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Report on the 4th session of the Expert Mechanism on the Rights of Indigenous Peoples

11 – 15 July 2011

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

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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. Its establishment came about due to lobbying undertaken by Indigenous Peoples.

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 are:

- Ms. Anastasia Chukhman (Russian Federation) will serve for a term expiring in 2013.
- Ms. Jannie Lasimbang (Malaysia) will serve for a term expiring in 2014.
- Mr. José Carlos Morales Morales (Costa Rica) will serve for a term expiring in 2013.
- Mr. Vital Bambanze (Burundi) will serve for a term expiring in 2012.
- Mr. Wilton Littlechild (Canada) will serve for a term expiring in 2014.

The fourth session was held in Geneva from 11 – 15 July 2011.

Agenda

The agenda¹ of the EMRIP focussed on four main themes, follow up on the first study of the EMRIP on the right to education, the final report on the study on Indigenous Peoples and the right to participate in decision-making, the UN Declaration on the rights of Indigenous Peoples (the Declaration) and proposals for future work. Interventions were made on the study on education report, the decision making report and future work.²

Study on Indigenous Peoples and the right to education

The first research report of the EMRIP completed in 2009 was on the right to education.

Interventions made on this agenda item by Indigenous Peoples referred to the lack of State support to ensure the dissemination and promotion of the report and ongoing concerns about the lack of implementation of the right to education.

It is interesting to note that New Zealand has not promoted this report nationally. Given this was considered a topic that was “non-threatening” to many States, it is unlikely that any effort will be made to disseminate the 2nd research report on the more topical issue of decision making.

The EMRIP has now completed two research reports. Their completion raises a number of questions such as, how they are being used, by whom and what can be done to further promote them.

¹ See UN document A/HRC/EMRIP/2011/1.

²<http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASH47f8.dir/EM11tracey029.pdf> ,
<http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASH015c/30c15feb.dir/EM11tracey098.pdf> and
<http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASH013c.dir/EM11tracey198.pdf>

The parent body of the EMRIP, the HRC receives reports from many of its subsidiary bodies including the EMRIP. A sceptical view would be that once the research reports are completed, they are left to collect dust. The HRC has no procedure to follow up research reports. However, it is clear that some States view the education report as helpful in formulating their policies regarding education and Indigenous Peoples' rights. Further, the High Commissioner for Human Rights, Ms Navanethem Pillay stated in her opening remarks to the EMRIP that the research reports and in particular their annexes added to the growing international jurisprudence of Indigenous Peoples' rights.

Study on Indigenous Peoples and the right to participate in decision-making

The members of the EMRIP tabled their final report on Indigenous Peoples and the right to participate in decision making³ at this session of the EMRIP. This final study will be presented to the HRC at its 18th session.

The final report focuses on two areas, examples of good practice and an annex that sets out the EMRIP view of Indigenous Peoples and the right to participate in decision making. The report defines the criteria for determining what good practice is, based on the Declaration. It also provides examples from around the world. A number of examples were provided from Aotearoa including the Kaimoana Fishing Regulations, the Maori electoral roll, Maori seats in Parliament and co management arrangements. The authors Janine Lasimbang and John Henriksen (the later a former expert of the EMRIP) noted that whilst many examples were provided, they could not confirm that all examples are without criticism.

Ms. Janine Lasimbang introduced the report by providing the background to it. She also posed the question as to how the report should be followed up including the implementation of the recommended measures.

Mr. John Henriksen presented the annex. He stated that it was important to not only focus on the right to participate but also the right to control the outcome of such processes. He noted that the Declaration provides the framework regarding the implementation of this right and that the right to participate in public affairs contains a collective aspect for Indigenous Peoples in relation to how they organise themselves with reference to their custom and traditions. He also highlighted the proposed measures set out in the penultimate paragraphs of the annex which focus on how to strengthen indigenous participation in decision making.

Other EMRIP experts also commented on the report. Mr. Willie Littlechild noted the exclusion of youth issues and traditional governments. He also noted that it was time to leave behind consultation which has been overemphasised and focus instead on free, prior and informed consent.

Ms. Anastasia Chukhman noted the difference between the right and its implementation and the need for education. She also noted the role of the HRC was important.

At the last session of the EMRIP I commented in my report that there seemed to be only two EMRIP experts that were actually doing any work, Janine and John. I was pleased to note that two of the new EMRIP members actively participated in this agenda item as well as other items. The other new

³ A/HRC/EMRIP/2011/2.

member, Mr. Vital Bambanze chaired the meeting and did a considerably better job than his predecessor.

NZ made an intervention on this agenda item⁴. Whilst they did not state anything that is worthy of praise, they did make an extraordinary statement regarding consultation “the Government’s ... commitment to work with Maori, in good faith and in a cooperative manner, on all aspects of law and policy and particularly on those issues which affect them and in which they have an interest, including natural and mineral resources.” I was able to respond to this fiction by referring to the recent example of Te Whanau a Apanui and Ngati Porou regarding the granting of a permit to Brazilian company Petrobras to explore for oil and gas in the waters that border their lands. The Brazilian government was listening and asked for a copy of my intervention.

Overall, this final report is a useful tool for both States and Indigenous Peoples. For example it can be used by Maori to review international examples of good practice that may be relevant to Aotearoa. It can also be used by Maori to formulate and expand upon our understanding of this right by seeing how it is understood internationally and how that understanding can assist us. It could also prove useful in the constitutional review/reform processes that are currently taking place.

Coupled with its use for Maori, the process of how the report was produced is also an excellent example of how States and Indigenous Peoples can work together proactively on issues of importance. The gathering of research takes place over a period of time. The authors call for case studies and research from all interested parties. They produce at least two reports – one interim and one final. Both reports are open to review and criticism and are thoroughly discussed during the sessions of the EMRIP. This process in itself is an excellent example of working in a collective and concerted way within a reasonable timeframe complete with transparency and input at all stages. This way of working was noted by Ross Noonan, a Commissioner from the NZ Human Rights Commission who stated that the inclusive consultative approach taken by the EMRIP in relation to its research ensures that all parties are afforded respect throughout the process. It is important to note that such processes are not a given, they only exist because Indigenous Peoples lobby and ensure that such methods of work are accepted and implemented.

UN Declaration on the Rights of Indigenous Peoples

Perhaps not unsurprisingly the majority of Indigenous People’s interventions on this agenda item highlighted the ongoing lack of political will to implement the Declaration and/or the adoption of national laws in breach of the rights set out in the Declaration.

NZ’s intervention on this agenda item referred to four areas where they believe they are implementing the Declaration. As is their usual way, they began with their disclaimer as to how they view the Declaration; “NZ support of the Declaration reaffirm[s] 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.” They highlighted the Treaty settlement process as an example of the implementation of the Declaration, as well as the Whanau Ora social services programme, the review of constitutional arrangements and Maori participation in decision making.

⁴ <http://www.docip.org/gsdll/collect/cendocdo/index/assoc/HASH26c3.dir/EM11newzealand091.pdf>

It is interesting to note how NZ views its Treaty settlement process despite consistent criticism from numerous Maori organisations, iwi and hapu both nationally and internationally. NZ is so confident of this process that it even suggested that such processes be the subject of a research report by the EMRIP. As AIR Trust and others have consistently highlighted the failings of the settlement process, it is difficult to understand how they can continue to hold to such a distorted view.

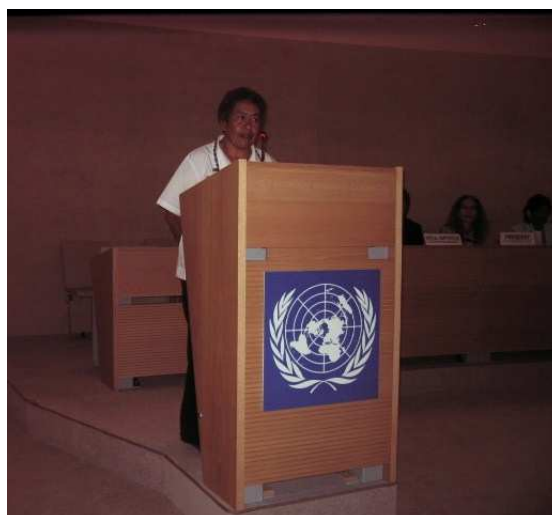
The EMRIP experts noted that the Declaration remains the basic instrument for the protection of Indigenous Peoples, that its content determines the course and direction of development and that the legal status of the Declaration is much more than simply aspirational and non binding despite what many States believe. It was also noted that many States are only supporting the Declaration on a piecemeal basis.

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 at the end of the EMRIP. Concerns were raised with NZ's nonexistent contribution to the Voluntary Fund. Lucy quite embarrassingly acknowledged that NZ had benefitted from the Voluntary Fund (by Anahera Scott's presence, see next paragraph) but had not contributed to this benefit. NZ has not contributed to the Voluntary Fund since 2005. There was also discussion as to where the EMRIP research reports should go once they are completed.

Maori participation

There were three Maori participants at the EMRIP, myself, Anahera Scott of Ngati Kahungunu and Fleur Adcock, PhD candidate. Anahera was invited to open the meeting with a mihi which was well received by all. Anahera was a recipient of the UN Voluntary Fund.



Anahera Scott addressing the plenary session at the opening of the 4th session of the EMRIP 2011



The Maori contingent who attended the EMRIP, 2011.

The Secretariat of the EMRIP

The new Secretariat of the EMRIP is Dr. Claire Charters, a former trustee of AIR Trust. Claire successfully organised the logistical side of the meeting and made access to UN processes and information easily available. It was also great to hear her address the plenary sessions with a “Kia ora”, something not often heard at the UN! Claire has lots of great ideas as to how to improve the EMRIP and we look forward to continuing to work with her in her new capacity.

NZ Human Rights Commission

Karen Johansen a Commissioner with the NZ Human Rights Commission attended the EMRIP. She made two interventions⁵. She chose to sit with the NZ government representative which was rather odd given last year she sat with her counterpart from Australia. By doing so it gave the impression that she was part of the government delegation and not an independent voice.

The Special Rapporteur and the Permanent Forum

Professor James Anaya the Special Rapporteur on the rights of Indigenous Peoples (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 referred to the work that EMRIP had done in particular their research reports. He noted that these reports are developing expert thinking in relation to the Declaration as well as practical guidance for its implementation.

⁵

<http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASHf967.dir/EM11karen080.pdf#search=%22karen%20johansen%22> and
<http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASH71ab.dir/EM11karen121.pdf#search=%22karen%20johansen%22>

Mr. Edward John, a member of the Permanent Forum on Indigenous Issues (PFII) also attended the EMRIP. He addressed the plenary by highlighting some of the work the PFII is doing and how each UN mandate that deals with Indigenous Peoples' rights have distinct but complementary roles to play.

The anecdote that comes to mind when considering the three different mandates is the ambulance in the valley. The SR deals with urgent and potentially dangerous hotspots that arise due to conflict between indigenous and non indigenous peoples. The SR can be likened to the ambulance in the valley at the bottom of the cliff.

In comparison, the EMRIP takes a more proactive role as it focuses on thematic studies and seeks to build upon the thinking and implementation of the Declaration from a thematic based approach. The EMRIP can be likened to the fence at the top of the cliff.

Finally there is the PFII which has a much wider mandate that goes beyond the area of human rights. It is mandated to provide expert advice and recommendations to the UN system through ECOSOC and raise awareness and promote the coordination of activities with the UN. Again, the PFII takes a more proactive approach focussing on how the UN system can better address Indigenous Peoples' rights through policies and methods of working; it can also be likened to the fence at the top of the cliff.

The indigenous caucus

The indigenous caucus held a one day preparatory meeting prior to the fourth session of the EMRIP and continued to meet during the week. The caucus made no collective interventions as it remains extremely difficult for consensus to be reached. Sadly the caucus is weak as many people choose not to participate in its work or, some of the regional caucuses hold their meetings at the same time as the full caucus which is not conducive to strong collective decision making.

One caucus that does work extremely well is the youth caucus. They write interventions collectively based on their respective countries and speak strongly and clearly on issues that affect them. As our future leaders they are more than capable of participating effectively in UN fora and I am always more than happy to assist them in their work.

Lunchtime presentations

I attended a meeting entitled "Advancing Dialogue on Treaties, Agreements and Other Constructive arrangements between States and Indigenous Peoples within the UN system". This meeting was organised by the International Indian Treaty Council (IITC).

The purpose of the meeting was to discuss whether a 3rd expert Treaty seminar will be held. An invitation was made by Hone Harawira at the 2nd expert Treaty seminar to hold the next one in Aotearoa. So far, this has not come to fruition however, IITC are very keen to ensure there is a further seminar.

I advised the meeting that Hone is extremely busy given his political commitments and that budget information would assist him to make an informed decision. There was also discussion about potential topics for the seminar and it was noted that the Declaration had reset/reshaped the relationship between Indigenous Peoples and States and that previous Treaty seminars had been held before the Declaration was adopted.

If the Treaty seminar is held either in Aotearoa or another place, there is potential for some interesting and useful discussions to be held at an international level in relation to matters such as Treaty settlements processes, analysing the Treaty of Waitangi and other Treaties in relation to the Declaration and learning about the many other Treaties that England entered into with other Indigenous Peoples.

The UN Office of the High Commissioner for Human Rights is tasked with making the seminar happen. They will make a decision as to when and where. The NZ government were open to it being in Aotearoa but had not received any formal notification or request to such effect.

World Conference on Indigenous Peoples

The UN has decided to hold a World Conference on Indigenous Peoples in 2014. This initiative was discussed amongst Indigenous Peoples and a temporary coordinating committee was established to start work on this to ensure the full and effective participation of Indigenous Peoples. I participated in this committee and helped draft a concept note⁶ to foster dialogue amongst Indigenous Peoples and articulate specific issues that need to be addressed.

EMRIP report and proposals

The agenda item of future work allows participants to put forward recommendations for consideration by the EMRIP experts. This agenda item allows for the planning of future work for the EMRIP.

From the many recommendations that were tabled, eight proposals were adopted by the EMRIP.

1. That the EMRIP carry out a thematic study building on its previous study of Indigenous Peoples and the right to participate in decision making with a focus on the extractive industry.
2. That the HRC holds an annual half day panel on topics of importance to Indigenous Peoples, that the HRC directs States and the UN system to utilize the recommendations and advice of the EMRIP and that the HRC pays close attention to the implementation of the recommendations concerning Indigenous Peoples in its Universal Periodic Review.
3. That the HRC encourages the General Assembly to adopt permanent measures to ensure that Indigenous Peoples governments are able to participate at the UN as observers.
4. That the EMRIP create a questionnaire survey in relation to measures to apply the Declaration to supplement information received at its annual session and provide further detail on measures and implementation strategies.
5. That the HRC ensures that the outcome of Indigenous Peoples preparatory processes for the World Conference on Indigenous Peoples is integrated into the outcome of the World Conference, that this be an agenda item at the fifth session of the EMRIP and that Indigenous Peoples participate at all stages of the Conference including planning, preparations and follow up.
6. The EMRIP encourages UN agencies and organisations to provide financial and technical support to Indigenous Peoples to establish their own education institutions and that the HRC encourages States to adopt legislative and policy measures to enable the development and implementation of traditional education systems.

⁶ Available on request.

7. The EMRIP proposes that an international expert seminar on truth and reconciliation processes is held in 2013.
8. The EMRIP welcomes the initiative by the Office of the High Commissioner for Human Rights and National Human Rights Institutions (NHRI) to develop an operational guide for NHRI to achieve the implementation of the Declaration.

Of the eight recommendations there are three which I believe are important to note. Recommendation 1 relates to Indigenous Peoples' rights and the extractive industry, clearly a pertinent and urgent issue currently being addressed by Maori. Should this research topic be taken up by the EMRIP, Maori will be able to provide case studies and concerns regarding NZ's lax approach to Maori rights in this context.

Recommendation 2 relates to specific advice to the UN system as to how it can use the work produced by the EMRIP to best effect and lastly recommendation 5 deals with the upcoming World Conference on Indigenous Peoples which all Indigenous Peoples need to be aware of and consider what they want this Conference to achieve.

Funding

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

Summary and recommendations

I firmly believe that the EMRIP has found its place. The EMRIP is a body that produces relevant and critical research. It has the capacity to do this well and, it has created a process for gathering research materials and reviewing the content of its draft reports that is considered inclusive and transparent. Coupled with a strong Secretariat, the EMRIP is creating a good reputation for itself. It is well attended by Indigenous Peoples, States and other interested parties and while at times the meeting can seem a little 'boring', it serves its mandate well. It does not have the range of issues or the volumes of people that the PFII attracts nor does it deal specifically with urgent and threatening matters like the SR. It therefore requires a more considered and thought out approach with less drama and urgency than the other two mandates.

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. Submit case studies and information for the research report on the extractive industry;
3. Continue to raise awareness of the importance of the Declaration amongst Maori and maintain pressure on NZ to implement the Declaration;
4. Continue involvement in the coordinating committee on the World Conference on Indigenous Peoples; and
5. Participate in future sessions of the EMRIP.