The Working Group during this session:
- Made substantive progress during informal consultations with provisional agreement on several articles.
- Had remaining obstacles in achieving consensus on issues concerning self-determination and lands, territories and resources.
- Will present a Chair's text to the 62nd session of the Commission on Human Rights based on what the Chair believes is the middle ground.

Background

For over two decades indigenous peoples have recognised the need for a normative standard to clearly articulate the rights of indigenous peoples. In their view, there is a significant gap in existing international human rights law where indigenous peoples' rights are concerned. A United Nations (UN) declaration affirming indigenous peoples' rights to language, education, self-government, cultural expression, lands, resources, and treaty rights would be a significant step in the advancement of human rights for indigenous peoples around the world.

In 1995 the Commission on Human Rights (the Commission) established an open-ended inter-sessional Working Group to elaborate a draft declaration on the rights of indigenous people (the Working Group). The Working Group was mandated to consider and elaborate upon the 1994 draft of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission) within the International Decade of the World's Indigenous Peoples 1994-2005 (the First Decade). The mandate of the Working Group was extended by the Commission into the Second International Decade of the World's Indigenous Peoples (2005-2015). The Commission also urged the Working Group to "present for adoption as soon as possible a final draft United Nations declaration on the rights of indigenous peoples".

Negotiations over the last 10 years have been slow. Key stumbling blocks in achieving progress during the First Decade were self-determination, treaty rights, and lands, territories and resources. In previous sessions of the Working Group, a few States proposed amendments to the Sub-Commission text that were strongly opposed by most indigenous peoples' representatives. At the 10th session, Norway took an active role in facilitating informal consultations to reach provisional agreement on articles that are close to or ready for adoption. However, at the end of the 10th session, very few articles in the draft were provisionally agreed. The goal of the 11th session is to bridge the gaps on the remaining contentious issues and finalise the text for approval at the Commission. Indigenous peoples' representatives and many States articulated the need to pass a strong and effective declaration that protects the human rights of indigenous peoples.

Participants and Process

The Working Group re-elected Mr. Luis-Enrique Chavez (Peru) to Chair the 11th session of the Working Group. Participants in the Working Group included: over 50 States; 60 indigenous peoples' organisations; observers from UN organs and specialised agencies such as United Nations for Training and Research (UNITAR), International Fund for Agricultural Development (IFAD), and United National Institute for Disarmament Research (UNIDIR), and the World Bank; observers from intergovernmental organisations such as the European Commission; the Holy See; national human rights institutions such as the Australian Human Rights and Equal
Working Group on the draft United Nations declaration on the rights of indigenous peoples

Opportunity Commission and several academics. Former Sub-Commission member, Ms. Erica-Irene Daes, who was instrumental in drafting the Sub-Commission text, also attended the resumed session.

The most active State participants were Australia, Austria, Brazil, Canada, Denmark, France, Greece, Guatemala, Mexico, New Zealand, Norway, Russia, Spain, the United Kingdom (the UK), the United States of America (the USA) and Venezuela. Indigenous peoples actively participated in all aspects of the Working Group intervening and making proposals on draft language during both the plenary and the informal consultations. However, several indigenous peoples’ representatives felt that their participation was often "window dressing" arguing that their proposals were not given adequate consideration by the Chair and the Working Group.

The Chair prepared a compilation of proposals (the Chair’s summary of proposals) submitted and discussed during the 10th session, which formed the basis of negotiations during the 11th session. In addition to the plenary session, Norway continued to facilitate informal consultations to increase the number of articles ready for provisional agreement. The 11th session was divided into two parts, the first session taking place from 5-16 December (the December session) and the session resuming from 30 January – 3 February (the resumed session). Many indigenous peoples' representatives felt that dividing the session into two parts was a tactic to hinder indigenous peoples' participation in the Working Group since it was financially draining for many indigenous peoples' groups to attend both parts. Many indigenous peoples' organisations strategically chose to attend the resumed session believing they would be able to make a stronger impact in the later and critical stages of negotiations.

Main Debates

Self-determination

The issue of self-determination was discussed at great lengths throughout the session and posed significant barriers to achieving a consensus text. The main issue was reconciling the divisions between States wanting to protect their territorial integrity and indigenous peoples' representatives trying to ensure that there were no limitations placed on the exercise of their right to self-determination.

Many participants in the Working Group, such as indigenous peoples' representatives and the delegations of Venezuela, Brazil, Mexico and Denmark attempted to ensure that Article 3 of the draft declaration affirming the right to self-determination for indigenous peoples remains unchanged from the original Sub-Commission text. However, other delegations such as Australia, New Zealand and the USA maintained a hard-line approach on the issue of self-determination and wished to place limitations on the right of self-determination to protect their State interests. These delegations believed that the declaration is articulating a right to self-determination for indigenous peoples that is different from the right to self determination in the International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (common Article 1 of the Covenants). Under international law, the right to self-determination in common Article 1 of the Covenants includes the right to succession and full independence.

Inclusion and formulation of Article 45

To protect the territorial integrity and political unity of existing States, the delegations of Australia, New Zealand and the USA insisted that reference must be made to preserving the territorial integrity and political unity of States in the operative parts of the draft declaration (Article 45). Many indigenous peoples' representatives were against the inclusion of Article 45, stating that such an article would significantly impair the full exercise of their right to self-determination. Several delegations including indigenous peoples representatives, Denmark, Mexico and Venezuela, expressed concern that the proposals from Australia, New Zealand and the USA were highly prejudicial and discriminatory towards indigenous peoples. However, in the spirit of compromise, they were willing to work on the language to come up with a consensus text.

An informal consultation led by Canada resulted in compromise language on Article 45 being proposed. The proposal positively affirms the rights set out in the declaration stating that these rights "shall be subject only to such limitations as are determined by law" according to international human rights law. However, the proposed

6E/CN.4/2005/WG.15/2 (December session) and E/CN.4.2005/WG.15/CRP.7 (resumed session)
language was not acceptable to a few State delegations. New Zealand for example insisted on including language on territorial integrity and political unity. In addition, indigenous peoples’ representatives were gravely concerned with the proposed inclusion of language that the rights can be limited by “just requirement of morality, public order and the general welfare in a democratic society”. According to a joint statement released by several indigenous peoples’ organisations, those very concepts have “been historically used to justify the perpetration of severe injustice against indigenous peoples, including genocide and ethnocide”. It is not clear how the Chair will reflect the lack of consensus on Article 45 or what the ultimate formulation of this crucial article will look like in the Chair’s summary text.

**Autonomy and Self-government**

Articulation of the right to autonomy and self-governance expressed in Article 31 was a sensitive issue. The main source of contention was defining the exercise of the right to self-determination through autonomy or self-governance. Some States such as Australia, Germany, New Zealand, the UK, and the USA, preferred the formulation that “indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government”. Several indigenous peoples’ representatives preferred the term “as a specific form of exercising their right to self-determination” because “in” would severely restrict the right of self-determination to autonomy and self-government. Indigenous organisations supported by States such as Brazil, Canada, Mexico, and Switzerland, argued there are a wide variety of forms of exercising self-determination that exist between States and indigenous peoples and the declaration should not place limits on the exercise of these other forms of self-determination. The Chair’s summary will likely reflect the greater consensus for inclusion of the stronger term “as a specific form of”.

Another area of lengthy debate concerned whether there should be a listing of the areas of “internal and local affairs” indigenous peoples have rights to control in Article 31. Canada and Greece favoured a specific but non-exhaustive list of areas under the exclusive control of indigenous peoples. However, most States favoured the removal of such a list. Several indigenous peoples’ groups, and several other States, such as Guatemala and Sweden felt that a list would be problematic and too prescriptive. According to the Chair, removal of the list would avoid a lengthy debate on what elements to include or exclude in a list.

Some indigenous peoples’ groups resisted the use of only the phrase “internal and local affairs” and also proposed the addition of “international affairs” to the areas of autonomous function for indigenous peoples. Indigenous peoples’ organisations stated that indigenous peoples are active in the international affairs as expressed in their participation in this Working Group and other international forums that concern their rights. In addition, as expressed by the Inuit Circumpolar Conference (ICC) and the International Indian Treaty Council (IITC), several indigenous communities cut across several State boarders and have treaties or international agreements with several States that are of international character.

Finally, there was disagreement on the placement of articles in the final draft. Australia, New Zealand and the USA, stated that Article 3 and Article 31 are closely interlinked and advocated for placement of Article 31 in close proximity of Article 3. However, indigenous peoples’ representatives strongly opposed this move since they believed that this placement would result in weakening of the right of self-determination as expressed in Article 3. The ultimate arrangement of articles in the Chair’s summary is still unclear.

**Lands, territories and resources**

Issues related to lands, territories and resources continued to pose significant barriers to achieving consensus language. Prior to the resumed session, an expert seminar on indigenous peoples’ permanent sovereignty over resources and their relationship to land was held from 25 – 27 January 2006 in Geneva. This expert seminar was used by indigenous peoples to strategise on the most effective means to lobby for strong language on lands, territories and resources. The expert seminar endorsed the reports of a former Sub-Commission member, Ms. Erica-Irene Daes, on indigenous peoples’ permanent sovereignty over natural resources and also recommended that the Working Group take

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9 [E/Cn.4/Sub.2/2001/21](E/Cn.4/Sub.2/2001/21)
into account the outcomes of the seminar when considering the provisions on lands, territories and resources in the draft declaration.

The Working Group agreed to consistently use the phrase "lands, territories, and resources" throughout the draft declaration, upon the urging of indigenous peoples' representatives. This phrase is to take into account that lands and territories are different entities. A positive inclusion in the draft was the addition of a new paragraph proposed by the Saami Council to reflect the concerns of nomadic indigenous peoples who did not necessarily "own" land but rather "use" land for a period of time (Article 25 para 2).

Relationship to lands, territories and resources

A contentious issue emerged in defining the relationship of indigenous peoples to their lands, territories and resources. The use of the term "material" (Article 25) in describing the spiritual relationship between indigenous peoples and their traditional lands and territories was problematic for some State delegations, such as New Zealand and Australia. Indigenous peoples' representatives insisted that the term "material" was essential in describing the unique relationship that indigenous peoples have with their lands and territories. Some indigenous peoples representatives described the crucial importance of this language to indigenous peoples and urged the Working Group not to "destroy its meaning". This is illustrative of the difficulties in reconciling the clash between States protecting their interests and indigenous peoples' attempts to express concepts, such as their unique relationship with their lands, territories and resources, with an indigenous perspective. The Chair indicated that "material" would be deleted from the Chair's summary text.

This clash between these different worldviews often arose during discussion of articles concerning environmental conservation and protection of indigenous peoples lands, territories and resources such as Article 28. Indigenous peoples' representatives believed that not only do they have rights to lands, territories and resources, but they also have a responsibility to protect these lands, territories and resources for future generations. Indigenous peoples' representatives protested against the removal of the word "transit" from Article 28 insisting that prior consent be obtained when hazardous materials are transported through indigenous communities. Many States felt that the obligation to inform indigenous communities would be too burdensome. The Chair was leaning towards deletion of the phrase in the Chair's summary.

Treaties

After extensive consultation, the term "treaties, agreements and other constructive arrangements" was agreed upon with the understanding that constructive arrangements would be understood as meaning "any legal text or other documents that are evidence of consensual participation by all parties to a legal relationship". However, during informal consultations, the delegations of Australia and New Zealand raised concerns over the definition of constructive arrangements. They argued that such a definition was too broad and over inclusive and would have broad policy implications. Several indigenous peoples' representatives expressed exasperation with the Australia-New Zealand position in debating the semantics of language that is only an explanatory note and does not form part of the draft.

An informal consultation on treaties (the Treaties Working Group) took place during the December session facilitated by Mr. Willie Littlechild and presented a proposal to the Working Group. The UK expressed concern over language in the proposal that refers to the "inherent rights" of indigenous peoples (preamble paragraph 6). In the UK the term "inherent rights" has a distinct legal meaning referring to rights conferred to individual human beings and not to collective rights of groups or peoples. Indigenous peoples' insisted that the term "inherent rights" remain in the text. However, during the resumed session, substantial progress was made concerning the use of "inherent rights". The UK delegation did not block consensus on the inclusion of "inherent" even though there remained concerns on the domestic legal interpretation of this term. Other delegations, notably New Zealand and Australia, could not accept the Treaties Working Group proposal because the ambiguity of the term constructive arrangements.

Several indigenous peoples representatives and State delegations such as Brazil and Mexico, urged the Chair to not allow isolated positions by one or two delegations to stand in the way of progress on these articles. Therefore, it is likely that the Chair will include the proposal of the Treaties Working Group in the Chair's summary text.
Right of Redress

A major source of contention related to a series of articles that referred to remedies for injustices against indigenous peoples (Article 27). Some State delegations led by Australia, New Zealand and the USA preferred the use of the broader term "redress", arguing that this wording includes more avenues of remedies. However, many indigenous peoples' representatives preferred explicit reference to specific forms of redress such as restitution where lands, territories and resources have been unjustly taken from them. Indigenous peoples felt that especially where their means of subsistence is at stake, compensation should take the form of restitution "equal in quality, size and legal status" of the lands, territories and resources taken from indigenous peoples.

In addition, some States wanted to express the right of redress as a procedural right preferring terms such as "entitled to effective mechanisms for redress" and "right to pursue claims for". Indigenous peoples' representatives insisted on stronger language that affirms the substantive right to redress. Indigenous peoples were concerned that that access to mechanisms does not ensure that indigenous peoples will receive fair and just remedies. Other delegations such as Venezuela, Guatemala and Mexico suggested compromise language that affirms the right to "redress through effective and just mechanisms". It is likely that the Chair will use this compromise language in the Chair's text.

Other contentious issues left unresolved

Language in the article affirming the right to control over lands, territories and resources was an issue that posed the most difficulties in drafting. State delegations such as Australia and New Zealand proposed language to limit the scope of lands, territories and resources that indigenous peoples can own, use, develop and control by adding the qualifier "that they possess/hold". Some indigenous peoples preferred the language from the original Sub-Commission text which refers to "land, territories, and resources which they have traditionally owned, or otherwise occupied or used" stating this language is broader in scope and did not limit the rights of indigenous peoples to only those lands and territories they currently own. However, the Chair will likely include a qualifier in the text stating that this article must be read in conjunction with article 27 that deals with lands no longer in the possession of indigenous peoples.

The delegation of the USA stated that many of the issues discussed such as recognising the intellectual property rights of indigenous peoples' cultural heritage (Article 29) are matters of technical expertise that are being discussed in other forum such as World Intellectual Property Organisation (WIPO). Indigenous peoples representative pointed out that the declaration is the appropriate forum to discuss this issue since intellectual property rights of indigenous peoples is a collective right that is not yet recognised by WIPO.

State delegations expressed concern over wording in prohibiting forcible removal and relocation of indigenous peoples (Article 10), which some delegations felt would impair the ability of States to move populations in emergency situations, such as natural disasters. Indigenous delegations insisted that the language of "free, prior and informed consent" remain in this article arguing that these concerns expressed by States were paternalistic. Indigenous peoples' representatives stated that when natural disasters or times of emergencies warrant evacuation, indigenous peoples' would voluntarily leave their lands and territories. However, indigenous peoples' were concerned by past historical practises where States would invoke emergency powers to justify the forced removal of indigenous peoples from their territories.

Conclusions and Outcomes

After a series of intensive informal consultations led by Norway, a vast majority of the articles in the draft were provisionally agreed upon. In addition, substantial progress was made on difficult issues in several articles related to self-determination and lands, territories and resources. However, by the end of the session, the Working Group did not reach consensus on several outstanding issues mainly concerning final wording of Article 45 and several articles in relations to lands, territories, and resources.

The Chair stated that this would be the final meeting of the Working Group. The Chair will prepare a summary text based on what he believes is the middle ground and present this draft as the Chair's text to the 62nd session of the Commission for approval. Some States such as the EU and Spain, expressed confidence in the ability of
the Chair to produce a balanced text. However, several indigenous peoples’ representatives were concerned with this process and feared that their input into the final text would be marginal. Indigenous peoples’ will continue to lobby at the Commission for a strong declaration affirming the rights of indigenous peoples that adds to the body of international human rights standards.

The Chair’s text of the draft declaration is still being finalised and will be presented to the Commission at its 62nd session. Official reports and ISHR reports on previous sessions of the work group are available on the ISHR website.

**NGO involvement**

Indigenous peoples’ representatives were actively involved the Working Group and coordinated their efforts through the Indigenous Peoples’ Caucus (IPC) co-Chaired by Mr. Davasih Roy of the International Working Group for Indigenous Affairs (IWGIA) and Mr. Wilton Littlechild of the International Organisation of Indigenous Resources Development.

The Indigenous Peoples’ Centre for Documentation, Research and Information (doCip) follows the Working Group closely and provides detailed documentation including background documents and statements made by States, intergovernmental organisations, indigenous peoples’ organisations and NGOs. This information is made available in English, French, Spanish and Russian on the doCip website. The American Indian Law Alliance also published a detailed report on the outcome of the December session available on their website.

All NGOs and indigenous peoples’ organisations in consultative status with the Economic and Social Council may take part in the deliberation of the Working Group. In addition, indigenous organisations without consultative status may also participate in the Working Group by contacting the Secretariat at WGindigenous@ohchr.org. UN Voluntary Fund for Indigenous Populations can be used to facilitate the participation of indigenous peoples’ representatives to participate in the Working Group. Procedures to participate in future sessions of the Working Group and are available on the OHCHR website.

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10 http://www.ishr.ch/About%20UN/Reports%20and%20Analysis/CHRWG/WGDDIP/WGDDIP-Contents.htm
11 http://www.docip.org
12 http://www.ailanyc.org
13 E/CN.4/RES/1995/32
14 A/RES/50/156
15 http://www.ohchr.org/english/issues/indigenous/groups/groups-02.htm

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