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UHULUMENI WAKWAZULU

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KWAZULU GOVERNMENT SERVICE



KWAZULU-REGERINGSDIENS

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DATE: 06/06/93

**No. OF PAGES
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MESSAGE:

**SUBMISSION TO THE TECHNICAL COMMITTEE ON CONSTITUTIONAL MATTERS
WITH REFERENCE TO INDIGENOUS PEOPLES AND THEIR LEADERS FROM THE
KWAZULU DELEGATION.**

KIND REGARDS,

KWAZULU DELEGATION.

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**KWAZULU GOVERNMENT DRAFT OPENING POINTS ON THE REPORT OF THE
TECHNICAL COMMITTEE ON CONSTITUTIONAL MATTERS OF 28TH MAY 1993.**

1.1 Paragraph 2.12 reads thus:

"The status of traditional leaders shall be acknowledged and recognised in an appropriate manner in the constitution. Unless provided otherwise by legislation, indigenous law shall be applied to the extent that it is compatible with the provisions of the fundamental rights contained in the constitution."

- 1.2 To proceed with the development of this principle, it is important to consider the "Draft Declaration of the Rights of Indigenous Peoples" adopted on 14th August 1992 by the Working Group on Indigenous Populations which is a sub-committee of The Commission on Prevention of Discrimination and Protection of Minorities of the United Nations (see Annex A).

Special attention should be drawn to the Seventh Preambular Paragraph which recognises *"...the urgent need to respect and promote the rights and characteristics of indigenous people, especially their right to their lands, territories and resources, which stem from their history, philosophy, cultures, spiritual and other traditions as well as from their political, economic and social structures....."*

Operative Paragraph 26 then goes on to state that:

"Indigenous people have the right to - (a) participate fully at all levels of government through representatives chosen by themselves, in decision-making about implementation of all national and international matters which may affect their rights, lives and destinies; and (b) be involved, through appropriate procedures determined in consultation with them, in

devising laws or administrative measures that may affect them directly. States have the duty to obtain their free and informed consent before implementing such measures".

- 1.3 This needs to be considered, compared and contrasted with the Government's White Paper on Land Reform, especially Part B; B.3 - The Tribal Land System (see Annex B). Whilst ostensibly recognising the traditional system of land tenure and the status of Traditional Leaders, its unilateralism and prescriptiveness is clearly against the spirit of the UN Declaration.
- 1.4 If we are to give true recognition to the status of indigenous peoples and their leaders, it is important that the UN Declaration be given immediate priority by the Technical Committee on Constitutional Matters in the development of constitutional principles.

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Annex I

PREAMBULAR AND OPERATIVE PARAGRAPHS OF THE DRAFT DECLARATION
AS AGREED UPON BY THE MEMBERS OF THE WORKING GROUP AT FIRST
READING

First preambular paragraph

Affirming that all indigenous peoples are free and equal in dignity and rights to all peoples in accordance with international standards, while recognizing the right of all individuals and peoples to be different, to consider themselves different, and to be respected as such,

Second preambular paragraph

Considering that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Third preambular paragraph

Convinced that all doctrines, policies and practices of racial, religious, ethnic or cultural superiority are scientifically false, legally invalid, morally condemnable and socially unjust,

Fourth preambular paragraph

Concerned that indigenous peoples have often been deprived of their human rights and fundamental freedoms, resulting in the dispossession of their lands, territories and resources, as well as in their poverty and marginalization,

Fifth preambular paragraph

Considering that treaties, agreements and other constructive arrangements between States and indigenous peoples continue to be matters of international concern and responsibility,

Sixth preambular paragraph

Welcoming the fact that indigenous peoples are organizing themselves in order to bring an end to all forms of discrimination and oppression wherever they occur,

Seventh preambular paragraph

Recognizing the urgent need to respect and promote the rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which stem from their history, philosophy, cultures and spiritual and other traditions, as well as from their political, economic and social structures,

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Eighth preambular paragraph

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from adverse distinction or discrimination of any kind,

Ninth preambular paragraph

Endorsing efforts to revitalize and strengthen the societies, cultures and traditions of indigenous peoples, through their control over development affecting them or their lands, territories and resources, as well as to promote their future development in accordance with their aspirations and needs,

Tenth preambular paragraph

Recognizing that the lands and territories of indigenous peoples should not be used for military purposes without their consent and reaffirming the importance of the demilitarization of their lands and territories, which will contribute to peace, understanding, economic development and friendly relations among all peoples of the world.

Eleventh preambular paragraph

Emphasizing the importance of giving special attention to the rights and needs of indigenous women, youth and children, and in particular to their right to equality of educational opportunities and access to all levels and forms of education.

Twelfth preambular paragraph

Recognizing in particular that it is usually in the best interest of indigenous children for their family and community to retain shared responsibility for their upbringing and education.

Thirteenth preambular paragraph

Believing that indigenous peoples have the right freely to determine their relationships with the States in which they live, in a spirit of coexistence with other citizens.

Fourteenth preambular paragraph

Noting that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Fifteenth preambular paragraph

Bearing in mind that nothing in this Declaration may be used as an excuse for denying to any people its right of self-determination.

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Sixteenth preambular paragraph

Encouraging States to comply with and effectively implement all international instruments as they apply to indigenous peoples, in consultation with the peoples concerned,

Seventeenth preambular paragraph

Solemnly proclaims the following Declaration on the Rights of Indigenous Peoples:

PART I

Operative paragraph 1

Indigenous peoples have the right of self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government;

Operative paragraph 2

Indigenous peoples have the right to the full and effective enjoyment of all of the human rights and fundamental freedoms which are recognized in the Charter of the United Nations and in international human rights law;

Operative paragraph 3

Indigenous peoples have the right to be free and equal to all other human beings and peoples in dignity and rights, and to be free from adverse distinction or discrimination of any kind based on their indigenous identity;

PART II

Operative paragraph 4

Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations;

Operative paragraph 5

Indigenous peoples have the collective right to exist in peace and security as distinct peoples and to be protected against genocide, as well as the individual rights to life, physical and mental integrity, liberty and security of person;

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Operative paragraph 6

Indigenous peoples have the collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities, including the right to self-identification;

Operative paragraph 7

Indigenous peoples have the collective and individual right to be protected from cultural genocide, including the prevention of and redress for:

- (a) Any act which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities;
- (b) Any form of forced assimilation or integration by imposition of other cultures or ways of life;
- (c) Dispossession of their lands, territories or resources;
- (d) Any propaganda directed against them;

Operative paragraph 8

Indigenous peoples have the right to revive and practise their cultural identity and traditions, including the right to maintain, develop and protect the past, present and future manifestations of their cultures, such as archeological and historical sites and structures, artefacts, designs, ceremonies, technology and works of art, as well as the right to the restitution of cultural, religious and spiritual property taken from them without their free and informed consent or in violation of their own laws;

Operative paragraph 9

Indigenous peoples have the right to manifest, practise and teach their own spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains;

Operative paragraph 10

Indigenous peoples have the right to revive, use, develop, promote and transmit to future generations their own languages, writing systems and literature, and to designate and maintain their own names of communities, places and persons. States shall take effective measures to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other effective means;

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Operative paragraph 11

Indigenous peoples have the right to all levels and forms of education, including access to education in their own languages, and the right to establish and control their own educational systems and institutions. Resources shall be provided by the State for these purposes;

Operative paragraph 12

Indigenous peoples have the right to have the dignity and diversity of their cultures, histories, traditions and aspirations reflected in all forms of education and public information. States shall take effective measures to eliminate prejudices and to foster tolerance, understanding and good relations;

Operative paragraph 13

Indigenous peoples have the right to the use of and access to all forms of mass media in their own languages. States shall take effective measures to this end;

Operative paragraph 14

Indigenous peoples have the right to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their own political, economic, social, cultural and spiritual development, and for the enjoyment of the rights contained in this Declaration;

PART III

Operative paragraph 15

Indigenous peoples have the right to recognition of their distinctive and profound relationship with the total environment of the lands, territories and resources which they have traditionally occupied or otherwise used;

Operative paragraph 16

Indigenous peoples have the collective and individual right to own, control and use the lands and territories they have traditionally occupied or otherwise used. This includes the right to the full recognition of their own laws and customs, land-tenure systems and institutions for the management of resources, and the right to effective measures by States to prevent any interference with or encroachment upon these rights. Nothing in the foregoing shall be interpreted as restricting the development of self-government and self-management arrangements not tied to indigenous territories and resources;

Operative paragraph 17

Indigenous peoples have the right to the restitution or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Unless otherwise freely agreed upon by the peoples

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concerned, compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those which were lost;

Operative paragraph 18

Indigenous peoples have the right to the protection and, where appropriate, the rehabilitation of the total environment and productive capacity of their lands and territories, and the right to adequate assistance, including international cooperation, to this end. Unless otherwise freely agreed upon by the peoples concerned, military activities and the storage or disposal of hazardous materials shall not take place in their lands and territories;

Operative paragraph 19

Indigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing arts, seeds, genetic resources, medicine and knowledge of the useful properties of fauna and flora;

Operative paragraph 20

Indigenous peoples have the right to require that States and domestic and transnational corporations consult with them and obtain their free and informed consent prior to the commencement of any large-scale projects, particularly natural resource development 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 effects. Just and fair compensation shall be provided for any such activity or adverse consequence undertaken;

PART IV

Operative paragraph 21

Indigenous peoples have the right to maintain and develop within their lands and other territories their economic, social, and cultural structures, institutions and traditions, to be secure in the enjoyment of their traditional means of subsistence, and the right to engage freely in their traditional and other economic activities, including hunting, fishing, herding, gathering, lumbering and cultivation. In no case may indigenous peoples be deprived of their means of subsistence. They are entitled to just and fair compensation if they have been so deprived;

Operative paragraph 22

Indigenous peoples have the right to special state measures within available resources for the immediate, effective and continuing improvement of their economic and social conditions, with their free and informed consent, that reflect their own priorities;

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Operative paragraph 23

Indigenous peoples have the right to determine, plan and implement, as far as possible through their own institutions, all health, housing and other economic and social programmes affecting them;

Operative paragraph 24

Indigenous peoples have the right to their own traditional medicines and health practices. This includes the right to protection of vital medicinal plants, animals, and minerals. The above may not be construed as a limitation to indigenous health systems, if they so wish;

Operative paragraph 25

Indigenous peoples have the right to participate on an equal footing with all other citizens and without adverse discrimination in the political, economic, social and cultural life of the State and to have their specific character duly reflected in the legal system and in political and socio-economic and cultural institutions, as appropriate, including in particular proper regard to, full recognition of and respect for indigenous laws, customs and practices;

Operative paragraph 26

Indigenous peoples have the right (a) to participate fully at all levels of government, through representatives chosen by themselves, in decision-making about and implementation of all national and international matters which may affect their rights, lives and destinies; (b) to be involved, through appropriate procedures, determined in consultation with them, in devising laws or administrative measures that may affect them directly. States have the duty to obtain their free and informed consent before implementing such measures;

Operative paragraph 27

Indigenous peoples have the right to autonomy in matters relating to their own internal and local affairs, including education, information, mass media, culture, religion, health, housing, employment, social welfare in general, traditional and other economic and management activities, land and resources administration, environment and entry by non-members, and the environment, as well as internal taxation for financing these autonomous functions;

Operative paragraph 28

Indigenous peoples have the right to decide upon the structures of their autonomous institutions, to select the membership of such institutions according to their own procedures, and to determine the membership of the indigenous peoples concerned for these purposes; States have the duty to recognize and respect the integrity of such institutions and their memberships;

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Operative paragraph 29

Indigenous peoples have the right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms and with the rights contained in this declaration;

Operative paragraph 30

Indigenous peoples have the right to maintain and develop traditional contacts, relations and cooperation, including activities for economic, social, cultural and spiritual purposes between indigenous peoples across borders. States should adopt measures to facilitate such contacts;

Operative paragraph 31

Indigenous peoples have the right to claim that States or their successors honour treaties and other agreements concluded with indigenous peoples, and to submit any disputes that may arise in this matter to competent national or international bodies, according to their original intent, or courts;

Operative paragraph 32

Indigenous peoples have the individual and collective right to access and prompt decision by mutually acceptable and fair procedures for resolving conflicts or disputes with States. These procedures may include, as appropriate, negotiation, mediation, conciliation, arbitration or judicial settlement at national courts and, where domestic remedies have been exhausted, international and regional human rights review mechanism for complaints;

Operative paragraph 33

States have the duty, in consultation with the indigenous peoples concerned, to take effective measures to ensure the full enjoyment of the exercise of the indigenous rights and other human rights and fundamental freedoms referred to in this Declaration;

Operative paragraph 34

These rights contained herein constitute the minimum standards for the survival and the well-being of the indigenous peoples of the world;

Operative paragraph 35

Nothing in this declaration may be interpreted as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire;

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Operative paragraph 36

Indigenous peoples have the right to special protection and security in periods of armed conflict. States shall observe international standards for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

(a) Recruit indigenous people against their will into the armed forces and, in particular, for use against other indigenous peoples;

(b) Force indigenous peoples to abandon their land and territories and means of subsistence and relocate them to special centres for military purposes;

Operative paragraph 37

Indigenous peoples have the right to retain and develop their customary laws and systems where these are not incompatible with human rights and fundamental freedoms enshrined in international human rights instruments;

Operative paragraph 38

Indigenous peoples shall not be forcibly removed from their lands or territories. Where relocation occurs it shall be with the free and informed consent of the indigenous peoples concerned and after agreement on a fair and just compensation and, where possible, the option of return;

Operative paragraph 39

The application of the provisions of this Declaration shall not adversely affect the rights and benefits of the indigenous peoples concerned or of any other national of a State pursuant to other international instruments, treaties or laws.

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REPUBLIC OF SOUTH AFRICA

WHITE PAPER
ON
LAND REFORM

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self-governing territory concerned. These arrangements will come into effect on the date mentioned in such notice.

B2.8 Serious problems complicate the upgrading of lower order land tenure rights to full ownership. The sites for which these rights were granted were often not properly surveyed or indicated on an approved general plan. Ownership cannot be registered in respect of unsurveyed sites. In addition, less formal towns and settlements do not always meet the requirements for township establishment and the rights of third parties have not always been taken into account in terms of the requirements for township establishment. There is not much an individual occupant acting on his own can do about these complications. Avenues for joint action will have to be found at local level. The State, too, will have to play a leading role in providing financial and administrative support. The Government for its part undertakes to do everything possible, within reason, to simplify and accelerate the process of conferring ownership.

B2.9 The Government believes that the upgrading of inferior rights of tenure to full ownership will benefit not only those concerned but also the economy as a whole. In effect, this will create a new property market with a substantial growth potential. The *Upgrading of Land Tenure Rights Bill* reflects the Government's commitment in this regard by providing for the automatic conversion of more than 300 000 registered leasehold rights and deeds of grant to full ownership as soon as possible after the commencement of the proposed Act. In those towns in which these conversions are made possible, the concept of lower order land tenure rights will lapse and all future registrations will establish full ownership. This opens the door for granting ownership in some 1 000 000 additional residential sites. The Bill further envisages active support by the State for the upgrading of inferior land tenure rights. This assistance will, *inter alia*, make provision for the mass surveying of numerous unsurveyed townships and the updating of obsolete registers in order to enable conversion to ownership. This assistance will also be available to tribes that choose to convert to private ownership.

B2.10 In addition to active support, the Government also intends to support upgrading by means of economic incentives. It has therefore been decided that where land in respect of which land tenure rights have been granted, is held by the State or the SADT, a scheme will be devised in terms of which the holders of residential sites can convert their rights into ownership without compensatory payments to the State or the SADT. Depending on the local circumstances or the individual case concerned, conversion should, at most, be accompanied by a contribution towards costs incurred to make the conversion practicable. It must, however, be clearly understood that such a scheme will apply only to the sites and not to any housing or other improvements to the land made with the aid of public or borrowed funds. The latter falls within the ambit of certain assistance schemes that are still receiving attention.

B2.11 In many cases, especially in towns and in the urban centres, only certain less serious technical problems impede the conversion of rights into ownership. The *Upgrading of Land Tenure Rights Bill* rectifies these problems and clears the way for the expeditious granting of ownership.

B3. The tribal land system

B3.1 Large tracts of the Black areas, in particular those within self-governing territories, are at present held in trust for tribal communities. This land, as well as adjacent land held by the SADT or the governments of self-governing territories and allocated to the tribal communities, is occupied and used by members of, and additions to, the tribe in accordance with the traditional communal system of land tenure. The rights accorded to individuals and families on tribal land are unique and cannot be typified under common law and converted into rights recognised in South African law.

B3.2 In the traditional areas, ethnic and tribal communities are realities that have evolved naturally in Black community life. A tribe's identification with its land and the communal tenure are essential for the continued existence of tribal community life. These realities cannot be ignored when determining a general land policy. After due consideration the Government has decided not to interfere with this traditional land tenure system. The traditional system of land tenure underpins a delicately balanced subsistence economy system which, if replaced injudiciously, could lead to the collapse of the communities to which it affords a livelihood. The Government is, however, not in favour of the expansion of this system.

B3.3 The Government believes that tribal communities should seriously consider the advantages of individual tenure. Although tribal communities will not be pressurised into converting the traditional rights to their land into individual rights of tenure, the *Upgrading of Land Tenure Rights Bill* provides for such a contingency. It is stressed, however, that the tribes themselves must initiate the reform of the tribal land systems, in which case the assistance referred to in paragraph B2.9 will be made available.

B3.4 Although tribal communities exercise full physical control over their land, ownership of such land is usually vested in a Minister in trust for the tribe or else in the SADT or the government of a

self-governing territory which has allocated the land to the tribe in terms of an administrative measure. About 354 000 ha of land outside the self-governing territories is held by tribes, both on a trust basis and in terms of allocations of SADT land. There is no reason for the perpetuation of paternalistic measures of this nature. The Government has therefore decided that full ownership of land which is held in trust for tribal communities, or which has been or may be allocated to these communities by the SADT, should where practicable, be transferred direct to the tribes. The granting of ownership to tribes will give them the full right to dispose of their land. However, to safeguard the interests of individual members of the tribe, the proposed *Upgrading of Land Tenure Act* prohibits the tribe from selling its land to persons other than members of the tribe during the first ten years after it has been transferred to the tribe, unless the tribe obtains an order of court authorising such sale. The rationale behind this is that the Court should ensure that the alienation of tribal land is in the best interests of the individual members of the tribe and of the tribe itself. This measure will not apply where the tribe decides to transfer land to individual tribesmen or persons who have joined the tribe.

B3.5 The Government realises that the acceptance of the principle of transfer of ownership to tribes may lead to boundary disputes between tribes. The boundaries between the lands of different tribes cannot always be clearly determined. The *Upgrading of Land Tenure Rights Bill* provides for the appointment of a person to settle such disputes.

B3.6 Tribal communities will also be able to enter the property market in their own right when land is made accessible to all. As in the case of all other persons, the ordinary laws of the land will, however, also apply to the acquisition of land by tribal communities and to the use of that land for residential and cultivation purposes. In particular, provisions relating to the establishment of townships and the subdivision of land are involved here, and tribal communities will have to comply with the relevant statutory requirements when they purchase land for communal occupation. In practice this means that as far as township establishment is concerned, they will have to apply formally to the Administrator to have the land declared an approved township after having complied with all the requirements with regard to planning, land survey, the approval of a general plan, the provision of services and the opening of a township register in the deeds office. This will also mean that tribes will be able to use land for communal residential settlement only if that land has been earmarked for township development. The Government considers it to be of cardinal importance for the country and its future that high-potential agricultural land be retained for agricultural purposes.

B3.7 On the other hand the Government does not deny that some tribal communities are in serious need of land. Ways will therefore have to be found to satisfy this need. The *Less Formal Township Establishment Bill* and the *Rural Development Bill* provide for the communal settlement requirements of tribes on land suitable for that purpose. At the same time it ensures that communal settlement takes place in such a way that it can subsequently be upgraded to individual ownership.

B4. The integrity of the title in land

B4.1 The state has a duty to look after private, community and public interests in land and to secure the integrity of the title in land. It does this in the first instance by honouring the integrity of land rights and in the second instance by maintaining law and order to protect private and public ownership against violence and other forms of unlawful infringement. The Government undertakes to honour these responsibilities and further to secure the free and undisturbed enjoyment of rights in land by looking after the interests of communities in a consistent, purposeful and firm manner. In particular, the process of urbanisation should be properly managed. It is evident that urbanisation should be assisted by providing adequate opportunities for settlement and housing; that the established urban environment should be protected against physical decay, deterioration and social ills; and that acceptable norms and standards should be promoted, particularly in residential areas. The views of the Government regarding these objectives and their potential stabilising effect on private, neighbourhood and community interests are outlined below.

B4.2 Adequate settlement and housing opportunities

B4.2.1 Peace, progress and stability cannot be achieved unless every effort is made to ease the present housing shortage. The need for housing and the intentions of the Government in this respect are dealt with in paragraph C4.8, but what is important here is that the continuing backlog in housing has potentially unfavourable implications for the maintenance of the quality of life in established residential areas as well. The housing shortage should be eased in order also to lessen the pressure on established residential areas, to counter unlawful squatting and prevent established communities from being displaced, and to protect community life against social disorder, disruption and the disregard of community values.

B4.2.2 The urban housing shortage is only too evident from the squatter phenomenon of recent years. On the one hand squatting is perceived as a serious threat by established communities, while on

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