

1. EMRIP and Treaty Bodies

I thank colleagues for the opportunity to participate in this important Workshop, called to review the mandate of EMRIP. As the programme indicates, I am an academic and a former member of CERD, and these comments in part refer to my treaty body experience, though my comments are personal and may or may not cohere with the views of CERD members or CERD as a whole. I note from the summary of the rich variety of responses to the questionnaire, that some submissions refer to actual or potential relationships between EMRIP and the treaty bodies.

We have been presented with a very helpful overview by the Secretariat of the UN mechanisms on indigenous peoples. For comparative purposes, it may be useful to recall some functions of treaty bodies, among which there are commonalities as well as differences so that some generalizations are possible. Treaty bodies characteristically employ a reporting procedure – State reports on a periodic basis or by special request. The reporting mechanisms have become complex and, for example in the case of CERD, include a review procedure (late reports), and a follow-up procedure, as well as an early warning and urgent action procedure. Treaty bodies may also process individual communications, and, at least on paper, inter-State claims – by a State claiming that another State has violated the Convention in question. Additionally, there is space in the agendas of the treaty bodies for variously styled thematic or general discussions, and for general comments or recommendations that, broadly speaking, perform an interpretative or guidance function. I note that some respondents to the questionnaire envisage that any future development of EMRIP should not approximate to the role of a treaty body, not least perhaps because there is no constituent UN ‘treaty’ in the case of indigenous peoples to which any such ‘body’ would be attached.

The mandate of EMRIP, as expressed in resolution 6/36 of the Human Rights Council, is briefly set out. Participants have recalled that the mandate refers to the provision of thematic expertise ‘on the rights of indigenous peoples’ to the Council, and that such expertise ‘shall focus mainly on studies and research-based advice’. There is also reference in the resolution to enhancing cooperation with the special rapporteur and the Permanent Forum, and on avoiding duplicating the work of these mechanisms. Looking at the text of the resolution analytically, the thematic expertise mandated is ‘on the rights of indigenous peoples’, and that, while the Declaration (UNDRIP) is recalled in the preamble to the resolution, the mandate of EMRIP seems to extend to indigenous rights more generally – a point made by numerous participants in the discussions. Further, the thematic expertise is to focus ‘mainly’ on studies, etc., not necessarily exclusively. So there is some flexibility in the resolution,

though there are also limits – the mechanism shall not adopt resolutions or decisions. Another limitation, commented upon in responses to the questionnaire is that, while EMRIP may suggest proposals to the Council, these are to be ‘within the scope of its work as set out by the Council’, thereby limiting any right of initiative on the part of EMRIP in setting out priorities and concerns.

With regard to the standards on the rights of indigenous peoples, the stimulus provided by the emergence of ILO Convention 169 on 1989 and the UNDRIP in 2007 galvanized the treaty bodies into taking ever greater note of indigenous issues, even where, as with, for example, ICERD, the ICCPR and the ICESCR, the Convention in question does not make specific reference to indigenous peoples. This is a remarkable development, especially since we are generally dealing with ‘universalist’ conventions. It seems to be true of all the leading UN conventions that indigenous issues have filtered into their substance by a kind of osmosis. The process has perhaps been marked in the case of CERD because of the open-ended nature of the rights set out in the Convention and the generosity with which the ‘grounds’ of discrimination have been interpreted. The sources of information on indigenous rights provided to the Committee have come from the ‘formal’ mechanisms of the UN system, and from the strenuous and regular input from organizations of indigenous peoples, from NGOs and NHRIs.

In general, it may be said that community/NGO input directs itself to the specifics of cases before the Committee, resulting in a mass of focused recommendations to States parties. The contribution of UN mechanisms on the other hand, while it may focus on concrete cases through liaison with the Special Rapporteur, is also usefully directed to the general understanding of indigenous rights. Their guidance functions may impact on States directly, or indirectly to State through, for example, treaty bodies. Adequate application of indigenous rights by the treaty bodies or other elements in the UN system is necessarily preceded by understanding. It should be recalled that bodies have varied expertise on the area of indigenous rights, and may, for example, lack the benefits gifted to CERD through the chairmanship of Francisco Calí Tzay. Hence, the continuing development of thematic expertise throughout the UN system is of great potential benefit to treaty bodies in enabling the integration of indigenous rights into broader portfolios of rights in general. Conversely, the application of indigenous rights through the main conventions lends a ‘cutting edge’ to the provisions of the Declaration, bearing in mind that the constituent instruments of the treaty bodies are legally binding. CERD has called upon States parties to base their policies with regard to indigenous peoples on the provisions of UNDRIP.

Where does this take us with regard to the mandate of EMRIP? In the first place, and in addition to any other enhancement of EMRIP functions, close relations with treaty bodies represent one evident *desideratum*. In light of the ongoing concern of CERD with indigenous rights, the development of thematic studies and advice to feed into its work is important and appropriate. As observed, indigenous rights are complex in both concept and application. EMRIP studies and advice in, for example, the fields of indigenous education, access to justice, and participation, tease out many inbuilt conceptual and practical complexities, and assist in the development of positive, legally grounded programmes in these and related fields, thereby helping to standardize usages on, for example, the concept of FPIC. Bearing in mind that the norms and standards of indigenous rights are not univocal in character, and require local application, further indications from EMRIP of ‘best practices’ in the application of indigenous rights would be extraordinarily helpful to a wide range of stakeholders – ‘best practices’ being understood as an application of the standards and not their dilution.

Noting the reflections by questionnaire respondents on the question of sufficient impact, it may be suggested nonetheless that ongoing conceptual clarification of the key themes of indigenous rights should continue to be treated as a highly valuable function. The background role of ‘think tanks’ at the UN and elsewhere should not be underestimated. Whatever further roles may be allocated to EMRIP, a guidance function is primordial in order to increase the understanding and appreciation of indigenous rights, recalling that they are often contested and challenged as well as misapplied or simply not applied.

None of this rules out greater liaison between EMRIP and other UN bodies in order to further ‘mainstream’ indigenous rights, or the development of supplementary methodologies to enhance ‘impact’. Nor does overlap between EMRIP and other indigenous mechanisms matter too much provided that each mechanism retains its predominant characteristic or core functions. One problem with merger of mechanisms is, as with the case of the proposed merger of treaty bodies into a unified standing treaty body, the potential loss of an archive and of specific expertise, of the institutional culture of the body concerned. EMRIP possesses its own distinctive character, which should not be diluted in any revision of its mandate.

The test of UN mechanisms in the field of indigenous rights and elsewhere is whether they enhance the level of understanding and appreciation of the rights in question and assist the rights holders in defending those rights as fully warranted by the legal and moral authority of international law. Whatever enhancements of impact follow from a revision of the mandate, clarity of vision on the nature, justification, and application of indigenous rights is a first requirement.

2. Responses to Discussion

On the composition of any reformed EMRIP, in human rights systems in general, expertise counts as a first requirement. If EMRIP is moving to an enhanced interpretative mode, there is a premium on expertise on indigenous issues and in international law, or at least international human rights law.

With regard to experts of indigenous origin, we may place the emphasis on ‘experts’ but it is absolutely appropriate to include indigenous experts on account of their sensitivity and personal, lived experience. Indigenous experts can assist in discerning issues that might easily be missed by non-indigenous observers. Community knowledge needs to inform any reformed body.

With respect to geographical and cultural diversity in a reformed EMRIP, it would be highly appropriate, and symbolic, if this diversity was based on an indigenous rather than a State metric.

With regard to gender balance, this is important not only on account of general human rights concerns for gender justice but also because, with regard to the rights of indigenous and other rights, women have a distinct experience of, for example, discrimination, that may not be the same as the experience of men. Hence women will bring a distinctive knowledge and sensibility to a reformed/expanded EMRIP.

With regard to arguments on rule-based formalism of a reformed body, it is important to distinguish between ‘formalities’ and ‘formalism’. While excessive procedural rigidities are undesirable, some formality is always needed in the interests of justice, fairness and transparency in order to avoid arbitrariness or any perception thereof.

In the development of indigenous rights at the UN, one of the very striking features of the bodies developing UNDRIP, and especially of the WGIP, was the extraordinary participation of indigenous peoples, of communities from around the world. This gave vivacity, point, and humanity to the proceedings and to the texts that emerged. It is important for any reform to keep alive this humanizing of institutions through the participation of indigenous peoples, so that the body reflects the rights of indigenous peoples to participate in decisions which affect them. The key ideas will emerge from indigenous peoples, as will the reports of violations. A body addressing indigenous rights should be a learning body as well as a proactive body, a living instrument infused with the spirit of indigenous peoples.

3. On studies and advice

With regard to the proposal to end thematic studies in a new EMRIP in favour of adopting ‘authoritative interpretations’ of articles/ themes of the Declaration (UNDRIP), language is important. In the case of the treaty bodies, the ‘authority’ comes from the legally binding conventions in question. However, even here, the treaty bodies are not courts and phrase their conclusions in terms of ‘recommendations’, ‘views’, ‘opinions’, etc. ‘Authority’ is an interesting term. The ‘authority’ or ‘legitimacy’ of the interpretations will depend not only on the quality of the Experts but also on how such interpretations are developed. The key question in this case is the process by which the interpretations emerge, an issue with special relevance for indigenous peoples, suggesting optimum participatory and consultative modalities, so that they truly share in the ‘ownership’ of the interpretations.

There is however no sharp line to be drawn between ‘interpretations’ and ‘thematic studies’ and ‘advice’ – there is already a great deal of significant and valuable ‘interpretation’ in the existing output of EMRIP; in deed that is part of its current *raison d’être*. The important question is to keep this background reflection on indigenous rights alive, whatever the terminology employed.

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7.04.2016