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INDIGENOUS ISSUES

Human rights and indigenous issues

**Report of the working group established in accordance with Commission on
Human Rights resolution 1995/32 of 3 March 1995 on its tenth session**

Chairperson-Rapporteur: Luis-Enrique Chávez (Peru)

Summary

The tenth session of the working group on the draft United Nations declaration on the rights of indigenous peoples was held from 13 to 24 September 2004 and from 29 November to 3 December 2004. Informal meetings were held by facilitators on clusters of most of the articles in the draft and the present report provides information on progress achieved.

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
I. OPENING OF THE SESSION	1 - 16	3
II. ORGANIZATION OF WORK	17 - 25	5
III. INFORMAL DISCUSSION OF ARTICLES	26 - 58	6
A. Lands, territories and natural resources	27 - 39	6
B. Self-determination	40 - 46	8
C. Provisional adoption of articles	47 - 50	9
D. Cross-cutting issues	51 - 57	10
E. Article 36 related to treaties	58	11
IV. CLOSURE OF THE SESSION	59 - 63	11

I. OPENING OF THE SESSION

1. By resolution 1995/32 of 3 March 1995, the Commission on Human Rights decided to establish an open-ended inter-sessional working group of the Commission on Human Rights with the sole purpose of elaborating a draft declaration, considering the draft contained in the annex to resolution 1994/45 of 26 August 1994 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights) entitled “Draft United Nations declaration on the rights of indigenous peoples” for consideration and adoption by the General Assembly within the International Decade of the World’s Indigenous People. This decision was endorsed by the Economic and Social Council in its resolution 1995/32 of 25 July 1995.
2. The working group held nine meetings during the tenth session. The present report reflects the discussion which took place on different proposals for amendments to the draft elaborated by the Sub-Commission, which was the basis for all discussions.
3. A total of 494 people attended the meetings of the working group, including representatives of 64 Governments, 5 United Nations bodies and specialized agencies and 68 indigenous and non-governmental organizations.
4. As agreed by the working group at its first meeting, the present report also contains a summary of the debate which took place in informal plenary meetings, as reflected by the Chairperson-Rapporteur.
5. The first meeting of the working group was opened by Dzidek Kedzia, on behalf of the Office of the High Commissioner for Human Rights (OHCHR). He welcomed all participants, including the 17 indigenous representatives assisted by the Voluntary Fund for Indigenous Populations, and thanked those Governments that had contributed to the Fund. He encouraged further contributions and underlined the importance of the financial assistance that is given through the Voluntary Fund to ensure broad participation of indigenous peoples.
6. The representative of OHCHR also recalled the recommendations made by the General Assembly and the Commission on Human Rights requesting that the declaration be adopted before the end of the International Decade of the World’s Indigenous People (1995-2004). In response to the request made by the Commission in resolution 2004/59, OHCHR had been able to organize additional meetings, which would be held from 29 November to 3 December 2004 in Geneva.
7. The working group elected by acclamation Luis-Enrique Chávez (Peru) as its Chairperson-Rapporteur.
8. Also at the first meeting, the representative of New Zealand, on behalf of Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, introduced an amended text for the declaration on the rights of indigenous peoples (E/CN.4/2004/WG.15/CRP.1) and an explanatory comment (E/CN.4/2004/WG.15/CRP.2). The representative of Estonia co-sponsored CRP.1 and CRP.2.

9. The representative of the Netherlands, on behalf of the European Union, welcomed CRP.1 as a useful basis for discussions. The representative of Argentina, on behalf of the Group of Latin American and Caribbean States (GRULAC), thanked the Governments that had prepared CRP.1.

10. The representative of Denmark, speaking on behalf of Denmark and Greenland, expressed the hope that the proposal presented in CRP.1 would contribute to a constructive discussion and prompt approval of the draft declaration.

11. The representative of Bolivia expressed his Government's willingness to reach consensus during the current session, regretting the slow progress of the working group during the last 10 years. He noted that Bolivia had undertaken a number of legal steps in favour of indigenous peoples, including, among others, the constitutional reform that defines Bolivia as a multi-ethnic and multicultural State and the ratification of Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries of the International Labour Organization (ILO). He also stressed that legal changes were not sufficient, but that anti-poverty programmes and international commitment were needed to make up for historical injustices.

12. The representative of Spain expressed the support of his Government to the efforts of the Chairperson-Rapporteur to advancing the draft declaration, as the achievement of an atmosphere of dialogue was a prerequisite for consensus. In that sense, the Spanish delegation confirmed its interest in achieving tangible progress in the negotiations and satisfying the legitimate aspirations of indigenous peoples.

13. An indigenous representative speaking on behalf of the International Indian Treaty Council and Treaty 6 noted that the amended text introduced a number of changes and that any proposals that weakened the rights of indigenous peoples, and especially their land rights, were not acceptable to indigenous peoples. The text adopted by the Sub-Commission should be the basis of the discussion and no consensus could be achieved without the agreement of indigenous peoples.

14. An indigenous representative from the Indigenous Peoples of Africa Coordinating Committee (IPACC) thanked the Governments for the proposals contained in CRP.1 and noted that in the proposal, priority was given to domestic over international standards and that in many countries indigenous peoples' rights were not included in domestic law. He also said that any consensus should be based on the principles of equality and non-discrimination.

15. An indigenous representative from the Aotearoa Indigenous Rights Trust underlined the importance of sharing domestically the proposals put forward by Governments on international standard-setting.

16. At the final meeting of the session, the Government of Mexico, with the aim of facilitating better understanding and favouring a reconciliation of the positions of indigenous peoples and States on themes and concepts of major concern related to the draft declaration, submitted to the Chairperson-Rapporteur a proposal to co-organize, in Mexico, within the framework of the working group, a workshop to be held in May 2005, with the participation of indigenous peoples' representatives, internationally recognized academics, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,

State representatives and civil society organizations. The Government proposed that the workshop be convened by the Chairperson-Rapporteur, with the support of the Office of the High Commissioner for Human Rights, and the Government of Mexico, through the national Commission for Development of Indigenous Peoples (CDI), which was willing to make a financial contribution to facilitate this objective.

II. ORGANIZATION OF WORK

17. The Chairperson-Rapporteur proposed considering during the first week all the proposals contained in CRP.1, as well as any other proposal for amendment to the original draft adopted by the Sub-Commission. At the request of indigenous peoples, he proposed that first, all articles and preambular paragraphs in CRP.1 that did not propose alternative wordings to the Sub-Commission draft, be considered, in the hope that consensus could be reached on those provisions. Then, he proposed that consideration be given to the articles of the original draft that had not been discussed at the previous session. Accordingly, he announced that the work would be organized around the following four clusters:

(a) The preambular paragraphs that had not been amended in any way by the proposal contained in CRP.1, i.e. preambular paragraphs 1-5, 7-9, 12, 14, 16-18;

(b) The articles that had not been amended in any way by the proposal contained in CRP.1, i.e. articles 2, 8, 10, 14, 19, 40, 42, 44;

(c) The articles considered during the ninth session of the working group in 2003 that could serve as a basis for future consensus, i.e. articles 16, 18, 33, 45;

(d) Finally, the preambular paragraphs and articles that had so far not been discussed, i.e. preambular paragraphs 6, 10, 11, 13, 19 and articles 22, 32, 34, 35, 37-41.

18. Consequently, the discussions of the first week (13-17 September 2004) covered preambular paragraphs 1-19, as well as articles 2, 8, 10, 14, 16, 18, 19, 22, 32-35, 37-41, 44 and 45. The Chairperson-Rapporteur underlined at the closure of the debate on those articles that the working group had completed the first reading of the draft and, therefore, the group had reached one of its objectives for this session.

19. During the second week (20-23 September 2004), preambular paragraphs and articles relating to self-determination (preambular paragraphs 14 and 15, as well as articles 3 and 45) and to lands and resources (arts. 25-30) were discussed, followed by informal consultations on those articles. The working group also revisited preambular paragraphs 6 and 16 and articles 16, 18, 22, 32-35, 37 and 39-41, based upon new proposals resulting from informal consultations carried out by the facilitators appointed by the Chairperson-Rapporteur.

20. Consultations also took place in order to discuss article 36 on treaties. Facilitators presented a report at the last meeting of the session.

21. The Chairperson-Rapporteur said that the aim of the meeting was to find acceptable language for each article, and invited participants to come forward with practical proposals which would facilitate consensus.

22. As a result of informal consultations held during the second week of the tenth session (20-24 September), alternative language was submitted on preambular paragraphs 6 and 13, as well as on articles 16, 18, 22, 32-35, 37, 39-41 and 45. Even though the Chairperson-Rapporteur felt that it was not possible to adopt any of those articles as presented by the facilitators, it was understood that consensus could be reached based on the outcome of the consultations.

23. During the third week of the session (29 November-3 December 2004), the Chairperson-Rapporteur proposed focusing the discussions on articles pertaining to the fundamental aspects of the declaration - the right to self-determination and the provisions on lands, territories and natural resources. After three informal plenary meetings, the Chairperson-Rapporteur appointed two groups of facilitators in order to discuss in informal meetings proposals for alternative language that could be the basis for consensus on both areas of rights.

24. The Chairperson-Rapporteur also appointed facilitators in order to address two other issues. Following a request from indigenous representatives, a third group of facilitators was charged with exploring the possibility of the provisional adoption of a number of articles of the draft. The Chairperson-Rapporteur asked the facilitators to explore the possibility of a provisional adoption taking into consideration his summary (CRP.4), in which he had identified articles that had not been the subject of proposals for changes, or where there could be consensus on alternative language.

25. The Chairperson-Rapporteur asked a fourth group of facilitators to carry out consultations with participants interested in addressing cross-cutting concerns of all participants that had appeared during the consideration of different articles. These included the relationship between different provisions of the draft declaration and other obligations of States or the rights of individuals, the question of collective rights, the scope of application of the declaration, as well as the provisions identified by indigenous peoples.

III. INFORMAL DISCUSSION OF ARTICLES

26. As a result of informal consultations led by the facilitators, the Chairperson-Rapporteur informed the working group of the status of the process regarding provisions (a) on lands, territories and resources; (b) on the question of self-determination; (c) concerning provisional adoption; (d) cross-cutting issues; (e) article 36 related to treaties.

A. Lands, territories and natural resources

27. The representative of Brazil introduced a summary of the informal consultation carried out on articles 25, 26, 28 and 30. He had collected all proposals and they all had merit. Having heard, analysed and discussed all the proposals, he made some comments and suggestions.

28. Informal consultations were held with various representatives and delegations. This work involved all actors such as non-governmental organizations, the indigenous caucus and States. The facilitator highlighted the prevalence of a positive and constructive attitude and identified the general wish to work towards a text of a declaration.

29. The facilitator stated that there was no consensus on articles 25, 26, 28 and 30. Nevertheless, consultations revealed the possibility of new ways towards consensus. He stressed, in particular, the preliminary understanding around article 26.

30. Regarding article 25, the facilitator identified the persisting difficulties of several States regarding the expression “traditional”. That expression reflected a desire of indigenous peoples for their spiritual and temporal relationship with their lands or territories to be recognized, but caused concern among governmental delegations. It seemed that that concern related to possible claims which would be extremely difficult to be fulfilled.

31. Another difficulty for some delegations was the use of the word “territory”. That question related to the issue of self-determination. The facilitator suggested for future discussions language that would respect the spirit of the Sub-Commission text and tried to reflect the concerns raised during the discussions. That proposal is contained in the summary of proposals, as an addendum to this report.

32. The discussions on article 26 opened up the possibility for indigenous representatives, Governments and NGOs to reach a preliminary understanding on the language of the article, based upon a proposal presented by the Indian Law Resource Centre, with slight amendments. A new article was also suggested to complement article 26 as well as other articles on lands and resources, by describing a method for realizing those rights.

33. Another important point for further consultation related to “subsurface resources”. Indigenous representatives expressed a desire to keep this language in the text, while many governmental delegations strongly opposed keeping it. The facilitator suggested that this point should be a matter of further consideration and, consequently, kept the expression in brackets.

34. Discussions showed that there were two different subjects in article 28. One related to the environment and the other to military presence on indigenous lands. In the view of the facilitator, one specific proposal deserved special consideration, that is, to split article 28 into two different articles: one on the environment and another on military presence.

35. Regarding article 30, two critical points were the subject of concern. The first related to the use of the words “seek” or “obtain”. Having heard all the positions presented, the facilitator strongly suggested keeping the original language, that is, the verb “obtain”. The second concern referred to the mechanism of redress. It was suggested that the solution to that question be addressed in other parts of the draft declaration, in particular article 27.

36. The representative of Guatemala introduced a summary of the informal consultation carried out on articles 27 and 29. Regarding article 27, he reported that this article was considered in informal meetings in which a broad range of States and indigenous groups were represented. A general and in-depth discussion was held on the entire text of the article, and efforts were subsequently focused on the terms “reparation”, “restitution” and “redress”, which constituted the main stumbling block for delegations. On the one hand, several indigenous and governmental organizations preferred to retain the word “restitution”, while other government delegations preferred the word “redress”. Concern was expressed relating to the translation of the term “redress”, as it had no direct equivalent in Spanish.

37. The facilitators had submitted a proposal which was discussed during the consultations. Although no consensus was reached, as noted previously, in their view this text had significant support. At the end of the consultations the delegation of Canada submitted a proposal that was not discussed, owing to a lack of time. These proposals, as well as other proposals concerning article 27, are included in the above-mentioned summary.

38. As the view had been expressed during consultations that no single text of article 29 was satisfactory to all delegations, the delegations of Mexico and Guatemala submitted a proposal aimed at reflecting the various concerns raised by the representatives of indigenous peoples and States. That proposal was discussed during the informal consultations. Some delegations, of both States and indigenous peoples, expressed support for that proposal, with some amendments and the introduction of some new elements, such as indigenous sports and traditional games. Other delegations, primarily of States, expressed a preference for the proposed text contained in CRP.1.

39. After the various views had been heard, the delegation of Mexico, whose previous efforts were commended, submitted a revised proposal that was co-sponsored by Venezuela and Guatemala. The debate on the revised proposal was centred specifically on the terms “intellectual property” and “genetic resources”, concepts that had not been accepted, primarily by State delegations, for inclusion in article 29, for various reasons that were set out during the session. As no consensus was reached with regard to those terms, they appear in square brackets in the text. In addition, several delegations reiterated their preference for the text contained in CRP.1. However, the proposal is included in the summary because it obtained greater support in the informal consultations.

B. Self-determination

40. The representative of Canada presented the report of the facilitators regarding the articles on self-determination. At the outset, he said that the facilitators thought that it was important to acknowledge that all representatives of indigenous peoples and some States supported article 3 of the Sub-Commission text.

41. During the course of their consultations, the facilitators had identified several proposals concerning the right to self-determination of indigenous peoples which they forwarded for further consideration by the Chairperson-Rapporteur. The following proposals were submitted with multiple sponsors: CRP.1; CRP.5; “emerging consensus” document with explanatory footnote.

42. In addition, the following proposals were submitted by individual organizations and States: World Peace Council; International Organization of Indigenous Resource Development; United States of America; France; Russian Federation.

43. In general, the facilitators were encouraged by the positive intent expressed in all the proposals received and the genuine commitment to achieving consensus. A notable development in most of the proposals was the comprehensive, or “package deal” approach to addressing the right of self-determination. Using that approach, the right of self-determination was stated clearly and situated within a context that was clarified in a combination of preambular and/or operative paragraphs.

44. In several of the proposals, the existing text of article 3 was unchanged: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." From that starting point, the proposals then diverge in the use of preambular and operative paragraphs and, in one proposal, the use of an explanatory note.

45. It was clear that the critical issue of "territorial integrity" had yet to be resolved and that there was no consensus to date. In the view of the facilitators, it remained to secure agreement on the appropriate preambular and/or operative paragraphs.

46. The facilitators were greatly encouraged by the evidence of an emerging consensus. They hoped that support would continue to grow for proposals that had received the sponsorship of indigenous and State participants.

C. Provisional adoption of articles

47. The Chairperson-Rapporteur requested the delegation of Norway to undertake informal consultations with indigenous peoples' representatives and States, aimed at exploring the possibility of adopting articles on a provisional basis. The delegation conducted such informal consultations, in collaboration with the facilitators of the indigenous caucus. The consultations were described as positive and constructive. Contributions from the indigenous caucus, which encompassed results of consultations within each of the seven regions, demonstrated a commitment to achieve substantial progress at the current session of the working group.

48. The representative of Norway stated that there was broad agreement on a large number of articles, and even potential consensus on many of them. However, he was of the opinion that it would be difficult to move to provisional adoption of the package before the working group had solved some of the other outstanding questions, including the right of self-determination, lands and resources and collective rights in general. The facilitator submitted a package, containing 13 preambular paragraphs (2-7, 9-12, 16-18) and 14 articles (arts. 4, 6, 9, 14, 16-18, 22, 33, 34, 40, 41, 44, 45) and proposed that it be set aside for final consideration at an appropriate time, in order to address the remaining outstanding issues in some of the articles.

49. A representative of the indigenous caucus expressed the view that preambular paragraphs 2-5, 9 and 18 and articles 2, 42 and 44 could be provisionally adopted. He added that preambular paragraphs 1, 6, 7, 12 and articles 8, 9 and 40 could also be provisionally adopted, as the outcome of consultations indicated. Finally, he said that preambular paragraphs 8, 16, 17 and articles 10, 14, 19, 22 and 34 could be provisionally adopted after discussion, if needed. He stressed the difficulties certain indigenous delegations would have in accepting changes to the Sub-Commission text. However, in the interest of attaining progress, they had decided not to object to this consensus.

50. The representative of the indigenous caucus stressed that several of the provisions mentioned by the facilitator were also included in the list presented by the indigenous caucus. He also noted that many more provisions were close to agreement.

D. Cross-cutting issues

51. The Chairperson-Rapporteur invited the representative of Spain and Mr. Les Malezer (FAIRA) to serve as facilitators for the consultations relating to cross-cutting issues that might be dealt with through a new general preambular paragraph that would help bring positions closer together concerning other articles of the draft. He said that he believed that the deliberations on cross-cutting issues should be held in consultation with other facilitation groups so as to avoid covering themes that were under negotiation in those groups. In the fulfilment of this mandate, the facilitators had agreed to organize two meetings with a number of States and indigenous organizations.

52. The representative of Spain, on behalf of the facilitators, said that during the consultations various delegations thought it would be useful to find a solution to the collective nature of the rights contained in the draft declaration; resolve the debate on self-identification; and take up the discussion of third-party rights. Some delegations also referred to other possible cross-cutting issues such as the international obligations of States, national security, or the responsibility of individuals. Taking into account the time limits, the mandates of the other facilitators and the evolution of their consultations, the facilitators on cross-cutting issues narrowed down the subjects of their informal consultations to possible proposals of collective rights (an issue not discussed by the other groups) and self-identification (a matter that was raised formally by one delegation during the plenary meetings).

53. During the informal consultations, three new proposals were circulated by the Governments of the United Kingdom and Portugal, and by the Grand Council of the Crees (in English, with an unofficial Spanish translation). The first two proposals would require the inclusion of a new preambular paragraph 18 focused on the specific issue of collective rights and the third, broader in scope, proposed incorporating a new preambular paragraph 15 ter on principles for interpreting the rights of indigenous peoples in cases of disputes.

54. On the basis of the proposals presented as well as the concerns expressed later, the facilitators concluded that for the great majority of participants, the consultations proposed by the Chairperson-Rapporteur had contributed to bringing positions closer together. There were important cross-cutting issues that required additional time and attention, such as those related to collective rights and certain other matters that had only been referred to.

55. As far as collective rights were concerned, and despite the efforts by the facilitators to encourage negotiation on the proposals made, it was felt that there was insufficient consensus to move forward and that, for the moment, it was important to put the proposals on record and to consider them at a later stage.

56. Some governmental and indigenous delegations considered that the proposals presented were constructive and could facilitate future agreement on this complex matter. Other governmental and indigenous representatives expressed a preference for not hurrying into this debate and said they had strong reservations about the proposal for the inclusion of a preambular paragraph and the risks that it implied for the draft declaration.

57. After this presentation, an indigenous representative, on behalf of a number of indigenous organizations, expressed the view that for them, the “cross-cutting” issues were the following: (a) the text adopted by the Sub-Commission represented a minimum standard of rights, which must be preserved in any final declaration if it was to be acceptable to most indigenous peoples; (b) the Sub-Commission text must remain the basis for discussion; (c) the focus of the declaration must remain the collective rights of indigenous peoples; (d) the term “indigenous peoples” must be used without qualification; (e) the internationally recognized rights of indigenous peoples must not be defined or qualified by national law; (f) the principle of prior informed consent and full collaboration must be applied for the effective implementation of the declaration; (g) the rights of indigenous peoples under international law must be applied without discrimination or qualification, in particular regarding the right of self-determination; (h) the rights related to self-determination, lands, territories, natural resources and treaties were of core importance to indigenous peoples.

E. Article 36 related to treaties

58. The Chairperson-Rapporteur requested the delegation of Canada and the representative of the International Organization of Indigenous Ressource Development to facilitate consultations on article 36. The representative of Canada summarized the consultations, reminding participants that some proposals for article 36 had been briefly discussed during the first two weeks of the session. She said that during those consultations the participants had looked at a number of proposals for wording, including one from a recent meeting held at the Organization of American States. She said that there was not yet agreed wording, but possible wording was presented as the “current working text” and the facilitators would be continuing to seek agreement on the wording of article 36, which could be brought forward at an appropriate time.

IV. CLOSURE OF THE SESSION

59. At the end of the session, the Chairperson-Rapporteur made a summary of the status of all the provisions of the draft declaration, which is contained in an addendum to this report. He acknowledged that even though substantial progress had been achieved, there was still no consensus on a number of articles. However, he said that he was convinced that the working group was progressing towards consensus. He therefore stated that he was ready to make a contribution towards reaching consensus in the form of a Chairman’s proposal to be considered by the working group, hoping that such a proposal would be a good basis for further work, as it would capture the many good elements that had been brought forward during the session.

60. In that connection, many representatives of indigenous peoples once again expressed their concerns about the process and the proposal made by the Chairperson-Rapporteur. The Chairperson-Rapporteur responded that he would take into consideration those concerns, which had already been expressed at the beginning of the third week in a joint statement by a group of indigenous representatives who considered that the current process threatened to undermine their fundamental rights.

61. The Chairperson-Rapporteur said that, owing to the consultations by facilitators up to the last day of the session, it was not possible to make a Chairman’s proposal before the end of the session. However, he told the working group that he would include his proposal as an addendum to the report.

62. The meeting ended on the understanding that the working group had made substantial progress towards consensus. The Chairperson-Rapporteur informed the working group that he would recommend to the Commission on Human Rights that it allocates additional time in order to conclude the process successfully in 2005.

63. At the end of the session, the Government of Guatemala said that States and indigenous peoples needed to continue working to build confidence and broaden dialogue with a view to adopting the declaration without limitations and restrictions that might put at risk the future of indigenous peoples. He said that the declaration should be elaborated in a consensual manner and appealed to everyone not to take precipitous decisions on articles that were the essence of the declaration. In that respect, it was desirable to extend the mandate of the working group and also to hold inter-sessional meetings with legal experts, States and indigenous representatives in order to analyse the range of the right of self-determination.
