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Report on the 1st session of the Expert Mechanism on the Rights of Indigenous Peoples

1 – 3 October 2008

Geneva, Switzerland

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Background

The Expert Mechanism on the Rights of Indigenous Peoples (EM) is a new UN body. It was created by the Human Rights Council (the Council) 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 EM has a specific mandate and is composed of 5 experts. The mandate of the EM is to provide thematic expertise in the manner and form requested by the Council. To this end, it focuses mainly on studies and research-based advice. The EM may also suggest proposals to the Council for its consideration and approval, within the scope of its work as set out by the Council.

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

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

The first session was held in Geneva from 1 – 3 October 2008.

Mandate and resolutions

The mandate of the EM is set out in Human Rights Council resolution 6/36. This resolution coupled with a resolution passed only the week before the first session of the EM formed the basis of the discussion. The second resolution (L.17) prescribed the work the Council required the EM to complete in its first session. This included reviewing and submitting recommendations to the Durban Review Conference, preparing a study on the right of indigenous peoples to education to be completed in 2009 and, to coordinate their work with the

Special Rapporteur and the permanent forum. This was a significant amount of work for a three day meeting. The EM also requested input from indigenous peoples as to how it should conduct its meetings. Given that L.17 was only adopted the week before the meeting, it gave little time for the experts or indigenous peoples to prepare. There was also concern with how prescriptive the L.17 resolution was, as it did not give the EM much scope to consider other matters.

It is clear that the EM and indigenous peoples want to decide what they work on. Whilst the mandate is narrow, it is hoped that the Council will consider the proposals of the EM and pass such resolutions that will allow the EM to move in the direction that it wants. There is a lot of political resistance from states to allow the EM much scope. States seem fixated on the need to avoid any duplication of work between the EM and the permanent forum on indigenous issues and the Special Rapporteur even though each entity has a different mandate.

Tension re EM not a complaints forum

There was concern that the experts of the EM were defining their mandate too narrowly by focusing on its thematic approach. Some indigenous peoples through their interventions raised concerns about specific human rights violations in their countries. Many if not all were advised by the Chair to contact the Special Rapporteur who can investigate human rights violations. Whilst communications to the Special Rapporteur are important, the EM 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 get their governments to speak with them.

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 EM has a more limited mandate.

Maori participation

There were three Maori participants at the EM, myself, Teanau Tuiono and Sharon Claire from Te Runanga o Nga Kaimahi Maori o Aotearoa Te Kauae Kaimahi. We delivered a joint statement on the methods of work of the EM which was well received.

Indigenous caucus

The indigenous caucus held a two day preparatory meeting prior to the first session of the EM. It was co chaired by Kenneth Deer of Canada and Hector Huertas of Panama. The caucus delivered an opening statement to the EM much of which was incorporated into the report and proposals of the EM.

New Zealand government

The New Zealand government was represented by Amy Laurenson, second secretary of the New Zealand mission in Geneva. A meeting was held between Amy, Sharon Clair and I to discuss the EM and how we saw its work being undertaken. We also raised concerns with NZ's poor contribution to the Voluntary Fund as well as discussion on NZ's position on the UN Declaration on the Rights of Indigenous Peoples (DRIP). NZ delivered two statements to the EM, the first included support for our own intervention! The second statement related to education and focused on the government's new policy, Ka Hikitia.

Special Rapporteur

Professor James Anaya the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people attended the EM. He made an intervention which focused on how he sees his work complementing the work of the EM. Given that his mandate also includes thematic research, he has decided that he will not focus on such research rather he will leave that to the EM. He will therefore focus on urgent communications regarding human rights violations of indigenous peoples as well as country visits. As states have focused on the requirement for no duplication, this clarifying of his role in relation to the EM was welcomed.

EM report and proposals

The reality of a three day meeting meant that the substantive parts of the agenda had to be completed in two days. Day three was set aside for the experts to write and adopt their report and proposals. The report is still in draft form but reflects the discussion that took place in the meeting. Among the issues raised by participants during the session were those pertaining to the holding of regional seminars on thematic issues, the situation of indigenous women, the effects of the global food crisis on indigenous communities, access to education in indigenous languages and the implementation of recommendations laid out in the DRIP.

Of perhaps greater importance are the five proposals that the EM adopted.

Firstly, the EM proposed that the implementation of the DRIP be a permanent agenda item on its agenda. The item would consist of two parts, the first, how the DRIP is being implemented at the regional and national levels and the second, looking at how governments are implementing settlements, redress, just and fair compensation and repatriation.

Secondly, the EM focused on the Durban review. They affirmed the review process and proposed it be revised to take into account new developments including the right to self determination and the principle of free prior and informed consent which are now universally recognized through the adoption of the DRIP. They also proposed that CERD recommendations be implemented.

Thirdly, the experts began work on preparing a study on lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education to be concluded in 2009. The EM invited the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples and the Permanent Forum on Indigenous Issues to contribute to the study and requested the Council to authorize a two-day technical workshop/review to finalize the study.

Fourthly, the EM requested the Council to suggest to the General Assembly to broaden the mandate of the United Nations Voluntary Fund to support indigenous peoples participation in the session of the Human Rights Council and Treaty Bodies.

Lastly, the EM proposed that the Chairperson-Rapporteur of the EM, or a designated member of the EM, participate in the session of the Permanent Forum on Indigenous Issues and invited all relevant mandate holders, in particular the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, to be present during sessions of the EM.

Experts also recommended to the Council that the Declaration be considered as one of the human rights standards in the Universal Periodic Review process.

It was encouraging to see the EM produce strong proposals for consideration by the Council. Not only were they strong but they were comprehensive addressing the work they had been asked to complete as well as addressing other substantive issues like using the DRIP as the normative framework for all their work as well as having the implementation of the DRIP become a permanent agenda item.

Universal Periodic Review

The Universal Periodic Review (UPR) was discussed by the indigenous caucus as well as by the EM. Given it is a new process, those indigenous peoples whose countries have been reviewed provided their insights and disseminated information about the new process.

The UPR was created by the Council. States must report on the situation of human rights within their country to the Council on a regular basis. Each state will present their report over a three hour period with an additional hour for consideration by the Council. The outcome of the review will be a report consisting of a summary of the review process, conclusions and recommendations. Subsequent reviews will focus on the implementation of the report.

New Zealand is due to present its report to the Council on 7 May 2009. Non governmental organizations (NGO's) are able to attend the review but have only 5 minutes to speak. One way of dealing with this is to have friendly governments ask questions of the state who is being reviewed. NGO's can also submit reports which are due mid November 2008.

The UPR should not be considered as replacing current Treaty monitoring bodies such as the CERD. Rather it is another process to monitor how states are implementing human rights within their respective countries. There is a concern that the UPR could potentially create lower standards for a state compared to standards set by existing Treaty bodies such as the CERD committee. States could potentially choose which standard to implement.

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Summary and recommendations

Overall the first session of the EM was a success. The experts listened to the views and recommendations of the indigenous peoples present and reflected them in their report and proposals. The opening statements by the deputy high commissioner and the president of the Council also reiterated that they view the DRIP as the normative framework for the EM to conduct its work. The next step is for the EM to present its report to the Council. It is unclear when this will occur as the Council meets four times a year.

Future work for consideration:

1. Encourage Maori to provide evidence for inclusion in the EM research report regarding the right to education;
2. Monitor when the EM will present its report to the Council and consider attending the meeting to support the EM;
3. Monitor NZ in the UPR process and participate by way of submissions and attendance in that process;
4. Participate in future sessions of the EM.