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REPORT OF THE SUB-COMMISSION ON PREVENTION OF
DISCRIMINATION AND PROTECTION OF MINORITIES
ON ITS FORTIETH SESSION

Comments on the Study on the significance of treaties, agreements
and other constructive arrangements for the promotion and
protection of the human rights and fundamental freedoms of
indigenous populations, received pursuant to resolution 1988/56
of the Commission on Human Rights

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Introduction

By resolution 1988/56 of 9 March 1988, the Commission on Human Rights requested the Secretary-General to bring that resolution, the outline prepared by the Special Rapporteur, Mr. Miguel Alfonso Martínez, on the possible purposes, scope and sources of a study on the potential utility of treaties, agreements and other constructive arrangements between indigenous populations and Governments (E/CN.4/Sub.2/1988/24/Add.1) and the deliberations thereon by the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the attention of Governments, specialized agencies and non-governmental organizations, including indigenous organizations, with a view to obtaining comments in advance of the forty-fifth session of the Commission.

In response to notes verbale and letters addressed by the Secretary-General to the interested parties, comments have been received from the Government of Canada and the International Labour Office. Any additional comments received will be issued as addenda to the present document.

CANADA

[12 January 1989]
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Paragraph 4 of resolution 1988/56 of the Commission on Human Rights, entitled "Study on the significance of treaties, agreements and other constructive arrangements for the promotion and protection of the human rights and fundamental freedoms of indigenous populations", requested the Secretary-General to solicit the comments of Governments and other interested parties on the outline prepared by Mr. Miguel Alfonso Martínez on the possible purposes, scope and sources of the above-mentioned study, in advance of the forty-fifth session of the Commission.

Considering the intention expressed by the Commission further to consider this question at its forty-fifth session taking into account, *inter alia*, the contributions of interested Governments (paragraph 5 of the aforementioned resolution), the Permanent Mission submits herewith the comments of the Government of Canada on this subject.

RESPONSE OF CANADA TO THE OUTLINE ON THE STUDY OF TREATIES,
AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS BETWEEN STATES
AND INDIGENOUS POPULATIONS PREPARED BY SPECIAL RAPPORTEUR
MR. MIGUEL ALFONSO MARTINEZ

The Government of Canada welcomes the opportunity to comment on the Outline on the Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations which has been prepared by the Special Rapporteur, Mr. Miguel Alfonso Martínez.

Canada has always been of the view that any study prepared on indigenous treaties, agreements and other arrangements should be reflective of the standard-setting mandate of the Working Group on Indigenous Populations (WGIP). Standard-setting remains the core element of the work of the WGIP. Any study done or work performed should advance rather than divert from this essential function of the WGIP.

The standard-setting and forward-looking orientation of the proposed study is set out very clearly in the preamble and operative paragraph 2 of the resolution of the Commission on Human Rights providing for the preparation of an outline (resolution 1988/56).

Operative paragraph 2 of the relevant resolution states that, in preparing the outline, the Special Rapporteur should pay "particular attention to the ongoing development of universally relevant standards and the need to develop innovative, forward-looking approaches to relationships between indigenous populations and Governments".

The linkage between standard-setting and the study's orientation to the future is significant. Together, they require that such a study not be focused on unresolvable historical situations or become a collection of claims and counterclaims regarding contemporary situations. The aim of the study should be to examine the possible utility of various arrangements for countries where these are not now in effect. We recognize that part of this process will be the examination of current arrangements between indigenous populations and States.

An essential element of this standard-setting and forward-looking orientation is universality. Valid standards must have relevance for the widest possible number of indigenous populations around the world. The resolution providing for the outline specifically refers to "treaties, agreements and other constructive arrangements" in order to ensure that any study which is eventually done does not exclude significant portions of the world's indigenous populations. It is clear then that the resolution establishing the study outline anticipates a very broadly-based undertaking, touching on the experience of many countries. Therefore, the study in question should not be restricted to sources and material covering a limited number of indigenous populations; instead, it should examine the widest possible number of indigenous groups.

Furthermore, to be viable, such standards will require broadly-based support.

Outline of the Study on Indigenous Treaties, Agreements and Other Constructive Arrangements

It is with the above concerns and criteria in mind that we have examined the outline that has been presented to us by the Special Rapporteur.

The Government of Canada is pleased that, in his study outline, the Special Rapporteur said in relation to the geographic scope of the projected study, that it was necessary "to obtain references and analyse examples of situations regulated by treaties, agreements and other constructive arrangements, in any part of the world in which the historical or contemporary existence of such instruments is confirmed or where they may still come into being in the future" (paragraph 12 of E/CN.4/Sub.2/1988/24/Add.1).

This reflects the emphasis that the Special Rapporteur correctly places on the need to examine as broad a range of situations as possible and highlights the Special Rapporteur's oral statement to the WGIP that his work would proceed on the assumption that the study should be universal in its approach (paragraph 97 of E/CN.4/Sub.2/1988/24). In this context, the Government of Canada notes that the study, if it is to fulfil its terms of reference, must not place undue emphasis on a limited number of regions to the detriment of others.

Canada also welcomes the statement by the Special Rapporteur that the study "must be basically future-oriented" (paragraph 98 of E/CN.4/Sub.2/1988/24). This forward-looking orientation is reflected in the outline where the Special Rapporteur, having referred to situations regulated by treaties, agreements and other constructive arrangements, expressed his intention to not limit the study "to an analysis of the conclusion, in the past, of juridical documents of that nature or to an examination of their contemporary significance" (paragraph 13 of E/CN.4/Sub.2/1988/24/Add.1). Nor did the Special Rapporteur intend to focus on situations where agreements were unilaterally terminated or where violations were alleged to have occurred.

Rather these situations would be examined only "to the degree to which they may affect the more practical objective of the study", namely an evaluation of "the extent to which the conclusion of new treaties, agreements and other constructive arrangements ... may contribute effectively to the development of more solid, lasting and equitable bases for the relationships ... between indigenous populations and States" (paragraph 14 of E/CN.4/Sub.2/1988/24).

The Canadian Government supports this forward-looking approach and assumes that the reference in the outline (paragraph 9) to a study which was "exclusively" technical-juridical in nature was not meant to be a departure from this approach nor to be an endorsement of a technical and legalistic examination of past arrangements which, in Canada's opinion, would not advance the objective of the resolution. We encourage the Special Rapporteur to concentrate on the forward-looking approach outlined above.

The Canadian Government believes that it is particularly important to ensure that the scope of a study stay strictly within the applicable criteria and not venture beyond the mandate of the Special Rapporteur into inapplicable areas. This is particularly important given the reference in the resolution of the Commission on Human Rights to the need to give due consideration to the "socio-economic realities of States and the inviolability of their sovereignty and territorial integrity" (resolution 1988/56). Canada is concerned that a study which purported to deal with inappropriate international concerns would fail to attract the support of a number of States.

The Government of Canada notes that, in his outline, the Special Rapporteur has stated, in reference to what he terms the juridical scope of the study, that it should be carried out in light of public international law (paragraph 15). Later, in paragraphs 16 to 18, the outline lists sources to be used in carrying out the study. Sources identified include international multilateral instruments, decisions of international tribunals and doctrinal sources including "classical works of international law".

However, these references to international law must be viewed in light of the fact that neither the ECOSOC nor the Commission on Human Rights have authorized the Special Rapporteur to examine a status in international law of the various domestic arrangements to be studied nor has the Special Rapporteur indicated that he planned to do so.

Given that such a study is meant to examine the utility of a variety of domestic arrangements between indigenous populations and the States within which they live, more appropriate sources for a study are actual agreements between States and indigenous populations, national constitutional and legislative acts of States, indigenous "norms, uses and customs that regulate the lives of indigenous populations" and the decisions of national courts, all of which have been cited by the Special Rapporteur. In addition, he may wish to examine standards in certain areas such as education and health, for example, and consider the variety of legislative and administrative arrangements by which they might be achieved. Such domestic sources provide ample and appropriate material from which to formulate universal standards for the protection of indigenous rights.

The Government of Canada appreciates the view of the Special Rapporteur (as expressed in paragraph 19 of his outline) that he will require indigenous and State co-operation to obtain access to certain sources. The Government of Canada expresses its appreciation for the reference in the outline to the co-operation Canada has extended to the Special Rapporteur to date and urges other States to extend the same co-operation.

We are confident that the necessity of examining the widest number of arrangements will ensure that no region with significant indigenous habitation will be ignored in the proposed study.

INTERNATIONAL LABOUR OFFICE

[18 January 1989]

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The International Labour Office and the United Nations - in particular the Centre for Human Rights - have worked actively together for many years on the subject of indigenous and tribal populations. The ILO will therefore be glad to provide any assistance it can in the preparation of the study which is being envisaged.

The ILO is currently in the process of revising the only international Convention on the subject, the Indigenous and Tribal Populations Convention, 1957 (No. 107), which was adopted in collaboration with the United Nations. It is expected that a revised Convention will be adopted at the seventy-sixth session of the Conference in June 1989, and will thus be a principal source for the Special Rapporteur (see paragraph 16 of document E/CN.4/Sub.2/1988/24/Add.1), along with Convention No. 107. While Convention No. 107 contains no language on treaties, the proposed revised Convention (contained in Report IV(1) to the seventy-sixth session of the Conference) includes the following Article 34:

The application of the provisions of this Convention shall not adversely affect rights and benefits of the (peoples/populations) concerned pursuant to other Conventions and Recommendations, under treaties or international instruments, or under national laws, awards, custom or agreements.

It should be pointed out that by the time the Commission on Human Rights meets in 1989, a further draft will have been issued on the basis of comments received from Governments, employers' and workers' organizations, and representative organizations of indigenous and tribal peoples.

With reference to the same list of sources in paragraph 16 of the outline, both Convention No. 107 and the draft revised Convention include provisions on customary laws of these peoples, to which the Special Rapporteur will certainly wish to refer.