

SPECIAL MEETING OF THE WORKING GROUP TO
PREPARE THE PROPOSED AMERICAN DECLARATION
ON THE RIGHTS OF INDIGENOUS PEOPLES
March 11 – 15, 2002
Washington, D.C.

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REPORT OF THE RAPPORTEUR

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Introduction:

The honorary rapporteur of the Working Group took on the task of drawing up the following summary of the discussions during the Special Meeting, which took place, with the participation of representatives of indigenous peoples, from March 11 to 15, 2002. This summary covers three aspects of the meeting: first, the informal discussions among all the delegations held during the afternoon of Monday, March 11; second, a summary of the discussion on the specific proposed articles;^{2/} and finally, a presentation of the areas of consensus which, in the opinion of the rapporteur, were tentatively reached at the meeting.

I. INFORMAL DIALOGUE BETWEEN REPRESENTATIVES OF THE STATES AND THE INDIGENOUS ORGANIZATIONS

At the opening session, after presentations by the experts (see the Report of the Chair, GT/DADIN/doc.82/02), there was an extensive informal dialogue, during which the representatives of the states highlighted the importance of this process in the OAS, both for the rights of indigenous peoples and for strengthening democracy and democratic practices in the states. In this regard, they referred to the Inter-American Democratic Charter approved in Lima, Peru in September 2001, and more specifically its references to the rights of indigenous peoples. The representatives of the states advocated that the process move forward as expeditiously as possible, following consultations and broad-based negotiations, designed to achieve the best results for both the states and indigenous organizations.

The representatives of the indigenous peoples indicated that they were expecting to achieve valid solutions in the American Declaration. They acknowledged in general that in this process, the OAS had created an opening for making concrete progress towards establishing new international standards for relations between states and indigenous peoples. They stressed the fact that this opening should be pursued and institutionalized in a possible permanent inter-American forum in which indigenous peoples and states could continue working to attain these objectives.

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1. Dr. Osvaldo Kreimer was elected rapporteur for the Special Meeting of the Working Group at its first session. Dr. Kreimer is a specialist on human rights of indigenous peoples and he was an official of the Inter-American Commission on Human Rights up to December 2001. At the present time, he is serving as an honorary special advisor to the OAS Secretary General, to support the work of the Working Group.
 2. The basic proposal for the discussions is the text approved in 1997 and proposed by the Inter-American Commission on Human Rights to the General Assembly. To facilitate discussions, previous proposals made by member states and indigenous organization were also used, as was a text proposed by the Chair to the Working Group, produced in January 2002 and contained in document GT/ DADI/N doc.52/02.

The representatives of indigenous peoples said that there were three key principles in the Declaration: self-determination, recognition of their condition as indigenous peoples, and recognition of their territories. They also made general proposals regarding various situations they regard as oppressive, such as lack of respect for their cultures and rights, and failure to respect and recognize their values, knowledge, and achievements of different sorts.

Some government delegations agreed on the importance of the concept of self-determination, provided that it is compatible with respect for territorial integrity and the political sovereignty of states. They highlighted the evolving and multifaceted nature of the concept, depending on the historical time and context in which it is used, which means that it is critical that an effort be made to define it appropriately in relation to the rights of indigenous peoples.

Attention was called to the highly diverse situations and experiences in the Americas in this area, including the legal difference between countries that have ratified ILO Agreement 169 and those that have not yet done so, and to the importance of determining standards that can be applied to these different situations.

They stressed the importance of the national consultations already initiated in some countries, and the need for all countries to engage in these consultations. Some representatives of indigenous peoples insisted on the importance of having these consultations organized by national committees in which indigenous peoples participate, as is the case in certain countries, and they requested the OAS to assist in forming such committees.

On this point, some states reported on the results of internal consultations held, and they proposed that the best practices determined in this area be shared among all states. They also suggested that certain specific concepts, such as the term "territories," were subject to interpretation, and that there were divergent views that should be elucidated in the course of the discussion.

In an atmosphere of openness and compromise on the part of the delegations of both states and indigenous peoples, there was general agreement on the importance of speeding up and further advancing preparation of the Declaration, by stepping up consultations and other technical activities during the time between meetings. This would facilitate a peaceful and equitable solution to the various types of problems and interference that have adversely affected the lives and development of indigenous peoples and their relationship with the states.

Discussions included the degree to which the future Declaration is binding, and its relationship with the internal body of law in the different countries. In view of the differences in the status of internal laws from one member state to the next, it was suggested that a general clause be added to provide for states to make a commitment to modify their domestic laws when necessary so that they reflect the rights recognized in the Declaration.

In addition, the relationship between individual and collective rights was discussed. In this regard, it was pointed out that not only are different types of collective rights recognized in the constitutions and case law of most member countries, but that also the recent decision by the Inter-American Court of Human Rights in the "Awasi Tingni" case offers recognition and a solid guide with respect to land ownership rights.

The procedure followed in the discussions allowed for ample participation by all delegations. The Chair explained that they were still at the point where they were clarifying themes and positions, and had not yet reached the specific stage of negotiating the proposed Declaration.

Subsequently, on the second day, they began reviewing the articles, starting with Section Three, since the previous two sections had been discussed at the Special Meeting held in March 2001.

II. DISCUSSION OF THE ARTICLES (SECTIONS THREE, FOUR, AND FIVE: ARTICLES VII TO XVIII^{3/})

SECTION THREE: CULTURAL DEVELOPMENT

Article VII. Right to Cultural Integrity

The representatives of indigenous peoples indicated that they view this right as being directly linked to self-determination. They emphasized the importance of cultural integrity, interpreted in a broad sense as including their world view, spirituality, institutions, practices, and language, all in an intercultural relationship with global society.

They maintained that this cultural integrity is essential in their relationship with their habitat, lands, and territories. They called attention to the value of indigenous cultures in the areas of the environment and sustainability. In this regard, they referred to various recent international declarations that confirm this position, and specifically the Plan of Action of the Quebec Summit in April 2001, in which countries made a commitment to respect indigenous rights, based on the principles of biodiversity, the Machu Picchu Declaration of the Presidents of Andean countries, and the Durban Declaration from the Conference against Racism and Discrimination.

They also believed that the cultural heritage should be viewed from the standpoint of ancestral traditions, and also as a living and dynamic reality, with a future.

One state delegation suggested that the term “cultural integrity” is not a right in and of itself, but rather an objective that promotes other rights included in the proposed Declaration, such as rights related to language, religion, education, spiritual and religious freedom, and freedom of association. It argued that all of these rights work to promote the cultural integrity of a group, and that each of them entails obligations for states. The delegation further maintained that if member states want to keep the term “cultural integrity,” they should state it as an objective, and not a right. The delegation went on to refer to the 2001 UNESCO Declaration on Cultural Diversity, which recognizes cultural rights as an integral part of human rights. It mentioned the need for a compromise between cultural integrity and human and fundamental freedoms, and stated that its country had passed legislation on a policy of multiculturalism as a fundamental feature of its national identity and heritage.

Another state delegation referred to the importance of placing value on cultural continuity, which includes social, economic, and political aspects.

3. Discussions on Article XVIII were initiated, but were not completed for reasons of time.

Various delegations stated that clarification was needed as to whether the term “property” used in this article referred to both tangible and intangible property. There were also divergent positions regarding the nature of the restitution mentioned as compensation for dispossession. An alternative proposal was that it be “fair and equitable.” Some state delegations said that there were no international standards in this area, and that they should follow the guidelines of their national jurisdiction.

On this point, the indigenous delegations maintained that this Declaration could not establish a standard for compensation that would be less than that established by ILO Agreement 169. They recalled that the Committee against Racism and Discrimination (CERD) invited states to grant to the indigenous peoples the land and territories of which they had been dispossessed.

Article VIII. Indigenous Concepts and Languages

The discussion reflected a general consensus on recognition of the different expressions and bases of indigenous cultures, including histories, language, world view, and nomenclature, as well as on the need to promote that culture using the media, and on the right of expression and understanding of principles and practices through the use of their own indigenous languages. During the discussion, examples were given of how different logical concepts generate different concepts of a right such as land ownership. Reference was made to the Aymara Congress in Iquique this year, and what was said there to ensure a better understanding with state representatives. There they examined the Aymara view on this issue, which is based on diversified, complementary methods of exploitation as a function of different ecological production levels and microclimates, and the different production capacities of the lands, rejecting dwarf or small land holdings, and seeking products for a globalized market.

These concepts, and especially the collective nature of use and organization, should be reflected in state laws and legal recognition, which would strengthen democracy.

Various state delegations commented that the Chair’s proposal for the article improved it and reflected current international law. Several state and indigenous delegations gave their support for the proposal put forward by a group of indigenous delegations for the first paragraph of this article.

With regard to Art. 8.2, a number of state delegations expressed their agreement with effective measures to reflect indigenous languages and culture in the media, although they believed that creating indigenous radio or television stations could represent a considerable financial burden. They indicated that progress could be made instead on the basis of incentives and by facilitating approval procedures.

The principle of being able to express oneself and to understand rules and procedures in one’s own language also met with general acceptance. One state delegation supported the principle that the indigenous peoples could rely on interpretation or other appropriate means to make themselves understood and to understand administrative, legal, and political rules and procedures. They remarked, however, that this proposal went beyond Article 14 of the International Covenant of Civil and Political Rights, which only provided for criminal proceedings, and that therefore the practical and political repercussions should be studied. The same type of implications should be examined with regard to obligations arising from declaring indigenous languages as official languages in some

areas. They suggested that the Declaration should proclaim the desired objective, rather than identify the procedures involved.

There was also widespread support for the objective expressed in Article 8.4, and for the use of indigenous names in both personal names and geographic or similar names.

Article IX. Education

There was general consensus on the right of individuals to education, and the right of indigenous peoples to all levels and types of national education, on an equal footing with other members of society. As proclaimed at international meetings, and even by UNESCO in Nairobi, both general and indigenous education systems should, it was stressed, be founded on the principle of interculturality based on a dialogue stemming from the richness of the different cultures, and not on the principle of multiculturalism, which tends to view cultures as isolated systems.

In addition, and on the basis of the principle of self-determination and self-government, representatives of indigenous peoples and some state delegations supported indigenous education systems with their own curricula, and agreed that national and international agreements on minimum standards should be respected. They said it was important that indigenous peoples have control over education in their communities, and over training of teachers for their communities.

In general, the state delegations indicated that these indigenous educational systems should meet the minimum requirements established by law, but that local indigenous authorities should to a large extent determine the academic programs.

There was consensus on and importance attached to the fact that educational opportunities for indigenous peoples should not be limited to elementary education, but that they should exist at all levels of education, including higher and specialized education, in view of the enormous need for professionals and technicians among indigenous peoples.

Various representatives of indigenous peoples complained about the disparity of the quality of education in rural areas, and the lack of opportunities and difficulty in gaining access to secondary and university education. Many of them pointed to the gap between the objectives of educational programs and laws, and the reality of these systems, in which indigenous peoples from rural areas do not have easy access to secondary or technical education, and much less to university education.

On this point, they stressed the need for occupational training of indigenous peoples, and the need to provide the necessary conditions for them to practice their trade or profession within or for their communities and in projects affecting them.

The theme of the value of indigenous languages and cultures and their interaction with other national and universal cultures was considered in general as a basis for their curriculum. Emphasis was placed on the fact that these systems should not set up barriers among cultures, but should instead foster interculturality between indigenous and other national cultures.

With regard to languages, it was pointed out that in many cases there are many indigenous languages within a single state. As a result, it was believed that the proposal in this article should be applied on the basis of the local linguistic situation. One state delegation suggested that indigenous

children in urban areas should have the opportunity to learn the traditional language of their families, especially in areas where there is a concentration of persons belonging to the same linguistic community.

The quality of education and the need for education in rural and indigenous areas to be on at least on a par with the quality of education in urban schools were issues brought forward by various indigenous delegations.

The representatives of indigenous peoples emphasized that the values underlying the philosophy of education should be those of the indigenous peoples concerned. As an example, they referred to the contradiction between the principles of individual competition that are predominant in educational systems, and the principles of solidarity and respect for ecology and spirituality, and the value placed on the ancestral traditions of the indigenous world view. Along these same lines, they highlighted the role of the community and the value of informal education in everyday life, that are adapted to each culture and are part of the maturing process, and are related to an individual's family and community responsibilities.

Some state delegations said that although they generally support these principles, they should be applied on a gradual basis, in view of their financial implications. They agreed, however, that elementary education should at the very least be of a high quality, even in the most remote regions. Indigenous delegations argued in this regard that one way of facilitating these improvements is to provide indigenous peoples with the mechanisms and technology needed to prepare their educational plans and discuss them with the pertinent educational authorities.

Article X. Spiritual and Religious Freedom

Various indigenous delegations stressed the importance of respecting spirituality, since they view religion as a system imposed from the outside, whatever the denomination may be.

All the indigenous representatives agreed that states should guarantee freedom of conscience and spirituality, since they are key to the full development of indigenous culture. Similarly, they were opposed to proselytizing in either an overt or subtle form, and they were against any attempts at conversion without effective individual freedom to decide for oneself. At the same time, a number of the state delegations indicated that freedom of conscience, beliefs, or religion should be respected for all persons, and that the manifestation of spiritual practices and beliefs should be free, as long as the rights of others are not affected.

The state delegations recognized the importance of protecting religious freedom and they rejected the imposition of beliefs and practices, pointing out that some countries had laws to protect these rights. At the same time, they drew attention to the fact that it would be problematic to prohibit religious proselytism among indigenous peoples, with criminal consequences. In this regard, they supported the Chair's proposed text, which clearly states the objectives of the article and the consequent duties of the state.

The indigenous delegations attached importance to recognition of their sacred places, which in some cases are numerous. They also drew attention to the spiritual nature of their relationship with and respect for the land and nature in general. They denounced cases of exploitation of the land, which create ecological imbalances and are viewed by indigenous peoples as violations of the sacred

harmony between men and nature. They gave the example of the drilling of water wells in a mountain regarded as sacred, a development which caused drought in neighboring areas.

Several indigenous delegations suggested that co-management systems be established for places regarded as sacred by the indigenous peoples.

One indigenous delegation proposed that a paragraph be included to the effect that indigenous peoples have the right to recover, strengthen, and practice spirituality, which is important as a way of settling disputes, as well as for maintaining family unity and transmitting culture from one generation to the next.

Article XI. Family relations and ties

In general, there was consensus among the delegations on the importance of recognizing the indigenous family in its different expressions, and specifically on the need to understand it as an “extended family,” which in many cases comprises the entire community. In this regard, they also acknowledged the importance of indigenous jurisdiction over cases related to adoption, filiation, child custody, and generally everything related to the family. Some state delegations requested clarification as to the scope of the proposed state obligation to recognize and respect the various forms of the indigenous family, marriage, family name, and filiation.

Reference was made to the fact that international doctrine, and specifically Article 4 of the Convention on the Rights of the Child, which establishes the primacy of the best interests of children in resolving situations involving them, agrees on the need to take into account the views of the relevant indigenous communities, and first and foremost those of the family in question. It was stressed that intervention of the community is necessary in any transfers of responsibility or custody of children outside the family, especially to prevent trafficking of children.

Several indigenous delegations pointed to the importance of the family and its connection with self-determination, since if they do not have their own authorities, indigenous jurisdiction cannot be exercised in family situations. They also referred to its relationship with the land, since it is the basis for support and unity. Certain economic developments have affected family unity and led to the social fragmentation of the community, marginality, unemployment, and poverty.

Equal importance was attached to recognition of gender equity in holding and exercising rights.

Other indigenous delegates explained that among the Aymara, during the people’s lifetime from infancy to old age, they go through and celebrate different stages in which their responsibility and capacity vary, and during these stages, the community intervenes and protects their development. This whole process, including the relevant celebrations, contributes to creating the family and social dynamics. This dynamic, organizing structure is lost if the family’s sense of culture and community disappears. They also said that these dynamics and family relationships create rights and interests that the state should respect.

Article XII. Health and Well-Being

There was general consensus that nondiscriminatory access to quality medicine and medical and health institutions should be available to indigenous peoples on the same terms as those offered to the general population. Several indigenous leaders and some state delegations stressed the different views on health held by indigenous peoples, who take a holistic approach to health based on spirituality and the harmony between human life and nature. For them, it is therefore connected to respect for rights to their land and self-determination in managing it.

The option that was generally supported by delegations was an intercultural relationship between indigenous health systems and the general system based on western medicine, in an arrangement of mutual support. Importance was placed on government respect for use of traditional medicines, and on the need to protect intellectual property rights related to traditional medical know-how, the result of centuries of experimentation. In this regard, the need to apply the standards already recognized in the Convention on Indigenous Biodiversity (Articles 8.j and 10) and by the World Health Organization was reiterated.

The indigenous delegations denounced the practice of experimenting on indigenous peoples, and especially women, without their informed consent, and the introduction of diseases by squatters on indigenous lands and through projects involving exploitation of these lands. They also indicated that privatization of health services had the effect of restricting access of indigenous peoples to health care. At the same time, they pointed to the positive effect in one country of introducing health insurance for indigenous peoples, with the support of the IDB and PAHO.

Although most indigenous delegates spoke of a need to set up indigenous intercultural health care systems, they insisted that states should provide accessible, quality medical and preventive health care services and infrastructure on indigenous lands, with qualified staff and opportunities for indigenous professionals and youth to receive training and instruction, so that traditional medicine and the cultural heritage can be institutionalized. It was pointed out that this knowledge is not a static pool of data, but rather a dynamic, on-going, scientific one.

Recognizing how important it is for indigenous peoples to gain increased access to the best physical and mental health care and to the institutions providing such care, one state delegation supported recognition of traditional indigenous practices, provided consideration is given to public safety and vulnerable persons. In addition, it suggested that the scope of the proposed legal recognition of traditional medicine should be clarified, or in other words, it should be determined if the reference is to a state's intellectual property rights system, or to a special legal regime in the area of medicine, or to the right to use traditional medicine and medication.

Article XIII. Right to Environmental Protection

Some state delegations pointed out that there is no "right to a safe and healthy environment" in international law, and that as a separate right, it would raise complex issues since many subjects are involved in it. They also noted that a safe and healthy environment is related to rights already recognized, such as the right to life, the right to a satisfactory quality of life, including food, clothing, and housing, the continued improvement of living conditions, and the right to enjoy the highest possible level of physical and mental health.

These delegations recognized the importance of the subject, and requested that it be taken up once the scope of related terms was clarified. These terms include “lands,” “territories,” “indigenous areas,” “conservation area,” “protected area, and “resources.” This will ensure that the consistency and complementarity of the different provisions of the future Declaration.

One state delegation believed that the article should include: a) the principle of equitable protection; b) the principle of equitable participation; c) access to information on projects to be developed on the lands in question; and d) a territorial management system that promotes the right to self-determination.

As a result of negative experiences stemming from abuses by mining and forestry companies, and damages to the environment and health as a result of chemical wastes, the indigenous delegates in general demanded that states assume the obligation to obtain informed consent, participation, and control in the case of every project that could affect the lands, territories, and resources that are either owned, held, or used ancestrally by indigenous peoples. In addition, the indigenous peoples in question should participate in the planning and management of all resources existing on such land.

Indigenous representatives stated their position that rights to ownership of their lands were also understood to include a responsibility on their part to maintain the environment in those territories, as they had been doing ancestrally, in opposition to resource depletion policies and sustainable productive capacity.

With regard to consultations to obtain the consent of indigenous peoples, the indigenous representatives stressed the need to conduct such consultations in cases involving the exploitation of both renewable and nonrenewable resources. They further stated that these consultations should be based on extensive information on the environment and the expected impact of the project, and should use the language of the indigenous peoples involved to make sure they understand correctly.

One state delegation maintained that indigenous communities and individuals should have nondiscriminatory access to information on decisions affecting the environment, to facilitate their participation in related activities and policies. It further indicated that in many countries, they already have the right to be consulted in preparing measures, programs, or policies that impinge on their recognized rights. It noted that in various international forums, progress was being made in this area and that the United Nations Human Rights Committee held a meeting of experts in Geneva to evaluate progress made in carrying out the Plan of Action of the Rio Summit on the Environment, where this subject was discussed.

Although that delegation accepted the principle that conservation areas and property of indigenous peoples should not be subject to development of their natural resources without their informed participation, it expressed the concern that this could also be interpreted as giving them the right to veto development of lands under claim or lands where they have a special interest. It proposed that the Declaration stipulate “effective national processes to handle claims that are not settled in a timely matter.”

It further indicated its agreement with the text referring to the right to conserve, restore, and protect their environment and the productive capacity of their lands, territories, and resources, provided this is done in accordance with international law and applicable national environmental rules

and practices. It said that this should be taken up together with Article 18.3, which refers to ownership of lands.

The same state delegation supported the principle that they should participate in formulating government programs and policies specifically designed to conserve their lands and in implementing such programs and policies. Moreover, like other inhabitants, the indigenous peoples should be entitled to appropriate government aid to protect their environment.

With regard to conservation areas, whether “protected areas” or wildlife preserves on indigenous land, there was general consensus on the need for participation by indigenous peoples in any efforts to develop natural resources on that land. The indigenous representatives insisted that this was only possible on the basis of informed consent, including the right of veto by the indigenous peoples. This request was based on experience with decisions to determine conservation areas which were used for abusive purposes and to diminish the rights of indigenous peoples.

One state delegation agreed on the proposed prohibition applicable to the storage or disposal of radioactive materials or other hazardous materials in violation of international and national standards, or without the prior, informed consent of the indigenous peoples affected.

The decision by the Inter-American Court of Human Rights, based in Costa Rica, in the *Awasi Tingni Case* was mentioned as a landmark ruling in recognition of the rights of dominion and obligations of states in defining the boundaries of and giving title to indigenous lands, with respect for uses and customs and common law. It was believed that this decision has direct implications for this article, because it recognizes the special cultural and spiritual relationship of indigenous peoples to the lands they live on and use.

SECTION FOUR: ORGANIZATIONAL AND POLITICAL RIGHTS

Article XIV. Rights of Association, Assembly, Freedom of Expression and Freedom of Thought

There was consensus that the indigenous communities should be guaranteed these rights, which have already been established by law as human rights of all persons. It was pointed out that these rights not only should be respected in general, but that in the specific case of indigenous peoples, they should be respected on the basis of the traditional forms and values which they apply to their practice. Various state delegations supported the Chair's proposal, and, like some of the indigenous delegations, they also referred to the link between this article and the right to self-determination. One state delegation suggested that this article include that term, either in the title or as part of the text.

There was an extensive exchange of views on the right of indigenous peoples whose members live on both sides of national borders, and the need for states to facilitate and respect the participation of these people in the activities of their group throughout the ancestral area, as well as their need to maintain full contact with the other members. Although there was general agreement on this point, some state delegations argued that states at the same time have the responsibility to apply customs and border control rules and regulations. The Chair proposed that reference to the importance of setting up special systems for “cross-border” indigenous peoples be included in the

text. One state delegation said that “cross-border” indigenous peoples were valuable as a mechanism for peace and understanding between neighboring states.

On the second paragraph of this article, one state delegation proposed the inclusion of Article 32 of ILO Convention 169, recognizing the collective right of indigenous peoples to determine their citizenship in accordance with their practices and customs, which would not preclude the possibility for the indigenous peoples to obtain citizenship in the states in which they live.

As regards the use of ceremonial and sacred areas, state delegations referred to the need to respect the rights of third parties. Indigenous delegations maintained that their rights to use these areas should take precedence, and could not be subject to supervening rights.

Article XV. Right to Self-Government

This article was considered to be inextricably linked to the principle of self-determination, and indigenous delegations argued that this principle should be stated explicitly as the basis of self-government and their autonomy. Various state delegations supported this view, and interpreted it as what is referred to as internal self-determination. They emphasized that this is a currently held view, and that it is important to try to a common ground for the divergent positions on this issue. They acknowledged that this is not an absolute right, and that it has to be adapted to the context in which it is exercised, namely, the present structure of states. In this regard, it was noted that the term had been developed in various international instruments, and that its use should not be limited to the context of decolonization. Other state delegations, however, did not accept this concept of internal self-determination; they maintained that it should be understood as a productive and constructive concept that would contribute to the edification of states.

A coalition of indigenous representatives presented a proposal based on the right to self-determination, which recognizes the right to determine their political status and their type of development, the right to self-government and autonomy, and the right to give their free and informed consent in any decisions affecting their rights, lives, or destiny. Various indigenous delegations explained that they had no separatist intentions vis-à-vis states, but that this term should be viewed from a multicultural and multi-ethnic perspective, as it is defined in the constitutions of many states in the hemisphere.

One state delegation noted that this is a key article in the proposed declaration, and that it includes many of the elements required for effective self-government. It further stated that “if it were combined with recognition of the right of indigenous peoples to self-determination, the two would be read together and would form the lens through which we would examine the entire proposed Declaration.” It referred to national acceptance of the inherent right of indigenous peoples to self-government with regard to their communities’ internal affairs, and to their cultures, identities, traditions, languages, and unique institutions, as well as with regard to their special relationship with their land and resources. The right should be put into practice through appropriate negotiations with the governments in question and harmonized with other levels of government jurisdiction, which is particularly important in the area of environmental practices and regulations.

It proposed a text that recognizes the right of indigenous peoples to participation in politics, subject to domestic law, and to be represented in deliberative national bodies and in other national government institutions in areas where indigenous peoples are present. It agreed that there could be

special agreements for participation in decisions directly affecting areas of specific concern to indigenous peoples, and that such participation is a collective function, in view of the fact that the indigenous peoples may develop their own decision-making institutions and elect representatives in accordance with their own procedures.

Article XVI. Indigenous Law

The majority of the delegations agreed that the common law of the indigenous peoples should be respected, as should their authorities who are responsible for applying it in internal community matters, within a framework of pluralism, including legal pluralism, although there were differing interpretations of this concept and issues that require clarification.

The indigenous delegations gave their general support to the proposed article, which represents an innovation in international law. They maintained that respect for and a guarantee of indigenous legal systems are critical to the self-determination of their peoples, and that this did not imply isolation or rejection of the general legal system. Rather, what is involved is an effective internal system that enriches and strengthens the rule of law throughout the territory, and consolidates states. Of course it is also an element of internal unity and strengthens the culture of indigenous peoples. They noted that its relationship with national law should not be one of dependency, but it should be regarded instead as a system of minimum norms, based on fundamental human rights.

State delegations indicated that some states recognize indigenous legislative powers and jurisdiction, and the administration and application of internal indigenous laws. They stressed, however, that depending on the nature of the issue and the matter in question, either national or indigenous law could prevail, and that this needs to be made fully clear in the article. They also requested clarification as to whether indigenous law refers to common law [law based on customary practices], or to those rules and regulations approved formally by the community. They also explained that they were not in favor of a separate legal system, which would be contrary to Article 14 of the International Covenant.

One point that was also stressed in this regard was the importance of ensuring that in any judicial or administrative proceeding, indigenous peoples would be able to understand the relevant law and procedures in their own tongue, and to use it during such proceedings. In addition, indigenous representatives drew attention to the importance of indigenous law as an element of harmony with ecology and the environment, and as a factor in organization of the use of their lands and territories based on their practices and customs, as well as in maintaining peace.

Article XVII. National Incorporation of Indigenous Legal and Organizational Systems

In response to questions raised by some indigenous representatives, the Chair clarified the scope of the proposed article, which attaches value to indigenous cultures, from which states can learn many things that can be applied to other sectors of their organization. He also clarified that this is an article which states aspirations, and that states should apply it in consultation with the indigenous peoples concerned.

State delegations generally supported this article, but they considered that it should be implemented on a gradual basis. One delegation proposed a text that would promote recognition by

states of the contributions of the indigenous peoples in establishing a multiethnic and multicultural society in their countries.

Indigenous and state delegations supported the objective of the article and considered that it should be put into practice as long as it does not affect the right of indigenous peoples to self-determination and as long as it does not entail a mechanism for assimilation and transculturation.

SECTION FIVE: ECONOMIC AND PROPERTY RIGHTS

Article XVIII. Traditional forms of property ownership and cultural survival. The rights to land, territories and resources.

The discussion on this section in general, and on Article XVIII in particular, was initiated with extensive participation by indigenous and state delegations, and a focus on the principle of indigenous ownership of ancestral lands.

The indigenous delegations viewed this as a critically important right, both for their cultural and physical integrity, and for exercise of their right to self-determination. Some of them maintained that the terms of “lands” and “territories” are a unified concept, which should not be restricted to the surface of the land, but should also include subsoil resources in the subsoil. In this regard, they indicated that in some countries, priority is given to the interests of government and business for exploitation of subsoil and other resources, rather than to the rights of indigenous peoples. One delegation argued that the concept of territory is a broad, collective concept, namely, the physical space where indigenous peoples pursue their lives, practice solidarity and reciprocity, and develop their knowledge. Land ownership is not for the purpose of accumulating capital, but rather for guaranteeing a way of life and cultural development.

A number of state delegations stated that they recognize indigenous ancestral lands in their laws and practices, and that in some cases, the area occupied by these lands largely exceeds the demographic proportion of indigenous peoples, since the area is defined on the basis of ancestral occupation and its use, and not on the basis of the productive criteria that are used for agrarian reform. One state delegation focused on the importance of defining the terms *lands*, *territories*, and *resources*, and proposed definitions for the first two terms. The term *territory* is more limited than the term *lands*, and therefore full exercise of rights in the territories may be more limited. All of them could be subject to regulations, for instance environmental regulations, and especially to comply with international law. That delegation explained that *property* is understood to refer to real estate, and not to other types of personal property.

Another state delegation indicated that ownership of indigenous land should be approached from the standpoint of a solemn, formal process between each state and each indigenous community, in an atmosphere of security for the nation-state condition and its membership within that state. It was noted that in the past, many times these processes were not fair and involved exploitation, and that these errors must not be repeated. That delegation listed the following conditions that should be present in the state:

- that consultations are required;
- that the tribal land cannot be sold without the consent of the tribe in question;
- that the land is not subject to national taxes;
- that the tribes have jurisdiction over their land, to a certain extent;
- that in prevailing treaties, many tribes reserve rights of use and assembly that are respected;
- that indigenous communities and individuals are generally entitled to the resources lying below their land;
- and, that there is a negotiating process to accommodate the right of access to sacred places.

As regards Article XVIII.2, one state delegation supported the principle of the right to legal recognition of their ownership and related rights, and to use of territories of traditional access, pursuant to the law. It stated that these provisions on land and territories should establish general principles to guide future action, and be flexible enough to allow for negotiated agreements and compliance with existing agreements or treaties, including ones in the area of human rights.

On Article XVIII.3, that same delegation indicated that this clause should refer to property or rights already recognized under national laws, which should be adapted for conservation and resource management purposes, after consultation with the indigenous communities concerned. With regard to Article XVIII.4, it agreed that in the case of state ownership of subsurface resources, a fair process should be put in place to consider the impact on the rights of the indigenous peoples. This process should be carried out with their full participation, taking into account their views, as well as the principle of fair compensation, in accordance with the law. It stressed the importance of participation by the indigenous peoples in the benefits of exploitation of subsoil resources on their lands.

That state delegation supported the Chair's proposal and suggested a text consistent with the proposal regarding the future United Nations Declaration, which explicitly expresses opposition to the arbitrary relocation of indigenous peoples, and includes provision for doing so in a nondiscriminatory way, following consultation, with fair and equitable compensation, and the possibility of return. It also supported elimination of the paragraph on "restitution," and suggested instead a process of treaties to achieve fair settlement. It indicated that it was in favor of facilitating civil remedies in cases of usurpation and adverse possession, as it maintained that criminal penalties were not required.

Another state delegation explained that traditional indigenous forms of ownership were recognized in its national constitution, as were their ethnic and cultural pre-existence, and that it provided for granting legal status and property title for lands occupied ancestrally, under agreements with the federal or provincial government.

Various state and indigenous delegations agreed on the importance of considering the rights included in this proposed article in a spirit of trust, cooperation, and understanding between governments and indigenous peoples, as part of an internal dialogue with respect for the principle of diversity.

III. COMMENTS BY THE RAPPORTEUR ON THE AREAS OF CONSENSUS

Together with the Chair of the Working Group, the Rapporteur has drafted a summary of the areas of consensus achieved in principle. They are built on agreements reached in previous meetings, and they offer a platform to pursue the work of drawing up a final version of the American Declaration on the Rights of Indigenous Peoples.

These considerations do not claim to be exhaustive or definitive, but rather they are set forth in an attempt to facilitate future work and to give value to the work already done.

It is our understanding that there is a general consensus on the importance of the process in and of itself. In this regard:

- This process is an indication of the international and national priority given to this issue, and to the need to develop a new relationship between governments and indigenous peoples, by establishing progressive standards, in a spirit of conciliation, compromise, and mutual respect, in the context of a genuine dialogue.
- This process is part of and is influenced by the advances that have been made in various international forums, and the new legal instruments on the subject.
- Every effort must be made to move this process forward and bring it to completion as quickly as possible, without sacrificing quality. I should add that the work of this session sets an example in this regard.
- As the process moves forward, it is critical that national consultations between states and the respective indigenous peoples be held or continued, as the case may be. In this regard, importance was attached to having the General Assembly recommend these national consultations in a resolution on the subject.
- It is equally critical that the process and the consultations be accompanied by discussions and studies during the time between meetings, and that indigenous organizations participate fully in planning and carrying out such activities.
- It is essential that a fund of voluntary contributions be formally established to facilitate the participation of representatives of indigenous peoples in future activities of the Working Group, and that this fund have authorities that adequately represent indigenous organizations.

As regards the substantive content of the future Declaration, there were areas of firm consensus also reached both on general principles as well as on specific articles that were discussed, as follows:

In general terms:

- It was agreed that the concept of self-determination is no longer an object of *opposition*, but that now it is a matter of establishing a new *relationship* between indigenous peoples and their states, with a view to releasing potential energy to ensure more equitable and genuine development to improve governance and strengthen democracy in states.

- That the concepts of self-determination, the relationship of indigenous peoples with their habitat, and their concept as peoples are key components of the Declaration, and as concepts they are cross-cutting issues throughout the text.
- That there is a shared understanding that the different articles are interrelated in a holistic way that expresses a relationship among individuals, as a community and with nature, a relationship that generates and is generated by a spirituality that is valuable and should be fostered and respected by all.
- That the concepts referring to culture and material elements should not be interpreted as limited to historical and archeological matters, but rather as part of dynamic, living, and active cultures, in both a present and future sense.
- That all the rights should take into consideration inter-generational and gender equity aspects.
- That the Declaration should specifically include a clause that refers to the intention of states to gradually develop necessary measures and legislation to put into practice the statements contained in it.
- That poverty is a phenomenon that particularly afflicts indigenous peoples and that is counter to the values and rights highlighted in this Declaration.

With regard to the section referring to culture and cultural identity:

- That cultural identity is a key objective for the integrity of the indigenous peoples and that states are willing to preserve and promote it.
- That multiculturalism is a distinctive feature of the large majority of our states.
- That the views and thinking of the different cultures comprising a state should be understood and respected, and their harmonious, respectful complementarity should be sought.

With regard to education:

- That education in our societies should be intercultural, to ensure the indigenous peoples of the capacity to develop their own educational systems, complemented by general education, and the possibility of access to quality services without discrimination, with a guarantee that all will have the opportunity to complete the required schooling.
- That informal education provided by life in the community and formal education are complementary.
- That special financial measures should be set up by the state to put the required educational improvements into practice, since human resources need to be trained at all levels to ensure their full development.

With regard to spiritual matters:

- That the indigenous peoples' view of spirituality, which includes religion, is holistic in nature and the expression of their concepts and relationships, and should be respected as such.
- That the spirituality of the indigenous peoples includes respect for individual beliefs.

With regard to the family:

- That the most typical form of indigenous families is the extended family, which represents the community network of ties.
- That the “best interests of the child” should be defined in consideration of these family and community ties, with the community playing a key role in this definition.
- That relations between men and women, parents and children, and generations should be based on criteria of equity and respect.
- That poverty and related phenomena contribute to the disintegration of families.

With regard to health:

- That the indigenous peoples should have the opportunity to develop their own health systems, based on a concept of intercultural health systems, complementary to general systems of health. Work done by the Pan American Health Organization should be used to advantage to this end.
- That indigenous health practices and knowledge should be respected, as not only do they have roots in history, but they are also constantly being renewed and enriched.
- That opportunities for adequate and nondiscriminatory physical and financial access to public health services should be guaranteed.

With regard to the environment:

- That there is a strong relationship between the environment and the cultural survival of indigenous peoples.
- That indigenous peoples have an active role to play in preserving the environment, and their knowledge on the subject should be recognized and used.
- The value of indigenous peoples in the co-management of ecological systems was recognized.
- It is important for states to protect natural resources that are located in indigenous areas or that affect them.

With regard to cross-border indigenous peoples:

- It was felt that the unity of indigenous peoples settled in several neighboring states should be promoted, by adopting nondiscriminatory measures to facilitate full relations among the different sectors of the same indigenous people.
- That this possibility for full contact should be viewed as a guarantee of solidarity and peace between the states in question.

With regard to self-determination, self-government, and autonomy:

- There is general acceptance as to the importance of self-determination of indigenous peoples, as a basis and foundation of their integrity or unity and of the nature and exercise of their different rights; and, that this concept, as presented by states and indigenous representatives, is related to the political and constitutional integrity and territorial sovereignty of states.

- It was recognized that this is an evolving concept, affected by different international legal currents of thought.

With regard to indigenous legal systems:

- That they are part of the national legal order and that their jurisdiction and area of competence should be respected by general judicial systems.
- That states should recognize their jurisdiction and area of competence, in addition to the authorities of the indigenous people who are responsible for managing said systems.
- That criteria of interculturality should be applied to indigenous legal systems and their relationship with general systems of justice.
- That indigenous systems of justice should be valued by states for their capacity to maintain or restore internal peace and harmony, and at the same time maintain the cultural unity of indigenous peoples.

With regard to ownership of indigenous lands and territories:

Although this discussion was not finished, an important debate took place on the right of indigenous peoples to the lands, territories, and resources which they have occupied and used ancestrally.

Washington, D.C., April 30, 2002.