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DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Analytical commentary on the draft principles contained in
the first revised text of the draft declaration on the
rights of indigenous peoples (E/CN.4/Sub.2/1989/36)
elaborated by the Chairman/Rapporteur of the Working Group
on Indigenous Populations, Ms. Erica-Irene A. Daes

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I. INTRODUCTION

1. At its thirty-ninth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted the Chairman/Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, with the task of preparing a working paper containing draft principles and preambular paragraphs for insertion in a draft declaration on indigenous rights. This was approved by the Commission on Human Rights, and by the Economic and Social Council in its resolution 1988/36. Subsequently, the working paper (E/CN.4/Sub.2/1988/25) was submitted to the Working Group at its sixth session.

2. In resolution 1988/18, the Sub-Commission recommended that Ms. Daes prepare a first revised text of the draft declaration as a whole based on comments made at the Working Group's sixth session and on written observations and suggestions received from Governments, indigenous peoples, intergovernmental and non-governmental organizations. The Commission on Human Rights welcomed this decision by resolution 1989/34.

3. The first revised text of the draft Universal Declaration on the Rights of Indigenous Peoples was submitted to the Working Group at its seventh session (E/CN.4/Sub.2/1989/33), and was the subject of a wide-ranging discussion among the members of the Working Group and observers of Governments and indigenous organizations. Comments and suggestions made orally in the course of the Working Group's seventh session have been analytically summarized in the Working Group's report (E/CN.4/Sub.2/1989/36). It should be noted that all speakers supported the standard-setting activities and stated that the revised draft represents an important step forward and provides a good formulation for further endeavours in reaching agreement on a Universal Declaration on the Rights of Indigenous Peoples.

4. In resolution 1989/34, the Sub-Commission recommended that the Chairman/Rapporteur of the Working Group be entrusted with the task of preparing a second revised text of the declaration to be based on comments made orally at sessions of the Working Group and on written observations and suggestions received from Governments, indigenous peoples, intergovernmental and non-governmental organizations. By resolution 1990/62, the Commission on Human Rights endorsed this approach, which was also approved by the Economic and Social Council in its resolution 1990/...

5. In the course of the last three years, the written and oral comments relating to the draft declaration, as it now stands in a preliminary version, amount to a substantial bulk of documents. At this stage of the proceedings, when the Working Group is about to enter the first reading of each article of the draft declaration, the Chairman/Rapporteur feels that an effort to compile, analyse, and respond constructively to the wide variety of useful comments and suggestions would constitute a practical and appropriate method for facilitating the Group's deliberations. Accordingly, this analytical commentary was elaborated and it contains the basic written observations and suggestions received. Furthermore, in this paper, Ms. Daes attempts to identify those provisions upon which there appears to be broad agreement; these provisions are listed in Part II of this working paper. Other draft

provisions are set out in Part III, with an analysis of the comments thus far made on each of them and preliminary suggestions for the direction of further consideration.

6. The Chairman/Rapporteur wishes to express her appreciation to all those who have made constructive written and oral contributions to the further analysis and refinement of the text of the draft declaration. She also expresses the sincere hope that the ongoing dialogue between all the parties concerned will continue with full vigour until the draft declaration can be adopted in its final form.

II. DRAFT PROVISIONS ON WHICH THERE IS BROAD AGREEMENT

7. The Chairman/Rapporteur, Ms. Daes, is pleased to note that a number of draft preambular paragraphs and articles have thus far attracted favourable observations or in any case no critical comments or suggestions, and therefore may indeed be widely acceptable. The Working Group at its eighth session may wish to consider adopting these provisions in first reading, so as to be able to focus its attention on those provisions of the draft declaration on which differing views have been expressed.

8. The provisions of the draft declaration, as it appears in the first revised text and which might be adopted at first reading, are the following:

- (a) in the preamble, all except the first, fifth and twelfth paragraphs;
- (b) in Part II, the third, fourth, and seventh articles;
- (c) in Part III, the thirteenth article;
- (d) in Part IV, the nineteenth and twentieth articles;
- (e) in Part V, the twenty-second and twenty-sixth articles;
- (f) in Part VII, the twenty-ninth and thirtieth articles.

9. The provisional adoption of the foregoing draft articles and paragraphs, in first reading, would leave remaining for discussion and further elaboration three preambular paragraphs and 20 articles. The Chairman/Rapporteur believes this approach would not only facilitate but also accelerate the work of the Working Group considerably, and help focus the Working Group's consultations with Governments and indigenous peoples.

III. PROVISIONS ON WHICH FURTHER CONSIDERATION IS NEEDED

10. This part analyses many of the suggestions made by Governments, United Nations organs and specialized agencies, indigenous organizations and non-governmental organizations for the further revision of the draft declaration. Proposals already fully reflected in the first revised text have not been repeated here. The Chairman/Rapporteur also points out suggestions of a technical character which can be incorporated in the second revised text. Generally, however, she has confined her analysis to indicating the possible course of further discussions.

Draft first preambular paragraph

"Considering indigenous peoples born free and equal in dignity and rights in accordance with international standards while recognizing the right of all individuals and groups to be different, to consider themselves different and to be regarded as such,"

11. One government observer felt that a reference to the "right to be different" is inappropriate, since the aim of every State is to ensure that all persons will be on equal footing before the law. Another, while supporting the text in principle, suggested that the reference to "existing" international standards is unnecessarily restrictive.

12. The Chairman/Rapporteur believes that diversity of individual and group identities and cultures is fundamental to a free society, and is not incompatible with equality before the law, as illustrated by the fact that both of these principles are reflected in the International Covenant on Civil and Political Rights (arts. 26 and 27). She notes also in this regard the 1966 UNESCO Declaration of the Principles of International Cultural Co-operation, article 1 (3): "In their richness and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind." Further reference in this connection should be made to the UNESCO Declaration on Race and Racial Prejudice.

13. As to the use of the term "existing", it is true that this could be undesirably restrictive and that it can accordingly be removed from the second revised text.

Draft fifth preambular paragraph

"Convinced that all doctrines and practices of racial, ethnic or cultural superiority are legally wrong, morally condemnable and socially unjust,"

14. A government observer proposed making this the first or second preambular paragraph. The Chairman/Rapporteur believes this suggestion should be taken up at the second reading as part of a general review of the ordering of the text.

Draft ninth preambular paragraph

"Believing that indigenous peoples should be free to manage their own affairs to the greatest possible extent, while enjoying equal rights with other citizens in the political, economic and social life of States,"

15. A government observer expressed concern that this principle could be incompatible with equality before the law and lead to conflicts, while an indigenous observer recommended deleting the words "to the greatest possible extent" on the grounds that it is too restrictive.

16. The Chairman/Rapporteur notes that this principle is contained in articles 6 and 7 of ILO Convention No. 169 (1989), where it also makes a balance between internal decision-making and equality of rights with other citizens of the State. Furthermore, it should be pointed out that this preambular paragraph is closely related to those articles of the draft declaration which deal with autonomy and other political and economic rights.

Draft twelfth preambular paragraph

"Acknowledging the need for minimum standards taking account of the diverse realities of indigenous peoples in all parts of the world,"

17. A government observer felt this principle was difficult to understand in the absence of a definition of the term "indigenous peoples".

18. The Chairman/Rapporteur notes that the phrase "diverse realities of indigenous peoples in all parts of the world" has been incorporated in the annual resolutions of the Commission on Human Rights in this field, since the establishment of the Working Group in 1982, most recently in Commission resolution 1990/62 of 7 March 1990. As to questions of definition, she will address those below under the heading "Other matters".

Draft article 1

"The right to the full and effective enjoyment of all fundamental rights and freedoms, as well as the observance of the corresponding responsibilities, which are universally recognized in the Charter of the United Nations and in existing international human rights instruments."

19. One government observer stated that this should be redrafted to make it clear that nothing in the declaration derogates from existing human rights instruments. It should permit the greatest freedom of choice for indigenous peoples, and not limit the options available to individuals. An indigenous observer proposed adding the words "as peoples" before the words "to the full and effective", and the words "including the right to self-determination" after the words "rights and freedoms".

20. The Chairman/Rapporteur believes that the present draft of this article is sufficiently flexible to permit indigenous people to assert and enjoy their individual rights under existing human rights instruments, and to exercise in addition, if they wish, the special rights contained in this declaration. As for the question of self-determination, there may be need for further

discussion of the manner and context in which this principle might be reflected in the draft declaration, unless it is decided that the reference in the tenth preambular paragraph is sufficient.

Draft article 2

"The right to be free and equal to all the other human beings in dignity and rights and to be free from adverse distinction or discrimination of any kind."

21. A member of the Working Group felt that this should be reworded so as to avoid any paternalistic connotation. Indigenous peoples might have different values and culture, but so do other human beings in other parts of the world.

22. The Chairman/Rapporteur appreciates the concern which has been expressed concerning this draft article, and notes that it is based on article 1 of the Universal Declaration of Human Rights, which states that "All human beings are born free and equal in dignity and rights". Indigenous peoples have in fact frequently been denied this equality and it would therefore seem appropriate to reaffirm the general principle.

Draft article 5

"The individual and collective right to protection against ethnocide. This protection shall include, in particular, prevention of any act which has the aim or effect of depriving them of their ethnic characteristics or cultural identity, of any form of forced assimilation or integration, of imposition of foreign life-styles and of any propaganda derogating their dignity and diversity."

23. One government observer expressed support for the right to be protected from ethnocide, but felt there was a need for a more precise definition of "ethnocide", or else a list of the acts which constitute ethnocide. Use of the term "propaganda" was also troublesome in the absence of a more precise definition, and should not be interpreted as restricting the legitimate exercise of freedom of speech. One solution would be to restrict the scope of this principle to actions taken by Governments.

24. Other government observers suggested deleting the reference to the imposition of foreign life-styles, which they felt was too vague and might be interpreted as negating compliance with national laws.

25. Participants in the indigenous peoples' preparatory meeting emphasized the importance of non-interference in indigenous peoples' affairs, which is at the foundation of many of the other provisions of the declaration and expresses a natural and fundamental aspiration of many indigenous peoples.

26. The Chairman/Rapporteur acknowledges that the aim of including the reference to "foreign life-styles" in this draft article may be covered by the phrase "forced assimilation or integration". As for "propaganda", she notes that this concept appears in article 20 of the International Covenant of Civil and Political Rights where it includes "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". A restatement or definition may not be necessary in draft article 5, which could be rephrased accordingly, since it would seem clear

that any Government advocacy of forced assimilation or integration of indigenous peoples would be prohibited by the earlier reference to "any act which has the aim or effect of depriving them of their ethnic characteristics or cultural identity".

27. It may be relevant in this context that ILO Convention No. 169, in article 31, imposes a positive duty on States to adopt educational measures among all sections of the national community "with the object of eliminating the prejudices that they may harbour in respect of these people". Article 11 of the draft declaration aims in the same direction.

Draft article 6

"The right to preserve their cultural identity and traditions and to pursue their own cultural development. The rights to manifestations of their cultures, including archaeological sites, artefacts, designs, technology and works of arts, lie with the indigenous peoples or their members."

28. A government observer expressed concern that this principle as currently worded, might be construed as giving indigenous peoples an exclusive right to the production of certain objects or artworks while another government observer wanted clarification that this provision would provide adequate protection for the market for indigenous art. The meaning of the term "technology" was also questioned.

29. One of the indigenous observers proposed adding a reference to protection of items of special cultural significance. Another suggested that a specific reference should be made to the protection of cemeteries and in particular the return of human remains.

30. With respect to the first point, the Chairman/Rapporteur observes that the World Intellectual Property Organization (WIPO) has adopted guidelines for the protection of folk-art designs and motifs, and thus this principle already enjoys a basis in international law. As to the second point, the Chairman/Rapporteur believes that it may indeed be useful to include the rights to the protection and control of items of cultural significance and to the protection of cemeteries and to the return of human remains more explicitly in this draft article, and invites further comments on this possibility.

Draft article 7

"The right to require that States grant - within the resources available - the necessary assistance for the maintenance of their identity and their development."

31. Indigenous observers suggested that this draft article might be reworded for clarity, and so as to apply more broadly to the development of indigenous peoples' own institutions and initiatives.

32. The Chairman/Rapporteur believes that the principle that States provide positive assistance for cultural development, rather than merely tolerating cultural diversity, is an important and necessary one, that is now also reflected in the text, on first reading, of the declaration on the rights of

national, ethnic, linguistic and religious minorities (E/CN.4/1990/41, Annex I). As the object is the promotion of cultural development, moreover, this draft article is quite distinct from draft article 19 below which relates to economic and social development. For reasons of clarity, it is of course possible to replace the words "require that States grant" with "special State measures".

Draft article 8

"The right to manifest, teach, practise and observe their own religious traditions and ceremonies, and to maintain, protect and have access to sacred sites and burial grounds for these purposes."

33. A government observer expressed concern that the right of access to sacred sites is not made subject to any "reasonable limits", nor does it take account of the possibility that sites may have changed in character.

34. One indigenous observer proposed adding a reference to "the right to obtain, use and preserve articles, implements and natural items needed for ritual and ceremonial practices."

35. The Chairman/Rapporteur notes that this principle is consistent with the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which in article 6 refers to the right to establish and maintain places of worship, and to make, acquire and use the necessary articles and materials related to religious rites or customs. To harmonize this draft article fully with the Declaration, a reference to religious implements could be included in a revised text.

Draft article 9

"The right to develop and promote their own languages, including an own literary language, and to use them for administrative, juridical, cultural and other purposes."

36. A number of government observers supported the objective of this article, but felt it was far-reaching as regards the use of indigenous languages for official purposes, especially in cases where indigenous languages had no written form. Some suggested that the right to use indigenous languages in judicial proceedings be limited to persons who have difficulty using the official language, while others expressed a preference for wording similar to article 12 of ILO Convention No. 169. One government observer stated that this principle would be incompatible with her national constitution, which recognizes only one official language.

37. Indigenous observers expressed strong support for this article, which they considered crucial for maintaining their identities and cultures.

38. The Chairman/Rapporteur notes that article 28 of ILO Convention No. 169 provides that "Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong", and also that "Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned". The

Convention also refers to the use of "mass communications in the languages of these peoples" (article 30), as well as the use of interpretation in legal proceedings "when necessary" (article 12).

Furthermore, with reference to the relevant language of UNESCO's Convention against Discrimination in Education, the Chairman/Rapporteur agreed that a further discussion may be necessary to reach agreement on this draft article.

Draft article 10

"The right to all forms of education, including in particular the right of children to have access to education in their own languages, and to establish, structure, conduct and control their own educational systems and institutions."

34. Some government observers indicated that the right to control of indigenous peoples' own educational institutions should be subject to the same limitation as is contained in article 13 of the International Covenant on Economic, Social and Cultural Rights, that is, conformity with minimum State educational standards. With regard to instruction in indigenous languages, one Government observer considered that this would be inconsistent with her national constitution, while another assumed that it was not intended to require each and every educational institution in the country to offer instructions in all indigenous languages.

40. At the same time, it was suggested that this principle be strengthened so as to provide for education in indigenous cultural traditions and heritage. There was a further question as to whether the right of access to education should be limited to children.

41. The Chairman/Rapporteur concurs that some of these suggestions would clearly improve the text, in particular, the expansion of access to education to cover all indigenous persons regardless of their age, and the requirement that education respect the traditions and heritage of indigenous peoples.

42. As for the other concerns which were expressed, she assumes that the provisions of the Declaration would be applied flexibly, without requiring anything unreasonable or impossible. Unlike a convention, which must be legally precise, a declaration is usually drafted in very broad terms, leaving room for interpretation according to national conditions. She submits that the words "as far as possible" could be included in this draft article for the sake of clarity.

Draft article 11

"The right to promote intercultural information and education, recognizing the dignity and diversity of their cultures, and the duty of States to take necessary measures, among other sections of the national community, with the object of eliminating prejudices and of fostering understanding and good relations."

43. A government observer suggested including a reference to the right of access to the mass media in order to create awareness of the problems of indigenous peoples. An indigenous observer suggested that the term "intercultural information" be clarified, and refer to the "history, cultures and institutions of indigenous peoples."

44. The Chairman/Rapporteur believes that these suggestions are useful and unobjectionable in light of similar provisions in articles 30 and 31 of ILO Convention No. 169 and article 17 of the Convention on the Rights of the Child and that they can be reflected in the revised text accordingly.

Draft article 12

"The right of collective and individual ownership, possession and use of the lands or resources which they have traditionally occupied or used. The lands may only be taken away from them with their free and informed consent as witnessed by a treaty or agreement."

45. Several government observers emphasized the widely differing laws relating to land tenure in many parts of the world. One suggested that this provision might conflict with established laws and practices of a non-discriminatory nature, for example, when lands are nationalized with the free consent of a majority of the population, and maintained that indigenous peoples' land rights must not be used to discriminate against other groups. Another government observer explained that, under her country's constitution, there can only be a single régime for the ownership of property, and resources are generally managed by the State for public benefit. Others noted that their national legal systems treated land and resources differently, or restricted private interests in land to use or possession.

46. Concern was also expressed that this draft article could be used to assert rights to all lands occupied by indigenous peoples in the past. By contrast, ILO Convention No. 169, article 14, secured rights only to lands which indigenous peoples "traditionally occupy", that is, which they continue to occupy today.

47. Indigenous observers generally stressed the collective aspects of land rights, and maintained that this principle should be expanded to include all lands presently occupied or used, including lands to which indigenous people had been relocated in the past, or which have been acquired for development. It was also suggested that the use of land should be protected, even if it co-exists with other uses of the same land by other groups.

48. Participants in the indigenous peoples' preparatory meeting were of the view that this draft article must refer both to "lands" and to "territories". Furthermore, it must apply to all lands to which indigenous peoples are justly entitled even though these lands may not have been "traditionally occupied" in the strict sense of those words, as well as lands which were traditionally "used" whether or not they were "occupied".

49. The Chairman/Rapporteur considers that draft article 15 is one of the most important and complex articles of the draft declaration and notes that this article addresses the question of lands which indigenous peoples had lost

by unjust means in the past. Rights to lands which indigenous peoples themselves had only recently settled, or from which they had only relatively recently been removed poses more difficult questions which merit wider discussion in the Working Group. It is clear, in any case, that this principle must be interpreted flexibly and fairly. Immemorial occupation is not required, only some genuine and legitimate connections with the land in question.

50. The Chairman/Rapporteur also notes that indigenous peoples enjoy a special relationship with their lands, which has been recognized in article 13 of ILO Convention No. 169, and that protection and observance of this special relationship may require legal measures different from those which apply to the national and administrative population as a whole.

Draft article 13

"The right to recognition of their own land-tenure systems for the protection and promotion of the use, enjoyment and occupancy of the land."

51. One government observer suggested that there could be problems in attempting to transfer indigenous land systems, including concepts of collective ownership, custodianship and inheritance, into a system of legally enforceable rights and obligations in national legal systems, which are based on different concepts.

52. The Chairman/Rapporteur notes that a similar principle appears in ILO Convention No. 169, article 17 (1), and that in some federal States or in States with ethnically-distinct regions, different forms of land tenure exist side-by-side. The problem would appear largely to be one of documenting indigenous land law.

Draft article 14

"The right to special measures to ensure their ownership and control over surface and substance of resources pertaining to the territories they have traditionally occupied or otherwise used including flora and fauna, waters and ice sea."

53. Many indigenous observers stressed the importance they attach to the use of the term "territories", which implies a common history, language, and way of life, and boundaries within which lay lands and natural resources. They urged that the declaration clearly protect indigenous ancestral and legal ownership and control of both surface and subsurface, renewable and non-renewable resources. One indigenous observer proposed including an explicit reference to "geothermal and other, mineral rights, reef resources and the resources of the ocean crusts".

54. Participants in the indigenous peoples' preparatory meeting were of the view that this draft article must include clearer language to protect indigenous peoples' ownership and control of subsurface resources. Indigenous peoples have an ancestral right under their own traditional legal systems to subsurface resources in the same manner as the surface of the land.

55. The Chairman/Rapporteur underlines that the term "territories" was employed in ILO Convention No. 169, article 13, to suggest the "total environment" used by indigenous peoples, including resources they use on lands occupied for some purposes by others. She also considers it relevant here that the General Assembly, in its resolution 44/228 of 22 December 1989, underscored the interrelatedness of environment and development, and in its 1986 Declaration on the Right to Development (resolution 41/128 of 8 December 1986), emphasized the linkage between development and the realization of human rights. Protecting indigenous peoples' basic human rights, as well as their right to development, may depend on their control of the surface and subsurface resources in the areas in which they live.

Draft article 15

"The right to reclaim land and surface resources or where this is not possible, to seek just and fair compensation for the same, when the property has been taken away from them without consent, in particular, if such deprivation has been based on theories such as those related to discovery, terra nullius, waste lands or idle lands. Compensation, if the parties agree, may take the form of land or resources of quality and legal status at least equal to that of the property previously owned by them."

56. One government observer expressed concern over the requirement of "compensation", suggesting that the development of economic and social support programmes and enhanced self-determination and self-management for indigenous peoples would achieve the same objective.

57. An indigenous observer proposed adding the words "occupation, cession, abandonment" after the word "discovery". In the view of the Chairman/Rapporteur, however, these issues are covered by the present text. A government observer expressed the view that this draft article allows for an extremely broad interpretation, which might be used to incite conflict between national or ethnic groups or between States.

58. The Chairman/Rapporteur believes that a fair and appropriate form of legal recognition of the right to reclaim lands unjustly lost, will guide existing tensions over land rights into constructive channels, rather than create new tensions. It should be kept in mind that the principles of a just and fair compensation and restitution are well established in international human rights law and should as a matter of course be extended to indigenous rights.

Draft article 16

"The right to protection of their environment and in particular against any action or course of conduct which may result in the destruction, deterioration or pollution of their traditional habitat, land, air, water, sea ice, wildlife or other resources without free and informed consent of the indigenous peoples affected. The right to just and fair compensation for any such action or course of conduct."

59. A government observer noted that States may have limited power to interfere with the actions of private citizens, including citizens of neighbouring States, and may therefore be unable to provide the degree of protection contemplated by this draft article. Another government observer stated that this principle was predicated on the existence of a reserve system, that is, it envisaged indigenous peoples living in separate and distinct areas within a country. The text should take account of other possibilities.

60. An indigenous observer proposed adding the words "negotiate and conclude" in the second sentence, between the words "the right to" and "just and fair compensation". Another indigenous observer proposed adding a reference to "subsurface and submerged ocean resources", while another suggested that this principle include the right to take special measures to ensure the right to development.

61. With regard to the power of States to enforce this principle, the Chairman/Rapporteur notes the growth of national environmental legislation over the past 20 years, and the increasing use of treaties and agreements among States to control transboundary movements of air pollutants and toxic chemicals. It would seem that most States agree that environmental quality should not be left to private choices. She notes that this principle is similar to article 7 (4) of ILO Convention No. 169.

62. The Chairman/Rapporteur also believes that this draft article will be of particular importance to the survival of the people of the globe and in particular of the indigenous peoples, and to the ability of indigenous peoples to pursue their own paths of development. Neither this principle, nor any other provision of the draft declaration, has the aim or effect of restricting indigenous people to separate areas, but some provisions of the draft Declaration will necessarily apply more readily to distinct indigenous settlements or territories than to the places where indigenous people are mixed with others. As elsewhere, a degree of reasonableness and flexibility should be exercised.

Draft article 17

"The right to require that States consult with indigenous peoples and with both domestic and transnational corporations prior to the commencement of any large-scale projects, particularly natural resource projects or exploitation of mineral and other subsoil resources in order to enhance the projects' benefits and to mitigate any adverse economic, social, environmental and cultural effect. Just and fair compensation shall be provided for any such activity or adverse consequence undertaken."

63. A member of the Working Group suggested that Governments and transnational corporations should consult with and obtain the consent of indigenous peoples before carrying out any projects which might have adverse consequences for them. Reference was made to the Code of Conduct for transnational corporations (TNC), and it was suggested that TNCs should take steps to mitigate the adverse consequences of their activities, including (a) undertaking social and environmental impact studies; (b) taking measures to restore land to its former condition; and (c) respecting sites of religious, cultural or economic importance to indigenous peoples.

64. One government observer suggested that, if this principle applied to projects carried out on lands owned by indigenous peoples, the requirement that States simply "consult" with them seemed too weak. Some indigenous observers suggested that the phrase "seek the consent" would be preferable, while participants in the indigenous peoples' preparatory meeting took the position that the right of "consent" is essential, particularly in relation to large-scale projects, which may frequently involve the destruction of indigenous peoples.

65. One indigenous observer proposed adding the words "to obtain the free and informed consent of" between the words "that States" and "indigenous peoples"; the words "which affect indigenous territories or rights" between "any projects" and "particularly natural resource projects"; and the words "the right to negotiate and conclude" before "just and fair compensation". It was also suggested that this draft article should not be limited to "large-scale" projects.

66. Another indigenous observer proposed rewording this principle as follows:

"The duty of States to seek and obtain their free and informed consent, through appropriate mechanisms, before undertaking or permitting any programmes for the exploration or exploitation of mineral or other subsoil resources pertaining to their traditional territories. Just and fair compensation should be provided for any such activities undertaken for the duration of such uses and for the fair market value of resources which are exploited, developed, or removed from traditional territories. The duty of the State to restore and rehabilitate the territories which have been utilized by States for mineral resource exploitation and development."

67. The Chairman/Rapporteur clarifies that this principle is similar to article 15 of ILO Convention No. 169, which relates to exploitation of subsurface and other natural resources. The ILO provision employs the term, "seek the consent", therefore no weaker standard should be used in this draft article. An appropriate formula should be sought in the further discussion of this principle in the Working Group.

Draft article 18

"The right to maintain and develop within their areas of lands or territories their traditional economic structures and ways of life, to be secure in the traditional economic structures and ways of life, to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional and other economic activities, including hunting, fresh- and salt-water fishing, herding, gathering, lumbering and cultivation, without adverse discrimination. In no case may an indigenous people be deprived of its means of subsistence. The right to just and fair compensation if they have been so deprived."

68. Some government observers felt this provision is unrealistic, in particular with regard to compensation for losses of subsistence, or they objected to the recognition of greater or exclusive subsistence rights for indigenous peoples.

69. One government observer expressed the view that this right should apply to the same lands referred to in draft article 12, that is, to "lands which they traditionally occupy". He suggested that the text be clarified, and that it take into account environmental protection and conservation requirements.

70. Another government observer expressed concern that this provision might be used to restrict an indigenous people's means of subsistence to traditional types of economic activities. It should not limit the extension to them, with their consent, of the economic and social programmes provided to all other population groups in the region.

71. The Chairman/Rapporteur notes that this principle is similar to the one adopted in ILO Convention No. 169 (article 23). The text of the draft article should be revised to make it clear that the geographical scope of this provision is related to draft articles 12 and 13, in other words, to the total environment traditionally occupied or used by these peoples, and over which they enjoy rights of ownership or control.

72. As for the question of environmental protection or conservation, the Chairman/Rapporteur believes this concern is covered by the words "without adverse discrimination". Non-discriminatory measures would be permissible, if necessary to preserve habitats or species. At the same time, the second sentence of this draft article would imply that States should restrict indigenous peoples' activities only as a last resort, when no alternative conservational measures are possible.

73. Lastly, the Chairman/Rapporteur is of the view that this draft article is permissive rather than restrictive in nature - that is, it leaves to the indigenous peoples themselves the choice of traditional or other forms of economic activity. It would in no way limit their right to benefit from progress in science and technology, or to adopt alternative forms of economic life.

Draft article 19

"The right to special State measures for the immediate, effective and continuing improvement of their social and economic conditions, with their consent, that reflect their own priorities."

74. One government observer noted that States are unlikely to have limitless resources available to them, and suggested that this draft article be reworded in more realistic terms.

75. The Chairman/Rapporteur takes into consideration this concern, and underscores her belief that this obligation, like the obligations contained in the International Covenant on Economic, Social and Cultural Rights, would be given progressive effect - that is, States would not be required to achieve everything at once, but only to take concrete steps to enhance the enjoyment of these rights, to the extent of their resources.

Draft article 20

"The right to determine, plan and implement all health, housing and other social and economic programmes affecting them, and as far as possible to develop, plan and implement such programmes through their own institutions."

76. One government observer reiterated concerns raised with regard to draft article 19, while another objected to giving indigenous peoples any greater right to influence matters affecting them than is enjoyed by the rest of the national population.

77. The Chairman/Rapporteur notes that this principle is consistent with the provisions of ILO Convention No. 169, which ensure the right of indigenous people to plan and implement programmes in the fields of education, vocational training, and health.

Draft article 21

"The right to participate on an equal footing with all the other citizens and without adverse discrimination in the political, economic and social life of the State and to have their specific character duly reflected in the legal system and in political and socio-economic institutions, including in particular proper regard to and recognition of indigenous laws and customs."

78. One government observer expressed the view that this principle should not prevent members of indigenous peoples from exercising the rights granted to all other citizens, or from bearing the associated duties. Another government observer stated that this principle could not and should not mean the establishment of a separate legal system. However, one representative of a specialized agency referred to the importance of ensuring that indigenous peoples are fully autonomous and in control of their own communities' social, cultural, economic and political life, in addition to enjoying equal opportunities to participate in the life of the country in which they live, to the extent they wish.

79. The Chairman/Rapporteur notes that this draft article includes the fundamental principle of equality and it could also be the basis for recognizing a distinct indigenous legal system within a State, but that such a result is not required. The text refers to a "proper regard" for indigenous laws and customs within the framework of the State legal system and institutions. This implies a certain measure of accommodation, rather than necessarily two independent legal systems.

Draft article 22

"The right to participate fully at the State level, through representatives chosen by themselves, in decision-making about and implementation of all national and international matters which may affect their life and destiny."

80. One government observer construed this to mean that indigenous people should enjoy equal rights with other citizens to elect their own representatives at the national level. Another preferred the expression "observing the principles of equality" to the term "full" participation. An indigenous observer felt that the concept of self-determination is of such overriding importance that it should also be included in this draft article.

81. The Chairman/Rapporteur believes that it is important to ensure that indigenous peoples are not only free to participate in national elections, on the same basis as other citizens, but that they enjoy an effective voice in national and international affairs affecting them. She notes that few States have reserved a small number of seats in their national legislatures, or have designed electoral districts, so that at least some indigenous representation will be maintained. Such measures would be consistent with the aims of this draft article, but not necessarily required by it.

Draft article 23

"The [collective] right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions."

82. Government observers questioned how the right to autonomy can coexist with the laws of the State. One expressed the view that a right to autonomy is incompatible with the political and social organization of his country. Another felt that this draft article envisages a system of separate indigenous reserves, which he considered to be a form of segregation. He suggested that it be limited to instances "where indigenous peoples require protection", and that it be applied "with the full consent of the indigenous peoples and so as not to establish a system of racial segregation". Still another government observer agreed that this principle could not practically be applied where an indigenous people live among the rest of the population without constituting a majority in any area.

83. According to another government observer, it was not clear whether the aim was the establishment of administrative, social, economic and other structures to replace those of the State as a whole, or the establishment of parallel structures. He suggested that the right to autonomy be exercised only "in accordance with established laws and practices". Still another stated that the declaration should make it clear that indigenous rights are to be exercised within the framework of State law, and are not to be interpreted as implying separate development or statehood, or extra-citizenship rights.

84. Further, another government observer expressed the view that autonomy should be regarded as a solution that can be adopted if and when it is in keeping with the specific situation and constitutional framework of the country in question. As a possible alternative to autonomy, provision could be made within the legislation and regulations of the country for indigenous peoples to participate in the organization and management of education, culture, health, social welfare and local economic activities.

85. Several indigenous observers emphasized the great importance to them of the right to self-determination, and recommended that it be included expressly in this draft article. One of them also suggested including a reference to control and jurisdiction over fiscal matters.

86. The Chairman/Rapporteur believes that this principle could apply to geographically distinct indigenous communities, wherever they exist, without prejudice to individuals' freedom of movement or freedom to choose their own residence. Furthermore, she wishes to draw attention to the two possibilities offered by territorial and personal autonomy. She also believes that respect for the right to autonomy does not necessarily mean replacement of the entire State structure, but an accommodation within it, as may be agreed between each State and the indigenous peoples themselves. She points out that such autonomous régimes exist already in many countries.

87. As for the applicability of the right to self-determination, she is of the view that it involves different considerations, and as such merits a thorough and independent discussion. While some indigenous peoples may meet the conventional criteria for enjoyment of the right to self-determination, others may not, and it might be unnecessary as well as inappropriate to restate existing standards in this declaration. It may be preferable simply to ensure that indigenous peoples are not discriminated against with respect to the implementation of existing standards, such as the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.

Draft article 24

"The right to decide upon the structures of their autonomous institutions, to select the membership of such institutions, and to determine the membership of the indigenous peoples concerned for these purposes."

88. A government observer sought clarification of the use of the term "institutions", explaining that it would be acceptable if it refers to community organizations, but not if it implies separate political institutions. Other government observers expressed the view that this draft article shared some of the problems they had identified in draft article 23.

89. One indigenous observer stated that this draft article did not adequately address the right to determine citizenship, which was the key to the perpetuation of indigenous peoples. He proposed adding the words "the right to determine their own citizenship without external interference."

90. The Chairman/Rapporteur notes that this draft article should deal more clearly with membership in indigenous societies, as was her intention from the outset; accordingly the text could be revised for clarity purposes.

Draft article 25

"The right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms."

91. A government observer expressed concern that this principle could be interpreted as legitimizing legal pluralism, that is, a separate system of laws for indigenous people. Another noted that occasions may arise where the community imposes obligations upon its members which conflict with their civil liberties as citizens of the State. This would be particularly troublesome if they had no choice with regard to their membership in the community. Still another suggested that individual responsibilities should be consistent with their duties and responsibilities as citizens of their respective countries, and with human rights and fundamental freedoms, in accordance with international conventions to which the particular country had acceded and relevant domestic laws.

92. The Chairman/Rapporteur clarifies that this draft article applies to the internal affairs of indigenous communities, and could not be used to deprive any person of basic human rights, including the right to leave the community, and thereby avoid its laws. The Chairman/Rapporteur also observes that internal rule-making is essential and fundamental to the enjoyment of cultural identity and self-development, and wonders whether there are many States in which no form of local law-making is permitted.

Draft article 26

"The right to maintain and develop traditional contacts and co-operation, including cultural and social exchanges and trade, with their own kith and kin across State boundaries and the obligation of the State to adopt measures to facilitate such contacts."

93. An indigenous observer expressed the view that the term "kith and kin" is unnecessarily restrictive, and suggested that this right extend to contacts with any other indigenous peoples.

94. The Chairman/Rapporteur notes that this principle appears in article 32 of ILO Convention No. 169, where it does extend to all other indigenous and tribal peoples, and not only to those which are related by kinship. Also, article 3 (3) of the draft declaration on the rights of persons belonging to national, ethnic, religious and linguistic minorities (E/CN.4/1990/41, annex I), recognizes the right of minorities to maintain transborder contacts "with other members of their group [and with other minorities]", which is broader than the notion of "kith and kin". Draft article 26 should accordingly be revised for consistency with these other relevant standards.

Draft article 27

"The right to claim that States honour treaties and other agreements concluded with indigenous peoples."

95. One government observer felt that this draft article was too weak, since it only referred to a right "to claim" that States honour their treaties and agreements with indigenous peoples. It should also include the obligation for the State to establish a mechanism to ensure that treaty commitments are honoured. Another government observer expressed the view that an unrestricted application of this principle would, however, lead to undesirable social and political consequences.

96. Participants in the indigenous peoples' preparatory meeting felt that this draft article must stress the duty of States to respect the "spirit and intent" of the treaties which have been signed, or which will be signed in the future with indigenous peoples.

97. One indigenous observer proposed that this principle be reworded as follows: "The right to have claims pertaining to treaties between indigenous peoples and States heard before an impartial international tribunal." Another suggested that it be rephrased to read: "The right to the observance and enforcement of treaties and other agreements concluded with indigenous peoples."

98. The Chairman/Rapporteur notes that the question of remedies for any breach of these rights, including rights arising under treaties, is addressed in draft article 28. The text should make it clear that what is intended here is a right to the implementation of treaties, however, and not merely the right to make complaints; it could be revised accordingly.

In the opinion of the Chairman/Rapporteur, States and indigenous peoples are free to renegotiate or agree to modify or set aside any treaty or agreement which has, through the passage of time or changed circumstances, become unenforceable or impracticable. This possibility falls within the scope of draft article 28.

Draft article 28

"The individual and collective right to access to and prompt decision by mutually acceptable and fair procedures for resolving conflicts or disputes and any infringement, public or private, between States and indigenous peoples, groups or individuals. These procedures should include, as appropriate, negotiations, mediation, arbitration, national courts and international and regional human rights review and complaints mechanisms."

99. One government observer questioned the propriety of applying international mechanisms to disputes between a State and persons or groups living within its borders. Appropriate procedures in such cases may include negotiations or consultations within the constitutional framework of the country in question. Another government observer believed that this draft article would oblige the State to establish separate procedures for the settlement of disputes with indigenous peoples, which would conflict with the principle of equality before the law.

100. The Chairman/Rapporteur notes that international mechanisms already apply to a wide variety of human rights problems arising within States. Likewise, many States themselves have established separate procedures for ensuring the fair settlement of disputes involving special groups such as minorities, families or children. The draft article is flexible and does not require that each and every kind of dispute resolution mechanism be available in each country, but only that there exist mechanisms which are mutually acceptable and fair. The text could be revised for clarity only, to remove any doubt that it applies both to disputes between indigenous peoples and States, and to situations involving infringements of the rights of individuals.

IV. OTHER MATTERS

Definition

101. A government observer stated that from the text as it now stands, it is not clear which criteria were used as a basis for the term "indigenous peoples". It seems to be viewed only in relation to a comparatively small number of ethnic groups which have not been fully integrated into the political and economic structures of existing societies or States. The term "indigenous peoples" could in principle also be applied to all ethnic groups (tribes, nationalities, nations) which have occupied particular territories at an earlier stage than settlers belonging to other ethnic communities that continue to inhabit those territories. The draft declaration should therefore indicate whether the term "indigenous peoples" should be understood broadly or narrowly.

102. Another government observer noted that being classified as "indigenous" could turn out to be a limitation rather than an expansion of a group's rights, for example, its right to self-determination. A clear definition was therefore needed. Still another suggested the use of article 1 of the ILO Convention as a model, while another stated that it was not necessary to define the term "indigenous peoples" in a declaration of this kind. The Chairman/Rapporteur wishes to strongly align herself with the view that a definition is not needed for the purposes of this exercise. She also refers to the working definition contained in the study of the Problem of Discrimination Against Indigenous Populations and in particular of the paragraphs 362-382, Vol. V. She further underlines that it is clear in almost all cases which groups would fall within the scope of the declaration; in the other cases it would be the task of Governments and international supervisory organs to iron out any differences.

Collective character of indigenous rights

103. One government observer expressed his satisfaction that the qualification of certain rights as "collective" had been deleted from the draft declaration. These qualifications, which did not seem to be uniform throughout the entire text, were unnecessary, because whether a right is collective or not is normally implied in its definition. Another government observer stated that the declaration should generally be oriented towards the rights of individuals, although he recognized that some of the rights in question have a collective aspect. Still another took the view that human rights are individual by definition.

104. An indigenous observer maintained that all indigenous rights have both individual and collective aspects. Another stated that it is in the area of collective rights that the declaration will make its greatest contribution, although the individual rights of indigenous people are equally important. According to another, specific references to "individual" or "collective" should be avoided unless the context of a draft article does not permit a broader interpretation. Participants in the indigenous peoples' preparatory

meeting stated that the concept of collective rights is of paramount importance. Without this, the declaration could not adequately protect indigenous peoples' most basic interests.

105. The Chairman/Rapporteur agreed that individual rights are of paramount importance for any standard-setting activities of the United Nations in the field of human rights. Nevertheless, she wishes to state clearly that several of the rights promulgated in the draft declaration by their very nature have collective beneficiaries, such as land rights and autonomy. Accordingly, and by necessity, these provisions would have to be so drafted or understood.