this provision and their human rights are violated on a regular basis.
51. Indigenous “Pygmy” women experience multiple forms of discrimination due to their poverty, their identity and their gender, and as a result, serious violations of their human rights. For example, as well as experiencing sexual violence to the same degree as other Congolese women, “Pygmy” women are subject to specific attacks due to their ethnicity. Perpetrators justify rape by saying that sexual relations with a “Pygmy” woman can cure back pain.⁶⁵ Victims are often scared to make a complaint because they may be seen as tainted and subsequently rejected by their communities. In violation of their right to justice, complaints of sexual violence by “Pygmy” women are rarely investigated by the police.⁶⁶
52. As mentioned above, “Pygmy” peoples, women and children in particular, are at the bottom of the socioeconomic index in DRC. Indigenous women do not have equal access to health services. Although sexual attacks often result in severe injuries, and many women are infected with HIV/AIDS, because of their poverty they do not have the means to pay for medical care.⁶⁷ Some women have also reported discriminatory and poor treatment at hospital due to their ethnic identity.⁶⁸
53. Women and girl “Pygmies” also encounter obstacles to accessing education services. For example, although the same number of boys and girls start primary school, the number of girls that go on to secondary school decreases because their families prefer to invest in their son’s education, believing that their daughters will marry and be cared for by their husbands.⁶⁹ Commentators have noted that Twa women’s literacy rate in the Great Lakes region is generally lower than that of male Twa.⁷⁰
54. Indigenous women’s low literacy rates obstruct their participation in public life. This is compounded by the lack of a national policy to promote the participation of

⁶⁴ Periodic Report, paragraph 177, page 42.

⁶⁵ Jackson, D (2003), page 16; MRG and CAMV (2004), page 2. The situation of indigenous women in DRC was described by CAMV in an oral intervention given at the Commission’s 42nd Ordinary Session. The intervention has been reproduced in CAMV’s report: *Echo des Pygmées*, No.20, January - March 2008, page 8

⁶⁶ CAMV, *Echo des Pygmées*, No.20, ibid.

⁶⁷ IRIN, ‘DRC: Sexual violence lack of healthcare spreads HIV/AIDS among pygmies’, 13 September 2006, available at: <http://www.irinnews.org/report.asp?ReportID=55536>.

⁶⁸ Jackson, D (2003), page 15.

⁶⁹ Ibid., page 14.

⁷⁰ Ibid.

unrepresented groups like “Pygmy” peoples in public institutions. Even though the national numbers of women participating in public life in DRC are extremely low, “Pygmy” women do not even reach these.⁷¹

55. Finally, it is important to note that DRC has still not ratified the Protocol of the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. We respectfully request the Commission to strongly urge DRC to ratify this treaty.

Suggested questions:

4. What measures is DRC taking to protect the rights, both in law and in fact, of “Pygmy” women and girls?

5. What measures is DRC taking to ratify the Protocol of the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa?

E. Violations of “Pygmy” peoples’ land and cultural rights

Article 14: The right to property

Article 17(2): The right to freely take part in cultural life

Article 20: The right to self-determination for all peoples

Article 21: The right of all peoples right to freely dispose of their wealth and natural resources and to lawful recovery of their property and to compensation in the case of spoliation

Article 22: The right of all peoples to their economic, social and cultural development

Article 24: The right of all peoples to a general satisfactory environment favourable to their development

56. Article 14 of the Charter guarantees the right to property. Article 17(2) guarantees the right of all persons to take part in cultural life. Article 20 guarantees the right of all people to self-determination, while Article 21 guarantees people the right to freely dispose of their wealth and natural resources and to lawful recovery of their property and to compensation in the case of expropriation. Article 22 guarantees the right of all peoples to their economic, social and cultural development. Article 24 guarantees the right of all peoples to a general satisfactory environment favourable to their development.

57. The legal principles governing indigenous peoples’ collective rights to their ancestral lands are well-established. Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) guarantees the right “*to own property alone as well as in association with others*”.⁷² In its General

⁷¹ CAMV (2006), *Rapport annuel*, op. cit, pages 29-30 ; APRODEPED (2003), *Droits des minorités ethniques, des peuples autochtones et des autres personnes victimes de discrimination*, op. cit, page 26..

⁷² *International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 September 1965*

Recommendation XXIII, CERD states that indigenous populations have the right “own, enjoy, control and use their communal lands, territories and resources”.⁷³

58. CERD has widely affirmed indigenous peoples’ land rights in its jurisprudence, including its Concluding Observations on, amongst others, Botswana and Uganda.⁷⁴ It has noted the direct links that exist for indigenous peoples between their lands, their culture and their economic practices. For example, in 2006, it asked Botswana to:

*pay particular attention to the close cultural ties that bind the San/Basarwa to their ancestral land.....protect the economic activity of the San/Basarwa that are an essential element of their culture, such as hunting and gathering practices, whether conducted by traditional or modern means*⁷⁵

59. The HRC has also linked the right of indigenous peoples to enjoy their own culture with their lands and resources, as well as social and economic activities such as hunting, including in protected areas.⁷⁶ It has further linked indigenous peoples’ cultural rights with their access to sacred sites,⁷⁷ and to their protection from forced displacement.⁷⁸ According to the HRC, indigenous peoples’ ability to exercise their cultural rights “may require positive legal measures of protection”.⁷⁹
60. In their jurisprudence, both CERD and HRC have indicated that indigenous peoples’ land rights comprise various aspects, including the delimitation and demarcation of their lands and territories,⁸⁰ ensuring that delimited lands are of a sufficient enough size to allow their traditional activities to take place,⁸¹ and the issue of title.⁸²
61. The United Nations Declaration on the Rights of Indigenous Peoples (“UN Declaration”) echoes international norms and also guarantees indigenous peoples’ land rights. Article 26 states that:

⁷³ CERD, *General Recommendations XXII concerning the rights of indigenous populations*, 18 August 1997, paragraph 5.

⁷⁴ See: General Assembly, *Report by the Committee for Elimination of Racial Discrimination: Sixtieth session (4-22 March 2002) and sixty-first session (5-23 August 2002)*, 4/4/2006, Document by UN CERD/C/BWA/CO/16, paragraphs 301 and 304, page 49; CERD, *Concluding Observations of the Committee for Elimination of Racial Discrimination: Botswana*, 4 April 2006, Document by UN CERD/C/BWA/CO/16, paragraphs 12-14, pages 3-4; CERD, *Concluding Observations of the Committee for Elimination of Racial Discrimination: Uganda*, 2 June 2003, Document by UN CERD/C/62/CO/11, paragraph 14, page 3.

⁷⁵ CERD, *Concluding Observations of the Committee for Elimination of Racial Discrimination: Botswana*, 4 April 2006, Document by UN CERD/C/BWA/CO/16, *ibid.*, paragraph 12.

⁷⁶ HRC, *General Observation No. 23: minority rights (Art.27)*, *op. cit.*, paragraphs 3.2 and 7.

⁷⁷ HRC, *Concluding Observations of the Human Rights Committee: Australia*, 24/07/2000, UN document A/55/40, paras. 498-528, paragraph 510.

⁷⁸ HRC, *Concluding Observations of the Human Rights Committee: Chili*, 30/03/1999, UN document CCPR/C/79/Add.104, paragraph 22.

⁷⁹ HRC, *General Observation No. 23: minority rights (Art.27)*, *op. cit.*, paragraph 7.

⁸⁰ See, for example, HRC, *Concluding Observations of the Human Rights Committee: Australia*, *op. cit.*, paragraph 11 ; HCR, *Concluding Observations of the Human Rights Committee: Guyana*, 25/04/2000, UN document CCPR/C/79/Add.121, paragraph 21; and CERD, *Concluding Observations of the Committee for Elimination of Racial Discrimination: Democratic Republic of Congo*, *op. cit.*, paragraph 18.

⁸¹ HRC, *Concluding Observations of the Human Rights Committee: Australia*, *op. cit.*

⁸² HRC, *Concluding Observations of the Human Rights Committee: Australia*, *ibid.*; CERD, *Concluding Observations of the Committee for Elimination of Racial Discrimination: Democratic Republic of Congo*, *op. cit.*

1. *Indigenous peoples have the right to the lands, territories and resources, which they have traditionally owned, occupied or otherwise used or acquired.*
2. *Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.*
3. *States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.*⁸³

62. Article 25 of the UN Declaration confirms the right of indigenous peoples to maintain and strengthen their spiritual bonds with their lands and resources.⁸⁴ Article 8 expands on the close links that exist for indigenous peoples between their culture and their lands, their identity and their integrity.⁸⁵
63. The Commission has added its voice to the growing body of international legal opinion on indigenous peoples' land rights by signalling that: *"The protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa and such protection relates both to Articles 20, 21, 22 and 24 of the African Charter"*.⁸⁶ Concerning collective property rights, the Commission has recognised that *"Collective tenure is fundamental to most indigenous ... hunter-gatherer communities, and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure."*⁸⁷
64. The Commission has observed that indigenous peoples in Africa *"have only, to a very limited extent, legal titles to their lands as their customary laws and regulations are not recognised or respected and as national legislation in many cases does not provide for collective titling of land"*.⁸⁸ The Commission has commented that denying indigenous' peoples customary rights constitutes a violation of their right to existence, to freely dispose of their wealth and natural resources, and to their economic, social and cultural development as provided for in Articles 20, 21 and 22 of the Charter.⁸⁹
65. Concerning the close links between indigenous peoples' lands and resources, their livelihoods, and their cultural rights, the Commission has observed that:

*Violations of cultural rights take different forms and are caused by a combination of factors. For instance, loss of key production resources is impacting negatively on indigenous peoples' cultures, denying them the right to maintain the livelihood of their own choice and to develop their cultures and cultural identity according to their wishes.*⁹⁰

⁸³ *United Nations Declaration on the Rights of Indigenous Peoples, Resolution adopted by the General Assembly, ("UN Declaration") 2 October 2007, UN document A/RES/61/295, Article 26.*

⁸⁴ *Ibid.*, Article 25.

⁸⁵ *Ibid.*, Article 8.

⁸⁶ WGIP Report (2005), pages 25-26.

⁸⁷ *Ibid.*, page 26.

⁸⁸ *Ibid.*, page 26.

⁸⁹ *Ibid.*, page 120.

⁹⁰ *Ibid.*, page 121.

66. A significant norm connected to land rights is indigenous peoples' right to give or refuse to give their free, prior and informed consent to activities which concern them, including on their land. This principle, which is often referred to by the acronym "FPIC",⁹¹ is widely affirmed in international jurisprudence. For example, in its General Recommendations XXIII, CERD asks to 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*⁹²

67. In its 2002 Concluding Recommendations on Botswana, CERD recommended that the State take "*no decisions directly relating to the rights and interests of members of indigenous peoples ... without their informed consent.*"⁹³
68. The HRC has also observed that exercising cultural rights can require "*measures to ensure the effective participation of members of minority communities in decisions which affect them.*"⁹⁴ In its Concluding Observations on Guyana in 2000, the HRC asked the State to "*ensure that there are effective measures of protection to enable members of indigenous Amerindian communities to participate in decisions which affect them*".⁹⁵
69. According to Article 27 of the UN Declaration:

*States shall establish and implement, in conjunction with indigenous populations, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognise and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the rights to participate in this process.*⁹⁶

70. Articles 10 also provides that:

*Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.*⁹⁷

71. The Commission has also demonstrated its willingness to recognise the norm of "FPIC". For example, in the case of the *Ogoni* people, the Commission noted that "*in all their dealings with the Oil Consortiums, the government [of Nigeria] did not*

⁹¹ The acronym "FPIC" stands for "Free", "Prior", "Informed", "Consent".

⁹² CERD, *General Recommendations XXIII concerning the rights of indigenous populations*, op. cit., paragraph 4(d).

⁹³ General Assembly, *Report of the Committee on the Elimination of Racial Discrimination: Sixtieth session (4-22 March 2002) and Sixty-first session (5-23 August 2002)*, 4/4/2006, op. cit., paragraph 304, page 49.

⁹⁴ HCR, *General Observation No. 23: minority rights (Art.27)*, op. cit., paragraph 7.

⁹⁵ HRC, *Concluding Observations of the Human Rights Committee: Guyana, 25/04/2000*, UN document CCPR/C/79/Add.121, paragraph 21.

⁹⁶ UN Declaration, Article 27.

⁹⁷ *Ibid*, Article 10.

involve the Ogoni communities in the decisions that affected the development of Ogoniland".⁹⁸

72. Another important legal principle relevant to indigenous peoples' land rights is the availability of an effective remedy for violations of human rights. According to international jurisprudence, indigenous peoples have the right to restitution of their ancestral lands that were taken without their free, prior and informed consent. In cases where restitution is not possible for factual reasons, the appropriate alternative remedy is compensation, which should take the form of alternative land if possible. For example, in General Recommendation XXIII, CERD asks States to:

*where they [indigenous peoples] have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories*⁹⁹

73. Article 28 of the UN Declaration notes that:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken or occupied, used or damaged without their free, prior and informed consent.
*2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.*¹⁰⁰

74. Article 11(2) of the UN Declaration provides that:

*States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*¹⁰¹

75. The Periodic Report indicates that DRC guarantees the right to individual or collective ownership according to law or custom.¹⁰² It notes that according to national law "no one shall be deprived of his property for public use and in return for a fair compensation paid beforehand under the conditions established by the law" and that "no one's property can be attached except by virtue of a decision taken by a

⁹⁸ Communication 155/96: Social and Economic Rights Action Center and the Center for Economic and Social Rights (NGO) vs. Nigeria, Communication No. 155/96, in African Commission on Human and Peoples' Rights, *Fifteenth Annual Activity Report 2001-2002*, op. cit., paragraph 55, page 39.

⁹⁹ CERD, *General Recommendation XXIII*, op. cit., paragraph 5.

¹⁰⁰ UN Declaration, op. cit., Article 28.

¹⁰¹ Ibid., Article 11(2)

¹⁰² Periodic Report, paragraphs 151-155, page 37

competent legal authority".¹⁰³ In addition, DRC "*applies an international policy which consists in allowing each people to enjoy all its riches*".¹⁰⁴

76. Article 46 of the Constitution guarantees the right to culture and the Periodic Report indicates that "*the State, in fulfilling its responsibilities, takes the cultural diversity of the country into account*".¹⁰⁵ According to the Periodic Report, the State has elaborated a cultural policy and supports the development of traditional medicine.¹⁰⁶
77. However, in violation of their rights set out in the Charter and the national law, "Pygmy" peoples in DRC have been, and continue to be, dispossessed of their ancestral lands, territories and resources. As a result, they experience extremely high levels of poverty, food insecurity and poor health, and their economic, cultural, physical and spiritual integrity are severely threatened to the point that their survival as distinct peoples is at risk.
78. Contrary to the Periodic Report, which states that the right to property is guaranteed in DRC, neither written nor customary Congolese law guarantees "Pygmy" peoples' effective land rights. For example, Article 52 of the 1973 land law states that the soil and subsoil belongs to the State, and Article 7 of the 2002 Forest Code declares that the State is the sole owner of all forests and all forestry resources. The State does not recognise indigenous peoples' customary land tenure and their ownership rights are denied as sources of legally enforceable rights.
79. "Pygmy" peoples traditionally own their land collectively. However, Congolese law does not allow collective title and only individuals can register a title.¹⁰⁷ The application process for individual title works against "Pygmy" peoples, who do not have the means to pay fees that cost around \$400, or attend urban administration offices which are located far from where they live. Furthermore, "Pygmy" peoples do not have the necessary literacy levels to complete the written requests for title.
80. The 1973 land law states that Congolese land which is not already divided into plots and titled, as well as land in non-urban communities, is governed by customary law, but the dominant customary law does not recognise "Pygmy" peoples' customary tenure regimes. As a result, these communities' lands are often registered as unoccupied or classified as "empty land" during the enquiry process known as "enquête de vacance". This land becomes part of the State's private domain and is allocated to other users.¹⁰⁸
81. DRC has not delimited or demarcated "Pygmy" peoples' lands and territories and there are no mechanisms in Congolese law to ensure "Pygmy" people's free, prior and informed consent to decisions that concern them or their lands. As a result, protected areas and concessions have been established on their lands and territories without consultation or consent, and without any compensation.

¹⁰³ Ibid.. Terms of expropriation for public utility use can be found in Articles 193-293 of the 1973 land law and Article 12, paragraph 3 of law 77/001 from 22 February 1977 on expropriation for public utility use.

¹⁰⁴ Ibid., paragraph 206, page 49.

¹⁰⁵ Ibid., paragraph 173, page 41.

¹⁰⁶ Ibid.

¹⁰⁷ Barume (2003).

¹⁰⁸ CAMV, UEFA and MRG, *Connaissez vos droits à travers les lois de la République démocratique du Congo. Livret No.1: Droits fonciers*, pages 3-4.

82. This was the case for thousands of “Pygmy” peoples brutally expelled from their forests to create and enlarge national parks in South Kivu (Kahuzi-Biega National Park, “KBNP”) and North Kivu (Virunga National Park). It was also the case for “Pygmy” families dispossessed of their ancestral lands in Beni, North Kivu, and in Ituri, Orientale, for logging concessions.¹⁰⁹

83. The Commission has previously observed that the Twa were dispossessed of their ancestral lands to make way for the KBNP without their consent or any compensation:

During the 1960-1970 period 580 Batwa families (3000-6000 people) were evicted from the Kahuzi-Biega forest in the Democratic Republic of Congo in order to create a 6000km² gorilla reserve. Land should have been given in compensation to the Batwa, but this did not happen. Now the Batwa are forbidden to hunt in the park, and forbidden to collect park products. They have no food resources or medicinal plants, and the forest is no longer their place of worship. The Batwa have been culturally and psychologically shattered by the loss of their forests.¹¹⁰

84. The Commission has commented on these communities’ continuing land insecurity:

The Batwa/Bambutu have been driven out of their forests, with neither financial compensation nor compensation in terms of other cultivable land. A large number of Batwa/Bambutu thus find themselves as landless and live as tenants on the land of others people, who can evict them at any time.¹¹¹

85. And:

The Batwa in the north of the Kahuzi-Biega Park have settled on plots of land but these lands, officially unoccupied, may be allocated to someone else by the local authorities. The Batwa have no legal protection once neighbours from other ethnic groups decide to take their land or drive them out of their villages.¹¹²

86. The Batwa evicted from KBNP consider it to be their land since time immemorial. However, the Park authorities refuse them entry and there is no global plan to address indigenous peoples’ rights.¹¹³ According to Congolese law, land which is expropriated to create national parks forms part of the State’s public domain and cannot be allocated for private use, including the social and economic activities of “Pygmy” peoples.¹¹⁴

87. CERD has recently noted with concern that in DRC “concessions are granted on the land and territories belonging to indigenous peoples without their prior consultation”.¹¹⁵ Neither the State nor forestry companies consult “Pygmy”

¹⁰⁹ Réseau des Associations autochtones Pygmées, *Etude de cas sur le code forestier congolais et les droits des peuples autochtones pygmées*, janvier 2007.

¹¹⁰ WGIP Report (2005), page 27.

¹¹¹ WGIP Report (2005), page 32.

¹¹² Ibid., page 28.

¹¹³ Ibid.

¹¹⁴ Barume (2003), page 97.

¹¹⁵ CERD, *Concluding Observations of Committee for the Elimination of All Forms of Racial Discrimination: Democratic Republic of Congo*, op. cit., paragraph 18, page 4.

communities during or after concession allocation, and very often not beforehand. This causes conflicts between “Pygmy” peoples and concessionaires, who fail to take their rights into account and fail to keep them informed about negotiations over the limits of their concessions. One example is the conflict that has arisen in the Bas Congo province between the Mbanda sawmill and the community living in the Vungu Bunzi village; another is the conflict between local communities and the SIDEFOR and SAFBOIS logging companies in Orientale province.¹¹⁶

88. In its 2003 Concluding Observations on DRC, the Commission expressed its concern about:

*reports of ongoing serious violations of the human rights of pygmy/Batwa populations in DRC, particularly in eastern districts, included forced removal from their lands...*¹¹⁷

89. The Periodic Report notes that the State has taken steps to protect “Pygmy” peoples in the Ituri district of Orientale province in eastern DRC.¹¹⁸ However, no measures were taken to help them find alternative lands after their territories were granted to forestry concessionaires. As a result, the “Pygmy” population finds itself dispersed around surrounding villages with no means of subsistence.

90. “Pygmy” peoples “believe that if they still lived in their forests, their lives would be better because they would still be able to collect medicinal plants and practice their customs.”¹¹⁹ They retain close psychological, spiritual and cultural links with the forest and their identity and survival as distinct and indigenous peoples is strongly linked to it. The expropriation of these lands and their continuing exclusion from it have extremely harmful effects on their health and well-being, and constitute a serious violation of “Pygmy” peoples’ cultural rights. A United Nations report published in 2006 commented that:

*Many Pygmies, having been deprived of their land and their means of subsistence, are living in extreme poverty. “From the moment we were ejected from our land death has followed us. We are burying people nearly every day. The village is being emptied out. We are starting to disappear. Now that all the elders are dead, our culture is dying too” said a Mutwa man from Kahele in the Democratic Republic of Congo.*¹²⁰

91. The Commission has taken note of the State’s indifference towards multiculturalism and the move towards cultural assimilation:

Discrimination against Pygmies is prevalent in DRC ... The authorities and the majority population neither understand nor respect their culture but do generally perceive the Pygmies to be at a lower developmental level. To the extent that any action is taken, the purpose is rather to assimilate the Pygmies

¹¹⁶ CENADEP (Oct 2007), *La voix du paysan congolais*, 3ième année, No9, Kinshasa, pages 10-11.

¹¹⁷ African Commission on Human and Peoples Rights (2003), *Concluding Observations on the Report of the Democratic Republic of Congo*, op. cit., paragraph 3, page 4.

¹¹⁸ Rapport périodique, paragraphes 52-53, page 17.

¹¹⁹ WGIP Report (2005), page 61.

¹²⁰ Integrated Regional Information Network (United Nations Office for the Coordination of Humanitarian Affairs), *IRIN In-Depth Minorities under siege: Pygmies today in Africa*, April 2006, page 9.

*into the dominant culture and not to promote multiculturalism, which respects the diversity and rights of all different groups.*¹²¹

92. In areas around North Kivu, Ituri, and forested regions without national parks and nature reserves in Equateur, there are “Pygmy” communities who maintain their traditional way of life and culture based on hunting and gathering in the forests. They continue to have traditional exchange and commercial relationships with Bantu communities (farmers). “Pygmy” peoples can work for these farmers, but still retain a degree of independence and can return to the forest.
93. Nevertheless, the Commission has observed that these “Pygmy” communities face the risk of continual encroachment onto their lands:

*The Batwa/Bambuti from the DRC suffer from serious problems in relation to their land. The multinational mining, exploitation and infrastructure companies have planned their strategies for activity in the DRC with a view to exploiting the natural resources of the Congo as soon as conditions permit. This will inevitably lead to the destruction of the forest and will wipe out the Pygmies’ way of life.*¹²²

94. DRC is currently implementing an ambitious plan of forestry reforms with support from the World Bank, but these reforms are going ahead without the effective participation of indigenous peoples and in violation of their human rights. Even the World Bank Inspection Panel has criticised the lack of consultation with “Pygmy” peoples during the reforms already introduced.¹²³
95. One of the national laws key to the reforms is the Forest Code adopted in 2002. The Forest Code states that at least 40 per cent of Congolese forest will be awarded to commercial concessions and that 15 per cent will be granted to conservation.¹²⁴ The remaining forest can also be used for concessions, but neither the Forest Code nor any other national law indicates the percentage of Congolese forest that will be identified as belonging to “Pygmy” peoples, delimited and titled.
96. The Forest Code limits use rights in classified forests to gathering certain specific products for non commercial use, and does not permit hunting.¹²⁵ It discriminates against “Pygmy” peoples’ social, economic and cultural practices and renders them illegal. One “Pygmy” man in South Kivu province has commented that:

*Banning hunting, the commercialisation of some products taken under the auspices of use rights, or even banning us from use rights in certain parts of our forests or forestry concessions, is just another way of marginalising us even further and violating our land and resource rights.*¹²⁶

¹²¹ WGIP Report (2005), page 42.

¹²² WGIP Report (2005), page 32.

¹²³ The Inspection Panel, *Report No. 40746-ZR*, August 31, 2006, op. cit., pages 55-54.

¹²⁴ Forest Code 2002, Article 14.

¹²⁵ Forest Code 2002, Articles 36, 37, 38 and 39.

¹²⁶ CAMV et al (Septembre 2005), *Les autochtones pygmées et les codes forestier et minier en RD Congo : vulgarisation des codes forestier et minier et résultat de la collecte d’opinion*, op. cit., page 29. (Unofficial translation by the authors).

97. The Forest Code depends on a number of decrees for its implementation, but to date these decrees have been elaborated and adopted without “Pygmy” peoples’ effective participation. The State provided civil society with some of these decrees, but only after they had already been adopted.¹²⁷ Furthermore, the Forest Code and its decrees are written in a language inaccessible to “Pygmy” peoples, the majority of whom are illiterate.
98. The situation is becoming serious because DRC is still elaborating and adopting decrees without “Pygmy” peoples’ prior consultation or participation. There is a strong risk that these regulations will be adopted and that in order to create more protected areas and forestry concessions the State will repeat and reinforce the exclusion that has already led to the expropriation of “Pygmy” peoples’ lands without compensation or consent.
99. The exclusion of “Pygmy” peoples from decisions that affect them and their lands is already apparent within the process of converting forestry concession titles.¹²⁸ The law regulating this process stipulates that all titles that existed when the Forest Code became operational must be re-registered and reissued as new contracts in order to be considered legal.¹²⁹ Although the process is already underway, the State has still not carried out widespread and in-depth consultations with indigenous communities to ensure that their rights are guaranteed, even though the process has revealed that many concessions exist on indigenous peoples’ lands.¹³⁰
100. In the current climate of land reforms and the large-scale push in favour of the commercial exploitation and environmental protection of DRC’s forests, there is a risk of irreparable harm to “Pygmy” peoples’ well-being and cultural, economic, physical and spiritual integrity. In 2006, CERD recognised the urgency of the situation: in a letter under its early warning and urgent action process, it asked DRC to:

*Indicate whether legislation or national regulations require that indigenous peoples are informed, notified, consulted and/or prior informed consent is obtained from them before concessions to exploit resources on their land or territory are granted. Are there mechanisms or procedures in place which guarantee that the rights and interests of indigenous peoples are taken into consideration before concessions of this type are granted?*¹³¹

101. More recently, in its 2007 Concluding Observations on DRC, CERD noted “*with concern that the rights of Pygmy (Bambutis, Batwas and Bacwas) peoples to own,*

¹²⁷ Nsosso, D. (2002), ‘Recovery of penalties in the Congolese forest sector’ en: CED, Rainforest Foundation et Forests Monitor, eds. *Forest Management Transparency, Governance and the Law: Case studies from the Congo Basin. Prepared for the ministerial Conference on Africa Forest law Enforcement and Governance (AFLEG)*, Yaoundé, October 13-16, 2003, page 41.

¹²⁸ See, for example: CAMV, *Le Forestier: Les communautés autochtones et locales, la gestion durable et décentralisée des forêts congolaises, No.1*, July 2007.

¹²⁹ Decree n° 05/116 from 24 October 2005 which set the terms for converting old forestry titles into forestry concession contracts and extended the moratorium in terms of granting titles for forest exploitation.

¹³⁰ Greenpeace (Apr 2007), *Carving up the Congo*, pages 82-85, available at: <http://www.greenpeace.org.uk/media/reports/carving-up-the-congo>.

¹³¹ CERD, Letter reference NP/JF, dated 18 August 2006, to S.E. M. Antoine Mindua Kesia-Mbe, Ambassador Extraordinary and Plenipotentiary, Permanent Representative, Democratic Republic of Congo Permanent Mission to the United Nations. (Unofficial translation by the authors)

develop, control and use their communal lands, territories and resources are not guaranteed".¹³² CERD recommended that DRC must:

*take urgent and adequate measures to protect Pygmy rights to land and to: (a) include the forestry rights of indigenous peoples in internal legislation; (b) list ancestral pygmy land in the land register; (c) declare a new moratorium on forest land; (d) take the interests of pygmies into account as well as requirements for protecting the environment, in terms of exploiting land; (e) set up an internal appeal procedures for cases where the rights of indigenous peoples are violated.....*¹³³

Suggested questions:

6. What measures is DRC taking to recognise and guarantee the land and cultural rights of “Pygmy” peoples?

7. What measures is DRC taking to delimit and demarcate “Pygmy” peoples’ lands and territories, to ensure that this land covers an adequate area to allow the traditional activities of these peoples, and to issue title to the peoples concerned?

8. What measures is DRC taking to guarantee “Pygmy” peoples’ right to participate in decisions concerning activities on their lands and to guarantee their right to free, prior and informed consent to decisions that concern them?

9. What measures is DRC taking to recognise the rights of “Pygmy” peoples to their lands and resources expropriated for use as protected areas and concessions without their consent? Does it intend to take measures to return this land to the “Pygmy” communities concerned, or to compensate them for the loss of their land, which for factual reasons cannot be returned to them?

10. What measures is DRC taking to ensure that forestry sector reforms recognise and respect the collective rights of “Pygmy” peoples, their right to effective participation, and to free, prior and informed consent?

¹³² CERD, *Concluding Observations of the Committee for Elimination of Racial Discrimination: Democratic Republic of Congo, op. cit.*, paragraph 18, page 4.

¹³³ CERD, *Concluding Observations of the Committee for Elimination of Racial Discrimination: Democratic Republic of Congo, op. cit.*, paragraph 18, page 4.

