

INDIGENOUS PEOPLES RIGHTS UNDER INTERNATIONAL LAW

I. INTRODUCTION

In 2009 international legal negotiations of particular relevance to Indigenous peoples continued under the United Nations (UN) Framework Convention on Climate Change (UNFCCC);¹ the Convention on Biodiversity (CBD);² and the auspices of the World Intellectual Property Office (WIPO). As in previous years, international human rights monitoring bodies developed jurisprudence on the rights of Indigenous peoples, contributing to the development of customary international law in the field.

New Zealand was the subject of the UN Human Rights Council's (HRC) universal periodic review (UPR) process for the first time in 2009. The HRC focused on Maori and their rights during the UPR with calls for New Zealand to support the UN General Assembly's Declaration on the Rights of Indigenous Peoples (Indigenous Peoples' Declaration) and to consider constitutional entrenchment of international human rights instruments and the Treaty of Waitangi.³

New Zealand's reluctance to recognise Indigenous peoples' rights persisted in 2009. New Zealand did not endorse the Indigenous Peoples' Declaration and Indigenous peoples' rights did not feature prominently in New Zealand's statements in international fora.⁴

II. DEVELOPMENTS IN RELATION TO INTERNATIONAL RESOLUTIONS, RECOMMENDATIONS AND OTHER FORMS OF NON-BINDING OR SOFT LAW INSTRUMENTS

A. Declaration on the Rights of Indigenous Peoples

Australia announced its decision to support the Indigenous Peoples' Declaration in April 2009, leaving New Zealand, Canada, and the United States as the only States in opposition.⁵ In July 2009 New Zealand's Minister

1 United Nations Framework Convention on Climate Change (UNFCCC) (opened for signature 4 June 1992, entered into force 21 March 1994).

2 Convention on Biological Diversity (CBD) (opened for signature 5 June 1992, entered into force 29 December 1993).

3 United Nations Human Rights Council "Draft Report of the Working Group on the Universal Periodic Review: NEW ZEALAND" UN Doc A/HRC/WG.6/5/L.7 (2009) (Draft Report of the Working Group) ["Draft Report on the UPR on New Zealand"]. See also *Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/RES/61/295 (2007).

4 See for example, Ministry of Foreign Affairs and Trade (MFAT) "Ministry Statements and Speeches 2009" (2009) <<http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2009/index.php>>.

5 In 2007 when the United Nations General Assembly voted to adopt the Declaration on the Rights of Indigenous Peoples 143 countries voted in its favour. Only 4 countries voted against: New Zealand, the United States, Canada and Australia. Eleven countries abstained

of Maori Affairs suggested that the Government would move to support the Indigenous Peoples' Declaration. However, a spokesperson for the Prime Minister responded that no further action would be taken to endorse the Indigenous Peoples' Declaration during 2009.⁶

III. DEVELOPMENTS IN RELATION TO INTERNATIONAL TREATIES

A. UN Framework Convention on Climate Change

The 15th Conference of the Parties (COP 15) to the UNFCCC and the fifth Meeting of the Parties (COP/MOP 5) to the Kyoto Protocol was held in Copenhagen in December 2009. New Zealand is a party to both the UNFCCC and the Kyoto Protocol.

The major outcome of COP 15 was the Copenhagen Accord, supported by New Zealand,⁷ but heavily criticised for the closed nature of the negotiations and its lack of binding commitments.⁸ To the disappointment of Indigenous peoples engaged in discussions leading up to COP 15, the Copenhagen Accord does not include a reference to Indigenous peoples' rights.⁹

Of particular importance to Indigenous peoples, COP 15 adopted a decision on methodological guidance for activities related to reduced emissions from deforestation and forest degradation (REDD), which recognises the need for "effective engagement" of Indigenous peoples and local communities in monitoring and reporting relating to REDD.¹⁰ Similarly, the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA), which negotiates elements of the Bali Action Plan, presented a draft decision under which, when REDD activities are undertaken, respect for Indigenous peoples' and members of local communities' knowledge and rights should be promoted and supported by "taking into account relevant international obligations" and "noting" the adoption of the Indigenous Peoples' Declaration.¹¹ Although not

from the vote (two of whom have since endorsed it) and 34 countries were absent from the vote. See United Nations Permanent Forum on Indigenous Issues (PFII) "United Nations Declaration on the Rights of Indigenous Peoples" (2006) <<http://www.un.org/esa/socdev/unpfi/en/declaration.html>>.

6 New Zealand Press Association "No Final Decision on Indigenous Rights – Govt" *Stuff online* (New Zealand, 7 July 2009) <<http://www.stuff.co.nz/national/politics/2570689/Government-to-endorse-UN-indigenous-rights-declaration>> accessed 9 August 2010).

7 United Nations Framework Convention on Climate Change "Report of the Conference of the Parties on its Fifteenth Session held in Copenhagen from 7 to 19 December 2009. Addendum Part Two: Action Taken by the Parties at its Fifteenth Session" UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010) ["UNFCCC Addendum Two"] 5.

8 S Stidsen "The UN Framework Convention on Climate Change" in C Mikkelsen (ed) *The Indigenous World 2010* (IWGIA, Copenhagen, 2010) 599.

9 Ibid.

10 UNFCCC Addendum Two, above n 7, 11-12.

11 United Nations Framework Convention on Climate Change Ad Hoc Working Group on Long-term Cooperative Action "Report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention on its eight session, held in Copenhagen from 7 to 15 December 2009" UN Doc FCCC/AWGLCA/2009/17 (5 February 2010) 35; Stidsen, above n 8, 599-600.

endorsed by COP 15, the ground has been laid for more robust recognition of Indigenous peoples' rights at the 16th Conference of the Parties in Cancun in 2010.

IV. ADOPTION OF NATIONAL LAWS AND REGULATIONS ON MATTERS OF INTERNATIONAL SIGNIFICANCE

The Government established a Ministerial panel to investigate whether the Foreshore and Seabed Act 2004 recognises and provides for customary and public interests in the coastal marine area in 2009. Taking into account New Zealand's international human rights obligations, the Ministerial panel's report found that the Act discriminated against Maori and recommended that it be repealed, with a more appropriate balance being struck between Maori property rights and public rights and expectations.¹² The Government advised that it would take some time to consider the recommendations made in the report before advising its proposed course of action that, by the close of 2009, was not yet finalised.

V. INTERNATIONAL OVERSIGHT OF NEW ZEALAND'S COMPLIANCE WITH INDIGENOUS PEOPLES' RIGHTS

A. Human Rights Council's Universal Periodic Review

New Zealand's approach to the HRC's UPR was notable for its constructiveness when compared to its more recent appearances before human rights treaty bodies, such as before the UN's Committee on the Elimination of Racial Discrimination in 2007.¹³ For example, the Minister of Justice Hon Simon Power expressed his appreciation for the input of non-governmental and Maori organisations into the UPR process and acknowledged the need to be honest in accepting that New Zealand still faces challenges in its compliance with human rights in relation to Maori.¹⁴ Concerns about New Zealand's record in relation to Maori dominated both the UPR session and states' recommendations in the associated HRC report, unsurprising given the extent to which questions were raised in submissions by Maori and other civil society to the HRC and the compilation of information from the UN.¹⁵

12 Hon C Finlayson and Hon P Sharples "Foreshore and Seabed Act Review Received" (press release, 1 July 2009).

13 See C Charters, "Indigenous Peoples Rights under International Law" (2007–2008) 5 NZYIL 199 at 200–201.

14 Meeting notes from 7 May 2009, Geneva, on file with the author, Claire Charters.

15 United Nations Human Rights Council "Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1: NEW ZEALAND" UN Doc A/HRC/WG.6/5/NZL/3 (2009) and United Nations Human Rights Council "Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1" UN Doc A/HRC/WG.6/5/NZL/2 (2009).

States participating in the UPR of New Zealand recommended, for example, that it:¹⁶

- support the Indigenous Peoples' Declaration;
- ratify the International Labour Organisation's Convention No. 169 on Indigenous and Tribal Peoples No. 169 (ILO Convention 169);
- consider public discussion over the status of the Treaty of Waitangi, with a view to possible entrenchment as a constitutional norm;
- consider implementing the recommendations of human rights treaty bodies and special procedures on indigenous people;
- take action to eliminate the socio-economic disparities affecting Maori;
- address all forms of political, economic and social discrimination against Maori by meeting their various demands for constitutional and legal reforms and recognition;
- "consistent with the observations of the Committee on the Elimination of Racial Discrimination and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, continue the new dialogue between the State and Maori regarding the Foreshore and Seabed Act of 2004, in order to find a way of mitigating its discriminatory effects through a mechanism involving prior, informed consent of those affected;"¹⁷ and
- pursue efforts to settle comprehensively land claims of the Indigenous population and find ways to provide adequate compensation to Maori, in particular for their loss of land.

In its response to the UPR and before the HRC, New Zealand rejected the recommendation that it consider ratifying ILO Convention 169 but stated that it would like to move to support the Indigenous Peoples' Declaration.¹⁸ It agreed with the recommendation to continue public discussion on the Treaty of Waitangi but "does not assume that the current mechanisms in place are inadequate or that entrenchment of the Treaty of Waitangi is the only possible outcome of public discussion."¹⁹ It also agreed with the recommendation to provide fair redress to Maori, although it noted that the "settlements framework does not apply a strict compensation or damages and losses approach [...]."²⁰

16 Draft Report on the UPR on New Zealand, above n 3.

17 Ibid, at [81](58).

18 United Nations Human Rights Council "Report of the Working Group on the Universal Periodic Review: NEW ZEALAND: Addendum – views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review" UN Doc A/HRC/12/8/Add.1 (2009) at [4].

19 Ibid, at [18].

20 Ibid, at [43].

B. UN Committee Against Torture

In May 2009 the UN Committee Against Torture (CAT) provided its concluding observations on New Zealand's fifth periodic report to the CAT. The CAT concluded, inter alia, that New Zealand should:²¹

- take further measures to reduce the over-representation of Maori (and Pacific Islanders), particularly women, in prison;
- undertake in-depth research on the root causes of the phenomenon of over-representation; and
- provide adequate training to the judiciary and law-enforcement personnel that takes into account the obligation to protect minorities, and integrates a gender perspective.

The CAT also expressed concern at the continued prevalence of violence against women, particularly Maori, Pacific Island and minority women.²²

VI. DISCUSSION OF INTERNATIONAL ISSUES RELATED TO INDIGENOUS PEOPLES IN INTERNATIONAL FORA

A. UN General Assembly Third Committee

In its statement at the UN General Assembly Third Committee, New Zealand noted the targeting of indigenous leaders in Fiji following the overthrow of the elected government in 2007.²³

B. UN Expert Mechanism on the Rights of Indigenous Peoples

At the second session of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in August 2009 New Zealand, and other States, commended the EMRIP for its study on the implementation of the right of Indigenous peoples to education.²⁴ New Zealand also contributed a report to EMRIP's technical workshop on the Study.²⁵

21 See United Nations Committee Against Torture "Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Concluding Observations of the Committee Against Torture: NEW ZEALAND" UN Doc CAT/C/NZL/CO/5 (14 May 2009) at [5].

22 Ibid, at [17].

23 J McLay, New Zealand Permanent Representative to the United Nations "United Nations General Assembly Third Committee, Item 69 b Human Rights Questions" (New York, 27 October 2009). Available at <<http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2009/0-27-October-2009.php>>.

24 Expert Mechanism on the Rights of Indigenous Peoples "Report of the Expert Mechanism on the Rights of Indigenous Peoples on its Second Session" UN Doc A/HRC/12/32 (2009) at [46].

25 See Expert Mechanism on the Rights of Indigenous Peoples "Technical workshop on the right of indigenous peoples to education and contributions to the study on lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education: Note by the Secretariat" UN Doc A/HRC/EMRIP/2009/3 (2009) at [8] and [12].

C. 1992 Convention on Biodiversity

The CBD's Working Group on Access and Benefit Sharing (ABS Working Group) is mandated to develop guidelines to assist state parties and other stakeholders with the implementation of the CBD's access and benefit sharing provisions, including in relation to Indigenous peoples' traditional knowledge (TK).²⁶ It met in April and November 2009 to further develop its working document. During the November meeting New Zealand is recorded as asking the ABS Working Group to consider how a legally binding access and benefit-sharing regime could be implemented, and which aspects of the regime were proposed to be binding.²⁷

D. World Intellectual Property Office

During 2009 the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources (IGC) considered the development of an international instrument or instruments concerning intellectual property (IP), TK, genetic resources (GR) and traditional cultural expressions (TCE).

At the June/July and December 2009 meetings of the WIPO IGC, New Zealand:

- raised the possibility of differentiating between commercial and non-commercial misappropriation of TK;²⁸
- recognised that the misappropriation of GR, TK and TCEs had a significant international dimension that needed to be addressed;²⁹
- proposed leaving a decision on the legally-binding status of the text until the end of the proposed work program, stressing the need to respect the unique circumstances of different countries, regions, Indigenous peoples and local communities and that, for New Zealand, it would be necessary to consult and engage with Maori before agreeing to any internationally-binding commitments;³⁰
- supported the IGC's continued exploration of sui generis models for the protection of TK and TCEs;³¹

26 See C Charters, "Indigenous Peoples Rights under International Law" (2008) 6 NZYIL 302 at 307-308; P Borraz "The Convention on Biological Diversity (CBD)" in C Mikkelsen (ed) *The Indigenous World 2010* (IWGIA, Copenhagen, 2010) 604.

27 Convention on Biological Diversity "Report of the Eighth Meeting of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing" UNEP/CBD/WG-ABS/8/8 (2009) at [30].

28 World Intellectual Property Office Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore "Report of the 15th Session Geneva 7-11 December" WIPO Doc WIPO/GRTKF/IC/15/7 (2010) at [125].

29 World Intellectual Property Office Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore "Report of the 14th Session Geneva 29 June-3 July" WIPO Doc WIPO/GRTKF/IC/14/12 (2009) at [185].

30 Ibid, at [47], [102] and [185].

31 Ibid, at [47] and [185].

- supported the development of guidelines and recommendations for improving the efficiency of national systems regarding GR, TK and TCEs, with a structured support program managed and delivered by WIPO;³² and
- supported proposals for increasing the contribution made by the Indigenous panel to the work of the IGC.³³

VII. EVENTS/DEVELOPMENTS CONTRIBUTING TO THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW AND/OR OF PARTICULAR RELEVANCE TO NEW ZEALAND

During 2009 international human rights monitoring bodies continued to develop jurisprudence on the rights of Indigenous peoples, contributing to the development of international customary law in the field and which will be of relevance to New Zealand when it is being reviewed by them.

As in previous years, the monitoring bodies continued their strong support for Indigenous peoples' land, political and cultural rights and the international instruments that promote Indigenous peoples' rights.³⁴ For the first time, the Committee on Economic, Social and Cultural Rights (CESCR Committee) encouraged a state party to take steps to mitigate the adverse consequences of climate change, which it noted impacted on Indigenous peoples in particular.³⁵ The Committee on the Rights of the Child (CRC) also adopted General Comment No. 11 (2009) on Indigenous children and their rights under the Convention on the Rights of the Child.³⁶

A. Committee on Economic, Social and Cultural Rights

The CESCR Committee urged states to respect Indigenous peoples' rights to their lands, territories and resources and emphasised the need for states to consult with Indigenous peoples on matters affecting them. For example, in 2009, it recommended:

32 Ibid, at [47].

33 Ibid.

34 See for example, United Nations Committee on the Elimination of Racial Discrimination "Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: PERU" UN Doc CERD/C/PER/CO/14-17 (2009); United Nations Human Rights Council "Report of the Working Group on the Universal Periodic Review: NORWAY" UN Doc A/HRC/13/5 (2010) at [105](36); United Nations Human Rights Council "Report of the Working Group on the Universal Periodic Review: CHILE" UN Doc A/HRC/12/10 (2009) at [96].

35 United Nations Committee on Economic, Social and Cultural Rights "Concluding observations of the Committee on Economic, Social and Cultural Rights: AUSTRALIA" UN Doc E/C.12/CO/AUS/CO/4 (2009) at [27] ["CESCR Australia"].

36 United Nations Committee on the Rights of the Child "General Comment No.11 (2009): Indigenous Children and their Rights under the Convention" UN Doc CRC/C/GC/11(2009).

- that Australia establish a national indigenous representative body;³⁷ improve the operation of the native title system in consultation with Aboriginal and Torres Strait Islander peoples;³⁸ and develop a special IP regime to protect Indigenous peoples' collective rights;³⁹
- the imposition of a moratorium on all forced evictions of Indigenous peoples in Cambodia and that Cambodia and Brazil continue to demarcate and title Indigenous lands;⁴⁰
- that Chad and the Democratic Republic of Congo adopt specific measures to protect the ancestral lands of their Indigenous peoples,⁴¹ including from the adverse effects of natural resource exploitation and forestry concessions; and
- Australia, Cambodia, Madagascar, Chad, and the Democratic Republic of Congo consider ratifying the ILO Convention 169.⁴²

B. Committee on the Elimination of Discrimination Against Women (CEDAW)

The CEDAW Committee supported Indigenous peoples' land rights, expressing concern about Indigenous women's access to land in Guatemala, given they can be displaced as a result of "new economic developments".⁴³

C. Committee on the Elimination of Racial Discrimination (CERD Committee)

The CERD Committee urged states to respect Indigenous peoples' rights to their lands, territories and resources and to ratify and implement ILO Convention 169. For example, in 2009, it:

37 CESCR Australia, above n 35, at [15].

38 Ibid, at [32].

39 Ibid, at [33].

40 United Nations Committee on Economic, Social and Cultural Rights "Concluding observations of the Committee on Economic, Social and Cultural Rights: CAMBODIA" UN Doc E/C.12/KHM/CO/1 (2009) at [16] and [30] ["CESCR Cambodia"] and United Nations Committee Economic, Social and Cultural Rights "Concluding observations of the Committee on Economic, Social and Cultural Rights: BRAZIL" UN Doc E/C.12/BRA /CO/2 (2009) at [9] ["CESCR Brazil"].

41 United Nations Committee Economic, Social and Cultural Rights "Concluding observations of the Committee on Economic, Social and Cultural Rights: CHAD" UN Doc E/C.12/TCD /CO/3 (2009) at [13], [35] and [38] [CESCR Chad] and United Nations Committee Economic, Social and Cultural Rights "Concluding observations of the Committee on Economic, Social and Cultural Rights: CONGO" UN Doc E/C.12/COD /CO/4 (2009) at [14] and [36] ["CESCR Congo"].

42 CESCR Australia, above n 35, at [15]; CESCR Cambodia, above n 40, at [16]; United Nations Committee Economic, Social and Cultural Rights "Concluding observations of the Committee on Economic, Social and Cultural Rights: MADAGASCAR" UN Doc E/C.12/ MGD/CO/2 (2009) at [36]; CESCR Chad, above n 41, at [13]; CESCR Congo, above n 41, at [14].

43 United Nations Committee on the Elimination of Discrimination Against Women "Concluding observations of the Committee on the Elimination of Discrimination Against Women: GUATEMALA" UN Doc CEDAW/C/GUA /CO/7 (2009) at [33].

- recommended that the Republic of Congo take urgent measures to protect the land rights of its Indigenous peoples, especially of the Pygmies,⁴⁴ and expressed concern at the low representation of Indigenous peoples in political life;⁴⁵
- questioned Finland's restrictive definition of who may be considered 'Sami', recommending it give more weight to self-identification; work with Sami to find an adequate settlement to land disputes; and adhere to ILO Convention 169;⁴⁶
- recommended Colombia implement legislation recognising Indigenous peoples' rights to prior consultation in accordance with ILO Convention 169 and ensure that Indigenous peoples' collective land rights are recognised;⁴⁷
- encouraged Pakistan to ratify ILO Convention 169;⁴⁸
- expressed concern about the lack of a specific legislative framework to guarantee the collective land rights of Indigenous peoples in Suriname, and the granting of mining licenses without prior consultation with Indigenous peoples;⁴⁹ and
- urged Chile, in consultation with Indigenous peoples, to speed up the process of constitutional recognition of their rights and the restitution of their ancestral lands;⁵⁰ recommended that it obtain Indigenous peoples' consent prior to implementing natural-resource-extraction projects in accordance with international standards; and redouble efforts to ensure Indigenous peoples', especially women's, full participation in public affairs.⁵¹

Under its early warning and urgent action procedure the CERD Committee expressed concern:

44 United Nations Committee on the Elimination of Racial Discrimination "Concluding observations of the Committee on the Elimination of Racial Discrimination: CONGO" UN Doc CERD/C/COG/CO/9 (2009) at [14].

45 Ibid, at [16] and [17].

46 United Nations Committee on the Elimination of Racial Discrimination "Concluding observations of the Committee on the Elimination of Racial Discrimination: FINLAND" UN Doc CERD/C/FIN/CO/19 (2009) at [13] and [14].

47 United Nations Committee on the Elimination of Racial Discrimination "Concluding observations of the Committee on the Elimination of Racial Discrimination: COLOMBIA" UN Doc CERD/C/COL/CO/14 (2009) at [19] and [20].

48 United Nations Committee on the Elimination of Racial Discrimination "Concluding observations of the Committee on the Elimination of Racial Discrimination: PAKISTAN" UN Doc CERD/C/PAK/CO/20 (2009) at [25].

49 United Nations Committee on the Elimination of Racial Discrimination "Concluding observations of the Committee on the Elimination of Racial Discrimination: SURINAME" UN Doc CERD/C/SUR/CO/12 (2009) at [12], [14] and [18].

50 United Nations Committee on the Elimination of Racial Discrimination "Concluding observations of the Committee on the Elimination of Racial Discrimination: CHILE" UN Doc CERD/C/CHL/CO/15-18 (2009) at [16] and [22].

51 Ibid, at [15], [20] and [22].

- at the suspension of Australia's Racial Discrimination Act (Cth) as part of its Northern Territory Emergency Response and encouraged Australia to give due consideration to the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people's finding that the Response is incompatible with CERD;⁵²
- with Brazil's failure to implement a Brazilian Federal Supreme Court decision allowing the Government to remove trespassers on Indigenous lands in Raposa;⁵³
- at the impact of several dam construction projects and the application of the Armed Forces (Special Powers) Act of 1958 on Indigenous communities in Northeast India;⁵⁴
- about the recognition and protection of Indigenous peoples' rights to their lands, territories and resources in Canada, Indonesia, Peru and Tanzania;⁵⁵
- about allegations of the deployment of military operations against the Hmong people of Laos and actions depriving them of access to traditional sources of food and livelihoods;⁵⁶ and
- at reports of "the inadequate participation of indigenous peoples' representatives in the ongoing constitution-making process in Nepal."⁵⁷

52 United Nations Committee on the Elimination of Racial Discrimination "Letters: AUSTRALIA" (2009).

53 Letter from the United Nations Committee on the Elimination of Racial Discrimination to the Permanent Mission of Brazil regarding the Indigenous Land of Raposa Serra do Sol (28 September 2009).

54 Letters from the United Nations Committee on the Elimination of Racial Discrimination to the Permanent Mission of India regarding Northeast India and the Armed Forces (Special Powers) Act 1958 (13 March 2009 and 28 September 2009).

55 Letter from the United Nations Committee on the Elimination of Racial Discrimination to the Permanent Mission of Canada regarding the development and privatisation of indigenous land and traditional territories in British Columbia (13 March 2009); Letters from the United Nations Committee on the Elimination of Racial Discrimination to the Permanent Mission of Indonesia regarding the property rights of indigenous peoples' over traditional lands (13 March 2009) and regarding a request for further information (28 September 2009); Letter from the United Nations Committee on the Elimination of Racial Discrimination to the Permanent Mission of Peru regarding the Ancomarca community of Tacna province (13 March 2009); Letter from the United Nations Committee on the Elimination of Racial Discrimination to the Permanent Mission of the United Republic of Tanzania regarding expropriation of ancestral territories of certain ethnic groups and their forced displacement and resettlement (13 March 2009).

56 Letter from the United Nations Committee on the Elimination of Racial Discrimination to the Permanent Mission of the Lao People's Democratic Republic regarding the use of military force against the Hmong people (13 March 2009).

57 Letters from the United Nations Committee on the Elimination of Racial Discrimination to the Permanent Mission of the Federal Democratic Republic of Nepal regarding the preparation of a new Constitution (13 March 2009) and regarding the inadequate participation of indigenous people in the preparation of a new Constitution (28 September 2009).

D. Committee on the Rights of the Child

In 2009 the CRC adopted General Comment No. 11 (2009) on Indigenous children and their rights under the Convention on the Rights of the Child.⁵⁸ The General Comment:

- identified specific challenges that impede Indigenous children from the full enjoyment of their rights, including the obscuring of Indigenous children's best interests by other issues of broad concern to Indigenous peoples, such as land rights and political representation;⁵⁹
- highlighted special measures states should undertake to implement Indigenous children's rights, including the provision of "culturally appropriate services in areas of health, nutrition, education, recreation and sports, social services, housing, sanitation and juvenile justice;"⁶⁰ and
- highlighted positive approaches to the practical implementation of rights for Indigenous children, including the implementation of traditional restorative justice systems for juvenile justice.⁶¹

The CRC also commented on the land rights of Indigenous children in its concluding observations on state reports. For example, in 2009 it:

- acknowledged Bolivia's enactment into law of the Indigenous Peoples' Declaration but expressed concern "at the illegal appropriation of indigenous lands by farm operators;"⁶² and
- noted with concern the acute effect on Indigenous children of the deprivation of Indigenous peoples from their ancestral lands in the Philippines under its 1995 Mining Act.⁶³

E. Human Rights Committee

Similarly, in 2009 the Human Rights Committee made recommendations to encourage states to respect an Indigenous peoples' right to be consulted on matters affecting them and their rights to their lands, territories and resources. For example, it:

58 United Nations Committee on the Rights of the Child "General Comment No.11 (2009): Indigenous Children and their Rights under the Convention" UN Doc CRC/C/GC/11 (2009).

59 Ibid, at [13] and [30].

60 Ibid, at [13] and [25].

61 Ibid, at [13] and [75].

62 United Nations Committee on the Rights of the Child "Concluding Observations of the Committee on the Rights of the Child: BOLIVIA" UN Doc CRC/C/BOL/CO/4 (2009) at [3] and [85].

63 United Nations Committee on the Rights of the Child "Concluding Observations of the Committee on the Rights of the Child: PHILIPPINES" UN Doc CRC/C/PHL/CO/3-4 (2009) at [21].

- recommended Australia increase its efforts to: consult Indigenous peoples and establish a national Indigenous representative body, provide reparation to the victims of the Stolen Generations, and continue its efforts to improve the operation of the native title system;⁶⁴
- recommended that Sweden ensure the fair and expeditious resolution of land and resource claims by Sami, in consultation with Sami communities;⁶⁵ and
- expressed concern at the lack of recognition of minorities and Indigenous peoples in Rwanda and the United Republic of Tanzania and recommended that the United Republic of Tanzania consult Indigenous communities “before establishing game reserves, granting licences for hunting, or other projects on “ancestral” or disputed lands”.⁶⁶

F. Human Rights Council Universal Periodic Review

As noted above, the HRC encourages the protection and promotion of Indigenous peoples’ rights under its UPR process, including through recommendations that states implement the Indigenous Peoples’ Declaration. The HRC’s promotion of Indigenous peoples’ rights is particularly noteworthy given that the HRC is made up of states, in contrast to the UN treaty monitoring bodies, which are comprised of independent experts. For example, in 2009:

- Canada was asked to: endorse the Indigenous Peoples’ Declaration and to consider ratifying ILO Convention 169; to redouble efforts to settle territorial claims by Indigenous peoples; and to continue to tackle discrimination and the root causes of domestic violence against Aboriginal women;⁶⁷
- Chile was asked to take all necessary steps to complete the process of implementation of ILO Convention 169 and the realisation of the principles of the Indigenous Peoples’ Declaration, in particular to ensure Indigenous peoples’ improved political participation and the transfer of demarcated and titled land;⁶⁸

64 United Nations Human Rights Committee “Concluding Observations of the Human Rights Committee: AUSTRALIA” UN Doc CCPR/C/AUS/CO/5 (2009) at [13] and [15]-[16].

65 United Nations Human Rights Committee “Concluding Observations of the Human Rights Committee: SWEDEN” UN Doc CCPR/C/SWE/CO/6 (2009) at [20] and [21].

66 United Nations Human Rights Committee “Concluding Observations of the Human Rights Committee: RWANDA” UN Doc CCPR/C/RWA/CO/3 (2009) at [22] and United Nations Human Rights Committee “Concluding Observations of the Human Rights Committee: UNITED REPUBLIC OF TANZANIA” UN Doc CCPR/C/TZA/CO/4 (2009) at [26].

67 United Nations Human Rights Council “Report of the Working Group on the Universal Periodic Review: CANADA” UN Doc A/HRC/11/17 (2009) at [86].

68 United Nations Human Rights Council “Report of the Working Group on the Universal Periodic Review: CHILE” UN Doc A/HRC/12/10 (2009) at [96].

- Cambodia was asked to improve awareness of Indigenous peoples' rights to better protect human rights defenders, including Indigenous leaders, and to prioritise work to end forced land evictions;⁶⁹
- Costa Rica was asked to debate Indigenous political participation as a democratising principle during its legislative review process;⁷⁰
- Malaysia was asked to continue efforts to improve the status and quality of life of Indigenous peoples, in particular Indigenous children, including through access to education, healthcare and judicial assistance;⁷¹
- Mexico was asked to adopt legislation conforming with international standards on the rights of Indigenous peoples, to address disparities in Indigenous peoples' (particularly women and children's) enjoyment of social, economic and cultural rights and to ensure that Indigenous peoples and other marginalised communities affected by planned economic or development projects are consulted in accordance with ILO Convention 169;⁷²
- Norway was asked to effectively implement the Indigenous Peoples' Declaration;⁷³ and
- Viet Nam was asked to consider ratifying ILO Convention 169.⁷⁴

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69 United Nations Human Rights Council "Report of the Working Group on the Universal Periodic Review: CAMBODIA" UN Doc A/HRC/13/4 (2010) at [82].

70 United Nations Human Rights Council "Report of the Working Group on the Universal Periodic Review: COSTA RICA" UN Doc A/HRC/13/15 (2010) at [89].

71 United Nations Human Rights Council "Report of the Working Group on the Universal Periodic Review: MALAYSIA" UN Doc A/HRC/11/30 (2009) at [104].

72 United Nations Human Rights Council "Report of the Working Group on the Universal Periodic Review: MEXICO" UN Doc A/HRC/11/27 (2009) at [93].

73 United Nations Human Rights Council "Report of the Working Group on the Universal Periodic Review: NORWAY" UN Doc A/HRC/13/5 (2010) at [105](36).

74 United Nations Human Rights Council "Report of the Working Group on the Universal Periodic Review: VIET NAM" UN Doc A/HRC/12/11 (2009) at [100](1).

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