

INTERNSHIP AT THE CENTER FOR PUBLIC POLICY AND HUMAN RIGHTS-EQUITY PERU

FINAL REPORT

On 26 November 2010 I completed my internship at EQUITY Peru. On 4 December 2010, I returned to New Zealand to take up employment with a Wellington-based law firm, Pacific Law. The firm specialises in, amongst other areas, acting for Māori (the indigenous people of New Zealand).

I summarise below the work that I did at EQUITY Peru since providing my mid-term report on 15 October 2010.

Evaluation of Peru's National Human Rights Plan

As I stated in my mid-term report, one of EQUITY Peru's current projects is assisting in the evaluation of Peru's first National Human Rights Plan, and in particular the extent to which the government has implemented the Plan. While at EQUITY Peru, and as a member of a team comprised of researchers from various civil society organisations, I principally worked on assessing the government's compliance with the areas of the Plan concerned with implementing the recommendations of Peru's Truth and Reconciliation Commission (TRC). The TRC was established soon after the 20 year internal armed conflict in Peru came to an end.

During late October and November, I revised reports of government agencies, including those of the Peruvian Ombudsman, regarding the implementation of the TRC's recommendations. I also interviewed members of civil society organisations which carry out work related to particular recommendations (namely the Peruvian Forensic Anthropology Team); and which advocate for the full implementation by the government of all the recommendations (namely the National Coordinator of Human Rights NGOs). My conclusions were that while some progress had been made, the government had not carried out the majority of the obligations set out in the Plan, and a considerable number of the TRC's recommendations remain unfulfilled. I set out my conclusions in a table, and they were combined with the conclusions of four other researchers who had worked on evaluating the government's compliance with other areas of the Plan.

On 23 and 24 November 2010, I attended a conference that EQUITY Peru and other NGOs organised to get feedback on our evaluation of the Plan and to consult on what action should be taken in relation to the Plan, which is about to expire. Approximately 120 people attended the conference. The participants were mainly representatives of civil society organisations from various regions of the country and government officials. The Dutch, Spanish, and Belgian embassies provided funding for the conference, and various observers from those embassies also attended.

On the first day of conference, one of the researchers who had worked on the evaluation of the Plan and I co-chaired a 3 hour group workshop regarding the government's implementation of the TRC's recommendations. We also discussed the government's compliance with international treaty reporting requirements, and the judgments and recommendations of supranational human rights bodies (such as the

Inter-American Commission on Human Rights and the Inter-American Court of Human Rights). The discussion during the workshop was animated and informed, and as well as confirming many of our conclusions, the participants identified some gaps in our evaluation and provided additional information. The participants also considered that the best course of action going forward would be to extend the Plan for a one year period.

On the second day of the conference, I assisted in providing a summary of the workshop's discussion to all the conference's participants. The chairs of other workshops that had been conducted on the first day also provided summaries. The consensus was that the government had not met the majority of its obligations as set out in the Plan, and that the Plan should be extended.

Following our presentation, the Executive Secretary of the National Human Rights Council apologised for the government's failure to comply with the Plan and expressed the Council's wish to collaborate more closely with civil society on the Plan and other endeavours aimed at protecting and promoting human rights. He also advised that the Council agreed that the Plan should be extended for a year, and that it would be making a recommendation to this effect to the Minister of Justice.

Overall, the participants and the organisers of the conference were of the view that it had been a considerable success, particularly because of the public commitment that the Executive Secretary made regarding extending the Plan.

Following the conference, I compiled a relatively detailed written report of the workshop I co-chaired and provided some additional observations of my own regarding the discussion during the workshop. I provided my report to the President of EQUITY Peru, Javier Mujica, together with two additional reports that a representative of the Peruvian Ombudsman had sent me to supplement the information already included in my evaluation. I understand that my report will be incorporated into a revised and more detailed evaluation of the Plan that EQUITY Peru intends to carry out over the following months in conjunction with its partners.

Advisory opinion from the Inter-American Court

As well as working on the evaluation of the Plan, I have continued to work on a potential request to the Inter-American Court of Human Rights for an advisory opinion regarding the rights of indigenous people under the American Convention on Human Rights. As I stated in my mid-term report, the rights of Peruvian indigenous peoples in their ancestral lands and in the natural resources of those lands are being increasingly violated or threatened by mining and other resource extraction activities. EQUITY Peru considered that one way of providing an additional level of protection for these peoples, and to highlight their precarious situation, could be to seek an advisory opinion from the Court regarding their rights, particularly in the context of concessions for extractive activities that may affect their use or enjoyment of their ancestral lands and resources.

As set out in my mid-term report, I drafted a summary of the Inter-American Court's jurisprudence on the rights of indigenous peoples with the aim of identifying the gaps in this jurisprudence and for the purpose of assessing the desirability or otherwise of requesting an opinion from the Court. I discussed this summary with Mr. Mujica and with Mr. García Hierro, a leading indigenous rights practitioner in Peru. We noted that the Court has found that State parties to the American Convention must not grant

concessions which may affect the property rights of indigenous peoples in their lands and resources without meeting a series of guarantees, such as carrying out good faith consultation with potentially affected groups before granting a concession. However, the Court has also found that if a State party issues a concession in breach of such guarantees, its obligation is only to revise the concession, for the purpose of considering whether the concession's terms need to be modified so that the rights of indigenous people are not (further) violated. The Court does not expressly state whether or not the State party must require the concessionaire to halt its activities under the concession during the period of the revision. Neither does it seem to consider that a concession granted in breach of the Inter-American Convention must necessarily be void (instead apparently leaving the validity or otherwise of the concession as a matter for the state to determine).

Mr. Mujica, Mr. García Hierro and I came to the opinion that the Court's jurisprudence does not currently go far enough. In our view, the Court should determine that a concession granted in breach of the American Convention is void. Further, it should also find that a State party which has failed to respect the rights of indigenous groups in issuing a concession must, amongst other things, require the concessionaire to stop all activities under the concession immediately (as those activities have not been legally authorised), re-tender the concession, and carry out any process for granting any new concession in accordance with the Court's jurisprudence regarding the rights of indigenous peoples. The State should also be obliged to restore the land or resources affected by the concession to their previous state and otherwise to compensate the affected indigenous groups for any loss. Without such sanctions, there are insufficient incentives for States and potential concessionaires to respect the rights of indigenous people in their land and resources.

Accordingly, we decided that it would be worthwhile to request an advisory opinion from the Inter-American Court, asking that it review and clarify its jurisprudence along the lines set out above. Following this decision, I authored a draft version of the request, and I understand that EQUITY Peru will soon circulate my draft among a number of experts and request their feedback.

Once agreement has been reached on a final version of the request, Mr. Mujica intends to contact representatives of the Bolivian, Nicaraguan and Uruguayan governments to see whether any of those governments would be willing to file it with the Court (i.e. essentially to sponsor the request). The reason for this is that under the American Convention, only States parties may seek an advisory opinion from the Court. Individuals and organisations have no standing to make such a request, and can only reach the Court through the individual petitions procedure. The latter is a long process, as any petition must first be filed with and determined by the Inter-American Commission on Human Rights before it may be referred to the Court, and a petitioner cannot enlist the Commission's assistance until he or she has first exhausted all domestic remedies. Accordingly, EQUITY Peru considers that, at least at this stage, seeking an advisory opinion from the Court would be a potentially more beneficial course of action (e.g. in terms of expediency) than, for example, filing a petition with the Commission on behalf of an individual tribe or tribes.

If the request were lodged and resolved by the Court on the basis argued above, the implications would be very significant. This is because it seems that many States parties to the Convention, and in particular Peru, have granted large numbers of resource extraction concessions according to procedures that do not meet the guarantees for indigenous people set out in the Court's jurisprudence. On our analysis, all of

these concessions would be invalid and the State parties who issued them would be liable for damages not only to the indigenous peoples affected, but also potentially to the concessionaires. However, the potentially far-reaching consequences of the request may mean that it is difficult to find any State party willing to sponsor it.

EQUITY Peru has invited me to continue working on this project following my return to New Zealand. I have accepted the invitation, as I am interested in maintaining my connection with this line of work. This is particularly because the work is relevant to similar issues that Māori face in New Zealand, and with which I expect to engage while working at Pacific Law in Wellington.

Recovery of judgment debt owing by the Peruvian state

In my mid-term report I advised that I had been researching ways to recover a debt that the Peruvian state owes as a result of a judgment of the Inter-American Court, *Acevedo Buendía y otros* (“*Cesantes y Jubilados de la Contraloría*”) vs. *Perú*, and judgments of its own Constitutional Court. The judgments concern illegal reductions that the state made to the pensions of 273 pensioners over a 10 year period. EQUITY Peru represents these pensioners, and because the state refuses to pay its debt (which currently stands at over US\$92 million), EQUITY Peru is considering whether it could be possible to seek recovery through the United States courts against the state.

Since filing my mid-term report, I have drafted a letter to a United States firm on behalf of EQUITY Peru. In my letter, I summarised the various judgments to date and the reasons why EQUITY Peru is interested in seeking relief in the United States courts. I also requested a teleconference to discuss whether the firm would be willing to act for EQUITY Peru’s clients. The firm’s human rights and employee benefits teams are currently considering the request, and EQUITY Peru expects to hear back from them shortly.

If EQUITY Peru does decide to bring or threaten proceedings in the United States courts, and the firm acting on the proceedings does not have lawyers who speak Spanish, I may continue to work on the case as an intermediary between EQUITY Peru and the firm.

Additional information

I trust that the above adequately summarises the work I have carried out at EQUITY Peru since sending my mid-term report. However, please advise me if you require any additional information.

The IHRP’s support

I would like to express my considerable gratitude to the International Human Rights Program for providing me with the funding to do this internship. I learned a great deal during my time at EQUITY Peru and was able to make a meaningful contribution to its work. In addition, and importantly, the internship allowed me to renew and strengthen my links with Mr. Mujica and other human rights defenders in Peru, and to establish a basis for further collaboration in the future. Without the IHRP’s support, which I greatly appreciated, none of this would have been possible.

Please advise me if I can assist in any way in the future with the IHRP’s work. I would be very happy to do so.

Joss Opie
Wellington, New Zealand
11 December 2010