

RESPONSE OF CANADA TO THE REQUEST OF THE
SECRETARY-GENERAL OF THE UNITED NATIONS
FOR COMMENTS ON DRAFT PRINCIPLES
ON INDIGENOUS RIGHTS
PRODUCED BY THE
U.N. WORKING GROUP ON INDIGENOUS POPULATIONS

Canada wishes to thank the members of the Working Group on Indigenous Populations (WGIP) for the work undertaken in developing the fourteen draft principles set out in annex II of the report of the working group's fifth session (U.N. Document No. E/CN.4/Sub.2/1987/L.20). Prior to the commencement of the fifth session of the WGIP, the Government of Canada provided written comments on the initial seven principles set out in annex II of the report of the working group's fourth session (U.N. Document No. E/CN.4/Sub.2/1985/22). In the course of the fifth session Canada also provided comments on the three additional draft principles (No. 8-10) that were developed at the NGO-sponsored workshop held in September 1986. These comments remain applicable. Canada welcomes the opportunity to reiterate and supplement its earlier statements and to comment on the additional draft principles.

In general, Canada considers that the draft principles, taken as a whole, contribute to the development of international standards relating to indigenous populations. However Canada continues to be concerned that the precise meaning and scope of certain proposed principles remains unclear.

Canada offers the following general and specific comments on the fourteen draft principles.

GENERAL COMMENTS:

The Government of Canada is of the view that the clarity of the principles will be enhanced if they are drafted in language which draws upon, where applicable, the language of existing international human rights instruments. This will also help to avoid any problems of potential inconsistencies between the various relevant human rights standards. To this end, we refer to U.N. General Assembly resolution 41/120, entitled "Setting of international standards in the field of human rights", and urge the WGIP to follow the guidelines contained in this text.

Canada is of the opinion that, in formulating standards for indigenous populations, efforts should be made to ensure that these correspond as closely as possible to existing norms so as to present governments and indigenous populations with objectives which are reasonable, achievable and designed to meet the needs of those populations. In this respect, Canada takes the view that, in general, when applicable, principles should be framed in terms of objectives, rather than as rights or entitlements to certain kinds of government programs.

Canada wishes to remind the WGIP of the comments Canada submitted previously regarding the initial draft principles. It was Canada's understanding that the focus of the working group, when developing draft principles, would be on the individual human rights of indigenous persons and that therefore the draft document being prepared would concentrate on those rights. At the same time, it was recognized that some of the rights referred to in the draft principles had a collective aspect.

Therefore, Canada is of the view that rights, referred to in the draft principles, should generally be oriented towards rights of individuals. In this regard we would emphasize Article 27 of the International Covenant of Civil and Political Rights where a right with a collective aspect has been stated in terms of individual rights.

The Government of Canada wishes to ensure that the work of the WGIP, in developing a declaration of indigenous rights, effectively addresses the serious problems of all indigenous populations. In order to achieve this objective and to preclude situations where the draft principles may be deemed to be inapplicable to particular indigenous populations because the states, within which these populations live, refuse to acknowledge their existence as indigenous persons, Canada suggests the inclusion, within the set of draft principles and the draft declaration, of a clear, objective definition of indigenous populations.

We offer for the consideration of the WGIP the following definition as an example of a possible definition:

Indigenous persons are members of populations which are regarded as indigenous on account of their descent from the populations which:

- (1) Inhabited the country, or a geographic region which became part of the country, or a geographic region to which the country belongs, at the time when persons of a different culture or ethnic origin arrived there, and subsequently became predominant by means of conquest, settlement or otherwise, and
- (2) retain social and cultural characteristics distinct from the predominant segments of the national population.

Canada also wishes to repeat its earlier suggestion that there be a preamble to any eventual draft body of principles and that the purpose to be served by such principles be clearly set out therein. In this regard it is suggested that particular attention should be directed to the issue of whether the desired objective is to adapt existing international standards to meet the unique requirements of indigenous populations, to create new standards specifically for these populations, or to achieve a combination of the above.

For the sake of clarity and to avoid overlap, it may be helpful to consolidate certain draft principles, such as those dealing with social and economic measures (principles 6, 8 and 10) and ethnic or cultural identity (principles 4, 5, 13 and 14).

Canada would also like to note that national laws generally make most human rights subject to certain limitations, justifiable in particular circumstances, provided that the basic content of these rights remains uncompromised. For example, the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Further, a balance must be struck between the rights of indigenous and non-indigenous populations inhabiting the same territory.

SPECIFIC COMMENTS

WGIP Draft Principles No. 1 and 2

1. The right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments, particularly in the Charter of the United Nations and the International Bill of Rights.
2. The right to be free and equal to all other human beings in dignity and rights, and to be free from discrimination of any kind.

With respect to principles No. 1 and 2, Canada is of the view that indigenous persons have the same right to enjoy universal rights and freedoms and to be as free from unwanted discrimination as any other Canadian citizen.

WGIP Draft Principles No. 3 - 6

3. The collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty and security of the person.
4. The collective right to maintain and develop their ethnic characteristics and identity.
5. The collective right to protection against any act which has the aim or effect of depriving them of their ethnic characteristics or identity. This protection shall include prevention of any form of forced assimilation, any propaganda directed against them, etc.
6. The collective right to participate fully in the economic, political and social life and to have their specific character reflected in the legal system and in the political institutions of their country.

Canada could support principle No. 3 on the understanding that it protects the right to physical as opposed to cultural or ethnic existence. This understanding is based on the observation that rights relating to culture and ethnicity are dealt with separately in other draft articles, notably articles 4, 13 and 14 upon which Canada has commented below.

Principles No. 4-6 contain a number of collective rights which detail various aspects of a group's right to maintain and develop its ethnic characteristics. In keeping with the comments made above regarding the concept of collective rights, Canada would have some difficulty with the characterizing of these rights as collective, particularly as this would be the first modern acknowledgement of a collective right to maintain ethnic characteristics and identity. However, Canada does support the general principle that members of indigenous populations should have the right to maintain and develop their unique characteristics and identity on the understanding that the phrase "ethnic characteristics" means those aspects such as language, culture and religion which distinguish an ethnic minority.

Canada is therefore supportive of principle No. 4 and part of principle No. 5, to the extent that principle No. 5 provides that states should not act to deprive indigenous populations of their unique characteristics.

However, difficulties are foreseen with two aspects of the present wording of principle No. 5. First, the right of protection in principle No. 5 applies to both the effects and the aim of acts. Second, the obligation of a state to prevent private acts with such undesirable aims or effects may be so broad as to be unworkable in the modern context. Consideration of the impact of the education system and of the mass media illustrate some of the problems embodied in the proposed principle. Canada would therefore favour amending principle No. 5 to restrict its application to state action, at most. Consideration should also be given to whether principle No. 5 should be further restricted to those acts done with the specific intent of depriving populations of their ethnic characteristics.

Similarly, Canada supports the concept embodied in the first half of principle No. 6, namely the right of indigenous populations to participate fully in national life. However the second part of the principle, as presently drafted, remains ambiguous. If the intention of principle No. 6 is to promote the establishment of special political institutions for indigenous groups, it should be redrafted to state this objective clearly; Canada, for example, has policies for the development of self-government by aboriginal communities and related institutions. However, Canada and probably other states would be unlikely to support a principle that went beyond this and required that national political institutions and legal systems be redesigned to reflect the character of indigenous populations.

Canada suggests that, in light of the considerable overlap between principles No. 4, 5, 6 and 13, consideration should be given to consolidation of these principles into a single more clearly drafted principle.

WGIP Draft Principles No. 7 - 10

7. The duty of the territorial State to grant - within the resources available - the necessary assistance for the maintenance of their identity and their development.
8. The right to special State measures for the immediate, effective and continuing improvement of their social and economic conditions, with their consent, that reflect their own priorities.

9. The right to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional and other economic activities, without adverse discrimination.
10. The right to determine, plan and implement all health, housing, and other social and economic programs affecting them.

The meaning and scope of the term "development" in principle No. 7 should be expressed clearly. Canada's understanding of this term in this context is that it is restricted to the development of the ethnic identity referred to in principle No. 4.

Canada believes that general comments made above, and statements previously made by Canada at the fifth session of the WGIP concerning principles 8 and 10, namely that Canada prefers that objectives rather than rights to programs and other state measures be identified, are also applicable to principle No. 7. In this regard, Canada would contrast the present phrasing of draft principles No. 7, 8 and 10 wherein state programs or measures are referred to as rights of populations and duties of states, with the rights outlined in the International Covenant on Economic, Social and Cultural Rights which are framed in terms of rights to be protected, with state obligations for the achievement of each objective explicitly set forth. In this light, state action should be viewed as a means rather than as an end in itself.

In this respect, Canada is of the opinion that principles which propose express state obligations to provide "necessary assistance" or "special measures" should be reformulated as subparagraphs of principles which begin by setting out the basic objectives in question; any particular state obligation thus created would then be included in the subparagraph.

An alternative would be to place a general provision on state obligations at the beginning of the declaration.

Canada is of the view that objectives defined and measures to be taken in the area referred to in principles No. 7, 8 and 10 should be reasonable and achievable.

With reference to principles No. 8 and 10, the Government of Canada would like to emphasize the increasing involvement of Canadian aboriginal people in the planning and implementation of indigenous social and economic programs; the aim of this involvement is to better reflect indigenous priorities and to allow a greater degree of local autonomy. At

the same time, this involvement must be balanced against the responsibilities owed by Government to the general population. Principles No. 8 and 10, as currently drafted, do not reflect that necessary balance.

Principle No. 9 provides for the security of enjoyment of "traditional means of subsistence" and for the free engagement in "traditional and other economic activities, without adverse discrimination". The meaning of the phrases "traditional means of subsistence" and "traditional and other economic activities" remains unclear. Similarly, though Canada is supportive of the general principle of non-discrimination, the text should clarify the types of discrimination to which reference is being made.

Principle No. 9 also raises the need for a balance to be struck between the rights of indigenous and non-indigenous citizens.

WGIP Draft Principle No. 11

11. The right to manifest, teach, practice and observe their own religious tradition and ceremonies, and monitor, protect and have access to sites for these purposes.

This need to balance the respective rights of indigenous and non-indigenous populations is also raised by the provision regarding guaranteed access to religious sites contained in the second part of principle No. 11. For example, difficulties could arise if the provision was understood to entail a right to enter private or public property without prior permission. The concept of a right of access to religious sites is a broader concept than that contained in provisions regarding freedom of religion in other instruments.

However, the first part of principle No. 11, providing for right of indigenous people to manifest, teach, practice and observe their own religious traditions and ceremonies, reflects standards already supported by Canada and would be acceptable to Canada.

WGIP Draft Principles No. 12 - 14

12. The right to all forms of education, including the right to have access to education in their own languages, and to establish their own education institutions.
13. The right to preserve their cultural identity and

traditions, and to pursue their own cultural development.

14. The right to promote intercultural information and education, recognizing the dignity and diversity of their culture.

Principle No. 12 provides for a right to all forms of education. A right to education is provided for in existing international human rights instruments. However, apart from a recognition in Article 2(1) of the Convention Against Discrimination in Education (adopted by UNESCO General Conference on December 14, 1960) that educational institutions established for religious or linguistic reasons should be exempted from that Convention's definition of discrimination, there is no recognition in international law of a general right of minorities to establish separate schools, or to demand access to schooling in a minority language.

However, Canada would support the objectives of allowing indigenous educational institutions and education in indigenous languages. In this respect Canada would point out that these objectives must take into account demands on resources, particularly in view of the diversity of languages and cultures which exist in various nations. It might be noted that there are over 50 different aboriginal dialects spoken in Canada.

Similarly Canada would support the right of indigenous populations to preserve indigenous cultural identity and traditions and their right to pursue their own cultural development and to promote intercultural information and education as contained in principles No. 13 and 14 provided that this imposes no obligation on states. There is no such obligation at the present time in international instruments.

Canada suggests that, as with other principles, consideration should be given to consolidating principles No. 12 and 14.

This concludes Canada's comments on the draft principles. Canada may address additional comments at forthcoming sessions of the WGIP.