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Report on the 3rd session of the Expert Mechanism on the Rights of Indigenous Peoples

12 – 16 July 2010

Geneva, Switzerland

Prepared by Tracey Whare, trustee for Aotearoa Indigenous Rights Trust.

Background and mandate

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) is a relatively new UN body. It was created by the Human Rights Council (HRC) to continue the work of the Working Group on Indigenous Populations (WGIP). Its establishment came about due to lobbying undertaken by indigenous peoples. Claire Charters another trustee of AIR Trust was pivotal in lobbying for its establishment.

The EMRIP has a specific mandate and is composed of 5 experts. The mandate of the EMRIP is to provide thematic expertise in the manner and form requested by the HRC. To this end, it focuses mainly on studies and research-based advice. The EMRIP may also suggest proposals to the HRC for its consideration and approval, within the scope of its work as set out by the HRC.

The five experts appointed by the President of the HRC for the period 2008-2010 are:

- Ms. Catherine Odimba Kombe (Congo)
- Ms. Jannie Lasimbang (Malaysia)
- Mr. John Bernhard Henriksen (Norway)
- Mr. José Carlos Morales Morales (Costa Rica) Chairperson/Special Rapporteur
- Mr. José Mencio Molintas (Philippines) Vice Chairperson/Special Rapporteur

The third session was held in Geneva from 12 – 16 July 2010.

Agenda

The agenda¹ of the EMRIP focussed on two main themes, the study on indigenous peoples and the right to participate in decision-making and, the UN Declaration on the rights of Indigenous Peoples (UNDRIP). Interventions were tabled on both agenda items.² There was also a third agenda item regarding proposals for future work.

Study on indigenous peoples and the right to participate in decision-making

As a result of a resolution of the HRC the EMRIP has undertaken to complete a study on indigenous peoples and the right to participate in decision-making and, to present a progress report to the HRC at its 15th session in September and a final study to the HRC at its 18th session.

During the 3rd session of the EMRIP the progress report³ of this study was tabled and discussed. This report was written by two of the EMRIP experts, John Henriksen and Jannie Lasimbang. The EMRIP had requested 3 years to complete this report but were only given 2 years with a word limit of 10,700. Two international workshops have been held which helped to form the basis of this report as well as the numerous submissions sent in by indigenous peoples, States and other parties. The Chair of the EMRIP called on participants to provide concrete proposals regarding the content of the report noting that only some amendments and changes would be made in the interim as the EMRIP is due to present the progress report to the HRC in September. More substantial changes would be incorporated at a later date before the final report is tabled at the HRC at its 18th session.

The report contains three substantive parts, the first canvasses the international human rights framework, the second how indigenous people's participation is linked to state and non state institutions and thirdly, indigenous peoples internal decision making. In addressing the indigenous caucus preparatory meeting the weekend before the EMRIP, John Henriksen noted that whilst the report makes reference to the principle of free, prior and informed consent (FPIC), it does not elaborate on the consent part. The reason that this part is not elaborated upon is that the experts could not reach consensus. John Henriksen asked for indigenous participants to address this issue in their interventions. He also raised the concern that States define consent as a duty to consult and that this interpretation originated from ILO 169 which does not address self determination. Given the adoption of the UNDRIP, the principle of FPIC has a much larger scope than simply a duty to consult. The principle of FPIC must be interpreted in light of current and developing international law which affirms the right to self determination of indigenous peoples. Many indigenous peoples addressed this issue in their interventions.

Whilst John Henriksen and Jannie Lasimbang were open with indigenous representatives about what issues they were facing and what assistance they needed from indigenous representatives, the other three experts did not provide any information or guidance to indigenous participants as to how to address the issues that are the focus of their work. This is particularly concerning given that John Henriksen has said that he does not wish to renew his term as an expert of the EMRIP and Jannie Lasimbang is also considering stepping down. It is not difficult to see that of the five experts these two

¹ See UN document A/HRC/EMRIP/2010/1

² See Appendix A.

³ A/HRC/EMRIP/2010/2

are the ones who are most active and the most capable. Without strong leadership within the EMRIP its mandate and work will suffer.

Overall the current draft report whilst in need of some work for example, addressing the issue of constitutional arrangements for the protection of indigenous peoples rights, the report does cover a number of important issues relating to indigenous peoples and the right to participate in decision making. It is clearly a report that will be useful in placating many governments concerns regarding what is meant by self determination as it draws upon a number of existing governance practices as well as detailing international law that supports this right. It will be important to monitor the progress of this report and its tabling before the HRC.

UN Declaration on the Rights of Indigenous Peoples

This agenda item generated much interest amongst indigenous peoples. Many indigenous peoples referred to specific examples where the UNDRIP was not being implemented in their communities and countries. Sadly, the Chair did not want to hear such things and often stopped people from speaking asking them to focus solely on recommendations. Whilst it would be wonderful to attend the EMRIP and convey positive experiences of the implementation of the UNDRIP sadly these are still few and far between.

There was also a lot of focus on Canada and the USA, the two remaining States who rejected the adoption of the UNDRIP and there were many calls for them to change their positions and endorse the UNDRIP. One particularly pertinent intervention by the Navajo Nation Human Rights Commission in my view summed up the experiences of many indigenous peoples. The speaker stated, "As we speak to the implementation of the Declaration in this 3rd session of the Expert Mechanism on the Rights of Indigenous Peoples and with the United States not having endorsed the Declaration, I speak somewhat in a vacuum, as there is nothing yet to implement."

The importance of this agenda item should not be underestimated. The implementation of the UNDRIP is something that the EMRIP can contribute to through ongoing debate in relation to the status of international instruments and the scope of the UNDRIP provisions. It is also clear that all States who have adopted or endorsed the UNDRIP should develop and adopt national implementation strategies for the UNDRIP. Article 38 of the UNDRIP encourages States, in consultation and cooperation with indigenous peoples, to take appropriate measures, including legislative measures, to achieve the ends of the Declaration. At the very minimum NZ should be reviewing current law and policy in light of the rights enshrined in the UNDRIP.

Also included under this agenda item was a report of the 2nd expert seminar on treaties, agreements and other constructive arrangements between states and indigenous peoples. This seminar was held in November 2006 in Canada. The seminars are an outcome of the then Special Rapporteur's report⁴ of the same name. The report of the seminar has languished in the UN system because the UN body which had originally mandated the seminar, the Commission on Human Rights no longer exists. If not for the perseverance of indigenous peoples to ensure that this work was not forgotten, the report would have become lost in the UN system.

⁴ E/CN.4/Sub.2/1999/20.

The report contains a number of recommendations including the need for states to implement effective participatory and just processes based on the principles of free, prior and informed consent thus allowing treaty violations and disputes regarding implementation to be addressed by states and indigenous treaty partners.

A further recommendation for a third treaty seminar to be held in Aotearoa was also made. Waitangi marae has indicated that the treaty seminar could be held there. The Office of the High Commissioner for Human Rights (OHCHR) who is responsible for the logistics of such seminars indicated that it could be held in 2011.

The content of interventions

Some indigenous peoples through their interventions⁵ raised concerns about specific human rights violations in their countries. At almost every mention of such matters the Chair gavelled the speaker and told them to contact the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (SR) who can investigate specific human rights violations. I raised this issue of how the EMRIP can address specific human rights violations in my first EMRIP report; it continues to be an ongoing concern. Whilst communications to the SR are important, the EMRIP is still a forum where human rights violations can and should be aired. There must be an opportunity for indigenous peoples to voice their concerns and bring international attention to their situations. It is also the only opportunity that some indigenous peoples have to ensure their governments speak with them.

I was able to include in our interventions reference to a number of current issues from Aotearoa without being gavelled, often it is how such information is delivered that determines whether or not the Chair chooses to intervene. It was disappointing that the Chair gavelled so many speakers, many were confused as to why as there seemed to be no consistency to his approach. It was also disappointing that he failed to listen to or comment on the content of many excellent interventions instead focussing on time keeping. I expected more from the Chair and felt his approach was often inconsistent and heavy handed.

It is up to the experts as to how human rights violations are reflected in their report and proposals. Many situations could be used as case studies in their research. The former WGIP allowed for such grievances to be aired because it had a specific agenda item entitled recent developments. However, the EMRIP has a more limited mandate.

New Zealand government

The New Zealand government was represented by Lucy Richardson, second secretary of the New Zealand mission in Geneva. A meeting was organised by Lucy with the Maori attendees however, the indigenous caucus meeting took priority and I was unable to attend. At the last meeting I attended with Lucy's predecessor during the first session of the EMRIP I raised concerns with NZ's nonexistent contribution to the Voluntary Fund. Sadly this position has not changed. Mr Melakou Tegegn, one of the trustees of the Voluntary Fund addressed the EMRIP plenary and noted that contributions have greatly decreased from \$537,269 USD in 2008 to \$257,329 USD in 2010. NZ has not contributed to the Voluntary Fund since 2005.

⁵ To view copies of all interventions delivered to EMRIP go to <http://docip.org/>

NZ delivered two statements⁶ to the EMRIP, the first referred to the study on decision making and the second to NZ's endorsement of the UNDRIP. In relation to the study NZ stated that it has developed and will continue to rely upon its distinct processes and institutions that afford Maori opportunities to participate in decision making. This really says nothing except that the status quo is sufficient and will remain. The second intervention focussed on the UNDRIP where reference was made to the aspirational nature of the UNDRIP as well as reaffirming NZ's existing legal and constitutional framework. Whilst not surprising, NZ's constant reiteration that international law and in particular indigenous peoples rights will only be acknowledged within the existing legal and constitutional frameworks of NZ is concerning. This is clearly in contradiction to the spirit of the UNDRIP and simply allows NZ to continue with "business as usual". I do not know which is more disturbing, the previous governments complete rejection of the UNDRIP or the current governments attempt to co-opt the UNDRIP within existing structures.

NZ Human Rights Commission

Karen Johansen a Commissioner with the NZ Human Rights Commission attended the EMRIP. She made two interventions⁷ and networked with a number of indigenous peoples.

The Special Rapporteur and the Chair of the Permanent Forum

Professor James Anaya the SR attended the EMRIP. The SR attends the EMRIP to provide input into the thematic research of the EMRIP and to conduct meetings with indigenous peoples, states and other parties. The SR made an intervention providing input into the study on decision making based on his experience as SR.

The SR also met with indigenous peoples during his time at the EMRIP. He also holds parallel meetings with indigenous peoples during the Permanent Forum on Indigenous Issues (PFII).

Given the SR's pending trip to Aotearoa I had hoped to meet with him. This did not happen however, both Kiri Toki and Kingi Kake Snelgar as part of the youth caucus and, Andrew Erueti met with him and conveyed a number of current Maori concerns.

The Chairperson of the PFII, Mr Carlos Mamani also attended the EMRIP. He made an intervention focussing on the study on the right to participate in decision making and referred to work undertaken by the PFII in this regard.

Given that one of the concerns of some governments has been that there is no duplication of work as between the different UN bodies that focus on indigenous peoples rights, it is encouraging to see the EMRIP, the SR and the PFII working closely together. It is clear that each body seeks to clarify their mandate in light of the others. My view is that they have successfully found a way of working together to ensure the least amount of duplication occurs.

Maori participation

There were numerous Maori participants at the EMRIP, myself, Catherine Davis of Te Runanga o te Rarawa, Wheturangi Walsh-Tapiata, current Maori indigenous fellow at the UN, Fleur Adcock PhD

⁶ See Appendix B.

⁷ See Appendix C.

candidate, Kiri Toki and Kingi Kake Snelgar both law students from Auckland University and Andrew Erueti of Amnesty International. During my time at the UN, I have never been part of such a large group of Maori and as Wheturangi succinctly stated “We were diverse but cohesive.” It was wonderful to have so many Maori present and working together. Catherine and I presented a joint intervention whilst Kiri and Kingi worked with the youth caucus and delivered interventions as part of that collective. It is encouraging to see other Maori engage with the UN and I hope that many if not all continue to be involved in this work.



The three Maori indigenous fellows, Tracey Castro Whare 1998, Catherine Davis 2005 and Wheturangi Walsh-Tapiata 2010



The Maori contingent dining out in Geneva.

Indigenous caucus

The indigenous caucus held a two day preparatory meeting prior to the third session of the EMRIP and continued to meet during the third session of the EMRIP. A number of caucus interventions were tabled. Sadly the caucus remains weak as many people choose not to participate in its work. There was also a lack of leadership from the Chairs when differing points of view were being expressed. This led to delays in work as well as conflict between members of the caucus.

One of the issues raised during the caucus which unfortunately did not receive much attention was the replacement of some or all of the EMRIP experts. There is an expert from each of the five geopolitical regions that the UN uses. These regions are Africa, Asia, Eastern Europe, Latin America and the Caribbean and Western Europe and other States. New Zealand falls into the later group. Given John

Henriksen who is from Norway and also falls into the later group has indicated he does not wish to continue for another term as an EMRIP expert, we should consider Maori nominations for this position. In order to succeed, lobbying of the OHCHR and HRC are necessary.

Lunchtime presentations

I was invited to participate in a panel discussion on "Possibilities of participation in decision-making at the international level and with transnationals". The panel discussion was organised by INCOMINDIOS and was well attended by indigenous representatives.

EMRIP report and proposals

It would be fair to say that at least 100 hundred proposals and recommendations were put forward by participants to the EMRIP experts during the third session. Clearly not every recommendation can be included in the EMRIP report; the experts have the unenviable task of deciding which recommendations will be included.

Ten proposals were adopted by the EMRIP.

1. That the HRC encourage states to ensure that they have strong national human rights institutions.
2. That the HRC consider organizing regular panel events devoted to the rights of indigenous peoples during its future sessions with the participation of the EMRIP and other relevant experts.
3. That the HRC include the EMRIP and representatives of indigenous peoples in the HRC review from the earliest possible stage of the process.
4. That the HRC authorize the EMRIP to on an annual basis to review developments pertaining to the promotion and protection of the rights of indigenous peoples pursuant to the UNDRIP and to give the HRC thematic advice on possible steps to take to achieve the ends of the UNDRIP.
5. That the HRC encourages states in consultation and cooperation with indigenous peoples to adopt appropriate measures in order to ensure respect for and full application of the UNDRIP.
6. That the HRC having completed a study on the implications of the expansion of the mandate of the United Nations Voluntary Fund to support indigenous people's participation in the session of the Human Rights Council and Treaty Bodies, take further steps to implement this proposal.
7. That the OHCHR compiles the recommendations issued so far by the Universal Period Review in respect of indigenous peoples.
8. That the OHCHR considers the possibility of preparing an international expert group seminar on national truth and reconciliation processes as a mechanism for conflict resolution and reconciliation.
9. That the OHCHR and states ensure that adequate human and financial resources are made available to the EMRIP.
10. Lastly, that UN specialized agencies continue to cooperate with the EMRIP and that these agencies continue to promote respect for and full application of the UNDRIP.

Of the ten recommendations there are three which I believe are important to note. Recommendations 4 and 5 relate directly to the UNDRIP. If recommendation 4 is accepted then the EMRIP would in effect be able to hear of specific country issues regarding problems with the implementation of the UNDRIP and provide advice to the HRC as to how the UNDRIP could be implemented more effectively. Whilst this would be useful to many indigenous peoples who wish to highlight areas of concern in their own countries it would also allow the EMRIP to build up a body of knowledge that could be fed directly to the HRC and would provide effective leverage for indigenous peoples in effecting change.

Recommendation 5 also focuses on the implementation of the UNDRIP albeit in a slightly different way. International pressure on states to move beyond the rhetoric surrounding the adoption of the UNDRIP and begin to focus energy and resources into the implementation of the UNDRIP can only be welcomed.

Lastly recommendation 8 should it come to fruition, is an issue that Maori could contribute to in relation to experiences with the Waitangi Tribunal.

NZ's response to the proposals of the EMRIP was tedious but not unexpected. There was concern that the EMRIP in making 10 recommendations on numerous matters was unfocused and that it was duplicating work. It would therefore be up to its parent body, the HRC to determine whether it was acting outside of its mandate.

I found this view to be exasperating. Three of the ten recommendations have been made by the EMRIP previously. The majority of them were focused on the HRC, three were specifically for the OHCHR and one for UN specialized agencies. Whilst many of the recommendations are specific to certain UN practices and processes, they must be understood as recommendations that could improve the current workings of the UN in its dealings with indigenous peoples. These recommendations clearly fall within the mandate of the EMRIP whereby the EMRIP can make proposals to the HRC for its consideration and approval.

NZ comments were disappointing and showed their unhealthy focus on duplication. Given the EMRIP, the SR and the PFI are at pains to ensure there is minimal duplication in their work and that all of the recommendations made by the EMRIP fall within their mandate, it is difficult to see how NZ can be so concerned and why a more generous interpretation of the EMRIP mandate cannot be accepted.

Previous work of the EMRIP - Study on Education

The previous study⁸ by the EMRIP on education has been completed and has been tabled at the HRC. The HRC resolution in relation to this study strongly encourages States to disseminate the report broadly and to take it into account when elaborating national plans and strategies. I am not aware of any response of the NZ government in relation to this resolution.

Funding

I would like to thank Incomindios and CWS Aotearoa for their financial assistance. Without their support, it would not have been possible to attend the EMRIP.

⁸ A/HRC/12/33.

Summary and recommendations

The EMRIP is beginning to find its feet. Given this is only the third session of this body, it has already produced two studies – one complete, the other in progress – as well as continuing to make strong and often practical recommendations to its parent body the HRC. The feedback on the current study was well received and the continual focus of the EMRIP in using the UNDRIP as its normative framework is important. This is something that the EMRIP focused on during its first session and it is encouraging to see that it is continuing. I did feel that many of the recommendations had already been agreed to by the EMRIP prior to the session. For future reference this means that if any recommendations are sought it is important to lobby and bring them to the attention of the EMRIP experts at an early stage and not rely on them being included in their report if they are only tabled at the session.

Future work for consideration:

1. Attend the 15th session of the HRC to monitor the reports presented by the EMRIP and the SR – including his report on New Zealand – and lobby as required;
2. Continue to raise awareness of the importance of the UNDRIP amongst Maori and maintain pressure on NZ to implement the UNDRIP;
3. Nominate a Maori expert for the EMRIP and lobby for their position;
4. Participate in future sessions of the EMRIP.

APPENDIX A

Intervention of AIR Trust and joint intervention with Te Runanga o Te Rarawa

Human Rights Council
Expert Mechanism on the Rights of Indigenous Peoples
Third session
12 – 16 July 2010

Agenda item 3: Contribution to the study on indigenous peoples and the right to participate in decision making

INTERVENTION OF AOTEAROA INDIGENOUS RIGHTS TRUST

1. Greetings to the members of the expert mechanism, indigenous brothers and sisters, supporters of indigenous peoples and government delegations. My name is Tracey Castro Whare, I am a trustee of the Aotearoa Indigenous Rights Trust from Aotearoa/New Zealand. I am supported here today by other Maori from Aotearoa and am very honoured and proud to be here with them. I also note that there are three Maori indigenous fellows here in this meeting, myself, Catherine Davis and Wheturangi Walsh. It is an historic occasion to have all three Maori fellows here at the UN at the same time and we are all very pleased and grateful for the establishment and continuance of the indigenous fellowship programme. The fellowship programme is an empowering and educational experience for all who participate in it, we three are testimony of that empowerment, may the indigenous fellowship programme long continue.

2. Allow me to begin by acknowledging and thanking the co-authors of this report Mr John Henriksen and Ms Janine Lasimbang. Given the constraints both in terms of time and the word limitation, this report succinctly canvasses the many issues that exist in relation to the right of indigenous peoples to participate in decision making and it brings together relevant and current regional and international jurisprudence. When the report is completed it will be a useful tool as to how the

right of indigenous peoples to participate in decision making can be implemented and strengthened.

3. I move now to comment specifically on the report. I refer to paragraphs 34 to 40 which relate to free, prior and informed consent. It is important not to confuse consultation with free, prior and informed consent. In Aotearoa/New Zealand consultation is the way by which government officials communicate with Maori. This has varying forms of success and failure and the terms of consultation are often dictated by the government with little scope for Maori to define how consultation should be undertaken. In comparison, the principle of free, prior and informed consent clearly implies a robust and transparent process with the end result being consent. The principle of free, prior and informed consent provides a fundamental safeguard for indigenous peoples in their dealings with third parties. It ensures the protection of rights and allows indigenous peoples to exercise decision making power over their lands, resources and lives.

4. It must be accepted that one of the outcomes of implementing the principle of free, prior and informed consent is that indigenous peoples may reject or decline a proposal from a third party. Sadly it is the thinking of some governments including New Zealand that consent should only apply to situations which the government deems is appropriate. Such a perception in our view is clearly *inappropriate*. There needs to be a fundamental change in thinking and an acceptance that indigenous peoples make decisions and that those decisions are respected. Without this fundamental change these rights which have been painstakingly fought for will simply become hollow words without meaning and life.

5. We therefore recommend that a more detailed analysis of the principle of free, prior and informed consent be included in the report.

6. Lastly I wish to comment on paragraph 58 lines two and three. The word "cultural" is referred to twice. It would read better if the word was only referred to once in the sentence.

7. Thank you Mr Chair.

Agenda item 4: United Nations Declaration on the Rights of Indigenous Peoples

**JOINT INTERVENTION OF AOTEAROA INDIGENOUS RIGHTS TRUST
AND TE RUNANGA O TE RARAWA**

1. This agenda item touches upon a critical component of the work of the EMRIP. A general discussion on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is both an important opportunity to report on developments in the last year as well as a time to reflect on further work.

2. We are pleased to report that the New Zealand government took the significant step of endorsing the UNDRIP in May of this year. This marks a complete change from its previous position of rejection of the UNDRIP and is a welcome development for Maori and all Indigenous Peoples.

3. With such a significant policy change of “officially” adopting the DRIP “without caveat”,⁹ it would be expected that moves to change policy at the national level would be inevitable. Unfortunately this is not the case, as NZ has stated that it will implement the DRIP “within the *current* legal and constitutional frameworks of New Zealand”,¹⁰ meaning that for the government it would seem that it is “business

⁹ Hone Harawira (Member of Parliament for Te Tai Tokerau) stated “Today I stand with pride to congratulate the M ori Party co-leader Dr Pita Sharples and his staff on the months of negotiation in the lead-up to yesterday’s announcement that New Zealand would be supporting, without caveat, the Declaration on the Rights of Indigenous Peoples at the opening session of the Permanent Forum on Indigenous Issues in New York.” http://www.parliament.nz/en-NZ/PB/Debates/Debates/3/9/9/49HansD_20100421_00000738-General-Debate.htm

¹⁰ “This Government has reviewed New Zealand’s position on the Declaration. The statement of support acknowledges these areas are difficult and challenging but notes the aspirational spirit of the Declaration and affirms to continually progress these, alongside Maori, *within the current legal and constitutional frameworks of New Zealand.*” (my emphasis). See “National Govt to support UN rights declaration”

<http://www.beehive.govt.nz/release/national+govt+support+un+rights+declaration> .

as usual”. Since May (for example), a number of issues affecting Maori have been dealt with by the government without consideration of the rights articulated in the UNDRIP and the Treaty of Waitangi.

4. The rejection of the Royal Commission on Auckland Governance recommendation to set aside seats for Maori in the new local government structure for Auckland, the unilateral decision by the Prime Minister to remove the Urewera National Park as part of the Treaty settlement for the tribe of Tuhoe and the recent granting of off shore mining permits for the East Coast of the North Island to Brazilian company Petrobras without Maori knowledge or consultation are just three examples of decisions that have been made by the government since May which effect Maori rights. These three examples relate to articles 5, 18 and 19 of the UNDRIP which focus on decision making, articles 27 and 28 which relate to redress and article 32 which relates to natural resources. These issues were missed opportunities for the New Zealand government to apply the UNDRIP.

FORESHORE AND SEABED

5. M ori also have concerns regarding the Government’s approach to the review of its Foreshore Seabed Act 2004 (F&S Act). The F&S Act has been internationally criticised as discriminatory, and a Ministerial Review Panel appointed to review the F&S Act recommended its repeal and replacement with new legislation.¹¹

6. The Government released for public consultation its proposals for change to the F&S Act. Its preferred option included to repeal the Act, and recognise customary M ori title of foreshore and seabed areas *conditional on* M ori claimants satisfying Government-prescribed legislative tests. However, those tests are based on restrictive Canadian common law, when there are in fact less restrictive Canadian case law available that could be used. This seems to contradict the statement made earlier this week by NZ at this EMRIP’s Third Session, that “*New Zealand has developed, and will continue to rely upon, its distinct processes and institutions that afford opportunities for M ori to participate in decision making.*” The stringent tests also appear to facilitate a Government policy objective of minimizing the incidences of customary title that could accrue to M ori.

7. An approach more consistent with Articles 27, 28 and 32 of the DRIP would be that the NZ Courts (while informed by relevant common law from other countries) develop its *own* jurisprudence to fit the unique circumstances and situation of our country.

8. The New Zealand government made a conscious decision to change their position on the UNDRIP. They should also make the conscious decision to amend their methodologies, policies and law in light of the rights set out in the UNDRIP. The continual breaches of good faith by the government and the lack of political will exacerbate the serious problems that exist between Maori and the government.

9. We have two recommendations. The first is that the EMRIP encourage states that have adopted or endorsed the UNDRIP to review and amend their national laws, policies and practices in light of the rights enshrined in the UNDRIP. This review should be undertaken with the free, prior and informed consent of indigenous peoples.

10. Secondly we recommend to the EMRIP to highlight in their report to the Human Rights Council the change in New Zealand`s position to the UNDRIP coupled with the concerns raised by Maori as to the absence of changes in New Zealand policy and law in light of New Zealand`s position to endorse the UNDRIP.

11. Thank you Mr Chair.

¹¹ During its current term, the Government initiated a review of the F&S Act by appointing a Ministerial Review Panel (the Panel) which released its Report on 30 June 2009.

APPENDIX B

Interventions of New Zealand government

Statement by New Zealand: EMRIP Agenda Item 3

Indigenous Peoples and the right to participate in decision making

Tena koutou katoa, greetings to you all.

New Zealand wishes to express appreciation to the members of the Expert Mechanism on the Rights of Indigenous Peoples for their work to date on the study on indigenous peoples and the right to participate in decision making, and to express appreciation to all those who have contributed to the study.

As set out in New Zealand's statement of support for the Declaration on the Rights of Indigenous Peoples, New Zealand has developed, and will continue to rely upon, its distinct processes and institutions that afford opportunities for M ori to participate in decision making. These range from broad guarantees of participation and consultation to particular instances in which a requirement of consent is appropriate.

In those processes and institutions, we acknowledge that our ongoing national dialogue is grounded in the Treaty of Waitangi. We further recognise that M ori have an interest in all policy and legislative matters and acknowledge the determination of M ori that custom, worldviews and cultural heritage should be reflected in the laws and policies of New Zealand. In relation to participation in decision making, M ori have been, and continue to be, active in developing innovative responses to issues

with a strong indigenous perspective and in engaging with successive governments on possible paths forward.

Next week Mr James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, will be visiting New Zealand. The New Zealand Government, iwi and non-governmental organisations will be very much interested in Mr Anaya's views on issues such as the role of indigenous peoples in decision making and we look forward to wide ranging discussions with him.

Thank you.

Statement by New Zealand: EMRIP Agenda Item 4

Declaration on the Rights of Indigenous Peoples

Tena koutou katoa

He mihi tenei ki nga tangata o nga hau e wha

Kei te mihi mahana ki a koutou katoa

The third session of the Expert Mechanism on the Rights of Indigenous Peoples is a valuable opportunity to share experiences and lessons learnt in the area of the rights of indigenous peoples. The rights of indigenous peoples are of key importance for New Zealand.

As many of you will be aware, New Zealand's Minister of Maori Affairs, the Honorable Pita Sharples, announced New Zealand's support for the Declaration on the Rights of Indigenous Peoples at the opening of this year's Permanent Forum on Indigenous Issues.

In keeping with New Zealand's strong commitment to human rights, and indigenous rights in particular, the New Zealand Government welcomed the opportunity to express its support for the Declaration both as an affirmation of fundamental rights and, in its expression of new principles, as an important statement of widely supported aspirations. New Zealand's statement of support reaffirmed the legal and constitutional frameworks that underpin New Zealand's legal system, noting that those existing frameworks define the bounds of New Zealand's engagement with the aspirational elements of the Declaration.

APPENDIX C

Interventions of NZ Human Rights Commission

HUMAN RIGHTS COUNCIL

EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES.

THIRD SESSION, JULY 12 – 16 2010, GENEVA

E nga mana, e nga reo, e nga maunga, e nga awaawa, e nga pataka o nga taonga tuku iho, tena koutou katoa. [translation: to all expert colleagues, all voices, the mountains, the rivers, the treasure houses, greetings to all of you.]

Mr Chair, thank you for this opportunity to speak as the Commissioner representative of the New Zealand Human Rights Commission. My name is Karen Johansen.

I will address agenda item 3, participating in decision making. This right for Maori, the indigenous people of Aotearoa New Zealand, is primarily through the Treaty of Waitangi. Signed in 1840, the Treaty confers rights and obligations on the Treaty partners who are the Crown (Government) and Maori.

Key mechanisms for constitutional participation include dedicated Maori seats in parliament and a dedicated Minister and Ministry of Maori Affairs. The Waitangi Tribunal addresses breaches by the Crown of the guarantees set out in the Treaty. There is recourse to the courts including the specialist jurisdiction of the Maori Land Court. The current parliamentary system of Mixed Member Proportional Representation has increased the numbers of Maori members of parliament.

Regionally there is an electoral option for Maori seats in local government and on health and school boards. Engagement with Maori is obligatory on resource management arrangements in respect of natural resources such as lakes and rivers.

New Zealand faces challenges to effective participation by Maori in decision making. There is a lack of constitutional protection for the Treaty. Participation is vulnerable to the political will, ie representation in parliament may be revoked by an act of parliament. There is inconsistent implementation at regional level. Capacity of Maori organisations to take part in consultative processes is varied. There is tension between government processes and Maori traditional processes. Maori political structures are themselves locally and nationally complex and diverse.

The New Zealand Human Rights Commission is actively involved with Maori, the Crown and the wider New Zealand community to address these matters.

Thank you for your attention.

Mauri ora
Commissioner

HUMAN RIGHTS COUNCIL

EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES

THIRD SESSION, JULY 12-16 2010, GENEVA

Tena koutou katoa.

Thank you Mr Chair for this opportunity to speak again as the commissioner representative of the New Zealand Human Rights commission.

I will address Agenda item 4 the UN Declaration on the Rights of Indigenous Peoples. When Aotearoa New Zealand formally support the UN Declaration on the Rights of Indigenous Peoples in April of this year there was a range of responses. Some support the Declaration but emphasise its non-binding nature (as is the NZ Government position). Others believe that this is the most significant event for Maori rights since the signing of the Treaty of Waitangi in 1840 (as articulated by the Maori leader, former New Zealand High court judge and Waitangi Tribunal chairperson, Justice Sir Eddie Durie).

Many of the articles in the Declaration intersect with the principles of the Treaty of Waitangi. There is considerable scope for the Declaration to be used to support, clarify and promote understanding of the Treaty. The Maori Land Court, for example, has indicated that the Declaration will have particular significance for its work.

The New Zealand Human Rights commission has been active in the promotion of the Declaration by translating the text in to te reo Maori, creating resources, delivering education throughout New Zealand, referencing the Declaration in relevant submissions, and creating case studies of good practice'

Finally, in reviewing the status of human rights and the Treaty of Waitangi this year, the New Zealand Human Rights Commission has prioritised the promoting of awareness of the Declaration particularly in fora with the responsibility for the management and administration of natural resources.

I will end with a story of how the Declaration, and particularly Article 36, has worked in practice. Earlier this year Ngai Tahu, a South Island tribe of Aotearoa New Zealand, hosted the Winnemem Wintu of California, USA in the South Island of New Zealand. They were here to greet their salmon relations that no longer swim in their traditional waters of the McLeod River, California but were released in New Zealand rivers 70 years ago. This event has not only initiated the process of repatriation of salmon stock (but has also begun a connection between these two indigenous peoples.

The New Zealand Human Rights Commission played a role in facilitating this process.

Thank you for your attention.

Mauri ora

Commissioner Karen Johansen,
New Zealand Human Rights Commission