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Report on the expert group meeting on the role of the UN Permanent Forum on Indigenous Issues in the implementation of article 42 of the UN Declaration on the Rights of Indigenous Peoples

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Background

Following the adoption of the UN Declaration on the Rights of Indigenous Peoples (DRIP) in September 2007, the UN Permanent Forum on Indigenous Issues (PF) has been considering how best to implement the DRIP and incorporate it into their existing work.

In particular, the PF has focussed on article 42 of the DRIP which states:

The United Nations; its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

The PF is of the view that article 42 creates a new mandate for the PF. As such the PF recommended to its parent body, the Economic and Social Council that an international expert group meeting be held to discuss the way in which the PF should address its new mandate under article 42 of the DRIP. That recommendation was approved and the expert group meeting (EGM) was held in New York, January 2009.

The Secretariat of the PF prepared a draft programme of work and background paper¹. The draft programme of work was divided into a number of themes. Indigenous experts from different geographical regions presented papers. The papers tabled at the EGM and the discussion that took place followed the themes set out in the draft programme of work.

The report of the EGM will be tabled at the 8th session of the PF to be held on 18 – 29 May 2009.

Participants

The EGM was attended by the following members of the PF:

- Victoria Tauli-Corpuz
- Bartolomé Clávero
- Michael Dodson

¹ Draft programme of work PFII/2009/EGM1/3 and background paper PFII/2009/EGM1/2. These two documents along with papers tabled at the EGM can be found at http://www.un.org/esa/socdev/unpfi/en/EGM_A42.html

- Tonya Gonnella Frichner
- Margaret Lokawua
- Carlos Mamani

Regional indigenous experts who participated were:

- Monica Aleman (Latin America and Caribbean)
- Dmitry Berezhkov (Eastern Europe, Russian Federation, Central Asia and Transcaucasia)
- Joan Carling (Asia)
- Wilton Littlechild (North America)
- Les Malezer (Pacific)
- Dalee Sambo (Arctic)

The Chair of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), John Henriksen attended. Professor James Anaya, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (SR) was due to attend but gave his apologies due to a death in his family. A number of UN agencies, government representatives and indigenous peoples also participated as observers.

Victoria Tauli-Corpuz was elected as Chair and Les Malezer as the Special Rapporteur of the EGM.

Discussion during the EGM

Due to the small number of people participating in the EGM (approximately 60), many participants took part in the deliberations. Whilst the discussion focussed on the programme of work, it did move back and forth between two main themes – the implementation of the DRIP and, the legal status of the DRIP.

Article 42 and its implementation

There was much discussion as to the meaning of article 42. There was general agreement that article 42 focuses on practical here matters and is primarily concerned with implementation. As such the PF for example, should frame its comments, opinions and recommendations with reference to the DRIP in particular with reference to specific articles and the preambular paragraphs which are often overlooked.

Article 42 should not be interpreted in isolation, it was part of a cluster of articles that should be read and implemented together for example, articles 19, 38, 39 and 41.

There is no mention of indigenous peoples in article 42. Article 42 obliges all UN bodies to implement the DRIP, this article should therefore not be interpreted as a specific mandate only for the PF. For example, the Universal Periodic Review (UPR) is a process of the UN therefore it is captured by article 42 of the DRIP.

There was discussion as to how the PF could support states to realise the DRIP for example, states could report to the PF on steps taken to implement the DRIP.

The legal status of the DRIP

Two papers were tabled by PF expert members that focussed on how the PF should interpret article 42 as providing the PF with a mandate to monitor state activities in relation to the implementation of the DRIP. Bartolomé Clávero² stated that there is a need for something similar to the Human Rights Committee (HRCmte) whereby states present reports regarding their implementation of indigenous peoples rights. He questioned whether the PF had the expertise and resources to address this mandate. He believes the HRCmte has the mandate and resources to achieve this.

His reasoning is that the HRCmte has jurisdiction over the DRIP as it is a further development of article 1 of the International Covenant on Civil and Political Rights as it relates to indigenous peoples. Therefore

² Task of the Permanent Forum on Indigenous Issues in light of the Binding Nature and with a view to Furthering the Effectiveness of International Human Rights Law, PFII/2009/EGM1/4, see note 1 above.

the HRCmte should supervise the implementation of the DRIP rights, extend its jurisdiction to include indigenous peoples rights and monitor state practice. The PF could then provide a complementary role by establishing a committee on the DRIP within the PF. This committee would monitor the development of the UPR, the performance of treaty bodies as well as the programmes and actions of the UN agencies. Its reports could serve as a basis for recommendations to be adopted by the plenary of the PF.

Carsten Smith³ also took a similar position to Clávero. He discussed the binding nature of the DRIP noting that the DRIP contains expressions of customary law which are binding. The process of its drafting and the overwhelming support it enjoyed at the General Assembly were also given as reasons for its greater legal status. He also supported the PF as having the legal authority to work as a treaty body.

Whilst indigenous peoples supported the idea of a monitoring mechanism regarding the DRIP, there was no agreement as to whether the PF was best placed to carry out this role. Constructive dialogue between states and the PF was also proposed though there was concern that such a process not replace direct dialogue between indigenous peoples and states in their respective countries.

One of the questions posed in the programme of work was how to reconcile Convention ILO 169 with the DRIP. It was agreed that this was an unnecessary task given both documents were created through different processes and for different reasons. It was also noted that Convention ILO 169 reviewed the previous Convention ILO 107 which is focused on the integration of indigenous peoples into the non-indigenous society and, that it was drafted over 20 years ago. Whilst indigenous peoples can choose to use the ILO Conventions and the DRIP, attempts to try and reconcile the differences between the two was not viewed as productive. The ILO representative also agreed with this viewpoint.

The EGM was reminded that international law is universal and that the practice of UN bodies and agencies should align themselves with international human rights law.

Capacity building

There was a resounding call for financial resources as well as in kind support to educate indigenous peoples about the DRIP. Indigenous peoples highlighted the need for capacity building within indigenous communities not only on the DRIP but basic human rights education as well. There were calls for the UN in particular the PF to fundraise and, for the mandate of the Trust fund of the Second Decade of the World's Indigenous Peoples to be expanded.

It was noted that the implementation of the DRIP requires more structured indigenous participation. A proposal that has been discussed by indigenous peoples previously was resurrected – the establishment of a permanent indigenous secretariat based in Geneva.

Maori participation

There were two Maori participants at the EGM, myself, and Kim Ngarimu from Te Puni Kokiri. I suggested proposals as to how the PF could implement the DRIP and Ms Ngarimu made a general intervention on behalf of the NZ government which is discussed below.

New Zealand government

The New Zealand government was represented by Kim Ngarimu, deputy secretary, policy of Te Puni Kokiri. She is based in Wellington. Ms Ngarimu in her intervention acknowledged that she is Maori and that she represented the government. Normally Maori civil servants don't disclose that they work for the government nor do they explain that Te Puni Kokiri is a government department.

Ms Ngarimu made one intervention. She said that NZ supports the principles of the DRIP but there are a small number of articles that it does not agree with. It also does not support the DRIP because it does not include third party rights. One of the articles that NZ does not agree with is article 19 (free prior and informed consent and legislation). NZ interpreted this article to mean that Maori would have a right of veto. Given that every piece of legislation affects Maori, all legislation would therefore be open to veto by Maori. However, the government is committed to working with Maori and is implementing the DRIP for example, legislation that settles land claims is drafted jointly with tribes that the government is settling with. Also, in the emission trading process, the government has engaged with Maori leaders and Maori technical

³ Comments on Article 42 as legal basis for a Declaration "treaty body", PFII/2009/EGM1/5, see note 1 above.

experts. Mention was made of legislation that was passed last year that transferred 40% of exotic forestry to Maori ownership.

Mention was also made of the role of Te Puni Kokiri who is responsible for monitoring how other government departments are implementing article 42. However, it was noted that such monitoring should be contextualised to the domestic situation of each country.

Whilst the position of the New Zealand government is nothing new, it was disappointing to have it reiterated yet again especially in light of the recent change of government following elections at the end of last year. NZ's need to continue to justify and explain its position regarding the DRIP is tedious and added nothing to the deliberations of the EGM.

A number of indigenous participants responded directly to the New Zealand intervention. Victoria Tauli-Corpuz reminded the New Zealand government of their actions at the recent UN Climate Change Conference in Poznan, Poland (UNCCC). At that meeting NZ along with the other CANZUS states removed references to the DRIP and deleted the 's' from the term 'indigenous peoples'. Given the UNCCC was focussing on tropical forests, the question was asked as to why NZ and the USA were involved given that neither country has tropical forests!

Michael Dodson said that states cannot use their domestic situations to exclude themselves from international standards, it is international standards that should be informing domestic practice. There was also little assistance to be gained with comparing the DRIP with third party rights. Indigenous peoples are distinctive and the DRIP protects indigenous peoples distinctive rights. For example, in Australia the previous government suspended all domestic legislation in order to treat Northern Territory indigenous peoples in a discriminatory way. This suspension was done without any reference to the peoples concerned. This is why article 19 is important. It is also important to recall the DRIP preambular paragraphs which explain why the DRIP is necessary for indigenous peoples, that is, in order to correct historical injustices.

Les Malezer stated that of all the CANZUS states, that NZ should change its position given its long term relationship with Maori since 1840. NZ should be leading the charge for change if they wanted to provide best practice examples. Further, free prior and informed consent does not equal a right to veto, the CERD committee in its General comment 23 have said that indigenous peoples have the right to free and prior consent.

Role of the SR and the EMRIP

Professor James Anaya, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples was unable to attend the EGM however he did table a paper. His mandate as set out by the Human Rights Council makes specific reference to the promotion of the DRIP. As such his work along with that of the PF and EMRIP must be mutually reinforcing, build understanding about the meaning of the DRIP and advance its implementation.

John Henriksen on behalf of the EMRIP explained the mandate of the EMRIP and noted that article 42 also applied to EMRIP. He advised that the EMRIP had written to the heads of all the Treaty bodies to advise them of the establishment of the EMRIP. The Chairs of the Treaty bodies meet once a year. He proposed that the SR and the Chairs of EMRIP and the PF could attend that meeting also. He also advised that apart from the funds to organise the one week meeting of the EMRIP, there were no other funds for EMRIP to carry out its mandate nor for the experts to hold preparatory meetings or attend other meetings.

It was also important to remember that other parts of the UN system are also dealing with indigenous peoples rights for example the advisory committee of the Human Rights Council and the Forum on Minorities which was looking at non-dominant languages. The later could be a useful option to explore though caution was expressed as many states confuse indigenous peoples rights with minority rights.

Governments who participated

Only a few governments chose to participate in the EGM, even less spoke. The USA raised concern with the proposal to establish a monitoring body for states. Chile actively participated in the implementation discussions suggesting proposals and making comments as did Mexico and Portugal. The Russian Federation did not see a need for a separate monitoring body given the DRIP embodies existing rights.

UN agencies

Many UN agencies presented reports on the work their respective agencies are doing. All of them reiterated the importance of the PF to help them focus on indigenous issues and assist them with their work at the country level. A recurring statement was that there were not enough funds available to undertake new work and it was difficult to get organisations to change their attitudes and ways of working with indigenous peoples. Notwithstanding the financial constraints and institutional challenges, it was disappointing to hear the same excuses being made as to why the DRIP and indigenous peoples rights were not being pursued more vigorously by international agencies.

There seems to be particular problems with UN agency country offices that are not aware of the DRIP nor of the Guidelines on Indigenous Peoples' Issues⁴ (GIPI) which were created by the Inter Agency Support Group on Indigenous Peoples' Issues. The Inter Agency group comprises a number of UN agencies. Concern was raised with the GIPI because they state that the DRIP is not binding and merely establishes a framework for discussion and dialogue between indigenous peoples and states.

The secretariat of the PF viewed the GIPI as one way they could promote the DRIP within the UN system. They are also providing training for technical personnel and running side events at UN meetings.

EGM report and recommendations

Whilst many proposals, ideas and concepts were discussed during the three day EGM, only three recommendations were set out in the draft report. The Special Rapporteur was of the view that three recommendations would be more useful for the PF. Further that within the report, immediately before the recommendations, the PF had been specifically directed to also consider all the recommendations as set out in the body of the report.

The recommendations are as follows:

Firstly, that the PF under its agenda item 'The Declaration on the Rights of Indigenous Peoples' encourages all participants particularly states, to submit written reports to the PF. The PF will appoint an 8 person team to examine the reports and communicate with the submitting parties. Such reports are to provide substantive information on the application and implementation of the DRIP and a reliable assessment of the effectiveness of the DRIP at the national and local level.

Secondly, to encourage states to incorporate adequate information on the implementation of the DRIP in their 'core report' to the human rights treaty bodies and, for states to establish if it does not already exist, a national dialogue with indigenous peoples on human rights, such dialogue to be based on the DRIP.

Thirdly, that the Secretary General of the UN provide an adequate budget for the implementation of article 42 to the PF and its secretariat. That all UN agencies integrate the DRIP into their respective policies, programmes and strategies including as a matter of priority capacity development of indigenous peoples to understand and use the rights contained in international human rights instruments including the DRIP. Also, that the Trust Fund on indigenous issues should assist indigenous peoples to participate in and conduct activities consistent with article 42.

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Summary and recommendations

Overall the EGM was a success. The level and quality of discussion was on point. There was a mixture of academic, legal and practical analysis. Participation by the experts and observers was high though greater contributions by states would have been helpful. It is also clear that indigenous peoples have many ideas as to how the DRIP can be implemented by the UN and states.

Whilst some experts of the PF are of the view that the PF has a new mandate to monitor the implementation of the DRIP by the UN system and states in particular, there was general agreement from

4 The document can be found at www.undg.org/index.cfm/P=270

indigenous peoples that this interpretation of article 42 does not mean that the PF is now akin to a Treaty monitoring body. A call for voluntary reports by states which already occurs in some instances was considered more productive and was a less forced interpretation of article 42. Whilst the PF has much to offer the UN system in terms of its recommendations, expertise, resources, and commitment, it is clear that indigenous peoples expect the whole UN system to implement the DRIP as well as states.

Future work for consideration:

- 1 Draft a document which details the history of each article and preambular paragraph of the DRIP in order to determine which rights in the DRIP are already part of existing international law;
- 2 The UN Democracy Fund provides funds for capacity building. This is a possible source of funding for education work on the DRIP. To research this fund to see if it is possible to obtain funds for capacity building;
- 3 Monitor the eighth session of the PF where the report of the EGM will be tabled to see what, if any of the recommendations are adopted;
- 4 The UN is to undertake a mid term review of the programme of action of the Second International Decade of the Worlds' Indigenous Peoples. Find out what if any activities of the programme of action NZ has completed.