FORUM FOR
DEVELOPMENT COOPERATION
WITH INDIGENOUS PEOPLES

Forum conference 2010

Indigenous Participation in Policy-making:
Ideals, Realities and Possibilities

Report

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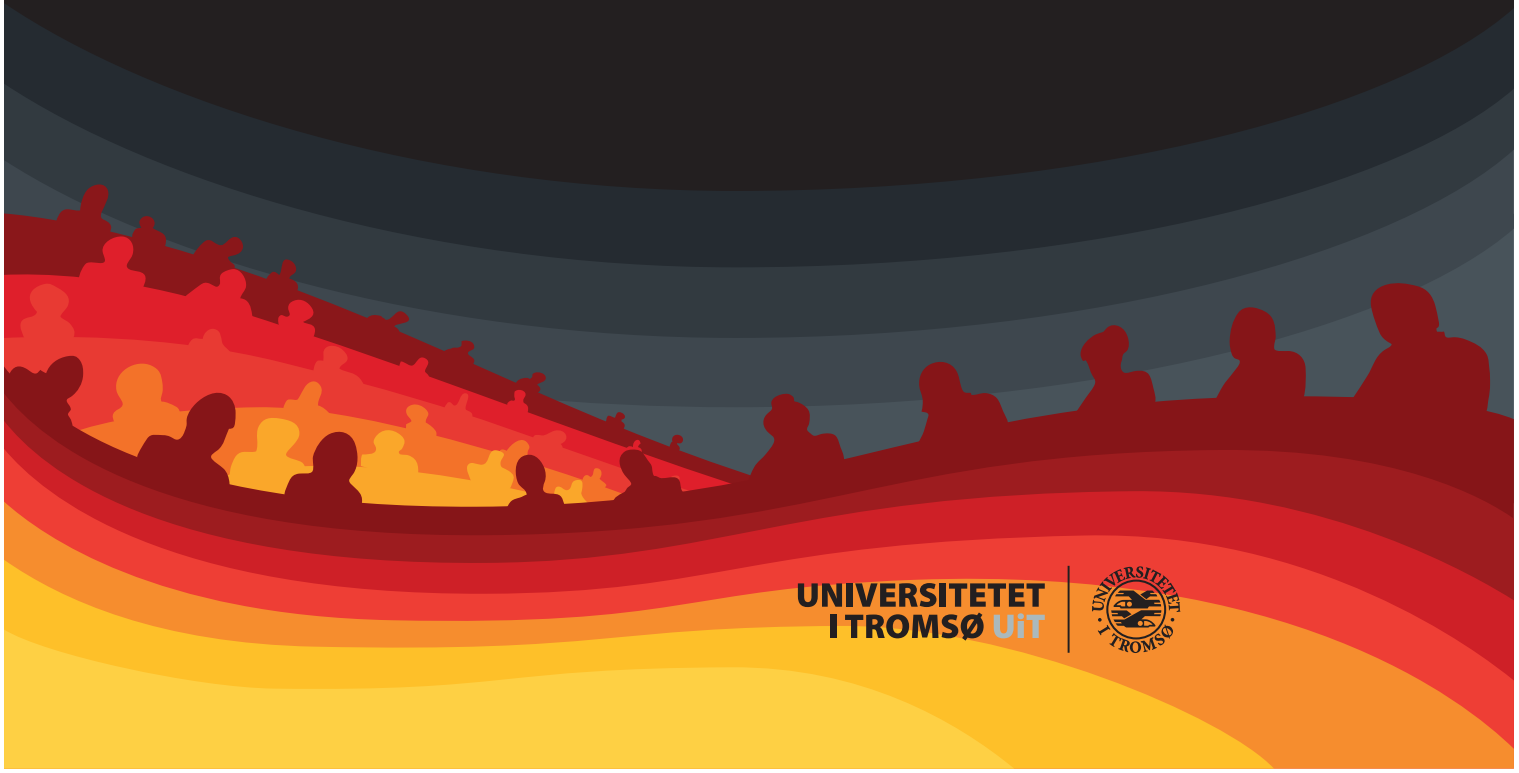

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Contents

Indigenous Participation in Policy-making: Ideals, Realities and Possibilities

Preface

This is the report for the 11th annual Forum for Development Cooperation with Indigenous Peoples, which commenced the 24th-26th of October 2010. The Centre for Sámi Studies hosted the conference at the University of Tromsø, Norway. This year's conference topic addressed the struggles and achievements of Indigenous peoples in policy making, and the implementation of these policies in a number of countries and political climates. Speakers for the 2010 conference came from the Philippines, Guatemala, Nepal, and Kenya and include academics, and representatives of Indigenous organizations and NGO's.

The Centre for Sámi Studies is the coordinating institution of the Forum for Development Cooperation with Indigenous Peoples. It was established in the year 2000 to provide a meeting place for academics, representatives of Indigenous organizations, NGO's, students and others interested in Indigenous issues. The Forum receives financial support from NORAD (Norwegian Agency for Development Cooperation).

The Forum board consists of the following: Tone Bleie (Chair) Bjørg Evjen, Georges Midré, and Jennifer Hays from the University of Tromsø; Magne Ove Varsi, Gáldu (Resource Centre for the Rights of Indigenous Peoples); Geir Tommy Pedersen, Saami Council; Siri Damman Rainforest Foundation; Øyvind Eggen, NUPI (Norwegian Institute of International Affairs) and Espen Wæhle, IWGIA (International Work Group for Indigenous Affairs). Deputy members of the board include Sidsel Saugestad, Ingrid Hovda Lien and Håkon Fottland, all of the University of Tromsø. Terje Lilleeng, of the Centre for Sámi Studies, is the administrative coordinator.

This report includes both manuscripts and summaries of the conference proceedings. Forum conference reports, as well as news and updates about Indigenous issues and upcoming events can be found on the website:
http://www.sami.uit.no/forum/indexen.html

Shanley Swanson
Centre for Sámi Studies

Tone Bleie
Forum Advisory Board Chair

Opening

Rector/President of the University of Tromsø: Jarle Aarbakke

Welcome to the Indigenous People's Forum Conference 2010. This is the eleventh forum conference and the subject of this conference is Indigenous Participation in Policy Making: Ideals, Realities and Possibilities. From the very start I will say this is a very important subject, and I am confident that this forum will bring its discussion and its political and scientific merits a good bit further.

The University of Tromsø is proud to be a university that hosts many programs that are of relevance and importance to indigenous peoples around the world, and of all our international programs, above all is our Master program in Indigenous Studies in conjunction with the Master program in Peace and Conflict Transformation. These programs recruit students from all over the world, and contribute to the fact that this university is, by percentage, the most international university of Norway. Around ten percent of our students come from abroad, and around twenty percent of our professors and associate professors come from abroad. We want that number to increase, and we want this university, even more so than today, to take part in international issues. We feel the most important way of doing so is by facilitating student exchange and programs that attract international students.

I am now in a committee looking into the development of the High North on behalf of the Norwegian government and on behalf of the Norwegian Ministry of Foreign Affairs. Over the last five years this has been an important and interesting task. We are looking ways to develop local, regional, international and global knowledge, in order to enhance the uses of human and natural resources in this part of the world, namely the High North. For those of you that are not familiar with the term High North, it is not synonymous with the Arctic. It's a political term rather than a geographical term, and it denotes the fact that there are many issues, especially regarding climate and energy, in the High North for the circumpolar nations of Canada, USA, Russia, Finland, Norway and Sweden, that can only be addressed in an international collaboration. In this context, you will suddenly and obviously realize that indigenous issues are of greatest importance, because this is, by tradition, the land of indigenous peoples. So whenever there is a discussion about resources and the use of resources in the High North there is also a discussion of development that immediately interests those of us that are devoted to looking into indigenous issues.

Why do I mention this, in an audience where many of you, for instance the Minister of Culture and Sports of Guatemala, Jeronimo Lancerio, are here representing southern regions? I had the privilege to visit Guatemala and Nicaragua in 2004, where I was shown the work and important programs developing for the Mayans. By comparison, this is a small university, nine thousand students, and I think that in 2004 San Carlos University had one hundred and seventeen thousand students. However, the issues, programs and political agenda, are in my opinion, very much the same. Details are different, but for instance the issue of indigenous participation in policy making, is quite similar in both places.

In September, the Prime Minister opened the Fram Center, or the High North Research Center on Climate and the Environment, here in the city of Tromsø. The University is highly involved with the five flagships in this program. I will just briefly mention them. One flagship is on climate effects on fjord and coast ecology. We have fjords and coasts all over the world, and research in this program will address the multiple ways climate change impacts the physical conditions of fjords and coasts, and how in turn habitats and food supply are affected. This is one of the flagships in which indigenous issues will be addressed to a very large extent. Another is the effects of climate change on terrestrial ecosystems and landscapes. Changes in northern terrestrial ecosystems will be highly relevant to society, in particular for agriculture, forestry, reindeer herding, and other nature-based industries. In addition, these changes will affect species concentration, tourism and recreation, and issues related to climate adaptation in the North. Included in this research will be work on the significance of climate change for Sami culture and settlements. Lastly, research with relationship to indigenous issues is that taking place on hazardous substances. Mankind is producing hazardous substances all over the world. They are concentrated in the North, and climate change reinforces the importance of filling the gaps in our understanding of the distribution of pollutants in the Arctic and their effects on the ecosystems and human health. The program also addresses the need for this knowledge to be incorporated in international agreements and processes.

There are many issues to be addressed when enhancing our knowledge on how to use both human and natural resources, in a smart and sustainable way. It takes many people to accomplish this and I therefore congratulate you on subject of this Forum Conference- Indigenous Participation in Policy-making: Ideals, Realities and Possibilities. At this time, the conference is now officially opened, and I wish you a good experience here in Tromsø.

Opening

President of Sami Parliament: Egil Olli

I thank you for the invitation. It is a very interesting agenda. I bring a few words on behalf of the Sami people and the Sami Parliament of Norway. When the Sami Parliament was established after the demonstrations against the damming of the Alta River Valley in the 1980's, it was acknowledged that there was a need to establish an institution to speak on behalf of all the Sami people in Norway. Furthermore, it was thought that this agency should promote Sami interests and be available for consultation with the Norwegian government on matters concerning the Sami people. The creation of the Sami Parliament was done by the adoption of a law concerning the Sami Parliament and other legal matters in June 1987. The law includes provisions on the Sami Parliament's authority which was initially formulated to be of an advisory character, or limited to cases where this was expressly established by law. The Sami Parliament was established in October 1989 after the first elections to the Sami Parliament were held in September of that year, and has thus been in existence for 21 years. I have been a member of the Sami Parliament since its establishment and now am its president.

The Sami Parliament and Sami organizations have actively participated for many years in international development with the goal of strengthening indigenous rights. Sami organizations participated in collaboration with other indigenous peoples in the work of the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, which was adopted in 1989. This Convention has been of great importance, both in Norway and other countries, especially when it comes to processes of indigenous rights to land and water. In Norway, it has also had great significance since 2005 in the development of the right to consultations with state governments on issues relating to legislation and measures affecting Sami interests. We have also participated very actively in conjunction with indigenous peoples from other parts of the world in the work of the UN Declaration of Indigenous Peoples adopted by the UN General Assembly in September 2007.

Our biggest difficulties have shown to be regarding our right to participation in the development of policies relating to indigenous peoples' own concerns. We believe, like indigenous peoples in other parts of the world, that the United Nations has, with an overwhelming majority-144 to 4 states, accepted a legal norm giving us the right to decide on matters that concern us. This rating is assumed to apply to all "people" including indigenous peoples during the course of history because of population movements and the establishment of national borders today to share their traditional territories or areas with other nations. King Harald's statements in his speech at the opening of the Sami Parliament in 1993 that "the Kingdom of Norway is based on the territory of the two peoples, Norwegians and Sami" must, in our context, be perceived as recognition of our demands for equality and the right to participate in the development of the policies that affect us.

Our relationship to large parts of this country since prehistoric times, our history, our myths, our language and our culture gives us, in accordance with internationally accepted legal norms, the right to decide on matters that concern us. Like other indigenous peoples, the

Sami have demanded that the majority society leave us here and leave us here in peace. We have been somewhat protected in Northwestern Europe by our remote settlements, far from major population and industrial center. During especially the past 100 years, we have experienced a growing interest for the resources that exist in our areas. This applies to fish in the sea, ores and minerals in our mountains, the energy that can be taken out of our lakes and rivers, - and most recently, the energy can be captured from the air we breathe.

Until recent years, we have had little or no influence on this development. The damming of the Kautokeino River and the subsequent establishment of the Sami Rights Commission has changed matters in regard to our interests, and to the Norwegian government's understanding of our inherent rights as indigenous peoples. This was particularly expressed on February 27, 1981 when the local government minister submitted a promise on the government's behalf that no more major intervention should occur before the Sami Rights Committee had submitted its report on Sami rights to land and water. This was further reinforced in 1995 after our first Sami Parliment President, Ole Henrik Magga, stopped the multinational mining company Rio Tinto Zinc's exploration for minerals on the tundra by declaring it illegal without the Sami Parliament's approval and urged the company to leave. The company's management then announced in a meeting with the Sami Parliament that it would respect the Sami Parliament's stance and await further clarification. This episode created a major restraint on the mining industry in Sami areas until the last year.

The Norwegian Parliament approved the New Minerals Act in 2009 after the government had declared further consultations purposeless and acted without the content of the Sami Parliament. The Sami Parliament demanded that the Sami interests should not be limited only in Finnmark and the acreage owned by the Finnmark Estate, but should apply to all traditional Sami agricultural and settlement areas in the country. Furthermore, they stated that local and Sami interests were favored with the regard to benefits or economic returns of operations even if the current resource belongs to the state, as stated in the ILO Convention 169, Article 15.2.

The Sami Parliament found the need to report the government's unwillingness to continue consultations and its lack of understanding of the ILO Convention to the ILO monitoring mechanism. After having reviewed the information throughly, including Norway's last report to the ILO issued in December 2008 and the Sami Parliament's report from August of the same year as well as the Sami Parliament's supplementary report, the ILO committee of experts concluded that the Sami Parliament's demands were justifiefed. The committee stated that the Sami's right to partial benefits or proceeds of mineral activities in traditional Sami areas south of Finnmark are not contingent on property rights of the ground. It was found that there is no particular model of how the dividend distribution shall take place and it is assumed that this should be determined on a case by case basis, taking into account specific interests indigenous people may have in the area. The Committee asked the Government to provide information about benefit sharing and how the Finnmark Act works in this regard.

In any event, the committee advices that these mechanisms that should secure that the Sami, as indigenous people, have a part of the income sharing of mineral activity, as provided in Article 15.2, on a regular basis should be looked into by the stat and bodies representing Sami interests. They also suggest this issue be regularly reviewed jointly by the state authorities and

bodies representing Sami interests. More generally, the Committee considers it important that the national minerals law be changed as quickly as possible to ensure the effective application of Articles 14 and 15 in traditional Sami areas south of Finnmark county, and urges the Government and the Sami Parliament to renew talks about this. It asks the Government to ensure that until such legislation is adopted, Sami rights in such areas will be secured by other appropriate means.

In the absence of relevant legislation to ensure Sami rights, the Sami Parliament even passed a supervisor of mineral activities in the Sami areas and in one case reached an agreement with a mining company that intends to start production of a large copper deposit in Finnmark. This Framework Agreement aims to establish processes that can ensure the Sami and local community interests in the exploitation of mineral deposit. Otherwise expect the Sami Parliament with an interest on the government's monitoring of the ILO's comments. So, the Sami Parliament is now waiting for the government to follow up with the ILO's recommendation. We have spent considerable time trying to get the Sami Parliament to be considered a partner in the Mineral Act. The government is now proposing to define mineral authority in Northern Norway as an important priority. They suggest to map the mineral resources in Nordland, Troms and Finnmark counties and to allocate 100 million Norwegian kroner over the next four years to this task. The Sami Parliament has often demanded to be part of the developing of the High North policy. I give this example of whether or not the Sami Parliament should be allowed to participate in the development of mineral law to paint a picture of how difficult it can be to gain influence in an important policy area. We ask that the government add instruments to facilitate such participation. A positive follow-up from the ILO committee of experts' comments will contribute to such adaptation.

My contribution to this conference will be incomplete if I did not mention any of the legislative changes enacted in recent years and that have increased the Sami Parliament's influence. For example, the new Planning and Building Act gives the Sami Parliament the right and obligation to participate in the planning and legal objections regarding plans affecting Sami culture and business. The problem is that the Sami Parliament has limited resources, which in general reduces the Sami Parliament's opportunities for active participation and follow-up.

Finally, I mention the limitation of the Sami Parliament's influence that comes from lack of knowledge in the public administration of indigenous peoples and of Sami rights. The UN Expert Mechanism on Indigenous Peoples' Rights with the support of UN Human Rights Council has directed an appeal to UN member countries asking to initiate work to increase knowledge on indigenous rights as they are expressed in the ILO Declaration on Indigenous Rights. I don't know if the Norwegian authorities have followed up on this suggestion, which I regret because a lack of knowledge also creates a lack of consciousness and negative stances which can limit influence from the Sami Parliament.

Thank you for your attention!

Opening

Chair of the Forum, Professor Tone Bleie, University of Tromsø

On behalf of The Forum for Development Cooperation with Indigenous Peoples I greet you all. A special welcome to our dignitaries and honourable speakers, both those of you who have had exhausting journies from distant lands in Asia, South America, Africa and elsewhere, and those of your who travelled here from less faraway places. A similar warm welcome to all other conference participants, from abroad and from Southern and Northern Norway. Some of you we welcome for the very first time, others amongst you we have been fortunate to have with us as our valued participants in earlier conferences.

The Forum Advisory Board is composed of the following institutional members; the University of Tromsø (UiT); Galdu the Resource Centre for the Rights of Indigenous Peoples; the Sami Council; the Rainforest Foundation; the Norwegian Institute for International Affairs (Nupi); and the International Working Groups for Indigenous Affairs (IWGIA). UiT hosts the Secretariat function with a Coordinator. The board members from our institution constitute the Forum's Working Committee. UiT and Galdu are the lead partners in planning this year's conference: "*Indigenous participation in policy-making: ideas, realities and possibilities*".

This is the 11th year the Forum hosts this international conference, a meeting venue for indigenous and other indigenous rights-based organizations, scholars on indigenous issues and the Norwegian authorities responsible for development cooperation. This conference always takes place in late October, a transitional Arctic season when the towering *Sálašoaivi* in Sami or Tromsdalstinden, in Norwegian, the Sami's sacred mountain, gets its white robe back, and the people of Tromsø retreat indoors. In our homes we collect around open crackling fireplaces and in public spaces and our conferencing and festival season starts in earnest.

The conference themes have over the years collected concerned indigenous and non-indigenous researchers and other experts, civil society leaders, bureaucrats, and aid practitioners around debates on a range of topics of high importance to the global indigenous movement, but also of importance to indigenous nations and indigenous communities. The very existence of this Forum is in itself an expression of a significant breakthrough in international law for indigenous rights and of course, heralds progress for humanity as such. The topics we have debated over the years have all in their own right addressed rights violations, claims, progress, and obstacles to making those rights living realities that end discrimination, inhuman practices and dispossession of indigenous peoples, and improve the lives, safety and respect for indigenous women and men, for young and old in different regions, and in the global south in particular.

Last year's conference addressed violent conflicts, and their pathways through ceasefires, peace accords- and beyond - when the guns have silenced. In addressing the background for the civil war in Guatemala, Ambassador Leon argued that among the main causes are closures of public and democratic spaces, institutional exclusion and state unwillingness to address the

structural causes which hinder full participation in public life. The fundamental failures to enable participation ran like a red thread through most of the conflicts we addressed last year. This year we focus on participation in policy making in general. First, we anchor indigenous participation in normative ways, as ideals, be that thorough international and national laws or in everyday concepts of morality and action. Keeping in mind these ideals, we intend to debate the enabling and constraining realities in different regions and in some selected countries. In keeping with the Forum's mandate, which stresses our role in making relevant use of Sami experiences, recent decades' developments of establishing forms of self-governance in Sapni is particularly highlighted in this conference. We may say the Norwegian Sami experience runs thorough this year's programme. We have already heard the President himself speak of these experiences.

The first session aims at setting the agenda by examining the principals of peoples' right to participation, how they relate to citizen rights and their interplay with state sovereignty, different models of democracy, including the right to self-determination and the right to free prior and in formed consent (FPIC). We are fortunate to have the Expert Mechanism on the Rights of Indigenous Peoples' with us, and we will be exposed to two vastly different cases, the Norwegian Sami parliament as a model and also we will be fortunate to hear a minister from the Guatemalan government share his experiences with his government.

In the second session, starting this afternoon and running until late tomorrow morning, we will be presented with very interesting cases from Kenya, Sápmi, the people of Mindoro Island and the Janajati nationalities of Nepal.

We will then end by a roundtable debate on the urgent priorities for the main stakeholders present in this conference: the civil society organizations, the academic institutions and also policy makers, as to how we can contribute to making a living reality out of the phrase "full participation". Following this is the separate Forum Update, a regular item in our conference programme, which will start tomorrow and be followed by the summing up.

Before I end, I would like to mention that this year we are doing a broader evaluation of the conference. As part of that evaluation we have developed a questionnaire and we urge all of our participants to take ten minutes of your valued time to respond to it.

I wish to conclude by again extending my warmest welcome to you all, both those of you that I have had a chance to greet and those of you I have yet to meet!

Subtheme 1: Introduction: setting the agenda

Indigenous Participation in Policy-making: Experiences from Guatemala.

Jeronimo Lancerio, Minister of Culture and Sports of Guatemala

Buenos Dias and good morning.

I would like to talk about the participation of indigenous peoples in the government and the direct participation of indigenous peoples in creating governmental policies. Recently, we as public officers had to assume responsibilities that sometimes went against the policies of the government. However, we believe that sometimes it is necessary to preserve who we are and where we come from, meaning that our political power can be decisive. I'd like to talk to you about Guatemala. It is a republic that started in 1821, when it became independent from Spain. We have the executive power, the legislative power and the judicial power. We have territories of some 108 thousand square kilometers, within which we have great biological and cultural diversity. For three centuries it has been a Spanish colony; conquest and colonization by Spain covered much of what today is Latin America. We had social, political and economic structures in place that excluded participation of the indigenous, and the republic was established with a mono-cultural, neo-colonial and racist system, which still affects our democracy in the 21st century. This began to change very slowly after 1945, as a result of the 1944 revolution, and with these changes came new laws and institutions. Currently, we identify ourselves as a multi-cultural, multi-lingual and multi-ethnic country, which is recognized in the republican constitution in Guatemala.

Guatemala is comprised of four peoples: the Maya, the Xinca, the Garifuna and the Mestizo. The Mayan people divide into 22 linguistic communities, of those Spanish is lingua franca, or the common language throughout the country. The people of African origin also speak Garifuna, about 70 thousand people in total. The Xinca people believe they are about 350,000 persons. More than 50% of the Guatemalan population considers itself descendents of indigenous populations.

Because we are here today at the University of Tromsø, I think it is important to tell you that Guatemala was not unaffected by the Cold War between the United States and the Soviet Union. We experienced a civil war that lasted for more than 36 years. As result, the counterrevolution of 1954 and 1960 started; an armed conflict that was more than 36 years long. Thousands of Guatemalans died. There were massacres against civilian populations, and the external and internal exile of thousands of people. A peace agreement, signed on the 29th of December in 1996, had its preliminary meetings in Oslo, Norway.

Finally, the peace process in Guatemala began. On the 30th of March 1990, a meeting between the National Reconciliation Commission and the General Command of the guerilla URNG, with the support of the people and government of Norway, began signing the first agreements. On the 27th of June 1994, in Oslo, we continued with the 2nd agreement, which had to do with the resettlement of displaced communities concerning Guatemalans who had

fled to other countries and also those who stayed in the country. After the 2nd agreement in 1994, many Guatemalans who had gone into exile because of political prosecution began returning to Guatemala. The government started to develop coordinated efforts to work with indigenous peoples rights. On the 23rd of June, 1994, there was a peace agreement regarding the historical clarification of human rights violations, which was called the Truth Commission. The Norwegian government and people participated in this effort, making it possible to sign the ceasefire agreement in 1996. This was prior to peace agreement. We then started a disarmament process of insurgent forces, facilitating the beginning of a peaceful co-existence.

The social movement of indigenous peoples started in 1996, and they have participated in developments claiming rights and concerning their opportunities for future development since that time. These changes started after the revolution of 1964 and a U.N. report about the armed conflict revealed racism on the part of the government. A large percentage of the victims of this conflict were indigenous. It was shown that an ideological war between the army and the guerilla movement was occurring during this time. Analysts agree that a real genocide took place in Guatemala. As peace agreements began between rebels and the government, the topic of indigenous peoples came up for the democratic state, as indigenous fighters and indigenous communities were the ones that were the most affected by the conflict. The United Nations reports on the armed conflict revealed the existence of racism in the state, since 83% of victims were natives of the country's rural areas. 17% of victims were non-indigenous.

Next, I would like to speak about the Framework Agreements. There were several different political, legal and institutional agreements created to further the development of indigenous peoples. A Framework law approved to establish instiutitionality was necessary to preserve democratic pluralism and respect for ancestral cultures. The legal structure of these peace agreements allowed the State to assume its commitments to create the institutions and necessary legislation to consolidate a democracy based on pluralism and respect for ancient cultures.

POLITICAL AND LEGAL INSTRUMENTS RELEVANT TO INDIGENOUS PEOPLES

- The Agreement on Identity and Rights of Indigenous Peoples
- National Language Act
- Law of the Academy of Mayan Languages
- The Intercultural Bilingual Education Program
- The ratification of ILO Convention 169
- The United Nations Declaration on the Rights of Indigenous peoples
- Guatemala's ratification of the Convention for the Safeguarding of Intangible Cultural Heritage and on the Strengthening and Promotion of the Diversity of Cultural Expressions

These instruments have focused on encouraging the participation of indigenous people in Guatemala, but we still do not have much will over the powers of the three branches of government. We do not have many systems for participation in Guatemala, but we do have

institutions that work in spite of the little money that each of these entities receive. They do exist, and they participate in a positive way. There is hope that soon these mechanisms will be built up, making it possible to conserve institutional instruments that work so hard on behalf of indigenous peoples.

Institutional Instruments: The Guatemalan Indigenous Development Fund, FODIGUA, was established in 1994 to promote socio-economic development with cultural relevance to indigenous communities. On average this fund has 2.5 million dollars per year cover the needs of more than 50% of the population. Obviously, this is not a lot of money. Mr. Guadalupe Zamora López is the head of this agency.

The Academy of Mayan Languages of Guatemala, ALMG, is an organization working for the survival and development of ancestral languages. The budget for this agency is 2.5 million dollars per year. We do not have the necessary equipment available at this time, but with international help we are fighting to realize this.

The Rural Affairs Secretary, or the Agrarian Committee, is the body responsible for the direction of actions required to fulfill commitments of the executive branch regarding agricultural issues contained in the Peace Accords, Government Policy, and the Constitution of the Republic. This is a very sensitive topic, as previously a few people have owned most of the land in Guatemala, but there is an institutional movement now to work with the Peace Agreements so that we can support government policies in redistributing lands to indigenous peoples. The secretariat is headed by Mr. Antonio Rodríguez.

The Presidential Commission against Discrimination and Racism CODISRA, is a specialized institution monitoring cases of discrimination and racism against indigenous people and working against the exclusion of indigenous peoples. Mr. James Bolvito is the head of this committee. DEMI (Organization for the Defense of Indigenous Women) is an organization created to support indigenous women, vulnerable to the violation of their civil rights. Cleotilde Cu Caal Licda Cleotilde Cu is the president of this committee.

The Ministry of Culture and Sports through the Directorate General for Cultural Development and Strengthening of Cultures Branch, and the Intangible Cultural Heritage Department, work on the issuance of ministerial agreements recognizing aspects of cultural rights of indigenous peoples. We have composed elders committees of the Maya, Xinca, and Garifunas, which give advice to the president so that we can influence some policies forgotten in practice, such as spiritual and cosmological issues. The Vice Ministry of Intercultural Bilingual Education is an entity promoting the transformation of curriculums to gain cultural relevance and to facilitate the use of native languages in indigenous communities. This committee is headed by Jorge Raymundo.

The Indigenous Ambassador, Sir Cirilo Pérez Oxlaj, constitutes a landmark in the international arena monitoring indigenous issues from the government's vision. He works internationally to strengthen the relationship between indigenous peoples and States.

The current government values cultural diversity as an asset of the Nation, to be promoted, protected and developed, and recognizes that ancient cultures contribute essentially to the construction of the national identity in Guatemala. Historically and presently, it is recognized that indigenous peoples are lagging far behind in development, due to exclusion and discrimination, so the current government's priority is to invest in more stocks to promote

their development. The president appreciates the Maya elders in the sense that he will work in favor of indigenous peoples, and we have had about three meetings in the last three years with the Maya, Garifuna and Xinca elders. The president listens to this advice and he recognizes what has been forgotten, which is ancestral knowledge. I will not talk about the culture, but it is important to understand that current problems in the world, such as global warming, have been mentioned forty or fifty years ago by indigenous peoples but governments did not pay attention. Today with the participation of the Maya elders, the Guatemalan government is participating differently in forums that have to do with global warming. We also participate in the Water Committee, because what indigenous peoples have suggested about the protection of waters: rivers, seas, lakes, is something that should have been done many years ago. It is not too late to draw from traditional knowledge and to influence political policies regarding the health of our planet. The current government has been characterized by social politics.

It is recognized that indigenous peoples have suffered setbacks in their development and the government wants to invest in the poorest of the population. We have a political development policy and we have influenced this policy to start where we have extreme poverty- normally the communities where indigenous populations live. We have a presidential policy of great importance: GOVERNMENT ON CONDITIONAL CASH TRANSFERS and I would like to explain this program. The government gives about fifty dollars a month to mothers in poverty, and the only condition is that they take their children to school and to health centers. And why is that so important? It is because education and health are two topics that have been forgotten by all previous governments for indigenous peoples. Now the present government is committed to health, but also to education, because we believe that education is the road to transformation.

Three-quarters (77.8%) of beneficiary households are indigenous. One fifth (21.9%) of families receiving aid are non-indigenous, and the rest are minorities: Xinca and Garifuna. The Conditional Cash Transfer program meets two basic objectives: to transfer income to households in poverty and to promote investment in human capital, thereby increasing the capacity of generating income in the future and breaking the cycle of intergenerational transmission of poverty.

In a population of 13 million, 1,693,399 have directly benefited from this funding. During the Year 2010, over $78 million dollars has been transferred to needy families, comprised of the following groups:

- Q'EQCHI (25.28%)
- K'ICHE' (18.16%)
- MAM (12.95%)
- Q'ANJOBAL (3.26%)
- KAQCHIKEL (3.18%)
- CH'ORTI' (2.94%)
- POCOMCHI' (2.76%)
- IXIL (2.05%)
- ACHI (2.03%)
- CHUJ (1.91%)
- TZ'UTJIL (1.23%)

Political Participation: Regarding the political participation of indigenous peoples, we have mechanisms at different levels that influence the decisions of the government and other institutions. Our political constitution and ordinary acts of law say that we as indigenous peoples can be elected to government and that we can vote. This apparently occurs without exclusion and racism, although traditionally there have been very few among the indigenous peoples that have been elected to office. At least in theory Guatemala has established itself in this respect as having a democratic process. Unfortunately, within political parties indigenous peoples have had little access to the leadership positions. Indigenous peoples within executive committees are almost non-existant. However, in 2007, Nobel Peace Prize winner, Rigoberta Menchu, participated in elections as a candidate for President, and she participated as the first woman presidential candidate. She received one hundred thousand votes. Although she was not elected, this was a great breakthrough for indigenous peoples. At least three or four Vice-Presidential candidates have come from indigenous groups. These individuals have paved the way for indigenous participation in national politics.

Rigoberta Menchu, Nobel Peace Prize winner and 2007 Presidential Candidate

Given this situation, the indigenous population has focused more on immediate local politics in municipalities. We have 150 indigenous mayors, of 333 municipalities in Guatemala. This is because these municipalities have a majority population of indigenous peoples, so it is possible to influence local and civic committees and politics.

As for other branches of national government, within the executive branch there are two indigenous Ministers and Secretaries of Mayan descent, your server as Minister of Culture and Sports, Mr. Erick Coyoy as Minister of Economy and Mr. Antonio Rodriguez as Secretary of Agrarian Affairs. We have two indigenous deputy ministers as well, one in the Ministry of Culture and one in the Ministry of Education. Approximately 10% of governmental employees of Mayan origin, with the exception of the Ministry of Culture and Education, where figures are about 30%. These are still low numbers, if we consider that a little over 50% of the total population are members of indigenous groups. But we believe that we have opened the way to indigenous representation in government, and that political education is happening.

In regards to the Congress, of which there are 158 deputies, only 20 are Mayan and there are no Garifuna or Xinca. Historically, there has never been representation from either of these groups in the Congress of Guatemala. In the Judiciary Committee we have 15% who are indigenous among the judges, magistrates and minor officials, but there are no members of the Supreme Court who have an indigenous background. Traditionally, we have been excluded from the Supreme Court, because although we have had indigenous peoples who have made careers within the judiciary committee, they have never obtained sufficient support to become members of the Supreme Court.

In the commercial sector indigenous peoples excel in agriculture, microenterprises and informal economy. One area in which there is a real movement is in non-governmental organizations (NGOs) and in non-formal organizations, such as farmers' unions, where we find social development and recognition of cultural rights. In these areas indigenous peoples exercise political, economic and social power, instrumental in generating changes in Guatemala. International support is also assisting in consolidating the indigenous movement and furthering its influence in national government. Additionally, it is important to note that nowadays 15% of university students are indigenous, and it can be said that indigenous peoples are becoming academically prepared to address the needs of their people. 15% may seem like a low number, but that this movement will be consolidated bit by bit. In some

universities in the country there are specific programs and organizations supporting the rights of indigenous peoples. A significant number of indigenous university graduates are gaining recognition from society. It has not been easy, and many of the first indigenous thinkers sacrificed their lives, or were forced into exile, but they paved the way for the political and academic participation of future generations.

Little by little the indigenous Maya, Garifuna and Xinca are occupying their rightful place in Guatemalan society. However current levels of participation are still insufficient, and racism and discrimination continue. Studies of international organizations indicate 56% of the total population of Guatemala live in poverty and of this 22% are extremely poor, most of whom are indigenous people. Similar situations occur in Bolivia, Columbia and Venezuela, and it has been important for us to share our common experiences. Many of us believe that our cultural rights are the only rights we should claim. These rights are important for self-esteem and for our participation as citizens, but it is also important for indigenous peoples to focus on consolidating our economic rights, cultural rights and political rights. Because throughout history we see that those who hold the political and economic power are the ones who decide the destiny of a nation.

Many people try to deny the indigenous movement, but I think that the most important aspect of recent years is the fact that indigenous peoples are now learning political processes and participating in areas that have previously been closed to them. We now have positions as insiders, and we are capable of creating types of change that we never could have imagined as outsiders. As a previous public officer I would like to say that I am very proud of our work to influence the public policy of indigenous peoples within the government. We are still in the creation process, and we are still in the process of consultation of these policies, but we have a lot of hopes, a lot of dreams, and now we are drawing from our experience to know that if we have these public offices, we can propose and about radical government changes.

The most difficult part for me happened this year, when as a minister, I had to sign a government equity agreement for the continuation of a petroleum license for an area in the north of Guatemala. I signed, but I said that I was actually against it. We were criticized by many, but I feel satisfied in some way that I was able to pursue my ideals as a member of indigenous peoples. It is not that we are against exploiting natural resources, but my feeling was that they did not take into account the process of consultation.

I believe that political participation makes it possible in one way or another to obtain increased participation in Congress. Unfortunately, I must inform you that many of the proposals by indigenous peoples presented to Congress were not taken into consideration, showing that we need to promote indigenous awareness and educate Congressional members in regards to indigenous issues and agendas. We have had many bills and laws stopped in Congress, for instance the law concerning the recognition of sacred places. There is still a lot left to be done, and this will be a big challenge for us. We dream of building a Guatemala where there is not only one or two indigenous ministers but where there will be a majority of indigenous ministers. We believe that Congress and political parties should welcome real participation of indigenous peoples, so that we may inform the laws of the country.

The impact on economic decisions and policies in the country's development is still not significant for indigenous peoples although it is increasing. This has a lot to do with the

current government, the laws that have been issued, and governmental and civil organizations that have been created. There has been recognition and affirmation of Guatemala as a multicultural, multiethnic and multilingual state. We have an indigenous peoples' flag waving from all governmental institution buildings, and this reminds us of our cultural rights and reaffirms that we are a multiethnic nation. Previously, when the President entered a formal setting a military march was played. Now, an indigenous song is played. These are small steps forward, but it shows the progress that we are making every day. Today we seek peace, social justice, and equal opportunities without exclusion and racism. We are starting to feel pride in our cultural diversity and consider it an asset. We are building a new Guatemala, with full respect for human rights of all its citizens. Indigenous peoples are contributing their efforts, with wisdom and patience. A beautiful dawn is coming....

MUCHOS GRACIAS
SIBALAJ MALTIOX
THANK YOU VERY MUCH

The Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples: "*Indigenous People's Right to Participate in Decision-Making"*

John Bernhard Henriksen, The UN Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)

Dear Participants,
I would like to start my presentation by thanking the organizers of the Forum Conference for giving me to opportunity to address the issue of *"Indigenous Peoples' Participation in Decision-making"*.

I represent the UN Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). The Mechanism is a thematic advisory body of the Human Rights Council, on questions related to the rights of indigenous peoples. It is composed of five members, appointed by the Human Council, to serve in their personal and independent capacity. I had the great pleasure and honor of serving as the first Chairperson-Rapporteur of the Mechanism.[1]

The Mechanism is mandated to provide the Council with expert advice in the manner and form requested by its parent body. So far, the Council has requested the Mechanism to undertake two specific studies on indigenous peoples' rights:

- The first study which was undertaken at the request of the Council was a *"study on lessons learned and challenges to achieve the implementation of the right of Indigenous Peoples to education"*. This study was completed in 2009, including a comprehensive set of general recommendations concerning the right to education.[2] The Council responded favorably to the study, including strongly encouraging States to take it into account when elaborating national education plans and strategies.[3] I am drawing your attention to this study, as it is also relevant in the context of international development cooperation.

- The second study requested by the Council, is a *"study on indigenous peoples and the right to participate in decision-making"*. The EMRIP has recently completed the first part of the study, and submitted it to the Council.[4] The final report on the study will be submitted next year.

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1 Further information about EMRIP: http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/

2 Contained in UN Document A/HRC/12/33, 31 August 2009; http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-33.pdf

3 Contained in UN Document A/HRC/12/L.33, 28 September 2009; http://daccess-dds-ny.un.org/doc/RESOLUTION/LTD/G09/159/99/PDF/G0915999.pdf?OpenElement

4 Contained in UN Document A/HRC/15/35, 23 August 2010; http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf

If you are interested in having a closer look at these two studies, you will find them on the UN Human Rights Council's web-page.

* * *

The overall theme of the Forum Conference this year is *"Indigenous Participation in Policy-Making: Ideals, Realities and Possibilities"*. My presentation will largely focus on the international normative framework for indigenous peoples' participation in decision-making. In the context of the theme of the Forum Conference, such norms should be regarded as *"normative ideals"* – because they represent a broad international consensus on the scope and content of indigenous peoples' rights.

Unfortunately, as we all know, there is often a gap between such universal norms and the reality which indigenous peoples are faced with on the ground. This is often referred to as "the implementation gap" – between ideals and the reality. The implementation gap is often a consequence of the fact that many governments and national parliaments often do not possess the necessary political will to effectively implement their international obligations towards indigenous peoples.

The implementation gap is a problem not only in the context of indigenous peoples' rights, but also a challenge in the broader human rights context. From time to time, I find myself wondering about whether we are currently experiencing an almost unnoticeable shift in priorities at the international level- to the detriment of human rights. In my view, the ongoing negotiations on climate change are, to a certain degree, an example in this regard.

In the climate change negotiations, States demonstrate reluctance towards fully accepting human rights as an integral part of discussions about climate change, including times when adaptation and mitigation measures are introduced.

The relationship between climate change and human rights may not be obvious at first glance. However, there is no doubt that climate change has adverse impacts on human lives and living conditions in communities around the world. Many indigenous peoples and communities are indeed in the front line of climate change, and their lives and living conditions are severely affected by the changing climate. Indigenous peoples are not only faced with direct adverse impacts of climate change caused by extreme weather conditions, but also suffer from effects of mitigation and adaptation measures which are taken in response to climate change.

Some states argue against the inclusion of clear human rights-based language in the text(s) being negotiated within the framework of climate change talks by referring to principles of State sovereignty and national legislation. In other words, the argument is that language referring to human rights and indigenous peoples' rights must to be balanced against the principle of State sovereignty, and that such international standards should be subject to national legislation.

This line of argument is not very convincing, because universal human rights standards already establish a very delicate balance between state sovereignty and human rights. At its core, this is what human rights are all about: limiting state sovereignty as far as the treatment of individuals, groups and peoples are concerned. In my view, altering this balance would

contribute toward undermining universal human rights and the entire international human rights regime.

International human rights standards should serve as a guide to tackle climate change, underscoring the fundamental moral and legal obligations to protect and promote full enjoyment of the rights enshrined in universal human rights instruments. Indigenous peoples are also marginalized in ongoing climate change negotiations and largely left with the option of trying to promote their rights and interests in the corridors of the venues where these negotiations are taking place.

International standards concerning indigenous peoples' right to participation are not limited to national policy-making processes. Article 41 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is very clear on requiring the UN-system and member states to ensure effective participation of indigenous peoples on issues affecting them. This particular provision is first and foremost applicable to international decision-making processes.

* * *

I believe it is fair to state that a major challenge faced by indigenous peoples worldwide is the unfortunate fact that they are rarely – or in some cases, never – given the opportunity to effectively participate in decision-making in matters which affect their rights and lives.

Indigenous peoples' participation in decision-making is of fundamental importance in so many areas, including in the context of good governance. Indeed one of the objectives of existing international standards on the rights of indigenous peoples is to fill the gap between their fundamental rights, on the one hand, and their implementation through governance interventions on the other hand.

Around the world, the participation and involvement of indigenous peoples in governance has been minimal due to historical discrimination and exclusion from political structures and processes. As we are all aware, in extreme situations this has brought about social and political discontent which has sometimes erupted into serious conflicts.

Unfortunately, in many instances, indigenous peoples continue to be marginalized from legal policy and decision-making processes, and remain vulnerable to top-down State interventions that take little or no account of their cultural circumstances. Such marginalization is often the underlying cause for land dispossession, ethnic conflict, displacement, and loss of sustainable livelihoods.

It should also be noted that some progress has indeed been made. However, the need to foster more inclusive participation in governance through initiatives that strengthen the capacity of governments to be more responsive to indigenous peoples, and the capacity of indigenous peoples to claim their rights, remain urgent in many instances. In my view, this should be one of the areas of priority in international development cooperation related to indigenous peoples.

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Allow me to briefly elaborate on the international human rights framework for the right to participate, or what in the context of this conference could be referred to as the "normative ideals" for participation.

International human rights law refers to the right to participation in both general and specific forms. Participation in its general form is to take part in the conduct of public affairs, whereas electoral participation is a specific form of participation. Furthermore, the right to participation is characterized as an individual right as well as a collective right. These fundamental principles are protected under Article 21 of the Universal Declaration of Human Rights.

The articulation of the right to participation has been further elaborated in various human rights treaty provisions, including article 25 of the International Covenant on Civil and Political Rights (ICCPR). Interestingly, and in contrast to all other provisions of the Covenant, article 25 employs the notion of "citizen" when referring to the subjects of this right. Therefore, States may require citizenship as a condition for exercising rights under article 25, although the provision does not prevent States from extending these rights to non-citizens.

The particular reference to citizenship is a fundamental legal obstacle for a large number of stateless indigenous individuals, whose legal status as alien in their country of birth and residence restricts their ability to participate in public affairs. These individuals also are unable to enjoy many other fundamental rights, including rights to education, employment, health, and property. This is an enormous legal and political problem for many indigenous peoples, including in South-East Asia.

The notion of "citizenship" as a condition for exercising rights under Article 25 of the Covenant establishes challenges for indigenous peoples that are divided by state boundaries. Those of you familiar with the proposed Nordic Sami Convention, know that the objective of the Convention is to affirm and strengthen such rights of the Sami people that are necessary to secure and develop language, culture, livelihoods and society, with the smallest possible interference by national borders and citizenship.

Allow me to provide you with a specific example on how a citizenship requirement impacts right to electoral participation for Sami individuals. The Sami Acts in Norway and Sweden respectively, contain very similar provisions concerning rights to participate in the elections to the Sami Parliaments of the two countries. However, there is one fundamental difference: Swedish citizenship is a legal requirement for participation in the elections to the Sami Parliament in Sweden; in other words one needs to be a Sami individual, with Swedish citizenship, in order to be able to vote or to be elected to the Sami Parliament in Sweden. The Sami Act in Norway does not establish a similar requirement, and therefore Sami individuals residing in Norway have the right to participate in the Sami Parliament elections regardless of citizenship. This is an example of two Nordic countries taking very different stances on the issue of citizenship in the context of Sami individuals' rights to participate in political processes and international affairs.

* * *

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) underscores that indigenous peoples' right to participation is a core principle of international human rights law, and more than 20 of its provisions– in one form or another- affirm indigenous peoples' right to participate in decision-making.

The principle of participation is articulated in various ways, as a "right" of indigenous peoples, or as an "obligation" for states, including as:

(1) Indigenous peoples' right to self-determination;
(2) Indigenous peoples' *right to autonomy or self-government*;
(3) Indigenous peoples' *right to participate in decision-making*;
(4) Indigenous peoples' *right to be actively involved*;
(5) States' duty to *obtain their free, prior and informed consent*;
(6) States' duty to seek *free agreement* with indigenous peoples;
(7) States' duty to *consult and cooperate* with indigenous peoples;
(8) States' duty to undertake measures *in conjunction* with indigenous peoples;
(9) States' duty to pay due *respect to the customs* of indigenous peoples.

Similarly, the ILO Convention No. 169 concerning indigenous and tribal peoples contains a large number of provisions concerning the right to participation.[5]

Unfortunately, some States have so far been somewhat reluctant to recognize that UNDRIP goes beyond being a non-binding aspirational document. However, it is fair to state that UNDRIP reflects the existing international consensus regarding individual and collective rights of indigenous peoples in a way that is coherent with international human rights standards, including the interpretation of human rights instruments by international supervisory bodies and mechanisms.

As a normative expression of this consensus, UNDRIP provides a framework of action towards the full protection and implementation of indigenous peoples' rights, including the right to participate in decision-making. It could be said that the Declaration reaffirms and applies the right to participation to the specific historical, cultural, economic and social circumstances of indigenous peoples, which typically are significantly different from that of the majority population in states where indigenous peoples are living.

The annual resolution of the UN Human Rights Council - entitled *"Human Rights and Indigenous Peoples"* adopted in September this year, is the most recent UN statement promoting the full and effective implementation of the Declaration. It encourages States that have endorsed the Declaration to adopt measures to pursue the objectives of the Declaration-

[5] The ILO Convention No. (1) right to *'participation'* [articles 2, 5, 6, 7, 15, 22, 23]; (2) right to be *'consulted'* [articles 6, 15, 17, 22, 27, 28]; (3) State obligation to *'cooperate'* with indigenous peoples [articles 7, 20, 22, 25, 27, 33]; (4) indigenous peoples' right to *'decide their own priorities'* [article 7]; (5) obligation to refrain from taking measures contrary to the freely-expressed wishes of indigenous peoples [article 4]; (6) obligation to seek *'agreement or consent'* from indigenous peoples [article 6]; (7) obligation to seek *'free and informed consent'* from indigenous peoples [article 16]; (8) indigenous peoples right to *'exercise control'* over their own development [article 7]; (9) indigenous peoples' right to *'effective representation'* [articles 6, 16]

in consultation and cooperation with indigenous peoples.[6] In other words, the Council clearly indicates that the Declaration is not merely an aspirational document, and perhaps most importantly in the context of this conference, the Council states it is required that indigenous peoples participate in the development of measures aimed at ensuring the implementation of the Declaration.

Indigenous peoples' effective participation is of crucial importance in relation to the enjoyment of a large number of human rights. For instance, indigenous people's right to identify their own educational priorities and to participate effectively in the formulation, implementation and evaluation of education plans, programs and services, is fundamental for their enjoyment of their right to education.

When elaborating on indigenous peoples' rights in the context of decision-making, one needs to distinguish between indigenous peoples' internal-decision making processes and institutions, and those external decision-making processes affecting indigenous peoples. In other words, the latter category refers to decision-making conducted by non-indigenous peoples. Such a distinction corresponds with the underlying logic of the UNDRIP, as it distinguishes between internal and external decision-making processes. Articles 5 and 18 of the Declaration affirms indigenous peoples' right to develop and maintain their own decision-making institutions and authority parallel to their right to participate in external decision-making processes that affect them.

Article 5 affirms that "indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so chose, in the political, economic, social and cultural life of the State."

Article 18 clearly articulates that "indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."

Consultations with indigenous peoples are one way of ensuring indigenous participation in decision-making. Articles 6, 7 and 15 of ILO Convention No. 169 provide the general legal framework with respect to the consultation and participation of indigenous peoples.

The ILO Convention establishes five qualitative requirements for States' consultations with indigenous peoples:

- Consultations shall be carried out **through indigenous peoples' representative institutions**.[7] Consequently, it is required that the indigenous peoples or community concerned identifies the institutions that meet these requirements, prior to any consultations.[8]

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[6] Contained in UN Document A/HRC/15/L.5; http://www2.ohchr.org/english/bodies/hrcouncil/15session/

[7] Article 6 (1) (a)

[8] ILO Governing Body, 282nd session, November 2001, Representation under article 24 of the ILO Constitution, Mexico, GB.289/17/3

- Moreover, consultations shall be carried out **through appropriate procedures**.[9] Procedures are widely regarded as appropriate if they create favorable conditions for achieving agreement or consent to the proposed measures, independent of the result obtained.[10] General public hearing processes are normally not regarded to be sufficient to meet the requirement of "appropriate procedures".[11]

- The Convention also establishes that consultations shall be undertaken **in good faith** and in **a form appropriate to the circumstances**.[12] This requires that consultations are carried out in a climate of mutual trust and transparency, and that the parties are sincere about finding a solution.

- The Convention also establishes that the objective of consultations shall be to **achieve agreement or consent**.[13] This requires that agreement or consent is the goal of the parties, and genuine efforts need to be made to reach an agreement or achieve consent.[14] This qualitative requirement is closely and inherently linked to the requirement that consultations shall be carried out in good faith.

- Finally, the ILO supervisory bodies have established that there should be a periodic evaluation of the effectiveness of existing consultations procedures or mechanisms between States and indigenous peoples, with the participation of the indigenous peoples concerned, with the view to continue to improve the effectiveness of such procedures or mechanisms.[15]

Finally, allow me to touch upon the principle of free, prior and informed consent (FPIC) which is another legal concept that is an integral part of the right to participation. Indigenous peoples identify the right of free, prior and informed consent as a requirement, prerequisite and manifestation of the exercise of their right to self-determination as defined in international human rights law.

International human rights treaty bodies (such as CERD[16] and CESCR) have clarified that indigenous peoples' free, prior and informed consent is required in accordance with state obligations under the corresponding treaties. In its General Comment No. 21, the UN Committee on Economic, Social and Cultural Rights, underlined that States parties to the

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[9] Article 6 (1) (a)

[10] ILO Governing Body, 289th session, March 2004

[11] ILO Committee of Experts, General Observation, 2008 (published in 2009)

[12] Article 6 (2)

[13] Article 6 (2)

[14] ILO, International Labour Standards Department (2009), *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*, see Chapter V

[15] ILO Committee of Experts, General Observation, 2008 (published in 2009)

[16] See UN Doc CERD/C/RUS/CO/19, 20 August 2008, Concluding observations of the Committee on the Elimination of Racial Discrimination Russian Federation 73rd CERD session, paragraph 24.

Covenant on Economic, Social and Cultural Rights should respect the principle of free, prior and informed consent of indigenous peoples *"in all matters covered by their specific rights"*.[17]

Similar jurisprudence is found at the regional level. In November 2007, the Inter-American Court of Human Rights, in its ruling on the Saramaka v. Suriname case which related to mining on indigenous peoples' lands stated that: *"the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the state has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions."* [18]

The importance of the right to free, prior and informed consent for the realization of the rights articulated in the UNDRIP is indicated by the fact that free, prior and informed consent is explicitly required in six of its articles.[19] The right to right to free, prior and informed consent is generally interpreted and analyzed in the context of States' duty to consult indigenous peoples. This interpretation has mainly been developed in the context of the ILO Convention No. 169, which is significantly different from UNDRIP in that the Declaration affirms indigenous peoples' right to self-determination. The ILO Convention does not address, or specifically recognize indigenous peoples' right to self-determination. It must be assumed that the non-reflection of the right to self-determination in the ILO Convention has influenced the interpretation of the "consent" element of the concept of free, prior and informed consent.

In my view, the difference between the ILO Convention and UNDRIP in this regard can be exemplified through article 16 (2) of Convention and article 10 of the UNDRIP respectively. While both provisions establish that indigenous peoples shall not be forcibly removed from their lands and territories, article 10 of the Declaration is worded in a more absolute manner than the corresponding provision in Convention No. 169.

The Declaration establishes that no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned, whereas the ILO Convention includes procedural elements that permit forced reallocation without indigenous peoples "free and informed consent". However, this is to be undertaken as an exceptional measure only, in the absence of indigenous peoples' free and informed consent, following appropriate procedures established by national laws and regulations.

The point I am trying to make is that the principle of free, prior and informed consent must be interpreted and understood in light of the fact that contemporary international human rights law affirms that indigenous peoples' have the right to self-determination. It is my view that this must have an implication on how the requirement of "consent" is

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[17] UN Committee on Economic, Social and Cultural Rights, General Comment No. 21, E/C.12/GC/21, 21 December 2009, paragraph 37. Note that other international instruments also recognize the importance of free, prior and informed consent in the context of indigenous peoples' decision-making, e.g. the existing guidelines for the implementation of Article 8 (j) and the Programme of Work on Protected Areas of the Convention on Biological Diversity (Akwe: Kon guidelines).

[18] Inter-American Court of Human Rights Case of the Saramaka People v. Suriname Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs) para 134.

[19] UNDRIP Articles 10, 11, 19, 29 (2), and 32

understood. The Declaration seems to support such a view, as it has reserved the principle of FPIC to situations of fundamental importance to indigenous peoples and their existence.

In conclusion, please allow me to draw your attention to UNDRIP's preliminary conclusion and distinction between "consultations" and the right of "free, prior and informed consent" –as contained in its progress report on the study on indigenous peoples' right to participate in decision-making:

> *"The right of indigenous peoples to free, prior and informed consent form an integral element of their right to self-determination. Hence, the right shall first and foremost be exercised through their own decision-making mechanisms. As the right to free, prior and informed consent is rooted in the right to self-determination, it follows that it is a right of indigenous peoples to effectively determine the outcome of decision-making processes impacting on them, not a mere right to be involved in such processes."*[20]

Thank you.

[20] UN Document A/HRC/15/35, Paragraph 41

Indigenous Peoples' right to free, prior and informed consent (FPIC) in policy making and development

Joan Carling, Secretary General, Asia Indigenous Peoples Pact (AIPP)

Hello. I would like to say thank you to everyone, and also to pay my respects to the Sami people here in Norway, and to express my gratitude to the organizers of this forum. My presentation today is along the lines of free, prior and informed consent (FPIC), focusing on its substance and principles, as well as explaining the basis for FPIC under international human rights instruments, and finally discussing the challenges of implementing FPIC.

This topic is an elaboration on the presentation given previously by John Bernhard Henriksen, of the UN Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples. Just to define FPIC for you once again: FPIC is a mechanism and a process in which indigenous peoples undertake their own opinions and collective decisions on matters that affect them, as an exercise of the right to demand input on territories, resources and their right to self determination. At the outset, I just want to emphasize that FPIC is not just a process, but is a matter of substance in terms of holding our collective rights as indigenous peoples.

Introduction

Indigenous peoples across the globe have been consistently asserting the respect and recognition of their inherent collective rights to achieve equality of peoples, non-discrimination, and to correct the historical injustices committed against them. Integral to this is their right to participate in policy-making and development in accordance with the recognition of their collective rights, their culture, ways of life, and dignity as distinct peoples. Along this line, the concept and principles of Free, Prior and Informed Consent (FPIC) of indigenous peoples is a core element in their participation in policy making and development.

This paper is intended to contribute to the understanding of FPIC as a core concept in indigenous peoples' participation in decision making and how it relates to their inherent collective rights. It also provides a brief overview on how FPIC is incorporated in the policies of key development actors, in particular, the World Bank (WB) and the Asian Development Bank (ADB). Key challenges to the implementation of FPIC are also presented at the end of this paper to provide some on-the-ground experiences and insights.

This paper is, by no means, comprehensive and should therefore be regarded as a contribution in generating better understanding of the core principles of FPIC as a substantive and distinct decision-making process specifically for indigenous peoples.

I. The CONCEPT and FRAMEWORK OF FPIC

FPIC is a substantive process of indigenous peoples' collective and independent decision-making process on matters that affect them, including the right to say NO or to set conditions or terms for their consent. It is a reiterative process to be undertaken in good faith with

indigenous peoples to ensure their meaningful participation in decision-making, and in respecting their collective rights. The substance of FPIC relates directly to upholding the exercise of their collective rights; the procedural aspects, on the other hand, ensure the meaningful and independence of the decision-making process of indigenous peoples. In particular, consultation is an integral part of the FPIC process, while consent is the result or outcome of this process as an exercise of their collective right to self-determination.

The substantive and core principle of FPIC is the exercise of indigenous peoples' right to SELF DETERMINATION and the right to LAND, TERRITORIES AND RESOURCES relating to decision-making processes, especially on matters relating to the use of their resources for development. It defines the relationship and terms of engagement of indigenous peoples with other entities and groups, including states, who are interested in the utilization, management, extraction, and development of their land and resources.

FPIC affirms the territorial integrity of indigenous peoples whereby their consent is required when activities are being planned for implementation within their territories. This often pertains to corporations. FPIC also serves as a mechanism for indigenous peoples to exercise independent collective decision making processes in accordance with customary laws and institutions and/or their self-defined mechanism of decision making. As an integral component of their independent decision making process, they have to be provided with sufficient and accurate information based on their level of understanding in order to reach or achieve an informed collective decision. Further, indigenous peoples should also be provided with sufficient time to undertake their own decision-making process before any commencement of activities affecting them begins. This is in line with respecting the particular circumstances of indigenous peoples and taking into account their ways and means of undertaking their own collective decision-making processes that may require a certain period of time.

In the context of the above, FPIC is thereby not only a procedural concept but, more importantly, a substantive mechanism to ensure the respect of indigenous peoples' collective rights and their meaningful participation in decision-making on matters affecting them. The concept and principles of FPIC are now integral components of international human rights instruments relating to indigenous peoples. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) has seven (7) articles relating to FPIC which are enumerated below. Other international human rights instruments with provisions relating to FPIC, such as ILO Convention 169, among others, are also listed below.

In terms of meaningful participation in crafting policies that concern them, Article 19 of the UNDRIP identifies the duty of states to ensure the meaningful participation of indigenous peoples and the requirement for their CONSENT:

"States shall consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their FREE, PRIOR and INFORMED CONSENT before adopting and implementing legislative and administrative measures that may affect them."

II. International Instruments relating to FPIC for Indigenous Peoples

Articles of the UNDRIP on FPIC

Article 10: related to the right to land and territory
"Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the FPIC of IPs concerned…"

Article 11, No.2: related to the right to culture and religion
"States shall provide redress through their effective mechanisms, which may include restitution, developed in conjunction with IPs with respect to their cultural, intellectual, religious and spiritual property taken without their FPIC or in violation of their laws, traditions and customs".

Article 19: related to self governance and the formulation of laws and policies affecting indigenous peoples
"States shall consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their FREE, PRIOR and INFORMED CONSENT before adopting and implementing legislative and administrative measures that may affect them."

Article 28, no. 1: right to land and to redress
"Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their FREE, PRIOR and INFORMED CONSENT"

Article 29, no. 2: right to territory
"States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their FREE, PRIOR and INFORMED CONSENT"

Article 32, no. 2: right to land and resources
"States shall consult and cooperate in good faith with the indigenous peoples concerned through their representative institutions in order to obtain their FREE, PRIOR and INFORMED CONSENT to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

B. Other international human rights instruments with reference to the provisions on FPIC:

1. The International Labor Organization: Indigenous and Tribal Peoples Convention, 1989 (No. 169)
2. Convention on the Elimination of Racial Discrimination (ICERD)
3. The Committee on Economic, Social and Cultural Rights (particularly the need to obtain indigenous peoples' consent in relation to resource exploitation)
4. Convention on Biological Diversity (CBD) work on Access and Benefit Sharing

III. Principles and substance of FPIC

At the outset, FPIC must be understood as one integral process and mechanism that applies specifically to indigenous peoples in their exercise of their collective decision-making process. The principles and substance of each element of FPIC are interrelated and should not be taken or treated as separate elements. In particular, the first three elements (Free, Prior and Informed) qualify and set the conditions of a CONSENT decision-making process. That means that violations of any of these elements invalidates a decision of consent. Thus, the mechanism of FPIC is regarded holistically as one distinct mechanism for the meaningful exercise of collective decision-making of indigenous peoples. Further, its application and implementation should be regarded within the broader framework of upholding the collective rights of indigenous peoples.

1. Free: independent process of decision-making

Free implies the absence of any manipulation or coercion from other groups, bodies and entities in the decision-making process of indigenous peoples. Any external influence that hinders self-determination in the process of decision-making and the outcome of their decision is a clear violation of this principle. Consent cannot be valid if it is taken from the authority or group that is not recognized by the indigenous communities or not accountable to them. Further, the independence of their decision-making process and the outcome must be verifiable by members of the particular indigenous communities these decisions are affecting. This further emphasizes what John Hendriksen has said: it should be the indigenous peoples deciding what decision making process they will use. These decisions are people-specific. The ways in which the Sami people choose to make their decisions, and the ways that my people choose to address decisions will be different, but we will define these processes, not someone else telling us what processes we will undertake.

'Free' also means a process that is absent of coercion, intimidation and manipulation. There are many cases in the Philippines where manipulation has been a key element in terms of getting the decision of indigenous peoples.

Finally, is the issue of misrepresentation from the decision making bodies, or the customary practices, which can often be based in fear. However, this can go both directions. Decisions must come from leaders who are truly recognized by indigenous communities.

2. Prior: right to undertake their decision making process for any project that concerns them before its implementation

Informed consent must be sought as a precondition before any activity can take place. Prior consent requires a comprehensive procedure to ensure that indigenous peoples have sufficient time to understand, analyze and discuss collectively the information they receive. The element of 'Prior' also denotes respecting the duration of time for indigenous peoples to undertake their decision-making process according to their pace and circumstances. Of course, corporations usually have a "timeline" of their own, and they say that they are losing money if it takes too long for a community to make a decision. However, it is the indigenous peoples who should define the time that they need to make a decision collectively. Time-bound requirements for information dissemination should be compatible with the situation of indigenous peoples. Parties requiring the consent of indigenous peoples must thereby engage in a good faith discussion with them to reach a mutual agreement on the timeline of the decision-making process.

While national legislations may contain provisions and timelines for the notice of information and the conduct of consultations, this should not pre-empt the self-defined process of decision making of indigenous peoples, including the time they need to deliberate regarding the information provided to them. Parties must be respectful of the time requirements of indigenous peoples in undertaking their decision-making process based on their unique circumstances and requirements.

3. Informed: right to be provided and to have sufficient information on matters for decision making

This is a core element of the decision-making process in order to reach or achieve a well-informed decision. It is thereby important not only to have access to information, but such information should be in provided in a form or manner that is clearly understood by community members. In many situations, such as structural projects like dams or mines, there is a lot of technical information that may not be easily comprehensible for members of the community. Therefore there should be processes to explain these technical terms and issues fully to those whose communities will be seriously affected the projects. Further, community members must have a level satisfaction regarding the level of information provided to them especially on matters needing clarification from their own considerations and perspectives, and according to their need, to guide their own deliberations and decision-making process.

Information disclosure for FPIC process includes, but is not limited to, the full and legally accurate disclosure of data pertaining to any activity or proposed developments or projects, including studies on environment and social impacts, project design, implementation plan, budget and sources of funds and terms of contracts or agreements relating to the activity or project, among others. Indigenous communities must also have the freedom to secure

additional information from other sources besides the project proponent, as well as to have the means to verify the accuracy of information provided to them. It is often the case that indigenous communities are provided with information highlighting only the positive aspects of the projects while potential adverse impacts are not fully divulged or provided, especially intangible impacts, such as impacts to culture. The critical area of these intangible impacts are often left unaccounted for.

The full disclosure of information to indigenous communities is the main responsibility of the project proponent and should be open for scrutiny regarding the accuracy or correctness of such information. This can include access to related information, including the results of similar projects in the past and the track record of the specific company involved. This includes access to information from other sources. In case a decision has been reached based on wrong or false information, indigenous communities should have the right to change and/or review their decision, and sanctions should be given to project proponents, based on due process. There are often many cases, especially regarding damming and mining processes where proponents provide false or misguiding information… the companies say, "Oh, this is just exploratory, we are just going to dig a little hole," but in reality that is not actually what they are going to do. Similarly with dams; we have heard from companies, "this will just be small, it will not affect your rice field, it will not affect your water," but the reality is very different than what they choose to tell indigenous community members. The result is often misinformation, which is provided so that indigenous community members will agree and provide their consent. Hand in hand with this misinformation come the promises… telling indigenous peoples that 20% of the proceeds will benefit their communities, or that roads and schools will be built in return for consenting to allow the company to begin with its project. This is clearly bribery, as it is the responsibility of the state to provide social services to their indigenous groups. It should not be a condition set for any project that will impact communities, and this has always been our belief. Because when companies come and make all of these promises, who would not say yes to schools? Who would not say yes to health clinics? When used as a condition for people to give their consent, this is clearly unacceptable.

Another point on the issue of information is that the resources must be allocated to meet the information needs of indigenous communities, especially as we have our own languages. Governments and corporations often say, "it is too expensive to translate the materials into your own language." But who can give a prior, informed decision if they are unable to understand what they are deciding on? Resources should be provided with the accurate and complete information necessary for indigenous peoples to clearly understand what the project is going to entail.

4. Consent: collective and independent decision of affected communities after undergoing their own process of decision-making

The collective decision-making process of indigenous peoples entails several steps and takes time in order to ensure that community members are given the opportunity to express their views, raise their concerns, and have time to seek additional information if needed, or to seek clarification on their questions or concerns. Consultation is just the process, and consent is the final decision of this process. Transparent, inclusive and well-informed consultation

processes, as well as accountability of leaders, are necessary steps and measures in the collective decision-making process of indigenous communities.

Further, indigenous communities must be given the time and space to discuss and deliberate on their own the implications of any project/activity. Indigenous communities should have the freedom to define their own mechanisms and process of decision-making, including customary practices of decision making. Further, they also have the right to set their terms and conditions or to say NO based on their own considerations and decision-making process. Indigenous communities must have the right to withdraw consent if conditions are not met. Any agreement reached should be written in a form fully understood by community members, and a NO CONSENT decision must be respected. Strong division with opposing views within indigenous communities means the absence of consent. On the other hand, consent does not mean unanimity. Based on the traditional systems of indigenous peoples' decision-making, consensus is always the desired outcome of a decision-making process, though it does not mean unanimity. In particular, even if there are views or positions that run counter to those of the majority, as long as those with opposing views agree to abide or respect the position of the majority, this is considered as a consensus and a consent decision.

IV. The World Bank and the Asian Development Bank relating to FPIC

1. CONSENT vis a vis CONSULTATION and BROAD COMMUNITY SUPPORT

The World Bank's Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10) includes a provision for the Free, Prior and Informed Consultation for World Bank-funded projects affecting indigenous peoples. In particular, the free, prior and informed consultation is required in the conduct of Social Assessment. Broad community support must also be ascertained during the planning stages and during project appraisal. "Broad community support" means securing the favor or acceptance of the project from the main affected groups. A government applying for funds from the WB must therefore be able to demonstrate that the project applied for has broad support from affected indigenous peoples' groups.

Free, Prior and Informed *Consultation* is not equivalent to Free, Prior and Informed *Consent*. It merely defines the process of decision-making, and the outcome or result is "broad community support" instead of consent. There is, therefore, a fundamental difference in these two types of decision-making processes in terms of the application of CONSENT decision. It should be noted, however, that OP/BP 4.10 was approved by the World Bank Board prior to the adoption of the UN Declaration on the Rights of Indigenous Peoples. Since the UNDRIP now sets the minimum standard for the respect and recognition of indigenous peoples, including the implementation of FPIC, it is important for the World Bank to, as a UN funding agency, to review its Indigenous Peoples Policy and make it consistent with the UNDRIP.

On the part of the Asian Development Bank (ADB), its new Safeguard Policy Statement, particularly its Indigenous People's Policy statement, includes the provision for the

requirement of Free, Prior and Informed Consent on projects affecting indigenous peoples. It also noted the adoption of the UNDRIP. However, its definition and application of CONSENT is "broad community support." Thus, there is no fundamental difference in the Indigenous People's Policy of the World Bank and the ADB in reference to FPIC. Therefore, it is important for indigenous peoples to continue to engage with both the World Bank and the ADB for these financial institutions to strengthen their Indigenous Peoples Policy and make this consistent with the concept and principles of FPIC within the framework of respecting the collective right of indigenous peoples as embodied by the UNDRIP.

V. Key Challenges in the Application and Implementation of FPIC

While there are several challenges to the application and implementation of FPIC that are more area-specific and people-specific, below are some common experiences of indigenous peoples on the key issues and concerns in the implementation of FPIC:

1. Lack of information/distortion of information:

Information on extractive development projects that have serious adverse impacts on indigenous peoples is often presented to them in terms of its benefits, while potential adverse impacts are downplayed, and sometimes simply not provided. Further, the conduct of environmental and social assessment/impacts does not fully account for intangible impacts to indigenous peoples, especially those relating to their culture and ways of life as distinct peoples. Information shared with communities regarding such projects is more focused on the economic gains and on the need to provide for the development requirements of the wider society such as energy and water, among other things. Further, technical aspects of projects and activities are not fully explained, and communities are not provided the needed support to be able to fully understand technical matters required to guide them in their collective decision.

Distortion of information relating to certain projects such as mining and dams, in terms of the actual design and potential adverse impacts, is often experienced by indigenous peoples. These are just a few examples on how information is manipulated to gain a consent decision, instead of ensuring accuracy, completeness and objectivity of information that is fully understood by indigenous peoples as a critical element in their decision-making.

2. Engineering Consent:

Based on various experiences of indigenous communities, cases of manipulation of consent through numerous means are becoming common practice by corporations and governments. These cases involve taking consent from false indigenous leaders (not from those recognized by community members); and setting conditions in a way that community members cannot say no (i.e., funds for community schools and clinics will not be provided if consent is not given). Instead of presenting the potential benefits and adverse impacts, project proponents make promises and provide different incentives for community members to agree to the project or give their consent (i.e., employment, road construction, scholarships). The lack of transparency in the conduct of information sharing and consultations is a manifestation of attempts to manipulate the decisions of indigenous communities. Cases in the Philippines

where a few leaders are the only ones being consulted and are being bribed to give their consent are becoming a serious concern.

3. Lack of cohesion of indigenous communities/understanding of FPIC:
Due to different historical circumstances, a growing number of indigenous communities already have weak traditional institutions and systems for collective decision-making. In these situations, the implementation of FPIC sometimes becomes problematic when members of indigenous communities become individualized in their decision-making, rather than upholding the common good. Likewise, the lack of accountability of leaders and weak adherence to collective and sustainable resource management of indigenous communities are also serious concerns when projects are being planned in their territories. In these situations, indigenous communities become susceptible to decisions based on individual considerations rather than upholding the common good. Indigenous leaders also become vulnerable to coercion, bribery and manipulation.

Further, the lack of community cohesion and understanding of their rights and the requirements for FPIC make them vulnerable to the manipulation of the FPIC process. It is critical that indigenous peoples fully grasp and understand the concept and principles of FPIC to be able to assert and protect their collective rights, and to ensure effective and meaningful participation in decision-making processes that they themselves should define. Sustained consolidation and strengthening of indigenous communities, as well as capacity building on technical matters, are necessary to empower indigenous peoples' communities and deter the manipulation or engineering of the FPIC process and decision.

4. Independent mechanism to monitor the implementation of FPIC and recourse mechanism for indigenous peoples' communities
In order to ascertain and validate the collective decision and the integrity of the decision-making process in accordance with the concept, principles and guidelines of FPIC, an independent mechanism for monitoring should be established, with a mandate to effectively address the concerns of indigenous communities. This mechanism should be formed by credible experts with the participation of indigenous peoples, and should be provided with the necessary resources to effectively conduct their duties and functions in a timely manner. Likewise, this mechanism should be accessible to indigenous communities, and should be able to establish an effective communication channel with indigenous communities and project proponents.

I want to end on a positive note regarding FPIC. There are many benefits of the proper implementation of FPIC: first, FPIC can result in mutually beneficial and equitable arrangements, partnerships and agreements between indigenous peoples and states, and other entities, resulting in decreased conflicts and better working relationships. Very importantly, FPIC puts indigenous peoples not only as rights holders, but indigenous peoples become central players in decision making, including the recognition of sustainable use and management of resources, traditional knowledge, and the concept of biodiversity. Proper implementation of the FPIC process, where partnerships are formed, results in the inherent worldviews of indigenous peoples as relating to sustainable use of resources being recognized

and understood, and then becomes part of the agreement or partnership. FPIC also strengthens self governments and effective participation in decision making and promotes cultural diversity and biodiversity. Why so? Because the views of indigenous peoples are then put into the mainstream. Cultural diversity and sustainable use of resources becomes a central agenda, and this questions the modern paradigm based on profit. Putting the perspective of indigenous peoples into the discourse of development, in terms of sustainable use of resources, self reliance, and self sufficiency, creates the space for the whole notion of cultural diversity to be brought to a higher ground. With that note, I thank you.

The Sami Parliament- its relevance as a model in democratic and undemocratic states

Magne Ove Varsi, Gáldu

Dear Participants,
My name is Magne Ove Varsi. I represent Gáldu– the Resource Centre for the Rights of Indigenous Peoples in Norway[21], a co-organizer of this conference. My presentation is entitled *"The Sami Parliament– its relevance as a model in democratic and undemocratic States"*. The Sami Parliament, as a representative body, elected by and among the Sami people in Norway, has a key role to play in relation to decision making affecting the Sami society.

However, before I proceed with my presentation, please allow me briefly to inform you about Gáldu- the Resource Centre for the Rights of Indigenous Peoples. Particularly, as many of you may not be familiar with Gáldu's organization and mandate. The Centre was established as a part of Norwegian human rights policy and is funded by the Norwegian Government, but it functions as an independent institution. The aim of the Centre is to increase knowledge and understanding on indigenous peoples' rights, in particular the rights of the indigenous Sami people. It collects, systemizes, maintains and disseminates information and documentation about indigenous peoples' rights both nationally and internationally. Our target group is everyone who is interested in or searching for information about indigenous peoples' rights, including schools, academic institutions, voluntary organizations, public institutions and State authorities.

For the benefit for our international guests, allow me also to provide brief background information about the Sami people and the Sami Parliament.[22] The Sami are the indigenous people of Finland, Norway, Sweden and the Kola Peninsula in the north-western part of Russia. The Sami are one people residing across the national borders of four countries, each with their own distinct identity, language, culture, social structures, traditions, livelihoods, history, and aspirations.

Traditional Sami livelihoods, such as reindeer herding, fishing and hunting, are integral parts of the Sami culture. Thus, lands and resources represent an important part of the material foundation for the Sami culture. However, the Sami culture of today is not limited to traditional livelihoods and cultural expressions. Similarly, as in other cultures, it is dynamic; continuously evolving and adapting itself to changing circumstances.

For centuries the Sami were subjected to constantly changing geopolitical situations, legal and political regimes; Denmark, Finland, Norway, Russia and Sweden have all occupied, or colonized, the Sami territory, either independently or as part of various nation state configurations. Eventually the traditional Sami territory was divided between Finland,

[21] Galdu – Kompetansesenteret for urfolks rettigheter. www.galdu.org

[22] Henriksen, John B. (2008), *The Continuous Process of Recognition and Implementation of the Sami People's Right to Self-determination,* Cambridge Review of International Affairs, Centre for International Studies, University of Cambridge, Volume 21, Number 1, March 2008, pages 27 - 40

Norway, Russia and Sweden. The Sami people were henceforth forcibly divided by state boundaries.[23]

Pressure from state policies and the influx of State sponsored settlers forced the Sami to mobilize themselves to defend their rights and interests. The traditional Sami institutions, i.e. the traditional community structure and leadership, were not suited to this purpose, and in an effort to fill this gap, some Sami leaders began engaging themselves in public advocacy to promote Sami language, culture and rights. They also started to get involved in local, regional and national politics to address the needs of the Sami people. Moreover, Sami leaders started to establish contacts with one another within the respective countries as well as across state borders.

The creation of the Nordic Sami Council in 1956 was the first tangible political result of the pan-Sami movement. It was established as an umbrella organization for the Sami living in the Nordic countries. Shortly after the fall of the USSR in 1991, the Sami in Russia also joined the Council and it was renamed the Sami Council to reflect that the Sami in Russia were included. The Sami Council is among the oldest modern indigenous organizations in the world. Today, however, publically elected Sami parliaments exist in Finland, Norway and Sweden. In 1998, the three Sami parliaments formalized their cooperation through the establishment of the Sami Parliamentary Council. In my presentation, I will only be focusing on the Sami Parliament in Norway, as the time does not permit me to address the situation in the other countries.

I have been asked to elaborate on the question of whether the Sami Parliament is relevant as a model for ensuring indigenous peoples' participation in decision making, within democratic as well as undemocratic States. Allow me to start with the part of the question which I feel is easier to answer: namely whether the model which the Sami Parliament represents could have relevance in undemocratic states. In order to answer this question, I believe it is necessary to identify the political, legal and constitutional framework within which the Sami Parliament functions.

The members of the Sami Parliament are elected by and among the Sami people in Norway through democratic elections every fourth year; the elections take place at the same day as the elections to the Norwegian National Parliament (the Storting). A number of Norwegian political parties also participate in the Sami Parliament elections, through specific lists of Sami candidates. At present time we have a situation in which both the Prime Minister of Norway and the President of the Sami Parliament belong to the same political party, the Norwegian Labour Party. His Majesty the King opens the National Parliament (the Storting) every year in September, as well as the Sami Parliament every fourth year when the newly elected Sami Parliament constitutes itself.

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[23] The *Lapp Codicil* of 1751, an addendum to the *Strömstad Border Treaty* of 1751 between Norway and Sweden, recognizes the Sami as the *"Lapp nation"* [Sami nation]. The Lapp Codicil is often referred to as the *Sami Magna Carta*, as it formalized the rights of the Sami across state boundaries, including the right to continue their traditional nomadic reindeer herding across the newly established border between Sweden and Norway.

In 1988, a specific section on Sami rights was introduced to the Constitution of Norway, establishing constitutional guarantees for Sami language, culture and society. Section 110a states that the obligation of the State to create the conditions necessary for the Sami people to protect and develop their language, their culture and their society. The establishment of the Sami Parliament in 1989 represents an important part of the implementation of section 110a of the Constitution.

The Sami Act provides that the Sami Parliament's mandate includes all questions that the Parliament considers to relate to the Sami.[24] The Parliament can on its own initiative raise and issue statements on all questions within its mandate, and raise questions before public authorities and private institutions; it also has the authority to make decisions when this follows from legislative or administrative provisions. The Sami Parliament is formally still an advisory body, with limited decision-making powers.[25] However, the political mandate given to the Sami Parliament through state legislation is only part of the Parliament's political mandate, as the mandate from the Sami people through the ballot box is at least just as important as the mandate given by national legislation. Within the so-called administrative area for Sami language, which encompasses eight northern municipalities, the Sami and Norwegian languages have equal status as national languages. The Sami have their own flag, national day, as well as other national symbols, which are widely respected by the State.

In other words, the Sami Parliament is established within the democratic and constitutional framework of Norway. Although its political powers are limited, it is still able to have significant political influence in many areas of life, due to the fact that it operates within a democratic and constitutional framework, which includes free and independent media. Personally, I have difficulties imagining how the model which the Sami Parliament represents would work in undemocratic states, in particular due to the fact that it formally remains as an advisory body with limited decision-making authority.

I believe that a properly functioning democracy is a prerequisite for this particular model of indigenous peoples' participation in national governance. However, this does not necessarily mean that this model would be useless in undemocratic countries, but I believe it would be difficult to achieve significant results, because this to happen requires that its political counterpart, and the society as such, functions within a peaceful and stable democratic and constitutional framework.

In Norway we only have one indigenous people, the Sami people; this makes it somewhat easier to create a representative indigenous body, compared with situations where countries have a large and diverse group of indigenous peoples. I believe that the model of the Sami Parliament, adjusted to the specific country situation could be relevant in countries with only one indigenous people, or a small number of indigenous peoples, provided that it has a stable democracy and constitutional situation.

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[24] Section 2-1

[25] In 2005, the Government of Norway and the Sami Parliament signed an agreement on procedures for consultations between State authorities and the Sami Parliament, aimed at strengthening the influence of Sami Parliament in decision-making process affecting the Sami society.

Nevertheless, I believe that countries and indigenous peoples in other parts of the world could benefit from the experiences in Norway, including positive and negative experiences, gained throughout the 20 years existence of the Sami Parliament. The remaining parts of my presentation will focus on some key Sami experiences, which I feel are important in the context of indigenous peoples' participation in decision-making.

Recognition and increased political influence

There is no doubt in my mind that the creation of the Sami Parliament, and the constitutional amendment and adoption of the Sami Act, together have strongly contributed towards a greater recognition of the Sami as a distinct people in Norway, and provided the Sami greater political influence. The State has recognized that the Norwegian nation state is established on the territory of two distinct peoples: the Sami people and the Norwegian people. The recognition of the existence of indigenous peoples within the territory of the State is often a prerequisite for respect for indigenous peoples' rights. This particular experience is highly relevant also in other countries. The implementation of contemporary international law, including the UN Declaration on the Rights of Indigenous Peoples, will in some cases require constitutional reforms, adoption of new laws or amendments of existing domestic legislation.

The creation of the Sami Parliament has certainly provided the Sami people with a political institution and platform through which it collectively can participate in the greater political life of the State. The Sami Parliament has gradually increased the Sami people's political influence in matters affecting their rights and interests. Some issues would probably have ended with different results, with larger negative impacts on the Sami society, had the Sami Parliament not been in existence. For instance, the Finnmark Act, which is legislation on land and resources rights in Finnmark County, would most likely been radically different had the Sami Parliament not been in existence and able to pursue the issue so forcefully as it did.

Consultations

The existence of the Sami Parliament facilitates consultation processes between State authorities and the Sami people; as it makes it easier for authorities to identify its counterpart when it is required to consult a representative Sami institution on matters affecting the Sami people. There are increased consultations and dialogue between the Government and the Sami, through the Sami Parliament, than there were prior to the creation of the Parliament.

In May 2005, the Sami Parliament and the Government finalized an agreement on Procedures for Consultations between State Authorities and the Sami Parliament. These procedures are a direct consequence of the fact that the Government of Norway did not adequately consult the Sami Parliament on its proposed Finnmark Act, prior to it submitting the proposed Act to the National Parliament in 2003. The government's failure to consult the Sami Parliament in the process of drafting the Finnmark Act, and the fact that this was widely regarded as non-compliance with its international obligations to consult the Sami whenever considering to propose legislative measures affecting the Sami directly, forced the Government to consider ways of avoiding a similar situation in the future.

Subsequently, the Government and the Sami Parliament established a joint working group to formulate possible solutions. This resulted in an agreement between the government and the Sami Parliament to establish procedures for consultations between State authorities and the Sami Parliament. The stated objective of the Procedures for Consultations is to contribute to the implementation in practice of the State's obligations to consult indigenous peoples under international law. Moreover, it seeks to achieve agreement between State authorities and the Sami Parliament whenever consideration is being given to legislative or administrative measures that may directly affect Sami interests, and to facilitate the development of a partnership perspective between State authorities and the Sami Parliament that contributes to the strengthening of Sami culture and society.

The Consultation Procedures apply to the Government and its ministries, directorates and other subordinate State agencies and activities. The Procedures apply in matters that may affect Sami interests directly. The important question today is how the Procedures for Consultations are implemented. Ironically, the best practice for consultations between the State and the Sami took place prior to the agreement on consultations procedures, within the framework of the dialogue on the Finnmark Act, between the National Parliament and the Sami Parliament. The Sami Parliament's rejection of the legislative proposal from the Government, and the fact that there had not been a process of consultations prior to the submission of the proposal to the National Parliament, created a very difficult political situation for the national assembly.

Under the Norwegian Constitutional system, the Legislative Assembly normally does not undertake major revisions of governmental proposals. However, in the case of the Finnmark Act, there were serious concerns from the outset of the parliamentary process about whether the proposed legislation met requirements established by international law for the identification and protection of Sami land rights, as well as whether the absence of consultations at the governmental level were compatible with Norway's international obligations.

In this situation, the National Parliament had two options: either to send the proposal back to the Government, or to start a process at the parliamentary level. The National Parliament followed the latter alternative and decided to amend the draft legislation, in cooperation and negotiations with the Sami Parliament. This was very significant indeed, as it was the first time that the National Parliament established direct consultations or negotiations with the Sami Parliament on legislative matters. I think it is fair to say that the process between the National Parliament and the Sami Parliament started as a political dialogue, and that it successively became a process of consultations, and was transformed into negotiations in its final stages.

The Sami Parliament was given the opportunity to debate the final legislative text, in its Plenary, prior to the final debate and adoption by National Parliament. The Sami Parliament gave its unanimous endorsement of the Act. In other words, the Sami Parliament gave its free, prior and informed consent to the Finnmark Act.

However, the picture in the post-consultation-agreement era is not as nice as the example which I just gave you. Despite the existence of Procedures for Consultations between the Government and the Sami Parliament, the Government has in some instances largely ignored

the strongly held views of the Sami Parliament, in "hard-core" issues related to natural resources. On matter of "softer" character, the picture is more promising.

Some commentators seem to doubt that the Government always enters into consultations with the Sami Parliament with the goal and objective to reach an agreement or consent, which is a requirement under international law, including with the structure of the ILO Convention 169. Needless to say, this particular issue is closely linked to the requirement that consultations shall be carried out in good faith.

In two relatively recent cases, both of which were of fundamental importance for the Sami people, the views of the Sami Parliament have largely been ignored by the Government. One of the cases I have in mind concerns the National Parliament's adoption of the National Mineral Act; the Sami Parliament, as some of you may know, was strongly opposed to the substantive content of the Act. The other example where the Procedures for Consultations proved to be of limited value for the Sami Parliament was on the White Paper (2008:5), concerning the right to fisheries in the sea along the coast of Finnmark.

The White Paper aimed at securing Sami fishing rights according to Norway's international obligations towards the Sami people. The Sami Parliament strongly supported the legislative proposals and legal justifications contained in the White Paper. However, the proposals were met with strong opposition from certain non-Sami and influential commercial interests, and the Government decided not to submit any of the legislative proposals contained in the White Paper to the National Parliament.

In other words, we have two examples, both related to issues of fundamental importance for the Sami– sub-soil resources and fisheries– in which the Government has largely ignored the views, rights and interests of the Sami people. Although I am not in a position to answer the question myself, I still believe it is relevant to ask whether these examples demonstrate that the procedures for consultations are only useful and effective when the issues at hand are of lesser importance for the State and influential third parties, including commercial interests.

Free, Prior and Informed Consent (FPIC)

States' duty to obtain indigenous peoples free, prior and informed consent (FPIC), under certain circumstances before adopting measures, is another key principle when addressing indigenous peoples' right to participate in decision-making. The question is whether FPIC establishes obligations for the State that go beyond the obligation to carry out consultations. In my view, FPIC establishes broader obligations than those requirements attached to the obligation to consult indigenous peoples, particularly in light of the fact that international law affirms indigenous peoples' are entitled to the right to self-determination.

Earlier in my statement, I referred to one example of good practice in Norway, in which the State authorities, in an important case, obtained the Sami Parliament's free, prior and informed consent. I am here referring to the process which took place between the National Parliament and the Sami parliament prior to the adoption of the Finnmark Act. The principle of FPIC is widely being respected in relation to issues related to Sami culture and language, whereas this is not the typical situation in relation to issues concerning natural resources. My impression is that the government of Norway, for all practical purposes, interprets the

principle of free, prior and informed consent, as implying free, prior and informed *consultations* – instead of *consent*. It is justified to argue that the State, under its existing international human rights obligations, is obliged not adopt or permit measures that may significantly damage the basic conditions for Sami culture, Sami livelihoods or society, unless *consented* to by the Sami Parliament, and Sami groups that are directly affected by such measures.

Right to Self-determination

The right to self-determination is a fundamental collective human right, to which all peoples are entitled, including indigenous peoples. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) identifies indigenous peoples as self-determining peoples– without any qualifications and within a human rights framework, as opposed to States rights. Article 3 of the UNDRIP mirrors common Article 1 of the two 1966 Covenants on Human Rights, affirming that indigenous peoples have the same right to self-determination as all other peoples. Article 4 of the UNDRIP, affirms that indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local matters, as well as ways and means for financing their autonomous functions. Some States question the status of the UNDRIP, and whether establishes any obligations at all.

Many authoritative UN bodies are of the view that although the UNDRIP is not binding in the same way as a legally binding international treaty, it nevertheless has a certain degree of binding effect, as it is fully in compliancy with already existing international human rights standards, including international jurisprudence. This view is held by a number of UN bodies and mandates, including the UN Special Rapporteur on the Rights of Indigenous Peoples, the Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples, the UN Permanent Forum on Indigenous Issues, and the UN Committee on the Elimination of All Forms of Racial Discrimination. Moreover, the UN Human Rights Council has recently encouraged member states to adopt appropriate measures to achieve the ends of the Declaration.

The Sami Parliament appears to hold a similar position to that of the mentioned UN bodies and mandates, whereas the Government of Norway largely appears to view the Declaration as a reference or aspirational instrument. In its most recent White Paper on Norwegian Sami Policy, the Government emphasizes that the UNDRIP is not a binding instrument, and that the instrument first and foremost will be of importance in countries that have not ratified the ILO Convention No. 169 concerning indigenous and tribal peoples in independent countries.[26]

The Government appears to be of the view that the UNDRIP does not affirm any rights that go beyond the provisions of ILO Convention No. 169. Hence, the right to self-determination, as recognized in the Declaration, is also largely viewed by the Government as a right to be *consulted*. In the White Paper, the Government expresses the view that the right to self-determination could be regarded as a "right to influence and co-management". When

[26] St.meld. nr. 28 (2007-2008), Chapter 2.3.6

the UNDRIP was adopted by the General Assembly in 2007, the Norwegian Government stated that Sami self-determination in Norway is *"considered to be secured through the current procedures and rights under Norwegian law."*

On the other hand, the Sami Parliament is of the view that it is the interpretation of the wording of common Article 1 of the International Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights, that furnishes the legal point of departure and the framework around the substantive content of the right to self-determination, as also articulated in UNDRIP and the proposed Nordic Sami Convention.

At Gáldu's International Conference on Sami Self-determination in 2008, the President of the Sami Parliament, Mr. Egil Olli, stated the following: *"I wish to emphasize that the Sami Parliament cannot see that there are any basis in international law for asserting that the Sami's right to self-determination should be interpreted differently from the right to self-determination enjoyed by other peoples under international law. It is not up to an individual country to freely interpret, delimit or define indigenous peoples' right to self-determination in ways that differ from the view expressed by UN member States in the UNDRIP. Had that been the case, it would undermine the whole point of the right to self-determination and international law as such."*[27]

In other words, the Sami Parliament is of the view that the Sami people are to be considered "a people" within the meaning of the earlier mentioned International Covenants, and that the Sami are therefore entitled to the general right to self-determination. The Government emphasizes the current national procedures and mechanisms, and national legislation, as being an appropriate framework for viewing the scope and content of Sami self-determination. These very different approaches and views create enormous challenges and obstacles for the Sami Parliament in its attempts to exercise the right to self-determination.

The right to self-determination, as articulated in common article 1 of the 1966 Covenants identifies the *resource* dimension of self-determination as peoples' right to pursue their "economic, social and cultural development" and their right to "freely dispose of their natural wealth and resources". It also states that a people may not be deprived of its own means of subsistence. The resource dimension of self-determination is extremely important in the Sami context, as traditional lands and resources are of fundamental importance to the Sami society, including Sami livelihoods and culture. In light of the many controversial issues related to natural resources in the Sami areas, the resource dimension of the right to self-determination may be an important contributing factor for the Government's reluctance to accept that the Sami are entitled to the same right to self-determination as all other peoples as articulated in international law.

I believe it is fair to conclude that the Sami Parliament's autonomous powers today are largely limited to issues concerning Sami culture and language. The Sami Parliament in Norway was established more than 20 years ago, at a time when there was limited international and national recognition of indigenous peoples' right to self-determination. This is reflected in the mandate of the Sami Parliament, as it officially remains as an advisory body on Sami issues.

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[27] Gáldu Čála No. 2/2008, p. 38

However, in reality the Parliment has gained considerable political power and influence. The Sami Parliament is the highest representative body of the Sami people in Norway, and it acts on behalf of the Sami in the country. However, in my view, the Sami Parliament does not have a mandate that enables them to contribute effectively to the realization of the Sami people's right of self-determination pursuant to the rules and provisions of international law. Its status as an advisory body on Sami affairs does not meet the requirements of contemporary international law, particularly in light of the fact that the UN General Assembly in September 2007, through the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), affirmed that indigenous peoples have the right to self-determination.

It has also been argued that the present model for financing the Sami policy, or Sami self-determination, is not in line with minimum standards of the rights of indigenous peoples under international law.[28] The Sami Parliament's opportunity to develop its own effective policies addressing challenges in the Sami society is virtually non-existent, due to the current financing model.

Assessment research demonstrates that it is extremely hard to find clear examples of cases where the Sami Parliament has succeeded in achieving a breakthrough for the needs of the Sami society expressed in conjunction with the annual national budget process.[29] In fact the State, through budget allocations, frames approximately 93 per cent of the Sami policy administered by the Sami Parliament in Norway. Therefore, many are of the view that the Sami Parliament does not administer its own Sami policy, but rather the State's Sami policy. In my view, it is very difficult to realize Sami self-determination unless the model for financing is adjusted.

Thank you for your attention.

[28] Fjellheim, Rune (2008), Self-determination and Economics, Sami Self-determination: Scope and Implementation, Gáldu Čála No. 2/2008 (Ed. John B. Henriksen), p. 96 -104

[29] Ibid

State sovereignty, Human Rights and Peoples' Participation

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Introduction

The right to participation that we are discussing here takes both general and specific forms. It is both an individual right and a collective right of peoples. In other words we are not limiting ourselves to only individual citizens in the strict liberal and legal sense. The Declaration makes reference to external decision making processes, which the report of the Expert Mechanism understands to mean both state and non-state institutions "affecting" indigenous peoples (HRC/EMRIP/2010/2, p.3).

These terms suggest that such internal central and local institutions are intact (from outside encroachment) in contrast to alien institutions. The internal institutions are interpreted in the report as linked to the right to autonomy and to self-government. As you may recognise, these are not only legal distinctions, they (external versus internal) build one of humanity's most basic conceptual bodily metaphors (inside-outside). I will attempt to highlight how these terms coexist somewhat uneasily with political science theories of the citizen, the state, sovereignty and the nation-state– modelled on European history.

I will also briefly outline recent social science policy-relevant research on globalization and how it poses immense pressure on nation-states. I will lift up one particular argument: the importance of contributing to well-functioning hybrid local and national institutions that are dynamic intermediary institutions. I use the term hybrid for these mechanisms and institutions as they are a mix of "external" (i.e. Western state-centric/Eastern empire-centric) and "internal" traits. By "internal" I mean elements of indigenous morality, legal systems, notions of self in relation to other living beings, individual and collective agency and non-state and state forms of participation and governance. Such institutions work as "bridges" between the state and the society. They promote peoples' sovereignty, reconciliation and progressive realisation of the right to participation. Such institutions are briefly addressed in the Expert Mechanism's Report under the heading "Transformation and Challenges of Indigenous Governance"(p.15).

In this presentation I first outline these important theoretical concepts. I also want to briefly address if they are helpful for understanding the evolving notions of state, nation and democracy in Asia, at a time of rapid globalization. The human rights regime, including indigenous rights, is part and parcel of this globalization from above and below. My reasons for a certain focus on Asia is not only an interest in presenting my own research that may 'speak directly' to the presentations here in this conference focusing on the Philippines, Nepal and China. I have two more reasons;

(1) The recognition in Asia of indigenous rights in terms of ratification of key instruments is quite weak. Only one country in the region, Nepal, has ratified ILO-169. A statement by Forum Asia recently stated that none of the nation-states in South East Asia have an ethos

that celebrates and promotes this diversity, or empower and protects the rights of its national, ethnic, religious and linguistic nationalities.
(2) The phrase "the 21st Century is Asia's century", is mostly likely a correct prediction. This region is not only going to be the world's "power house" in an economic sense, but also in terms of challenging current Euro-centric models for democracy and the nation-state.

So, how can I briefly characterise the ideals behind different political regimes in Asia? They vary from democratic centralism in China, to India's hybrid model, having elements of Soviet socialist centralism, Western liberal democracy and home grown civil-secular, cultural plural democracy. Bangladesh is based on a more liberal model, which is in certain respects ill-liberal, since its constitution discriminates against the country's many indigenous groups. Until twenty years ago, Nepal was an ill-liberal state, based on sacred Hindu monarchy. After democracy was won, policies (both economic and social), become liberal. Then in 1996 the Maoists declared "a people's war", which lasted a decade. What about post-war Nepal? Do we see a transition from a young liberal democracy to a different kind of democracy, one which reflects Maoist ideology and the ethnic movements' demands for recognition, including self-determination? I like to come back to our hopes regarding the type of democracy that emerges in Nepal.

Take for example China and India, are they nation states? Or are they multi-national states, or rather multi-ethnic nation-states? Both these giant countries are products of diverse old civilizations that have gone through a succession of empires, with political identities larger than ethnic groups (see fg. Mukerji 2010). Cultures have coexisted, conflicted, adapted, integrated and assimilated over large timescales. Let me now dwell however briefly on how China's unitary state system addresses the nationality question.

Unitary state systems, the problem of nationality and participation through autonomy

Autonomy is the central tenet of China's ethnic policy, designed to ensure harmonious relations between ethnic and religious minorities and between minorities and the Han majority. The regions in question are border regions. Their political and cultural integration is seen as crucial for ensuring stability in South East Asia, South Asia and Central Asia - and ultimately to ensure the sovereignty of Greater China.

The Chinese understanding of nationality *(minzu)* is an adaption of Stalin's definitions of nationality; "a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up manifested in a common culture". Later, for a short period in the early 1930s, Lenin's more radical definition of self-determination as a right to independence for minority areas, based on the Soviet model of federalism, was adopted.

This was detracted after the Long March, which made Mao Zedong the foremost leader of the communist movement. Those ethnic minorities, who joined the war against the invading Japanese (the Great China-Japan War), had demonstrated a patriotic spirit and were accorded a right to handle their own affairs within a unitary state model. This strong link

between patriotic contribution to defend state sovereignty and regional autonomy was reconfirmed in 2005 in the government's White Paper on ethnic issues.

Importantly, China's current 56 nationalities (including Han) are based on a scientific project of ethnic classification in the 1950s. Originally around 400 self-identified groups wanted such official recognition. A policy of integration and cooption of ethnic elites into the communist party and into government at prefectural and country levels was pursued. The Cultural Revolution (1966-1976) brought destruction of culture and assimilation. These excesses were excused in the 1980s by CCP General Secretary Hu Yaobang, and a period of certain liberalization followed with so called "preferential policies". Unrest in Tibet and Xinjiang in the 1990s and recently, has shown the emergence of a harder approach, where modernization is seen as the cure against ethno-nationalism.

This state, a unitary multinational state, based on communist ideology (Marxism-Leninism and Mao Zedong Thought), recognise limited group rights: in particular cultural rights and the right to participation and to development based on regional autonomy. Commitments to minority rights do however not translate into any guarantees. Research (see fg. Yash et. Al 2010) indicates that ethnic tensions are exacerbated by unequal economic growth. Unequal political and bureaucratic representation in the government (in autonomous regions) and at local levels, difficulties in perusing an indigenous lifestyle, in using native languages and freely exercising religion, also fuel tensions. In a nutshell, the overriding priorities on sovereignty, stability, unity, weak democratic institutions and an ideology of integrating nationalities, make aspirations and demands for genuine autonomy and participation difficult indeed.

Democracy and Sovereignty in General

How can we, who are concerned with ethnic minority rights and indigenous rights, best characterise democracy in general? Democracy is characterized by its ability to ensure rights to participation, to distribute political power and make leaders accountable for their actions. Through its constitution, any democracy creates the government's rational authority. This must be modern and secular, anti-discriminatory, recognise diversities, including recognition of different ethnic groups and peoples.

Democracies need to seriously change their decision making processes and institutions if they have "second class citizens" or groups with no citizen rights, for example ethnic and religious minorities, indigenous groups, smuggled or trafficked persons, asylum seekers etc. In addition, constitutions should be limitation-setting and nourish broader representative structures for participation.

A well-ordered democracy puts constitutional checks against any tyranny of any majority, defined on ethnic, religious, territorial, caste, gender or demographic basis. We can not afford to overlook "worst cases", the misuse of ethnicity and race for establishing deeply discriminatory states (i.e. apartheid in South-Africa on the occupied West Bank etc.) with exclusionist territorial politics and unequal citizen laws.

A democracy provides citizens with two kinds of rights. Firstly, *negative rights* against the encroachment of government, as well as non-interference and certain constraints to

individual liberty. Secondly, *positive rights* related to citizens wellbeing, dignity, identity and capacity to exercise one's own legitimate interests. These two sets of rights are mutually related. Democracies to varying degree (also in Europe) grant negative and positive rights to illegal migrants, asylum seekers and discriminated minorities: the recent controversial forced move of Romani people in France is such a case. In many Asian countries, negative rights are quite often violated, as interference by the state is often exercised widely, on grounds of threats towards the unitary state (separatism etc.) Positive rights are selectively promoted and protected. In China for example, economic and social rights are progressively sought and realised. The respect for civil and political rights is less– but the picture is variable.

Any government is only fully legitimate if it is representative of all citizens. It should not deny the existence of social hierarchies or disregard aspirations for recognition. Instead it should develop measures to overcome entrenched hierarchies and discrimination.

Popular sovereignty is measured by the existence of public policies that are fully decided by citizens, partly through their direct participation, and partly through their representatives. Popular sovereignty in a multiethnic state is not fulfilled if one or a few of many indigenous groups is allowed participation at the expense of others who are less educated or have less political clout or demographic weight. There might be other non-ethnic groups who suffer similar or worse exclusion and whose rights to development are violated. If indigenous movements have "tunnel visions" promoting only their right to participation, they risk not contributing to consensus-building publicly, and might unintentionally exacerbate instability and strife in already fragmented, conflict- ridden political systems. Such conflicts may tear apart the state institutions they seek concessions from.

Tomorrow we will hear about Nepal's indigenous (Janajati) movement. This movement expresses a quest for popular sovereignty, which will result in the demolishment of the caste hierarchy. It works for a fundamental change – that Nepalese citizens should gradually discard caste as a pre-modern basis of solidarity and actively engage on equal terms in the process of law making for the new constitution. As a scholar on South Asia I have to warn of the risk that caste as a pre-modern basis for solidarity and identify is now being substituted by primordial ethnic identities or ethno-nationalist identities – restricting the needed development of overlapping identities. Of course, if Nepalese leaders from the indigenous movement and other social movements and political parties are to succeed in democratic nation-building, they have to be able to reconcile the mushrooming of ethnic and regional identities with a new understanding of common (supra)nationality. Only then can the current crisis of national identity, which used to be based on the Hindu monarchy and the Nepali language, be overcome. This means that peoples have to balance group rights and individual citizen rights in order to contribute to a shared sovereignty, conformity to law and a wish for collective life. These are the main features of a national political community and a vibrant representative political system. Such a state can progressively realise the "right to development... the right of all individuals in a country exercised collectively" (Bleie, 2005: 65).

So what is a theory of sovereignty? Sovereignty is the just use of political power in a state and a society. Popular sovereignty and state sovereignty are distinct, but interwoven. In the current state-centric world, each one of us can only become sovereign citizens in a sovereign state. Such as state has the ability to protect national borders. It possesses legitimate

monopoly on power, and the ability to institutionalize our citizenship rights and open a wide range of opportunities based on them. Otherwise, the state can not remake pre-existing and unequal ties between citizens and peoples. It cannot redistribute power among all social classes and peoples, and become a neutral mediator that creates civic solidarity– that is necessary "to glue" the society together. Regardless of whether indigenous demands for participation or self-rule pose objective threats to state sovereignty or not, indigenous movements and organizations are often criticised for doing so. However, there are critical phases of societal transformation, often in the wake of civil wars or regional conflicts, when misjudging the nation-state's capacity to deliver justice can have very serious and long-standing consequences (Bleie and Dahal, 2010).

So far I have briefly discussed the notions of democracy and peoples and state sovereignty. I would like to conclude this section with some remarks on the notion of the nation-state. The defining features of the nation-state are a people with certain unique features, whose territorial distribution defines the outer borders. This model notion has a European origin (the so-called Westphalian system). The model defines democracy and the nation in the singular: within the nation-state. The imposition of this European model by expansionist colonial powers leaves the many peoples within post-colonial states with a bitter legacy, a fatal mismatch between the model or "map" and their multiethnic "terrain". Such realities form much of the background for recent decades' struggles for self-determination and challenging the nation-state to find new modes to accommodate participation, demands for autonomy and integration.

The experiences of huge civilizations like India and China suggest that "nation" and "state" are separate, yet congruent. Both ethno-nationalism and civic nationalism preceded the formation of post-colonial sovereign states. Every nation-building project is a process of developing a more inclusive and respectful culture and institutions. This means the inclusion of ethnicity and indigenousness, but also of gender, class, environmental justice etc. Nation-states that fail to integrate through such pluralistic modes of participation will be vulnerable to ethno-nationalism, even secessionism.

Beneath and beyond the nation-state: globalisation and the translocal

Market-driven globalization of capital, technology, ideology and communication mark a radical shift from the welfare state-oriented constitutional democracy to the competitive market-driven state and the constitutionalization of international norms, agreements, laws and institutions. This is making the state-centric definition of democracy increasingly problematic. Modern democracy has moved beyond the nation-state. There is an increasing imbalance between social transactions of the national society that cross state borders and the regulative capacity of territorial state. Instant communications and rapid travel reduce and remove the distance of time and space. All over the world societies are pulling states into expanded territories—through diasporas, migrant workers, refugee movements, participation in peace keeping, new social movements, foreign investment and foreign policy issues. All of these tendencies reshape the rights to representation in state, non-state and intergovernmental institutions, and the meanings of representation and of state-society

relations. Dynamic movements, including the global indigenous movement, mark the structural transformation of peoples' power versus state-power. Over-nationality is actively used to hold states accountable and to reform laws, institutions and decision-making processes. The subordination of states to plural authority structures of the United Nations, the World Trade Organization, the World Bank, regional trade and security organizations are also questioned and actively resisted.

While some states (such as China) have the capacity to collect resources (tax) to sustain welfare programs and rule of law, others do not that this capacity. This undermines the authority and capability to cope with internal and external challenges and to realize governance goals—be that security, rule of law, voice, civic participation, service delivery and resolution of political conflict. National territories of buffer states are vulnerable to regional and global geopolitics. Globalization of ideas (including human rights) and regionalization of political economy erode the state's autonomous institutional capacity across its territory. Also, the historically evolved state-centric nationalism and the concept of state-defined citizenship are undermined.

Global indigenous movements have appropriated and expanded the human rights regime. The movement spread of new ways (discourse) to act and speak of indigenousness, new forms of leadership and networks, makes effective use of a mix of the new electronic media, global travel and governance. There is a growing body of research on global indigenism, including what is termed transnational activism. The argument about a "boomerang effect", that local movements go global as a result of state oppression and lacking recognition, in order to expose and shame from above (by the global civil society and the intergovernmental institutions) and launch new pressures from within, has been criticised (Keck/Sikknik 1998:13), Stewart (2004). Stewart, for example, has said the boomerang effect argument is too general to explain the Guatemalan indigenous rights movement national and global nature.

The pathways of indigenous activism between local, national, regional and global levels vary significantly, as does indigenous peoples' ability to mobilise and participate in decision-making locally, nationally and globally, and how grievances are defined and strategic alliances at these different levels of scale are forged. Today's presentations as well as those tomorrow give us new valuable insights about the Sami Parliament and background for the Finnmark Law, the Janajatis in Nepal, the peoples of Mindoro Island, the Massai in Kenya which are illustrative of the ongoing transformations of the concepts I have underlined above.

The need to redefine and expand the meaning of democracy

Scarcity and economic insecurity in developing countries have not hindered guaranteed individual and group-based freedoms and autonomy, nor have made democracy a healthy polity. Indigenous women and children continue to face cruel gender and age-based discriminations in spite of international commitments and reform laws. The spirit of liberation expressed by new social movements of women, Dalits, youths, indigenous peoples and workers is a calling to all concerned activists, policymakers and scholars that true meaning of democracy is still in the making. Only an inclusive democracy can realize distributive justice and full rights to participation in both state and non-state institutions.

The promise of the so-called post-liberal democracy is, therefore, based on the expansion of personal rights matched with group rights. The vision of a post-liberal democracy breaks sharply with the liberal tradition in certain respects. It represents the individual as an intrinsically social being, therefore collective capacities, sentiments and attachments can be given due recognition. The primary of private control over productive property such as indigenous lands, and plundering of resource, becomes unacceptable, not only as an obstacle to popular sovereignty (Bleie and Dahal op.cit.).

Post-liberal democracy recognises that the ideals of democracy and human rights in no way can be achieved for all citizens under conditions of social and economic inequality and poverty. It therefore stresses that the state has to fulfil not only civil and political rights but also social, economic and cultural rights. In order to create democratic conditions for active citizenships, differentiated targeted policies are required for equitable and just distribution of resources through a thriving public sector, full employment and a support to the welfare state. In this context, the helpless and downtrodden require not only protection, but also additional opportunities so that democracy creates a level playing field for all- for life chances and equal participation- in public life rather than creating winners and losers.

Nepal is an illustrative example of a segmented political culture, where power sharing is needed in order to escape the current political deadlock of confrontation. The new political dispensation of Nepal, which we hope to see emerging, bears many elements of inclusive democracy and accommodation to the indigenous movement as well as other social movements. These elements are: recognition of group identity and autonomy, multi-party polity, grand coalition government, proportional sharing of executive and legislative powers, interest in strong bi-cameral legislature, federalism, proportional election system and a culture of compromise.

The prospective democracy in the making is quite close to the ideal of con-sociational democracy (see cf. Arndt Lijphart) that is meant to accommodate segmented societies along ethnic and territorial lines. There are of course critics that argue that ethnic-based federalism can deepen uncompromising attitudes, which in turn will make power-sharing arrangements unstable and short-lived (see cf. Hueglin, 2003:69).

Conclusion

I have attempted to highlight how the defining terms of indigenous rights as group rights coexist somewhat uneasily with political science theories of individual citizenship, state, of sovereignty and the nation-state – all of which have so far been modelled on European political history.

I have briefly characterised the ideals behind different political regimes of Asia. They vary from democratic centralism in China, to India's hybrid model, having elements of Soviet socialist centralism, Western liberal democracy and home grown civil-secular and cultural plural democracy. I have made use of my characterizations of these important countries, which have many nationalities - for establishing a more general argument.

The argument is that we need to be acutely aware of these concepts and to develop them, in order to grasp better the evolving notions of citizenship, state, nation and democracy, not only in Asia, but in all continents at a time of rapid globalization. The human rights regime, including indigenous rights, is part and parcel of this globalization from above and below.

This globalization of ideas, including those regarding indigenous rights, and regionalization of political economy, erode the state's autonomous institutional capacity across its territory. Additionally, historically evolved state-centric nationalism and the concept of state-defined citizenship are increasingly undermined. Let us as academicians and practitioners take responsibility, in alliance with other collective actors around our periled planet who work for a humane and just world, in striking the balance between group rights and individual rights.

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Subtheme 2: The Realities of Participation in Different Regions

A case of indigenous peoples' participation and involvement in constitution review

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Good afternoon. I would like to give a presentation concerning a case of indigenous peoples' participation and involvement in constitutional review in Kenya. But before that, I would like to thank this University and the organizers of the conference for inviting me to be a part of this very important process.

In most cases when we talk about Africa, we are often talking about conflict, we are talking about AIDS, but it is uncommon for us to be talking about Africa's constitution. When we talk about constitution making, we are often talking about the aftermath of a very serious conflict, usually to expose or solve some instability in areas that have gone through extreme problems. Kenya is different from many other countries in Africa, and I would like to shed some light on why and how it was necessary for us to go through constitutional reform. Kenya was colonized by the British, who, like many colonizers, were interested in land and natural resources. In the late 50's and early 60's most countries in Africa received independence, and Kenya received independence in 1963. We replaced the British and elected Africans to govern our country. The reason we fought for independence was because we believed that our land had been taken from us unjustly, and in order for us to get this land back we had to fight the British. Land has been central in Africa gaining independence. Unfortunately, when we gained independence the government often retained the same philosophy as the British in regards to land. They moved away from traditional indigenous government structures to a dictatorship structure, which often went against indigenous ideals. We ended up having one single party, which was a dictatorship, as we could only elect those who were referring to people already in power.

In the 90's people began talking about the second liberation. The first liberation was of course, regaining our country from British control, the second was to move away from a single party system to a more democratic government structure. The Kenyan constitution was amended in 1991 to allow for a multi-party democracy. Also of importance at that time were discussions about land and natural resources. Achieving the multi-party system did not completely change the composition of Kenya's problems, especially those of indigenous peoples. Indigenous peoples in Kenya have gone through ethnic, social, economic and political marginalization for years. We have been marginalized on the basis of ethnicity, on the basis of where we come from, and as well as culturally and spiritually. Many liberties have been taken from us. Revenues from natural resources are benefiting others, not indigenous

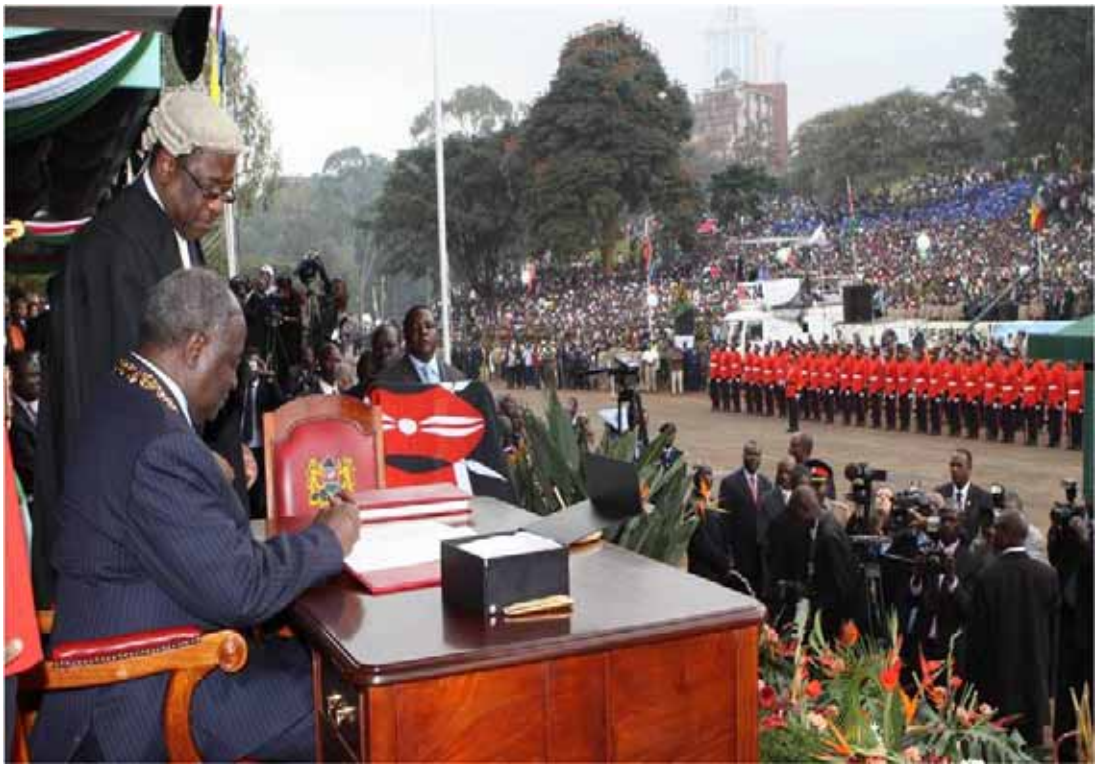
peoples. Their rights have been ignored, and human rights activists maimed, killed and tortured by the government in their efforts to silence them. Their lands have been invaded and their livelihoods and cultural practices degraded and seen as backward and barbaric. The conservative nature of the indigenous peoples in Kenya has been misconceived as non developmental and tribal. They have been used as only marketing tools by governments with no compensation and recognition for their vital role in environmental and cultural and protection and advancement.

The process of recognition in Kenya was very important to us, for a number of reasons. There were a number of principles that we wanted the new constitution to ensure. The number one issue was that we wanted our land to be owned communally, not just individually, which was the system imposed by the British. Number two, our right to culture is so, so, strong. The third issue was that of marginalization. The process of creating a new constitution has taken almost 20 years. So, although Kenyan independence is almost 46 years old, for almost 20 years we have struggled to get a new constitution in place to address some of the challenges that I have highlighted. In the following lecture, I will explain the process in which we received our new constitution- what I call a "road map" to our new constitution.

The struggle for a new constitution lasted for more than 20 years, and these 20 years were filled with bloodshed, detention, brutal dispersions of demonstrations and costly attempts to institute the new system, including the 2005 referendum that the government lost. It was rejected by the government because it had been manipulated to suit the interest of the sitting governments. The contested general election of 2007 led to a post election violence in which 1,300 people lost their lives and more than 300,000 people were displaced. The country was close to civil war. One of the key indicators of marginalization within Kenyan institutions is the fact that although 1,300 people were killed, to this day there have been no arrests or trials to account for such a loss of innocent human lives. There was an immediate intervention by the Panel of Eminent African Persons led by the former UN Secretary General– Koffi Anan. Anan's intervention led to the signing of the National Accord Peace Accord, and from this came the creation of the coalition government. Several commissions were formed including; TJRC, NCIC, CoE, IIBRC & IIEC. The Committee of Experts was formed to spearhead constitutional reforms, which basically created the new constitution. They created a "road map" which was central to us as indigenous peoples. This road map traced a number of steps to be completed so that we could establish the fundamentals of a constitution that would speak to many competing interests, and still serve the Kenyan people. This is a politicized process, and therefore it is a complicated and expensive process. Indigenous peoples had to complete to have their needs met in the creation of the new constitution. We participated from the beginning until the very end of this referendum process.

IIEC final results indicate that **6,092,593** Kenyans voted for the Proposed Constitution. This represents **66.9 per cent** of the votes cast. On the other hand, other **2,795,059** people, representing **30.6 per cent** voted to reject the new law. Those who voted against the Constitution did so mostly on the basis of land. There were many concerns with Chapter 5, which I will highlight later on. In addition, there was the issue of religion. Kenya has a large population of both Christians and Muslims, and there were a number of people that were against the adoption of the new Constitution due to their religious beliefs. However, on the

27th August, 2010 the new Constitution was instituted into the Kenyan political structure. Kenyans are now enjoying their new Constitution, and have achieved what many Kenyans believe is the "second liberation."



Now how did we, as indigenous peoples, ensure that our issues were addressed in the constitution building process? The number one and the most important way we did this was to be a part of the "inside process." We had links available for indigenous peoples to discuss these issues at a national level. We worked closely with the Committee of Experts, we worked closely with legislators, and we worked to lobby the Parliamentary Select Committee (PSC) and the Parliamentary Pastoralist Group (PPG). We also monitored the process closely through our indigenous representatives working on the Committee of Experts.

We also worked very closely with indigenous peoples to encourage them to come out in large numbers and vote. We provided civic education for indigenous peoples through civil society organizations, indigenous students and professionals. We utilized an extensive use of media to promote voting and educate the public, especially on vernacular stations. We had meetings, in which we mobilized public figures, officials and traditional leaders, to encourage voting in their communities. We translated the constitution into local languages, so that it could be understood by all. And finally, through regular and consistent meetings with indigenous civil society organizations in addition to monitoring the referendum process and voting, we were able to provide a link between grass-roots, indigenous peoples' networks and those influencing the constitution on a national level.

As I mentioned earlier, there was strong collaboration between the indigenous peoples of Kenya and the Committee of Experts. Joint activities were established in which indigenous peoples and representatives from the Committee of Experts participated together in encouraging voters to come out in large numbers and vote for the constitution. Fundraising was conducted by indigenous peoples' organizations to facilitate civic education. We feel that

the high levels of innovation and creativity experienced by indigenous peoples during this process had very positive effects on voter turn-out, as well as involvement in and comprehension of the creation of the new constitution.

The road to this new constitution was not an easy one. I believe that one of the most important aspects of colonization, particularly in Africa, is the colonization of the mind. I feel that people have internalized colonization to the extent in which a strong resistance from Africans themselves is often the response to certain ideologies, wisdoms and traditional ways, or when one talks of traditional culture. So, when we push for our rights as indigenous peoples to be met, at times we are met with very strong resistance, even from our own people.
I would like to talk about articles in the new constitution that particularly apply to culture, ethnicity, and human rights, as well as issues relating to marginalization. There are a number of gains that have been made by indigenous peoples present in the new constitution:

1. **Recognition:** The Preamble recognizes the ethnic and cultural diversity and those who heroically fought for the liberations of Kenya. Under Article 10 (2) these values and principles include human dignity, equity…….specifically "*nondiscrimination and protection of the marginalized*." Article 27 provides for equality and freedom from discrimination and prohibits any form of discrimination on the grounds of ethnic or

social origin, belief and culture. Article 11 recognizes culture… and obligates the Parliament to enact legislation to ensure that communities receive compensation or royalties for use of their cultures and cultural heritage etc. Article (5) says that the general rules of international law shall form part of the law of Kenya.

2. **Representation:** Chapter 11 of the Constitution gives the provision to create 47 counties in Kenya, each of which is represented by an elected county governor. Chapter 8 provides for the position of an elected senator. The whole idea of counties is to bring down the power of the high government to the local people.
3. **Human rights & judiciary:** All pastoralists and marginalized groups are beneficiaries of a now expanded Bill of Rights; particular attention having been given to economic, social and cultural rights. Article 21 states that it is the "duty of the State to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights," and "that all state organizations and public officers have the duty to address the needs of vulnerable groups within society, including members of minority or marginalized communities, and members of particular ethnic, religious or cultural minorities." Article 10 recognizes the traditional mechanisms of conflict resolution under the judicial service.
4. **Women representation:** In Kenya, one of the difficulties facing our country is that women have also been marginalized and neglected. This has occurred in both the national and community levels. During the constitution building process women were able to be at the center of this discussion, and now our constitution is upholding their rights. Article 27 states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic cultural and social spheres. Article 97 gives 47 posts in elected and appointed offices to women. Article 21 (3) on rights and fundamental freedoms say "all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities."

5. **Participation and Development:** This next aspect is fundamental to indigenous peoples' rights to be free from marginalization. Historically, decisions have been made not by us, but by others, and these decisions, which have been made without any kind of consultation to those they affect, have directly influenced our levels of poverty, our local issues, and environment. Therefore we feel that we have to ensure that in the future there is serious participation between indigenous peoples and those in power. Article 56 obligates the State to put in place affirmative action programs designed to ensure that minorities and marginalized groups:

(a) participate and are represented in governance and other spheres of life;
(b) are provided special opportunities in educational and economic fields;
(c) are provided special opportunities for access to employment;
(d) develop their cultural values, languages and practices; and
(e) have reasonable access to water, health services and infrastructure.

6. **Land and Environment:** As I have mentioned earlier, the issue of land is very central to the people of Kenya. During the constitution process, we wanted to ensure that we could hold land as a community, and not just as individuals. This was not easy for others to accept. We also worked hard to have traditional judicial dispute resolution recognized as valid in relation to land disputes. This has freed indigenous peoples from the expensive and time consuming justice system that had previously been the only option in resolving land dispute claims. Article 63 provides for "community land which shall vest in and be held by communities identified on the basis of ethnicity, culture." It recognizes community forests, grazing areas, ancestral lands as well as trust lands held by counties. It also recognizes the application of traditional dispute resolution

mechanisms in relation to land disputes. In addition, Article 67 (e) states the right to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. We are also very concerned about the environment, and gains in rights within this area are significant steps forwards, which have been achieved under the shelter of involvement. Specifically, Article 69 obligates the State to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, while Article 70 grants every person whose right to a clean and healthy environment has been violated the ability to petition the court for redress.

7. **Public Finance:** The establishment of an Equalization Fund was put in place to assist in the recovery marginalized communities. Every year 0.5% of the government's money must go into this fund for services like water and health facilities in marginalized areas. Article 201 provides that expenditure of public finances shall promote the equitable development of the country, including by making special provision for marginalized groups and areas. Article 204 establishes the Equalization fund to provide basic services such as water, roads, health facilities and electricity in the marginalized areas.
8. **Recognition and Definition:** This was maybe the most difficult part of the constitution: deciding what kind of language we are going to use to define indigenous peoples. A common definition is instrumental for ensuring human rights and Article 260 clearly places indigenous peoples in its definition of minority and marginalized communities as follows: "….a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; …a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; …an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or pastoral persons and communities, whether they are nomadic or settled." This definition is one of the major achievements of the constitution and as indigenous peoples we believe that correct definition should be part of political discourses.

To summarize, I feel that the most important aspects of the new constitution that have benefited indigenous peoples are as follows: the Preamble, Chapter 2 (Articles 5, 6 and 11) Chapter 4 (Articles 44 and 56) Chapter 5 (Articles 63, 67 and 69) Chapter 10, Chapter 11 and Interpretation 260. Additionally, huge strides were made in the implementation of civic education and in voter registration sensitization.

Conclusion

- Today indigenous people are confident that under the new constitution hard work and efforts will be rewarded, and that nobody will be held back by individuals or representatives, public institutions or systems, due to their personal livelihoods, social and cultural backgrounds, race, ethnicity, gender or any other factor.

- Several legislations must be passed through parliament for the indigenous peoples to enjoy specific rights and protection, especially in regards to land.
- The new constitution is now the foundation of our highest hopes, aspirations, ideals and values as indigenous groups. It will provide a more sustainable, peaceful, coexistence for the people of Kenya. It gives and provides renewed optimism about an equal and just society in which indigenous peoples are part and their contribution is recognized, acknowledged, and appreciated.
- Indigenous peoples should ensure meaningful and constructive participation in the implementation process to ensure they have a role in formulation and implementation of the legislation.

ASHE OLENG'
THANK YOU!

Indigenous rights and citizenship rights: contradictory or coherent?

Else Grete Broderstad, Centre for Sámi Studies, University of Tromsø

Thank you for the invitation. I appreciate the opportunity to present my paper, and to be a part of the discussion on indigenous peoples' right to political participation. In the invitation it is stated that the conference will address principal policy issues and major conceptual and pragmatic challenges and constraints in realizing different kinds of participation. My take on this is a focus on the 'bonds' between indigenous and citizenship rights. By addressing this concern, I am indicating the existence of a form of reconciliation between indigenous and citizenship rights. But first of all a couple of introductory remarks: talking about indigenous participation, and in particular political participation, its crucial to take into account the different contexts indigenous peoples are situated in, and have to relate to in their struggles for recognition due to variations in history, and political, legal and welfare systems. That said, I am convinced that the lessons we learn from each other: from the experiences we are collecting, the battles we are losing and the victories we are gaining are comparable and transferable.

Outline

I. Conceptual clarifications

- Central components of citizenship… and indigenous rights

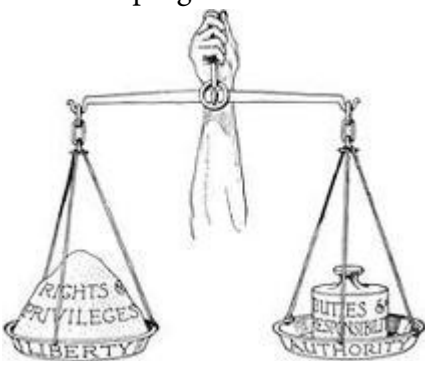
II. The ties between indigenous rights and the rights of citizenship

- Legal protection related to the participatory aspects of indigenous rights
- Political rights related to the participatory aspects of indigenous rights

First, I'll comment on central conceptual components of rights as rights are intrinsically linked to participation and vice versa, and secondly I'll examine the ties between indigenous rights and citizenship rights by linking together central aspects of citizenship rights– that is legal protection and political rights, with central participatory aspects of indigenous rights.

A conceptual clarification

Citizenship rights



The components of citizenship and the role of political rights
First generation: civil rights
Second generation: political rights
Third generation social and welfare rights
Fourth generation: minority and indigenous rights

The reason I am making a point out of citizenship and citizenship components, is due to the salient role of political rights. By making use of the political rights we have as citizens, the Sámi movement revealed new aspects and arguments of rights and participation and shed new light on Sámi-Norwegian relations. The results are recognition in the meaning of international and domestic law as well as the establishment of political arrangements. It is through the political rights of participation that other rights have been identified and recognized. The Sámi movement made use of the political rights of citizenship: the freedom of association, the freedom of speech and even civil disobedience when other means became insufficient.

Let me just add that one way to approach the concept of citizenship is the classic way to divide it into bundles of rights (as you see in the box above) starting out with a first generation of civil rights followed by a second generation of political rights, and then a third generation of social and welfare state rights and a fourth generation of minority and indigenous peoples' rights. This order in development may be characteristic for western liberal democratizes, but what about the range of order of citizenship rights of new emerging economies? Could social rights be developed prior to political rights? I pose this question as a critique to this classic approach.

Yet another take on this is on the one hand to distinguish between citizens' formal status-legal and political rights and duties in their relationship to the nation-state, which of course is vital to indigenous people; and on the other the affiliations the members of a society have to political, social and economic institutions of that society… this substantial dimension would even embrace those individuals without a citizenship. At this time I will not elaborate more on the understandings and the content of citizenship, instead we will move forward to the next main concept of my talk, namely indigenous rights.

A conceptual clarification

Indigenous rights

- Cultural rights The right to self determination
- Political rights
- Land rights… legal protection necessary
- in order to counteract the arbitrariness of political decisions

Indigenous rights can of course be categorized in a variety of ways like cultural, political and land rights, as well as emphasized by the collective right of self-determination as the salient dimension of indigenous rights, and the end line of all efforts. The most prominent expression of this development is the United Nations Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly September 13th 2007, in which Article 3 states that indigenous peoples have a right to self-determination. But what does self-determination imply in a complicated demographic landscape, within the complexity of legal and political relations? I do not aspire to provide an answer, but I will conclude by pointing out one approach to this debate.

Indigenous rights understood as rights to land and water would be about property and usage rights implying more substantial legal perceptions. With reference to land rights of indigenous peoples, the fallibilities of political decisions become even more critical due to a lack of institutionalization of indigenous influence or because of the fact that authorities have regulated away or removed customary rights of indigenous peoples through political decisions. The legal protection offered to citizens by means of the constitutional state has not protected the indigenous use of land areas in the same manner as non-indigenous user rights. Thus, legal protection is necessary in order to counteract the arbitrariness of political decisions.

For that reason, the 2001 Norwegian Supreme Court cases of Svartskog and Selbu, became salient in terms of representing a paradigmatic change. In the Svartskog case the local population of the village of Manndalen in Troms County, was awarded collective ownership rights to an outlying field area– the so-called area of Svartskogen. The case of Selbu, in the county of South Trøndelag, dealt with reindeer herding groups of Essand and Riast/Hylling who were awarded pasture rights on private property within the district of the reindeer herding area. The Supreme Court states in both cases that the distinctive features characterizing the Sámi use of land must be taken into account, and the Court signals that the conditions for acquiring legal rights through immemorial usage must accommodate Sámi legal reasoning and Sámi use of recourses.

A conceptual clarification

- A "negative" aspect, passive protection
- A positive aspect, a duty of activity upon the nation-state
- A procedural aspect, real influence, consultations and negotiations, but self determination?

Indigenous rights – a procedural approach

For this purpose, with indigenous participation as the red thread, I prefer a procedural approach in order to account for the understanding of participation in a Sámi-Norwegian context which could be divided into three stages of progress. This is a development parallel to the evolvement of indigenous rights as "bundles" of rights in international law.

In the first phase I place the traditional readings of Article 27 of the International Covenant on Civil and Political Rights from 1966, which are rights preventing discrimination or "passive" rights. When Norway ratified CCPR the relationship to the Sámis was not regarded as relevant (Minde 2003). Not until the Alta struggle was this connection activated, and in 1982 and '83 the Human Rights Committee thoroughly examined Norwegian position towards Sámis. The perceptions changed and in 1984 the Sámi Rights Commission is doubtless in their case that Article 27 allows for measures of positive rights.

The Norwegian Parliament followed this reading, implying that the nation-state has to actively contribute to developing Sámi culture, as well as embracing the material aspects of a minority culture. We are talking about active or positive rights that are recognized, and an admission of a duty of activity upon the nation-state, all this as a result of an increased Sámi political participation and involvement.

This positive aspect of participation is further developed into a procedural aspect, which is asserted in a Sámi-Norwegian context through the consultations prior to the decision on the Finnmark Act and the 2005 consultation agreement between the government and the Sámi Parliament. For those of you unfamiliar with the content, let me explain that the Finnmark Act was adopted by the Norwegian Parliament in May/June 2005, and that the right of disposition over the land in Finnmark was conferred to a new landowning body called the Finnmark estate. Also in May 2005 the Sámi Parliament and the Norwegian government entered into a consultation agreement.

Many of the provisions of the ILO convention No. 169 concerning aboriginal populations and tribal people in independent nations, can be read in view of a procedural perspective. The surveillance bodies of ILO have stated that consultations and active participation constitute the core elements of ILO 169. (In a statement from the surveillance bodies of ILO in a 2003 observation statement to Paraguay's report on compliance of the Convention, it is stated that

consultations and active participation constitute the core elements of ILO 169.) In current interpretations of Article 27, the ILO 169 provisions on consultation and participation, and the UN Human Rights Conventions' Article 1 on the right to self determination, the procedural aspect of indigenous rights is retrieved.

I started out by indicating the existence of a form of reconciliation between indigenous and citizenship rights. The terms citizenship and equality are often read as an acceptance to become the same as the majority population of a state. The principles of equal respect and rights for each individual regardless of cultural belonging and the liberal principle of 'one person, one vote' are considered to be in conflict with the principle of acknowledging cultural recognition and protection of collective identities. Different regimes of autonomy presuppose extended relations between indigenous institutions and other institutions within as well as outside indigenous areas cf. Kingsbury (2000). John Borrows (2000) argues for an understanding of Aboriginal citizenship in Canada, which implies a perspective on indigenous autonomy and self-determination, but also a need to include these perspectives into a debate on citizenship. I share this view. The fact that the Sámi relate as citizens to different levels of authority, including their own self-governing system, necessitates a debate about the bounds between indigenous and citizenship rights.

Development of the participatory aspects of indigenous rights / Citizenship-Functions	The "negative" aspect	The "positive" aspect	The procedural aspect
The legal protection of citizenship	1) Traditional cultural protection, nonintervention.	2) Obligations of international law: a duty on the state to be active, i.e. recognition, and call for legal decisions and policy efforts.	3) Acknowledging that the ordinary obligations of the constitutional state also protect indigenous use of land.
Political rights as citizenship	4) Variation of ascription of belonging and loyalty. A right to internal disagreement and a right to exit.	5) A new understanding of Sami-Norwegian relationships. Political participation, autonomy arrangements.	6) How to understand and implement autonomy and self-determination? By means of a relational form for self-determination?

As an attempt to respond to my initial assumption of reconciliation between indigenous rights and the rights of citizenship, I present the table above summarizing some lines of arguments. One may claim that the image I am presenting of the development in Norway is too ideal, but I am insisting on the explanatory sense of my account. Of course the step between national policy and local implementation may be a lengthy one, as we will hear more about in the following presentations.

Back to the table; the main functions of citizenship: legal protection and political rights, are linked to the participatory aspects of indigenous rights, the negative, the positive and the procedural aspects, in order to shed light on the developmental stages that I have accounted for.

(1) Thus, the traditional protection of culture implying non-state intervention becomes evident, a condition not corresponding with modern indigenous politics.

(2) On the other hand, in the next column; at the next stage where legal protection of citizenship is linked to the positive aspect, a duty on the nation-state to be proactive is acknowledged and furthermore adjusts for recognition, support and efforts. This is the stage set for the Sámi political institution meetings. This is the mid-80's with the establishment of the Sámi Parliament, the Sámi Act and Norway's Constitutional Amendment. It is in this period where political rights are acknowledged.
(3) As a result of this legal and political development, Sámi customary rights and use are being incorporated into the legal system, and the legal protection that is provided to citizens through the constitutional state also protects the indigenous use of land, illustrated through the Supreme Court cases of Selbu and Svartskog. Here the importance of public debate and of learning is revealed. The court decisions discuss earlier use of sources, evidences, methods and conceptions, grounded in domestic law and legal understanding. The use is considered to have a lawmaking character and therefore needs to be included in the legal protection of land use.
(4) Returning to the negative aspects as linked to the function of political rights-membership and political participation is about indigenous and minority individuals' right to internal disagreement and individual diversity. Anyone is free to choose to exit. There are still many people that could have registered themselves in the Sámi electoral roll for the purpose of taking part in the election to the Sámi Parliament, but they have not done so, which does not necessarily mean that they are ignorant of this option of participation. Their lack of interest may even express an active choice, and a right to internal disagreement.
(5) However, the political rights to participation essential to autonomous arrangements are not impaired, and coincide with the core political rights of citizenship. Through these political rights, other rights are clarified. Thus, citizenship is a political resource, not only for the individual citizen, but for the Sámis as an indigenous people. By making use of those means of communication available in the public sphere, the Sami political movement has pursued new issues, presented new arguments and placed Sámi-Norwegian relationships in a new light. Debates of recognition have also affected the self-understanding of the majority. This is not only a one-sided development. It is not only a development within the Sámi political field, or within the Sámi community. It is also a relational aspect, and may even shape what it means to be Norwegian.
(6) In the last column of the table, the procedural aspect coincides with the political rights we have as citizens, included as indigenous citizens. This is about the aspirations of self-determination, and particularly about the implementation of self determination. As I said earlier; there are no easy solutions in a complicated demographic, legal and political landscape, so I have found it useful both in a theoretical and practical or empirical sense to apply the concept of relational self-determination (Svensson 2002: 32, Kingsbury 2005, Young 2007: 38-57.) We are all situated in a reality that is demanding. Concepts we may take for granted, such as identity, cultural distinctiveness, existing frameworks of political participation and the notion of the nation-state are challenged. What about those cases where there is no clear distinction between a Sámi and a Norwegian issue? Exercising of authority will imply change, renewal and conflicts (cf. Pettersen 2002: 76).

I find a relational approach to self-determination relating to democracy attractive in order to capture core challenges to the implementation of indigenous self determination. Additional strengthening of Sámi political authority is hardly gained by walking alone in the meaning of non-interference, and require participation in political arrangements as it contributes to common understandings. Therefore, the consultations lead the way. Citizens, including Sámi citizens, have to exercise their autonomy in common, participate in political processes in common, specify justified interests and standards, and agree upon relevant concerns in order to decide when similar issues should be equally treated and when different issues need to be conducted in a diverse manner.

The Finnmark Act and afterward- Sámi political influence under different premises

Eva Josefsen, Norut (Northern Research Institute)

My presentation today has the title "The Finnmark Act and afterward – Sámi political influence under different premises". I will give a short presentation of the making of the Act and what has happened in the implementation process, and also say some words about the consultation agreement between the Sámi Parliament and the Norwegian government. Since time is limited, I will not go into details about these arrangements, but focus on the political processes and how Sámi political influence seems to appear.

The Finnmark Act had a long and hard birth. After fifteen years of investigation the Norwegian government finally forwarded an act proposal towards the Norwegian Parliament in 2003. The proposal became heavily contested by different local and regional actors, especially by those who did not want any Sámi rights to be recognized in a land act. The Sámi people and the Sámi Parliament also protested against the Act, but with an opposite focus, that is on the *absence* of recognition of existing land rights in the proposal. Due to these protests the Norwegian Parliament's Standing Committee on Justice decided to consult with the Sámi Parliament as part of their work on the Act. Simultaneously the Finnmark County Council was also consulted. The decision to consult external parts in an internal law deciding process was without precedence in the history of the Norwegian Parliament. Two years later, after some significant changes, the Finnmark Act became law.

In the Finnmark Act's final form, the state relinquishes its role as landowner, transferring the performance of ownership to the Finnmark Estate which is to manage the lands "for the benefit of the people of the county, taking particular account of their value in the promotion and conservation of Sámi culture, reindeer husbandry, outfield use, industry and governance" (preamble to the Act). The executive board of the Finnmark Estate consists of only six members, three from the Sámi Parliament and three from the County Council. Further, residents of the county now have precedence over other Norwegian citizens when it comes to land use rights, although the general public still enjoy "right of access" for purposes such as sports fishing in inland waters and small-game hunting. Furthermore, the Act acknowledges land rights acquired by *the Sámi and others* through customary or ancestral use. These rights still await clarification as to whether they are user or property rights, by a commission has been specifically created for this purpose (*Finnmarkskommusjon*) A Land Title Court (*Utmarksdomstol*) is being created to handle disputes over ownership or use that may emerge in the wake of the commission's investigation. The rights are to be clarified as to who have land rights and whether they are user or property rights. The Act also involves a limited incorporation of the ILO Convention169 into the act, and if there is conflicts between the convention and the Act, the Convention will have precedence. Finally, the Sámi Parliament has the right to issue guidelines for any changes to the use of land. The Sámi Parliament and its representatives exercised influence and definition power during the consultations by

delivering substantiated arguments and also by building trust with justice committee members.

Since then, the Finnmark Commission is in working order and the identification process is ongoing, but with no results so far. The Finnmark Estate (FeFo) however, came into operation in 2006, the year after the Finnmark Act was passed.

As a result of the consultations with the Norwegian Parliament Justice Committee, the Norwegian Government and the Sámi Parliament signed a consultation agreement in 2005. The agreement is explained towards the ILO Convention 169 on the state's responsibility to consult with its indigenous people (Article 6). Objectives of the procedure is, among other things, to contribute to the implementation of Norway's obligations under international law in practice, seek to achieve agreement between State authorities and the Sami Parliament whenever consideration is being given to legislative or administrative measures that may directly affect Sami interests, facilitate the development of a partnership perspective between State authorities and the Sami Parliament that contributes to the strengthening of Sami culture and society and to develop a common understanding of the situation and developmental needs of the Sami society.

The consultation agreement is spoken of as the most important tool for the Sami Parliament influence towards the Norwegian government. It formalizes and regulates the contact, and is a way of decision that rests on comprehension and consensus, in which parties are equal and in search for mutual understanding by the better arguments (Broderstad og Hernes 2008). It is also an obligation for the Government to pay attention to Sámi aspects in its handling of political and administrative cases. On the other hand, this agreement gives the Sámi Parliament an influential voice into political processes on a governmental level. This channel of influence is not open for the public, and there is little information on what is agreed upon until the decisions are done. Nor is it open for Norwegian County Councils, and in my opinion, this is a negative aspect of the consultation process.

The consultation agreement is essential for understanding the strengthened role of the Sámi Parliament both as a political premise provider and as an equal provider of policy input. The agreement is a tool for building capacity for real influence and participation on more equal terms, participating in decision making structures and cooperation structures. The Government has attended to Sámi perspectives in its policy formation more systematically than earlier. According to oral information from the Sámi Parliament, there consultation on approximately 40-50 issues every year, both on a political and an administrative level towards central government. The effect is that the Sámi Parliament of Sámi political leaders does not have to politicize issues late in the process because the necessary considerations have been attended to in an early stage. It is then possible to go straight to the heart of disagreements, getting away from the policy of symbols and on to hard-core policy.

This shows that the Finnmark Act process contributed to a significant formal strengthening of the relationship between the Norwegian Government and the Sámi Parliament. The Sámi Parliament's influence has increased beyond the Finnmark Act towards the Government. Regionally this is not the case. I want to return to the Finnmark Act and the FeFo.

The implementation of the Act went fairly well in terms of transferring the tasks from the old regime to the new. The management of renewable resources is fairly detailed in the Act and the earlier regime had good routines on how to manage these. Most of the existing arrangements were extended. In terms of the management of the property, the ground or the land, the Statskog had good routines on sale and leasehold for building plots. This task was not regulated in the Act as the renewable resources were, thus the board had a larger space of action, and with a larger space of action the potential for conflicts becomes larger. It is the estate's commercial activity that have the potential for the deepest conflicts, because then the estate becomes an actor as any other actor from outside pushing on the areas, where among others, the reindeer husbandry are using today. Any physical development project has the potential to drive away traditional users. Their eagerness to become an industrial actor may come in conflict with the collective interests and also with the preamble regarding both sustainable development and Sámi culture at large. In connection with the renewal of its strategic plan this year, the Estate initiated an evaluation of itself last winter. The conclusion was that all in all the Estate had handled its community responsibility well. There were, however, some significant remarks.

First of all, the *cooperation* between the FeFo-board and its appointing institutions, the Sámi Parliament and the Finnmark County Council, were weak or nearly absent in the Estate's three first years of the evaluation period. Still, the two appointing institutions chose two opposite approaches towards the Estate. The Sámi Parliament was very reluctant commenting on anything in public regarding the Estate. Almost all contact was informal between the Parliament and the three board members appointed by the Parliament. So the public access to the content of this contact was thus limited and even absent. The public was not involved. The argument for this strategy by the Sámi politicians was that they did not want to interfere in the board's work; one had to trust the board members in implementing the Act and the intentions of the Act.

The Finnmark County Council on the other hand took upon itself a very active role, and acted almost as an owner to the Estate, for example by drawing up a steering document on the Finnmark Estate. The FeFo, on the other hand, is, according to the Act a foundation without any formal owners and did also insist on being an independent body with the board collectively responsible for the management of the Estate. The contact between the FeFo-board and the County Council occurred mainly through media, and was often marked by confrontation more than communication. Only three years after the establishment of FeFo did these three institutions establish a common meeting place for debate, discussions and exchange of information; a place to become known with each other and confident on each other's motives.

Secondly, even though there has not been any systematic research performed on this subject, to say that the legitimacy among the county population seems weak is not too far off. The evaluation report concludes that there is a huge mistrust in the population. The debate of Sámi rights in the county of Finnmark had been ongoing since late seventies and many were against recognizing these rights all together. It is a complicated topic. In addition, the consultation process of the Finnmark Act was closed, thus leaving the public on the outside. There were no efforts taken to secure the support of the Act among the county population.

This may also explain the third significant mark in the evaluation, namely that the FeFo-board emphasizes only one part of the preamble in the Act; the best interests of the people of Finnmark.

The considerations regarding sustainability have not been debated by the board explicitly. Nor has the part of the preamble regarding the Finnmark Estate as a basis for Sámi culture. This strategy seems to be agreed upon by all the board members, including the members appointed by the Sámi Parliament. Interviews made during the evaluation by board members reveals that the board members have very different understandings of their responsibility towards the preamble. Some even tend to disregard these obligations.

The weak cooperation between the Sámi Parliament and the Finnmark County Council is not unique, but only part of a weak political partnership between the Sámi Parliament and the regional political level all together. As appointing institutions of the board of the Finnmark Estate and the special role these two popularly elected bodies play in regard to the Finnmark Estate could have given an opportunity to develop and create new conditions for political influence in general. However this has not happened. The story of the Finnmark Act and Sámi political influence afterwards may in many ways be considered a story of success, but not all together.

Thank you.

Below the public policy surface: Local reality and popular resistance against the Finnmark Act

Ole-Bjørn Fossbakk, University of Tromsø

Ladies and Gentlemen, organizers, I thank you for providing me this opportunity to give the audience some small insight into the realities of the Finnmark Act.

As the background for the Finnmark Act is duly introduced, I would like to dedicate this brief orientation to account for some aspects of the resistance that the Finnmark Act has met on a local level. As the Act itself now is being implemented by the board of the Finnmark property and its administrative units, which is managing the resources more or less in the same line as its predecessor, the State, there is an persistent resistance against the Finnmark Act and Sámi rights to land and water, especially in the coastal areas and towns like Alta and Hammerfest. Why is there resistance against a law that pleads for justice for the Sámi population, as well as for the many local communities for whom the law aims at secure the rights to land and water, according to long time and customary usage?

First: what is resistance? The resistance towards the Finnmark Act was, until the first bill was rejected by the Sámi Parliament, of a more subtle kind, which according to James Scott, is typical of resistance that comes from non-organised groups: protests, non-cooperation, silence and ignorance. But after the Sámi Parliament rejected the first proposal because of its shortcomings when it came to meet the requirements of the ILO 169, and the proposal was sent to two different expert groups for evaluation, the debate took off. This was partly due to the contradictory conclusions in the respective evaluations, one that favoured the Sámi Parliaments' view and one other that rejected the first Expert Committee's report. The Parliament Committee of Justice, on its own initiative, initiated the consultation institute in order to get the Sámi Parliament's and the Finnmark County Council's view on the Finnmark Act.

At the same time, a central politician representing Finnmark in the Parliament, Olav Gunnar Ballo, said that the report written by Fleischer was a "slaughtering" of the report and favoured the view of the Sámi Parliament, and that the implications of this were the start of a process towards the privatisation of Finnmark. This view was the starting point of a more organised protest against the Finnmark Act. In 2005, a few months before the Finnmark Act was going to be presented for the National Parliament, an initiative to start a petition was taken by a few individuals from the socialist left party and communist party, to persuade the government to say no to the Act. The argument was that the Finnmark Act would lead to privatisation of the commons. The petition got 11, 000 signatures, which is a significant number in Finnmark, where the total population is only around 70 thousand people. This did not seem to have any great influence on the government parties or the largest opposition party, the labour party. The Parliament voted for the law in 2005. In the spring of 2007, a press release stated that a new organisation was going to be established. It was called Etnisk og Demokratisk Likeverd, EDL, which translates to Ethnic and Democratic Equality, implying

that the Sámi were now in the role of suppressors of the majority population. Their mission statement was to work against privatisation of Finnmark.

Soon it became clear that it also worked against special treatment on ethnic basis, that is the EDL's definition of special privileges for the Sámi. They believe in entitlement to land for individuals or local communities, to be a representative organ for the common access to the property, and maybe most importantly, to remove the ILO 169 preferential status in the Finnmark Act. According to a pamphlet issued by EDL 2008, the ILO 169 is not valid within the Norwegian context because the majority of Sámi do not fulfil the requirements to be considered a indigenous people because they are assimilated into the population at large, that is demographically, by trade and industry, economic and social conditions and further not by having their own, characteristic traditions, customs or political institutions. The words in this pamphlet were written by a former Sámi leader and intellectual.

The EDL currently has 680 members, and it has been quiet for some time now. But there is reason to believe that they are supported by a large portion of the population in the coastal areas. Furthermore, the initiators belong to blocs within the labour party, the socialist left party and the liberal democratic party. These parties have the majority of votes in the National Parliament. The liberal democratic party even got two representatives into the Sámi Parliament with the political goal to put down the Sámi Parliament from within.

The point here is that the EDL movement and the blocs within the national political parties represent a longstanding opposition towards Sámi ethnopolitics within both the Norwegian and Sámi population.

The introduction of property in Finnmark

The fact that the Finnmark Act in itself does not discriminate amongst any ethnic groups does not seem to have reassured those who are against the Finnmark Act. That is partly because the worst is yet to come. The work of the Finnmark Commission has been established to investigate all previously existing informal rights based on the principles of long time usage or customary usage, as individuals or groups in local communities may hold and recognise individual or collective use rights, entitlement or other rights. This process is, according to the resistant voices, expected to lead to a process of privatisation of the former state commons in which the Sámi will be allowed special rights according to their status as an indigenous people. According to this line of thought, the majority can be excluded from the "common goods of nature" (*felles naturgoder*),[30] previously secured equally for all by the state.

Finnmark has been considered as a state common where all have the equal right to lead an outdoor life without any limits on movement or on where one can fish and hunt, despite the fact that the local communities have had their territories, defined by how they have adapted their usage according to the prevalent resources necessary for the household viability over time. However, there have never been admitted, defined or recognised, any formal property

[30] Within a Norwegian context, natural resources and access to natural areas is perceived as a common good for all. The right to outdoor life is considered an important part of the welfare of the people. The right to access is secured by "Friluftsloven" - the "Outdoor act" - of 1957. The feeling that this right is threatened in Finnmark by the recognition of indigenous and local rights has led to protests.

rights to individual or group rights in the local communities of Finnmark. Thus the concept of property rights and duties are largely unfamiliar within the context of Finnmark.

Therefore, the Finnmark Act as it is formulated, does indicate that there will be an introduction of formal property in some sense or another, and this will contribute to a change the relationship between different groups of users. Today no one is quite sure of what that will mean, which is where the source of conflicts lie, and which is partly why the resistance has gained terrain. The public is imagining that Finnmark is going to be divided into small property areas where the common people do not have any access, or that their access will be limited by local people, private owners and local administrations, once the Finnmark Commission has ended their work.

What, or who, is forming a resistance?

As we are very accustomed to think in ethnically "clean" categories, it is easy to dismiss the resistance as individuals within the Norwegian majority population forming racist arguments, while the victims and the oppressed are the Sámi. The ILO Convention 169 says that everything should be done according to *their* tradition, *their* consent. This word 'their' forms for us a neat and clean sociocultural category, that of indigenous people.

But according to my data, the majority consists not only of those of Norwegian descent – on the contrary, quite a large percentage has a Sámi background. According to my informants, the difference is that that they think that their ethnic origin should not form the basis for demands to rights to land and water. Its easy to dismiss these voices as the assimilated Sámi, the victims of the colonising state who have taken on a Norwegian identity, and hold Norwegian values. But I would argue that a great part of the resistance could come from the majority of the Sámi population; a Sámi population that rejects the legitimacy of the Sámi Parliament and the Sámis' status as an indigenous people by abstaining from enrolling in the electoral role, who protest against the Finnmark Act, and in general hold a different ideological basis for their political choices.

The recognition of another Sámi public?

It is understandable that the ethno-political movement mobilised during the current Sámi revitalisation process, which has succeeded in establishing an institutional network to promote Sámi issues and which moves towards self-determination in central matters (with the Sámi Parliamentary system at the top) to a large degree neglects such points of view. Should they be responsible for taking into consideration and mobilizing the Sámi outside the electoral roles?

There has been a very long processes of professional investigation and continual political pressure from Sámi organisations and the Sámi Parliament on behalf of Sámi rights and the Finnmark Act, mainly directed towards the state level and the international level and as a interaction between the state and representatives for the Sámi political and professional leadership. On a local level the question of what kind of rights that are to be recognised remains unclear and a source of conflict.

Maybe the Sámi Parliament, and other responsible politicians in the future, must address the Sámi that still remain outside the electorate and take into consideration competing political ideologies held by these groups? Maybe even a systematic analysis of radical political points of views from organisations like EDL can lead to a more enlightened Sámi public in the long run? However, this is not enough. The major Norwegian political party needs to deeply reconsider their ideologies and their policies concerning the Sámi as an indigenous people. A few, quite a few, of those who initiated the creation of the EDL organization are also central politicians in the labour party. So when there are questions of access and control over territories over natural resources, at least we should be playing with all the cards, from all sides.

Thank you.

The Situation of Indigenous Peoples in Mindoro Island

Jeff Rafa, ALAMIN, Philippines

Thank you very much. First I would like to thank all of you and the forum organizers for giving us the chance to be here at this very important event. It is a rare opportunity for a community organizer like me to be a part of this kind of activity, and I would like to take this chance to share the experiences of our indigenous peoples with you, and hopefully gain support from all of you and from other activists around the world. My presentation is about the present situation of the indigenous peoples on the island of Mindoro.

Mindoro is an island of the Philippines located about 140 km southwest of Manila. The name Mindoro was coined from the Spanish term "Mina de Oro" which means "gold mine". This was how Spanish navigators, led by Juan de Salcedo, described the island after they found buried Chinese cargoes with gold threads, jars, silverware and porcelain.

It was on November 15, 1950 that this island was divided into two separate provinces, the province of Oriental Mindoro on the eastern half and Occidental Mindoro on the western part of the province. It is the 7th largest island in the Philippine archipelago.

Mindoreños in enjoy a pleasant life springing from the pastoral and idyllic atmosphere of the province. The province is largely rural, 70% of the population is engaged in agriculture and fishing with only 30% living in urban centers. Equally peaceful and at harmony with their environment are the Mangyans of Mindoro, who comprise seven ethno-linguistic groups.

Mangyan is the generic name of the seven indigenous groups, each with its own tribal name, language, and customs. The total population may be around 100,000, but no official statistics are available because of the remote and generally reclusive nature of these tribal groups, as some of chose to have little contact with the outside world.

Indigenous Peoples & Mining

Since 1997, a foreign mining operation has been being pushed through in Mindoro. The concession previously owned by Norwegian MINDEX ASA covers about 11,000 hectares situated within the ancestral domains of the *Alangan* and *Tadyawan* Mangyans of Mindoro. Crew Minerals acquired ownership in 2000 and Norwegian Intex Resources in 2007.

The US engineering corporation Dames and Moore carried out a scoping report for the company in 1999, which identified several potential impacts that the subsequent Environment and Social Assessment (ESIA) would have to address. These included that "Mangyans' sacred places will be affected or destroyed by the construction activities and by the project operation."

The traditional religion of the Mangyan upholds the inherent sacredness of all creation which had been bestowed by Ambuwaw with spirits. Alangans' (a subtribe of the Mangyan people) cosmology and ritual practices attest to this continuing ecological belief. Thus, the

land and the ecosystems in their ancestral domains are accorded with respect, and they are important, having value which is simply beyond any monetary equivalent.

For the Alangans, nature is animated by spirits and must be treated with deep respect. The rivers are protected by the spirit of *Alulaba*. The forest and its diversity of plants are watched over by *Kapwanbulod*. The geo-ecological ethics of the Mangyan Alangans underlines most specifically the deep spiritual importance that their ancestral domains have for them. Thus, the large-scale mining will undeniably cause drastic impacts on the life of the Mangyans. Since the traditional culture of the Mangyans revolve around their relationship with their land, the entry of mining operations will change the very foundation of their distinct existence as indigenous people. The destruction of the land from where they get their sustenance both physically and spiritually could forever alter their way of life and their traditional values that are deeply rooted on their autonomy and in the interdependence of all life.[31]

Article 25 of the United Nations' Declaration on the Rights of the Indigenous Peoples explicitly provides that: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

Free, Prior and Informed Consent (FPIC)

The Indigenous Peoples Rights Act of 1997 provides that "the consensus of all members of the ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, should be obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community before any project can be implemented within the ancestral domains of the indigenous peoples.

The mining company was refused FPIC by both indigenous peoples' organizations from Alangan and Tadyawan tribes, respectively. The National Commission for the Indigenous Peoples, a government office in the Phillipines, tasked to protect the rights of the indigenous peoples, despite the refusal of the indigenous peoples' organizations, issued a Certificate of Pre-Condition allowing mining to proceed despite the IPRA's requirement that 'no certification shall be issued by the NCIP without the free and prior informed and written consent of ICCs/IPs concerned'. Following objections from the Mangyan organizations to this in 1999, KABILOGAN, which is another indigenous peoples' organization, was formed by the mining company and the NCIP. This is an example of a manufactured FPIC vote in the Philippines. It claimed to be a new tribal group which happened to be located precisely in the mining area and consisted of many of their existing work force and employees, who were understandably supportive of mining. FPIC covering another part of the concession was obtained in 2008 from the same individuals who gave the first FPIC. In both cases only the consent of this subgroup of Mangyan was obtained and the existing official recognized

[31] Gariguez, Edwin. 2008, *Articulating Mangyan Alangans' Indigenous Ecological Spirituality as Paradigm for Sustainable Development and Well-Being*. Phd Dissertation, Asian Social Institute, p. 256 and 239

Mangyan organizations whose ancestral domains are covered by the mining concession were excluded.

This constitutes a breach of the IPRA which requires the consensus of all impacted indigenous peoples and its rules and regulations in force at the time required that 'when the policy, program, project or plan affects…a whole range of territories covering two or more ancestral domains, the consent of all affected ICCs/IP communities shall be secured.' Moreover, consent should have been obtained without taking advantage of the situation of indigenous peoples, as well as their lack of understanding regarding the mining project and its impacts on their land and lives in general. The project proponent, aside from giving information about the project, should have in no way influenced the decision making progress by giving or promising material incentives to the ones making the decision. It is our experience in Mindoro that mining companies have on several occasions, been involved with different assistance programs. To help other people, to give them assistance and support is very noble, but to give them assistance in exchange for their consent, in exchange for their rights to their properties and to their ancestral domains, is not noble or ethical. However, this is not the whole problem. Mindoro has a very fragile ecosystem, and after the discussion on indigenous peoples I would like to explain a bit more about the environment of Mindoro, because it is a great opportunity to be in Norway with all of you and we would like to provide more information in attempts to gain support in our struggle, which has gone on for almost ten years now.

The Environment & Mining

The proposed nickel mining operations will bring environmental destruction to the island affecting lives of indigenous peoples, agricultural production, and biodiversity. The rate of degradation of the forest in the island of Mindoro is alarming. From the 967,400 hectares of forest in the 1950s, the remaining forest cover at present is only about 50,000 hectares. The significant forest lost of 95% contributed to the instability of the environment both in the upland and lowland areas.

The proposed mining site is located at the upper portion of Central Mindoro. It is also part of the range of Mindoro Island which serves as a contiguous watershed to more than 15 river systems, draining to the northeast side of the rich agricultural plains of *Calapan, Naujan,* and *Victoria* of Mindoro Oriental. In particular, the mining site is within a major watershed of *Mag-asawang Tubig* which is one of the major river systems in Mindoro Oriental. The mining operation is directly anchored on the Mag-asawang Tubig river system, and should the mining operation of Aglubang/Intex push through, Mag-asawang tubig River will be directly affected. Likewise, all the communities to which this river passes through would be affected, primarily the farming communities. Farmers are diverting some of the river water to irrigate their farms. If and when the river water becomes polluted or carries some substances detrimental to the crops, this will be reflected in the quality and quantity of the harvest of the farmers. Those who depend on the river and its tributaries for irrigation would also be affected. The mining company has even commissioned another engineering firm to access the possible impacts of their mining project. This firm identified the following impacts of the

possible mining project in Mindoro as being: increasing erosion and sediment yield, decrease of forests habitat and several other impacts. "Mining will expose areas to the risk of erosion and also the establishment of overburden stockpiles will create additional areas prone to erosion."[32]

DENR Secretary Heherson Alvarez in his article in Philippine Star, dated November 13, 2001, asserted that: "The project site forms part of the recharge area of watershed where the headwaters of Mag-asawang Tubig emanates. The extraction of the nickel ore deposits by strip mining method...will aggravate risk of reducing recharge capability and increasing siltation, even with best mining practices...Downstream of the Magasawang Tubig lies vast irrigated rice-lands from which thousands of Mindorenos are dependent for their food security. No amount of mitigating measures can take away the risks faced by these areas."
NORAD donated around 20 million Pesos for a comprehensive study on flood mitigation in the province. This study, while it does not address the issue of mining, was conducted on the watershed area which includes the mine site at the head of the watershed. It highly recommends that watershed rehabilitation is necessary, something which independent environmental experts have pointed out is completely contrary to large scale nickel mining operations in the same area. It is interesting to me that NORAD, a Norwegian government agency has given us this money.

Food Security and Mining

"Mining is likely to damage the island's important food production capacity, its fisheries and its eco-tourism potential and is clearly inconsistent with its sustainable development plan. In the light of other factors, including seismic and climatic conditions, the proposed Intex Nickel project has the potential to cause massive damage for the water catchment area, impacting up to 40,000 hectares of rice producing lands and exasperating flooding of towns and villages."[33]

Mindoros' fishing grounds include one of the richest marine biodiversity areas in the world which coastal Mangyan and other local communities rely on. The mining processing plant is planned to be located on the coast with the proposed locations impacting this most sensitive stretch of sea. In 2007 the Smithsonian Institution has declared that the passage between the island of Mindoro and the island of Patanga as the center of marine biology in the world. You can see more species in this area than in any other part of the world.

In July of 2001 the Department of Environment and Natural Resources, under the administration of Gloria Macapagal-Arroyo, revoked the mining concession on environmental and social impact grounds. Then DENR Secretary Alvarez explained his decision and that of President Arroyo as being based on the need to protect critical watersheds, to protect the food security of the Mindorenos' local communities, and to respect the social unacceptability of the project including the failure to obtain the consent of all of the

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[32] One of the findings of Kvaerner Metals, engineering consultants hired by Crew to do the pre-feasibility studies of the Mindoro Nickel Project in 1998.

[33] Robert Goodland and Clive Wicks, 2008. *Mining or Food?: Mindoro Case Study*, Report of the Working Group on Mining in the Philippines, p. 161.

Mangyan as required by the IPRA. "The Mindoro Nickel Project is one case where sustainability is bound to fail…President Arroyo is fully aware of the situation…what does it gain the nation to be short sighted and merely think of money, when an irreparable damage to the environment will cost human lives, health and livelihood capacity of our farmers and fisher-folks endangering the food security of our people."[34]

Biodiversity and Mining

The 2002 Final Report on Philippine Biodiversity Conservation identified Mindoro and particularly the mining site as extremely high conservation priority areas for plants and birds and terrestrial animals. In terms of importance level, the area belongs to extremely high terrestrial and inland water areas of biological importance. Moreover, the area under the Mindoro Nickel Project is at the heart of a once proposed Mangyan Heritage Park which is inhabited by innumerable species of flora and fauna many of which are considered endemic.

The loss of vegetation cover will directly affect forest species which is a home to many animals, and birds, particularly cuckoo doves, psittacines, hornbills, cuckoos and coucals, woodpeckers, and coletos, among others. It will affect frugivores, whose survival depends heavily on the existence of fruiting trees. The forest also serves as habitats for the insects and other prey on which insectivores and carnivores depend for their survival.

As mining causes loss of habitat and disturbance of wildlife, local extinction may occur either through emigration or death. Emigration to other habitats means an increase in competition within these habitats. Migrating animals driven out of their former habitats will now compete with the local population for the resources, which were once solely utilized by them. For the more sensitive species, or for those that are not able to compete, death is imminent. Similarly, those populations which cannot emigrate from the primary impact area may also disappear, or otherwise decrease in number. Either way, the gene pool will be reduced, decreasing the level of biodiversity and with it threatening the Mangyan way of life.

The People's Response

The Federation of Mangyan organizations and the organizations representative of the Mangyan whose ancestral domains the concession overlaps have issued petitions stating their rejection of the project and disputing the flawed FPIC process.

In addition the people of the island of Mindoro have made their voices known through the Provincial Ordinance No. 001-2002 which declares that "it shall be unlawful for any person or business entity to engage in land clearing, prospecting, exploration, drilling, excavation, mining, transport of mineral ores and such other activities in furtherance of and/or preparatory to all forms of mining operations for a period of twenty-five years." This means that mining has been prohibited by the Provision Board of Mindoro in 2002.

Even the Municipal Councils of the stakeholder towns have issued respective resolutions reiterating their opposition the project:

[34] Heherson Alvarez, Philippine Star, November 13, 2001

- January 11, 2006: Municipality of Victoria passed Resolution No. 237-2006 "expressing strong objection to the proposed operation of the Crew Gold and Aglubang Mining Corporation"
- January 26, 2006: Municipality of Pola passed Municipal Resolution No. 06-06 "strongly opposing the proposed mining and other similar activities in Oriental Mindoro"
- February 6, 2006: Municipality of Socorro passed three consecutive Municipal Resolutions (No. 2006-20 to 22) expressing strong opposition to the proposed nickel mining, and giving clarification that the municipality is not endorsing the project of Crew as claimed by DENR Secretary Michael Defensor.

In November 2009, after an Environmental Clearance Certificate (ECC), the final clearance the company needs to have the operation started, was granted to the mining project, Mindoreños, both indigenous and non-indigenous, held a hunger strike in front of the Department of the Environment asking for the immediate revocation of the clearance. The revocation was granted 10 days later. An investigation committee was also formed to look into alleged violations the company has committed in securing the clearance. The issue on whether the site is a watershed area or not, if there were FPIC process anomalies, and local government's consent will also be tackled by the team. The project has yet to secure its Environmental Clearance Certificate at this time.

Our Call

Mining operation cannot compensate for the social and cultural impacts of depriving the Mangyan of their traditional lands. Unless mining could be done without impacting the occupation, the already delicate tenurial rights of Mangyan communities will continue to be usurped, leading to further loss of land and proving fatal to their way of life.

We, the Mangyan and other Mindorenos, stand united not to oppose development, *per se*. However, we believe that development must not contradict the basic rights and welfare of our people. Development must be pursued in line of promoting equity, poverty alleviation, justice, integrity of creation and common good. We support and pursue the development programs for our people. However, "a true and just development must fundamentally be concerned with a passionate care of our earth and our environment." We do not oppose mining in general. Mining is essential in making our lives better and easier. However, mining should be done responsiblely. Responsibly enough to see that mining could never be done in places like Mindoro, with such fragile ecosystems. Responsibly enough not to begin a project without the consent of stake holding communities, including indigenous peoples.

The peoples' unified stand against the Mindoro Nickel Project of Intex Resources and their opposition to the entry of any mining operation in the province were clearly articulated in the Ordinance promulgated by the Provincial Board of Oriental Mindoro on January 28, 2002, declaring a mining moratorium in the province. Since the economic thrust of the Provincial Government of Oriental Mindoro is anchored on food sustainability, eco-tourism and the development of the agricultural industry, the entry of mining operations is considered detrimental to the sustainable development agenda of the province. Oriental Mindoro's

Provincial Physical Framework Plan specifically rules out the development of mining industry.

Again, we call upon fellow environmental, indigenous and human rights advocates, both indigenous and non-indigenous peoples, to support our decade-long struggle for the protection of our land, our life, our future. Thank you very much.

The effectiveness of legal and non-legal remedies for addressing the rights of Indigenous Peoples at Mindoro Island and elsewhere

Cathal Doyle, Middlesex University

Hello, and thank you. I would like to start by saying that Mr. Rafa's explanation and history of Mindoro is in many ways representative of hundreds of cases in the Philippines. Many cases relate to mining; it is really the big issue in many indigenous and local communities. What I will try and do is give an overview of the Philippines' context, to show, to a certain extent, why this is happening, and then to give some other examples, and also to talk about how other international groups are trying to assist the local struggles of indigenous and local communities in the Philippines.

The Philippines is home to somewhere in the region of 12 million indigenous peoples, with up to 15% of the entire population being members of some 90 indigenous groups. It is in a unique position with regard to recognition of its indigenous peoples' rights, having in effect incorporated the UN Declaration on the Rights of Indigenous Peoples- which indigenous peoples regard as the minimum standard necessary for their cultural and physical survival- into its legislative framework when it enacted the Indigenous Peoples Rights Act (IPRA) 13 years ago.

The Philippines' Rights Recognition Framework: Ideals or Minimum Standards?

The IPRA finds its roots in the 1909 *Cariño vs. [the Philippine] Insular Government,*[35] ruling of the U.S. Supreme Court which recognized indigenous peoples' native title affirming that their lands were their private property by virtue of '*native custom and long association*'. However, despite this landmark ruling, public land laws continued to classify indigenous peoples as squatters in their own lands and legitimise large scale expropriation of their territories for logging, mining and dam construction. Indigenous resistance to these projects contributed to the downfall of Marcos and led to their recognition in the 1987 Constitution which saw a shift from attempted assimilation of indigenous peoples to recognition of their rights.[36] The IPRA was enacted in 1997 to give effect to this constitutional recognition.

The IPRA recognizes indigenous peoples' inherent right to self-determination, rights to their ancestral domains and the primacy of their customary laws within these domains. It also recognizes indigenous peoples' right to determine and decide their own priorities for developments affecting their lands and well-being and requires their participation at all stages of '*policies, plans and programs...which may directly affect them.*' It commits the State to

[35] United States Supreme Court – Cariño vs. Insular Government of the Philippine Islands, 212 U.S. 449 (1909)

[36] 1987 Constitution of the Philippines Article XIV, Section 17

recognizing and promoting these rights within the framework of national unity and development- the intent being that development only proceed in a manner consistent with these rights. To give effect to this and to facilitate the exercise of their right to self-determination the IPRA established the requirement for indigenous peoples' Free Prior and Informed Consent (FPIC) in relation to developments in their territories as the safeguard for their effective participation in decision making.

Realities– Flawed Interpretation and Implementation.

The enactment of the IPRA appeared to herald a new era of self-determination for the country's indigenous peoples. However, 13 years after its enactment, it has shown little evidence of living up to this promise. In the context of the development projects, in particular extractive operations, a number of key constraining factors which have contributed to the divergence between expectation and practice can be identified. These include a) non-participatory policy formulation, b) discriminatory underpinnings of judicial decisions, c) misinterpretation of the IPRA's rights recognition framework and d) flawed implementation at the local level. This presentation will briefly address each of these issues and conclude with some suggestions regarding their relevance for home country governments of mining companies such as Norway.[37]

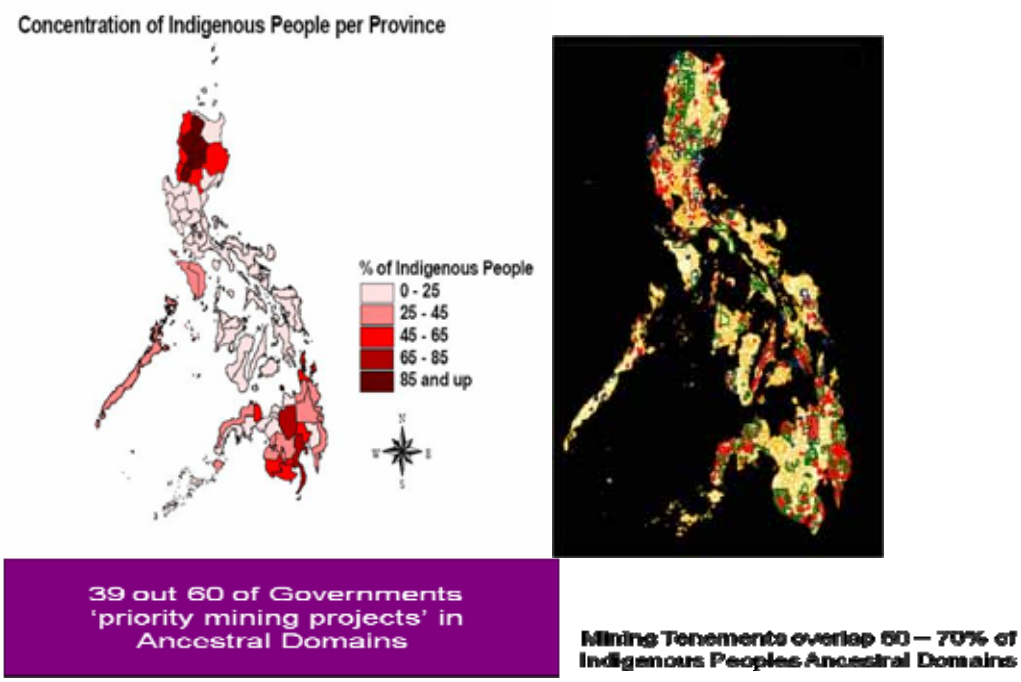
a) Non-participatory policy formulation:

The Philippines' National Mineral Policy framework has served as a major constraining factor on realization of the rights recognition promise of the IPRA. In 2003 the government embarked on an aggressive policy to promote the country as a mining destination, targeting up to 30% of its landmass for mining. Most of this mineral rich land is located in indigenous peoples' territories. Cognizant of the potentially profound implications of this policy on their rights and well-being, indigenous peoples submitted proposals during the policy formulation process. However, these were ignored with a clear bias in favour of the mining industry eliminating any potential for meaningful participation.

In the process this bias was reflected in the policy requirement that the IPRA be '*harmonized with the 1995 Mining Act*' to make it more '*current and responsive*'.[38] The harmonization involved the National Commission on Indigenous Peoples (NCIP) amending the FPIC procedures so that they now impose restrictions which are inconsistent with indigenous peoples' customs, laws and traditions. The resulting reductionist interpretation of the IPRA is perceived by many as having transformed the Act into a bureaucratic tool that serves the expansionist interests of the state.

[37] These issues are addressed in greater detail in the Philippines Indigenous Peoples CERD 2009 Shadow Report which the author was involved in preparing.

[38] Mineral Action Plan for Executive Order No. 270 & 270-A National Policy Agenda on Revitalizing Mining in the Philippines



b) Discriminatory underpinnings of judicial decisions:

A second significant factor that has constrained the IPRA's potential for rights realization is the inconsistent and at times discriminatory rulings of the courts. One such example relates to a constitutional challenge of the B'laan people to the 1995 Mining Act. Having first upheld the challenge in January 2004, the Supreme Court, under pressure from the industry and legislators, chose to reverse its decision less than 12 months later arguing that '*[t]he Constitution ... should not be used to strangulate economic growth or to serve narrow, parochial interests'* and that having *'weighed carefully the rights and interests of all concerned, [it had] decided for the greater good of the greatest number'*. This and other rulings, equating indigenous peoples rights with narrow parochial interests, and echoing Marcos era demands that they willingly sacrifice themselves for the good of the nation, are viewed by indigenous peoples as being reminiscent of the 1919 *Rubi vs Provincial Board of Mindoro* Supreme Court ruling - describing the Mangyan tribe as 'possessing a low degree of civilization and intelligence'[39] - thereby denying them equal due process rights under the law.

c) Misinterpretation of the IPRA's rights recognition framework:

The third factor that has contributed to the distortion of the IPRA in practice has been the reluctance of the judiciary and government agencies to engage with its paradigm of inherent rights recognition.

On the formation of the Philippine Republic in 1935 the argument that the country's sizeable indigenous population had all but disappeared served to facilitate the application of the Regalian doctrine in their territories. The doctrine, a legacy of the Spanish colonial

[39] Rubi vs Provincial Board of Mindoro, 39 Phil. 660 (1919)

system, which was incorporated into the 1935 constitution, and included in all constitutions thereafter, holds that all lands of the public domain, including minerals, forests and other natural resources are owned by the State.[40]

The 1987 constitutional recognition of indigenous peoples' land rights and the IPRA's recognition that their ancestral domains included the mineral resources therein, posed a direct challenge to the application of the Regalian doctrine in indigenous territories. In 1998 a constitutional challenge to the IPRA was mounted by those supportive of the mining industry. In its 2000 ruling the Supreme Court upheld the IPRA's constitutionality, however, it concluded that: '*there is nothing in the [IPRA] that* ***grants*** *to the Indigenous peoples ownership over the natural resources within their ancestral domains…[t]he IPRA does not therefore violate the Regalian doctrine...'*. This rational reflected a conception of indigenous peoples' rights as 'grants' from the State, rather than 'inherent rights' which the IPRA serves to recognize. The failure of the Court to engage with the IPRA conception of indigenous rights permitted their subordination to the Regalian doctrine without necessitating an analysis of the underlying definitional tensions between the doctrine and the very concept of ancestral domains. This failure was brought to the attention of the Philippine Government in 2009 by the UN Committee on the Elimination of all forms of Racial Discrimination (CERD) which expressed its concern *'that the Regalian doctrine as applied to indigenous property seems to run counter to the notion of inherent rights under the IPRA'*.

A similar interpretation of indigenous peoples' pre-existing and inherent rights has occurred in the context of claims to third party property rights within ancestral domains. The IPRA's Section 56 states that '*[p]roperty rights within the ancestral domains already existing and/or vested upon effectivity of this Act, shall be recognized and respected*'. The dominant interpretation of this provision by government agencies is that, regardless of the circumstances under which they were obtained, all concessions granted to corporate entities in ancestral domains prior to the IPRA's enactment take precedence over indigenous peoples' pre-existing private property rights. This position stands in direct contradiction to developments in international human rights law requiring reparations for taking of indigenous property without their FPIC. As noted by the then UN Special Rapporteur, Professor Stavenhagen, on his 2002 visit to the Philippines '*[t]he idea of prior right being granted to a mining or other business company rather than to a community that has held and cared for the land over generations must be stopped, as it brings the whole system of protection of human rights of indigenous peoples into disrepute.'*

d) Flawed implementation at the local level:

These three factors which constrain the implementation of the IPRA's rights recognition framework, when coupled with a range of manipulative tactics at the local level, have effectively transformed the IPRA's FPIC requirement from a mechanism for the operationalization of self-determination into a bureaucratic framework for a systematic

[40] 1987 Constitution of the Philippines Article XII National Economy and Patrimony Section 2

violation of rights. Perhaps the clearest manifestation of this is, that over 13 years after the IPRA's enactment, indigenous peoples claim that 70% of all extractive activities in their territories do not have their consent. In their efforts to assert their rights some indigenous communities are consequently seeking assistance at the international level. Two of these communities are the Mangyan of Mindoro and the Subanon of Mount Canatuan.

The main issues encountered by the Mangyan of Mindoro during the FPIC processes conducted for the Norwegian-pbased Intex Resources' Mindoro Nickel project have been addressed in the previous presentation. These events spanned a 13 year period during which numerous complaints were made to the NCIP by the Mangyan Federation and support groups. However, as a result of the NCIP's complicity in the facilitation of the FPIC processes the substantive issues raised in these complaints were not adequately addressed.

In 2006, in an effort to raise awareness of the issues, a Mangyan representative together with a Mindoro priest visited Norway. Their visit drew national media attention following a recommendation by Crew Minerals that its shareholders avoid meeting with them. The ensuing public concern in relation to the company's actions prompted the Norwegian Ambassador in Manila to conduct a fact finding trip to the island in 2007. The Ambassador met with a broad spectrum of stakeholders and a number of his observations are worth highlighting. His report pointed to inadequacies in Crew's explanations as to whether '*representations for the indigenous peoples had a sufficiently wide base*' or if '*people will be forced to move when the mining operation starts*'. Members of the NCIP were reported as stating that *'the mining plans had created a good deal of complications in what was earlier a peaceful tribal area'* and that Kabilogan, the organization which gave consent, was created when Mindex came to Mindoro and its *'claim to be a "separate eight tribe*"' was unfounded, as only seven Mangyan tribes exist on the Island. In presenting the position of the Federation of Mangyan Tribes and the Mangyan organizations whose ancestral domain claims are encroached on by the mining concession, the report noted that they felt that '*[t]he deceptive way the company set up the Kabilogan organization gave no reason to have good faith in the company for the future*'. The report concluded that the '*vast majority [of the Mangyan] is strongly opposed to any form of mining in their areas'* and that *'there is substantial discontent with Crew Minerals'*. This was a clear acknowledgement that the Mangyan's legal right to withhold their FPIC had not been respected when the concession was issued. The report also concluded that the majority of the islanders opposed the project due to its potential impacts on a critical watershed area. However, the embassy stated that it was not competent to judge if it was possible to start the project in a manner that ensured respect for the Mangyan interests.

Prior to the 2006 visit to Norway by the islanders which triggered the Ambassador's investigation, a fact finding trip on mining in the Philippines was led by Clare Short, the former British Minister for International Development. The team, of which I was a member, consisted of individuals with human rights and environmental expertise and met with the Governor of Mindoro Oriental and other local representatives who appealed for assistance in influencing the mining company, their investors and home government(s) to respect the rights of the Mangyan and the laws of the province. As a result of this and similar requests from other indigenous and local communities a London based Working Group on Mining in

the Philippines was formed. The Working Group commissioned the former World Bank environmental advisor and author of the Bank's first policy on indigenous and tribal peoples, Dr Robert Goodland, and a member of the IUCN Commission on Environmental, Economic & Social Policy, Clive Wicks, to visit the Philippine to assess the potential impacts of mining in a number of indigenous territories, including Mindoro. In addition the process involved participatory mapping of the impacted areas identifying overlap of ancestral domains, agricultural and water catchment areas, coastal and marine biodiversity and protected areas with the mining concessions. The report 'The Philippines: Mining or Food' was published in January 2009 and held that responsible mining was not feasible in the area where Intex sought to conduct large-scale strip-mining. Furthermore, it recommended that the project should not proceed due to its potentially disastrous impact on the Mangyan people, the watershed area and the livelihoods of the downstream farmers.

Despite a series of reports highlighting the widespread opposition to the project, the serious issues in the consent processes, and the potentially disastrous impacts of the project on the sensitive watershed area, Intex reaffirmed its intent of proceeding with its mining operations. As a result the available international complaint mechanisms were analyzed and a decision was taken to lodge a complaint under the OECD Guidelines. This mechanism was chosen as it provided an opportunity to directly challenge the company's actions, while human rights mechanisms do not. It also had the advantage of spanning the human rights, environmental and legal issues applying to both indigenous and other impacted communities. In addition Norway's international reputation as a promoter of indigenous peoples' rights suggested that its OECD National Contact Point (NCP) may be sensitive to the Mangyan concerns.

In January 2009 the complaint was submitted by the Norwegian based NGO, Future in Our Hands. The NCP held its first meeting with both parties in May of that year and in June it asked the new Norwegian Ambassador to conduct a pre-investigation which it deemed necessary to determine the case admissibility. This pre-investigation report was completed in January 2010 but owing to a failure to meet with many of the impacted stakeholders, such as the Mangyan organizations and the provincial governors, it presented a distorted view of the situation on the island, differing substantially from the more grounded 2007 report of the previous Ambassador. These shortcomings were pointed out and the NCP deemed the case admissible in March 2010. An independent consultant was selected in October 2010 to conduct an on-site investigation which will take place in January 2011, some two years after the complaint was submitted. This delay could have rendered the complaint academic, as in November 2009 Intex was granted the environmental clearance certificate (ECC) that it needed to commence mining by the Department of the Environment and Natural Resources (DENR), contrary to the recommendations of the DENR's own environmental review committee. As explained in the previous presentation, the Mangyan and other islanders were forced to go on hunger strike which led to a national investigation into the ECC issuance.

The recent contracting of the independent investigator and scheduling of the on-site visit are welcome developments. The Norwegian NCP is also currently in the process of making a number of important improvements to the NCP's capacity, employing secretarial staff and appointing new NCP members. An update of the substantive and procedural aspects of the

OECD guidelines was also initiated in April 2010, and Professor Ruggie, the UN Special Representative on Business and Human Rights, has recommended that a human rights chapter be added to the guidelines and that enterprises should 'consider additional standards specific...to indigenous peoples...in projects affecting them'.

I will now turn briefly to the case of the Subanon of Mount Canatuan. It involves a community, which, like the Mangyan, had since the 1990's engaged all legal avenues to assert its ancestral domain rights but was nevertheless powerless to stop a concession being issued in 1996 to a Canadian Mining company, TVI Pacific, to mine their sacred Mount Canatuan. TVI deployed a paramilitary force in and around the Subanon ancestral domain and human rights violations ensued. Statements at the Working Group on Indigenous Peoples and visits to Canada in 2001 by the Subanon resulted in international attention being focused on the case. This in turn prompted an investigation by the Philippines' Commission on Human Rights in 2002 which concluded that the issuance of the concession, without the consent of the Subanon, was at the root of the issues at Canatuan.

Rather than respect the IPRA's requirement to engage in good faith consultations with the Subanon, in accordance with their customary laws and practices, the NCIP proceeded to facilitate the establishment of a new "Council of Elders" from which to obtain consent. The Subanon traditional leaders filed a legal challenge but the case was rendered moot due to court inaction. In 2004, the Subanon of Canatuan and surrounding areas convened their highest judicial authority, the Gukom of the Seven Rivers. The NCIP formally recognized the authority of this body and committed to enforcing its rulings. However, when the Gukom ruled that the formation of the newly created Council of Elders was '*an affront to the customs, traditions and practices of the Subanon*' and instructed the NCIP to disband it, nullify all agreements entered into by it, and pay a fine for being part of its creation, the NCIP simply ignored the ruling. It continued to bestow legitimacy on Council thereby allowing mining of the sacred mountain to commence. The Gukom also imposed penalties on TVI in 2007 for its violation of their customary laws, but neither the NCIP nor the Canadian government took steps to ensure compliance with the ruling.

In 2007, the Subanon, together with national and international support organizations, made a submission to CERD which resulted in the invocation of its Early Warning Urgent Action procedure. This led to some positive developments, however, the government continues to rely on its interpretation of IPRA's Section 56 on prior vested rights to justify its failure to obtain Subanon consent and to accord recognition to the illegitimate council. CERD has instructed it to consult with the Subanon and resolve the issues at Mount Canatuan in a manner that respects the Subanon customs, including according formal recognition to the traditional leadership role. The case remains open and should the government fail to address the issues appropriately, the result may be a decision by CERD.

The experience of the Subanon of Mount Canatuan, together with the imminent threat of mining projects facing many other Subanen communities[41] have prompted representatives of most of these communities to develop their own collective FPIC manifesto or protocol. They refer to this FPIC manifesto as the 'Voice of the Subanen across the Zamboanga Peninsula',

[41] The spelling of Subanen varies by community and includes Subanon and Subanen.

who number approximately 300,000 people, and regard it as an assertion of their right to self-determination. The Subanen presented their Manifesto to the NCIP and are now engaged in related capacity building and education process in their communities. Unlike the existing homogenising and bureaucratic FPIC guidelines, which are open to manipulation and fail to take the cultural diversity of indigenous peoples into account, the FPIC manifesto seeks to ensure that decision making and participatory processes in Subanen territories are defined by the concerned people themselves and consequently are culturally appropriate and consistent with their customary laws, practices and institutions.

Possibilities- Challenges for Norway and other Home Country Governments: The experiences of the Mangyan and the Subanon afford home countries of mining companies such as Norway, Canada and others the opportunity for much needed informed reflection with regard to the development model they and their transnational corporations are pursuing.

Canada provided controversial support for both of these projects at a critical phase in their lifecycles. In July 2001, the Philippine Department of the Environment and Natural Resources (DENR) revoked the permit of Crew Gold (Intex's predecessor, which was part Canadian and Norwegian).[42] The then Canadian Ambassador wrote a letter to the President of the Philippines objecting to this revocation. The President subsequently reinstated the permit without addressing any of the DENR's stated reasons for its revocation, one of which was the failure to obtain the FPIC of all the impacted Mangyan. Likewise, at a critical phase in the Subanon community's efforts to prevent the mining of their sacred mountain, the Canadian International Development Agency (CIDA) channelled funding for community development

[42] Mindex a Norwegian company was acquired by Crew Gold. Crew Gold subsequently listed Crew Minerals A/S separately on the Oslo Stock Exchange and Crew Minerals created Intex Resources.

projects through TVI's Community Development office, thereby increasing the company patronage among the Subanon.[43] In 2005, a Standing Committee of the Canadian Parliament on Foreign Affairs and International Trade recommended that the Government of Canada conduct an investigation into TVI's impact on indigenous peoples rights and '*ensure that it does not promote TVI Pacific Inc. pending the outcome of this investigation*'. A proper investigation was never conducted and Canadian public support for the mining project continued while violations of Subanon rights remained unaddressed.

In Mindoro, NORAD has provided funding for a flood mitigation project which recommended rehabilitation of the very watershed that will be impacted by Intex Resources' mining operations. There is a clear inconsistency in funding a project supporting the provincial government's efforts to address serious issues associated with flooding on the one hand, and failing to challenge the project of a Norwegian mining company which that provincial government has declared illegal in order to protect that same watershed. Divorcing the two issues suggests a lack of sincerity on the part of the Norwegian government in relation to its concern for the islanders' well-being and, as noted in the Ambassador's report, has unfortunately led to suspicion among some islanders of the motives for the Norwegian government's involvement there.

In 2006 complaints by indigenous peoples regarding the overseas activities of Canadian mining companies have resulted in CERD recommending that Canada '*take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada*' and to '*explore ways to hold transnational corporations registered in Canada accountable*'. The Philippines Indigenous Peoples shadow report submitted to CERD in 2009 raised issues of Norway's responsibility in this regard. The upcoming national review of Norway by the CERD in February 2011 may provide an opportunity to engage with the Norwegian government in relation to how it is complying with this responsibility.

Should engagement with the OECD NCP and CERD fail to illicit an appropriate response from the company and governments an option may potentially exist to engage the ILO supervisory mechanism with regard to Norway's obligations under Convention 169 in relation to the operations of its companies in indigenous territories overseas. Following Spain's adoption of ILO Convention 169 in 2007, Spanish organizations have been examining the potential for invoking ILO Convention 169 in the Spanish Courts in relation to its companies activities in indigenous territories in Latin America, and a similar assessment could also potentially be conducted in Norway.

In 2004 the Norwegian Ministry for Foreign Affairs published guidelines on efforts to strengthen support for indigenous peoples in development cooperation, committing to a human rights-based approach premised on ILO Convention 169.[44] A commendable example

[43] See Representatives from Siocon, Southern Philippines, Oppose Canadian Mining Company TVI Pacific Aug 13 2005 http://www.miningwatch.ca/en/representatives-siocon-southern-philippines-oppose-canadian-mining-company-tvi-pacific

[44] Guideline Norway's Efforts to Strengthen Support for Indigenous Peoples in Development Cooperation
A human rights-based approach Norwegian Ministry of Foreign Affairs 2004 Page 18

of this in action was NORAD's involvement in funding and participating in the indigenous peoples' organized 2009 International Conference on Extractive Industries and Indigenous Peoples in Manila. The guidelines also acknowledge the need for coherent targeted approach across ministries to achieve their objective. As the situation of the Mangyan in Mindoro and the Subanon of Mount Canatuan illustrate, for this approach to be meaningful it must extend to taking responsibility for the regulation and control of overseas activities of companies impacting on indigenous peoples. Following the adoption of the UNDRIP the revision of the guidelines to align them with the UNDRIP's provisions, in particular in relation to the right to self-determination and to obtaining FPIC, would also be appropriate. To ensure this is achievable in practice, such guidelines should require that indigenous peoples' perspectives of how companies engage with them be respected. This necessitates guaranteeing that where indigenous peoples' own FPIC protocols and manifestos exist, or their development is being considered by the impacted community, due respect must be afforded to them.

At the 2005 Forum for Development Cooperation with Indigenous Peoples, Russel Barsh addressed the need to break the hermetic seal that serves to compartmentalize state recognition and promotion of indigenous rights from states' action or inaction which results in profiting from the activities of transnational corporations violating these same rights. Norway has a reputation on the international stage for promoting indigenous peoples' rights. Its expanding global interests in hydroelectric and extractive projects in indigenous territories should therefore make addressing this artificial and rights denying compartmentalization increasingly urgent. The Intex case provides it with an opportunity to promote a rights compliant development paradigm that could serve as a model not just for other Norwegian companies, but also for other states in similar contexts. How Norway chooses to react to this opportunity will certainly have major implications for the Mangyan and could also have potentially profound implications for indigenous peoples the world over.

Indigenous peoples' movement and challenges of ILO Convention 169: Implementation in Nepal

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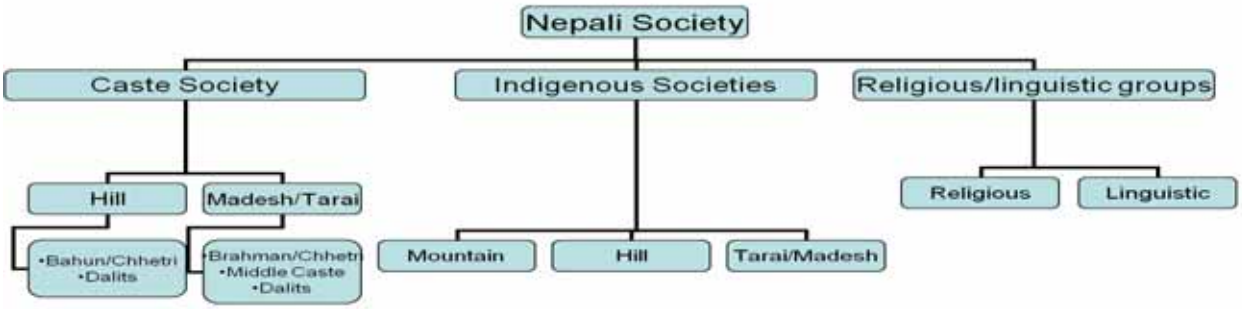
Thank you Madam Chair, and thank you to the organizers of this conference for the opportunity to be here, it is an honor.

I will begin with a brief background to introduce to you to features of Nepali society and the context of the ILO ratification in 2007. I will focus on consultation and participation aspects of the convention and after that I will present you three cases: one is how Nepal is trying to work in consultation and participation in the constitution making process, the second is national and local development planning, and thirdly, I will give a specific case which shows challenges we are working against.

To introduce you briefly, Nepal is bordered by two large neighbors, China and India. In Nepal we have mountains, but also hills and plains, and indigenous peoples are spread throughout all three zones. Nepal's society can be divided broadly into three distinct social groups. One is the caste society, which is a Hindu system, and is based on the idea that the society is divided into hierarchies. Different privileges are afforded according to the caste status. We have indigenous societies, and then we have other minorities- religious and linguistic minorities.



The caste system in Nepal is deeply rooted our history, because unlike other countries in Southeast Asia, caste based discrimination was legal from 1854 until 1963. According to their castes and sub-castes, people were given privileges and obligations. For example, in this system, different punishments for similar crimes were prescribed based on the respective caste ranks of the perpetrator and the victim. Depending on these rankings, punishment for the same crime could vary from execution to a small fine and a ritual bath. Because of this

long history of legalizing caste-based discrimination the Nepalese society, particularly indigenous peoples, are very much marginalized.

In 2001 the government of Nepal passed an act called the National Foundation for Development of Indigenous Nationalities Act. For the first time in history, Nepal identified and recognized 59 indigenous groups in Nepal, that make up about 40% of the population. Indigenous peoples are known as "*Adivasi Janajati*" and "Indigenous Nationalities", and the 2001 Act defines *Adivasi Janajati* as those: *"tribes or communities as mentioned in the schedule who have their own mother tongue and traditional customs, distinct cultural identity, distinct social structure and written or oral history of their own".*

There is significant inequality in terms of income and poverty. 31% of Nepali citizens live below the poverty line. When we look by caste and ethnicity, 18.4% of the population of the Brahman/Chherti are below the poverty line. If we look at the Dalits, which are the lower-caste Hindus, poverty rates are at 45%. Similarly, indigenous groups have higher rates of poverty incidence, 44%. But interestingly, when you look at the population of the poor in Nepal, the highest rates are within indigenous communities.

Nepal Incidence of Poverty by Caste and Ethnicity, 2003-04

Caste/ethnicity	Head Count Rate	Distribution of Poor
Caste Group		
Brahman/Chhetri	18.4	15.7
Madeshi Other Castes (Yadavs)	21.3	1.9
Dalits (Hill and Tarai)	45.5	10.9
Indigenous Group		
Newar	14	3.4
Hill Janajatis	44	27.8
Terai Janajatis (Tharu)	35.4	9.2
Others		
Muslim	41.3	8.7
Others Minorities	31.3	22.3
Nepal	**30.8**	**100**

Source: CBS, World Bank, DFID, and ADB 2006

Indigenous peoples have struggled over the past two decades and the struggle culminated in the Peoples' Movement 2006, during which millions of people came out into the streets for 19 days, and eventually they were able to influence Interim Parliament and institute the Interim Constitution. The Interim Constitution promised state restructuring to end caste/ethnicity, linguistic, and culture-based discrimination. IPOs further agitation resulted in a 20 point agreement between NEFIN (Nepal's Federation of Indigenous Nationalities) and the Nepali Government. Part of this agreement in 2007 was the ratification of ILO Convention 169 and

UNDRIP. Then, in 2008 the Constituent Assembly elected 601 members out of which 218 identify themselves as indigenous. This is the background of how we came to the ratification of ILO Convention 169, which was ratified by Nepal in September 2007 and came into effect one year later. The first Progress Report was submitted September 2010 (due in September 2009).

The Context for Ratification

- As a tool for peace- with promise for protecting indigenous peoples' rights to end the violent conflict
- As instrument for inclusive political processes and democratic representation
- As a mechanism for enriching an equitable development approach
- Protection of human rights and fundamental freedoms of indigenous peoples

However, the current status is not very encouraging. After the ratification, the main thing that was completed was the Draft National Action Plan, submitted by a high level task force and presented to cabinet. It has been in the cabinet for about one year and there has been no explanation as to why it is taking so long for approval. The Social Committee of Cabinet has been reviewing the NAP for last 9 months, but nothing has come out of it so far. In the meantime, awareness on the ILO 169 has increased, and political parties, international development communities and civil servants are interested to know what ILO 169 is about. In the meantime, indigenous peoples are anxiously awaiting the implementation of the Convention.

Now let me move on to the issues regarding consultation and participation in ILO 169. The Convention states that consultation and participation of indigenous peoples is the "basis for applying all other provisions". Article 6 (1) (a) of ILO Convention 169 obliges governments to consult indigenous peoples, through appropriate procedures and through their genuine representatives, whenever considering legislative or administrative measures which may affect them directly. Article 6 (1) (b) requires that indigenous peoples "can freely participate… at all levels of decision-making".

To operationalize these concepts, in Nepal indigenous organizations and intellectuals are of the agreement that consultation should mean active dialogue in good faith between the state and indigenous peoples. Participation should mean representation of indigenous peoples in all relevant institutions and the right to have a voice in decision making processes. Consent should be the outcome of the process of consultation and participation, and when linked with the right to self-determination, indigenous peoples in Nepal should have the right to give or withhold their consent. This is somewhat contentious, because the government would like to be able to continue the implementation process after a consultation but not necessarily acknowledge indigenous peoples' consent or lack thereof. However, indigenous peoples' groups assert that consent from indigenous communities must be the basis for beginning any project affecting indigenous communities.

Consultation and Participation of Indigenous Peoples in Constitution Making What is the present situation regarding constitution making? The Constitution Assembly failed to complete the task of drafting a new constitution within the given time and the one year period extended until May 2011. There is high skepticism among the people regarding whether the constitution will be finalized on time because of the way the political parties are handling this issue. In the meantime the indigenous peoples' movement is struggling to find ways to raise their voice in new constitution. Indigenous peoples have three major concerns regarding this matter:

- Consultation and Participation/Nature of Representation
- The Process of Constitution Making in the National Assembly
- Actual Content of Constitution

Regarding the content of the Constitution, indigenous peoples have some major issues that they would like the Constitution to guarantee:

- Federal design that recognizes history and culture of indigenous peoples
- Self-governance and autonomy
- Right to self-determination
- Reserved political representation
- Proportional election system
- Collective right to land and territories
- Recognition of customary law
- Official use of indigenous languages
- Right to natural resources
- Affirmative action in education and employment
- Multilingual education

The Constitution Assembly has different committees and each have produced reports which have been reviewed by indigenous peoples' organizations and analyzed as to whether there is proper perspective on indigenous peoples' issues. One of the outcomes of these reports is the proposal for the restructuring of the state. They have come up with the basis for restructuring as having two major points: one is capability and one is identity. The subcommittee on the restructuring of the state has proposed 14 states, 7 of which are based on identities of indigenous peoples' cultural groups. When the indigenous peoples have assessed these reports, they have found the idea of restructuring the state based on identity as being a very important one, and they welcome it, but they have a lot of criticism as well. Indigenous people's assessments regarding Constitution Assembly reports are as follows:

- Tendency of strong centralization, instead of self rule and shared rule as hoped for by indigenous groups

- Welcome the major emphasis on "identity" and "strength" for federal design
- Need to demarcate states and territories according to history, and cultural identity
- Lack of clarity on definition of "nation" and "state"
- Privileging Nepali language again, in offices and in education
- No recognition of customary law
- Unclear notion of right to self-determination, and who will be afforded this right
- The long-standing demand by indigenous peoples for a proportional electoral system is absent
- Indigenous peoples' rights are not recognized as fundamental right
- Prior rights for the indigenous peoples is not clear
- Distinction between indigenous peoples and local communities need to be made clear

In terms of the process, aspiration for federal system is linked to the process of decolonization, regaining autonomy, self-governance. Indigenous peoples also demanded a separate Constitution Assembly sub-committee on indigenous rights, but this was denied. Although it was not formal, an IP Caucus was set up: indigenous peoples came together to form this caucus to put their views into the public eye. This was a historic achievement.
Now looking to representation, in 2008, within the Constitution Assembly, the number of indigenous peoples increased, almost to the levels that they are represented in the population. But despite this increase in representation, these members coming from indigenous communities are representing their political party and possibly the political ideologies to which their party subscribes. Therefore there is a need for separate advisory body within Constitution Assembly for indigenous peoples' issues. Indigenous organizations (LAHURNIP and others) filed a case against the Constitution Assembly for 'violation of their right to participate in the ongoing Constitution making process through their own representative freely chosen by themselves in accordance with their own procedure' in March 2009.

International attention has been drawn to the Nepali constitution-making process: CERD under its Early Warning Procedure wrote letter to Nepal, on March 13, 2009 and a follow-up letter on September 28, 2009 recommending setting up a thematic committee on indigenous peoples' issues of FPIC. Similarly, in July of 2010 UN Special Rapporteur recommended, *"In addition to existing means of representation in the Constituent Assembly, special mechanisms should be developed for consultations with the Adivasi Janajati, through their own representative institutions, in relation to proposals for new constitutional provisions that affect them."* But as I have previously mentioned, there are no such mechanisms in place at this time. Nepal has invited experts on international law to visit Nepal and assess their constitution making process. The ILO's Governing Body is of the view that *"if an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention."* Even with these recommendations, Nepal has still not responded to this process, so there is the danger that members of its population will continue to be marginalized if the new Constitution does not include more on indigenous peoples' rights.

These are some of the issues and challenges in regards to Nepal's constitution making process and how do we go forward? Some ideas as to how we can form an alternate mechanism to the Constitution Assembly:

- Through proportional representation of groups in legislative bodies? Quota/Reservation for excluded, especially for small indigenous groups?
- Through non-territorial separate electoral constituencies or encouraging IP/regional political parties?
- Through reviving traditional organizations?
- Alternative mechanisms?

Consultation and Participation of national and local planning The Three Year Interim Plan (2007/08-2009/10) sets targets of increasing Human Development Index (HDI) for Adivasi Janajatis by 10 percent, and allocated some 15 billion NPs for the task. It is continuous of the previous plan (Tenth Five Year Plan/PRSP) for including target, and the upcoming Three Year Plan (2010/11-2012/13). The Approach Paper also includes provisions for 20% of the District and Village Development Grants to be allocated for marginalized groups including indigenous peoples. The problem is that there are no clear mechanisms for consultation and participation of indigenous peoples in the planning process. It is often expert groups who do this planning. There are no consultative bodies for consultation except in districts. However, we feel that the National Foundation for Development of Indigenous Nationalities (NFDIN) being a semi-autonomous body, could coordinate such mechanism.
However, there are some good indicators of progress in the district level. In 2006 Ministry of Local Development issued directives to all districts to form Adivasi Janajati District Coordination Committees (AJ-DCCs) as consultative bodies at district level. Adivasi-Janajati District Coordination Committees (AJ-DCCs) are located in the District Development Committee (DDC) Office. The Local Development Officer (a central government civil servant) works as the chair at the moment and the vice-chair and members are nominated from among political parties in the district and other indigenous peoples' organisations. The AJ-DCCs are supposed to help the DDC to allocate the program and budget in such a way that it benefits indigenous peoples. The problem is that because members are again representing their political parties, they carry the party's interests before the interests of indigenous peoples themselves.

Because we are having some problems with political party vs. indigenous representation, we are coming up with other solutions and other possibilities to get the needs of indigenous groups met. For example, we have the Nepal Federation of Indigenous Nationalities– its 54 Indigenous Peoples Organizations (IPOs), and District Coordination Councils in 62 districts. Additionally, we believe that we need to recognize and revive traditional institutions of indigenous groups such as Barghar of Tharu, Nangkhor of Tamangs, Guthi of Thakali and Newars, but we will need to work at this goal.

Lastly, I bring you the Melamchi Drinking Water Project. Melamchi is the name of the river north of Kathmandu. The purpose of this project is to alleviate the chronic water shortage in Kathmandu Valley by transferring water from the Melamchi into Kathmandu

Valley through a 26 kilometer tunnel. ADB funding has been withdrawn by Norway, Sweden and the World Bank. An Environmental Impact Assessment was conducted some 10 years ago, the results of which were not made public. Because of this indigenous groups resisted the project, demanding proper consultation with indigenous peoples, and as a part of this resistance they actually locked up the project office for several months. This is a very important issue as Kathmandu is a capital city and the first phase of the project cost 317.3 million USD. Finally in 2009 the Indigenous Struggle Committee and the Deputy Prime Minister, representing the Neapli government, came to an agreement, stating that the government would follow the guidelines put in place by the ILO Convention 169 in implementing this project.

Emerging issues and challenges:

- Process
  - What is proper process/mechanism for consultation?
  - How to determine legitimate group/leaders for consultation?
  - How to adapt traditional decision making process for internal consultation?
  - How to deal with communities in mixed settlements?
  - Distinction between indigenous and local people?
- Content
  - Mechanism of participation/representation
  - Impact
  - Benefit sharing
  - Ultimate ownership of the natural resources

These kinds of issues relate to many other topics, including hydropower, mineral resources, and forests and national parks. For example, in Nepal, power produced in indigenous communities provides for 51% of the electricity for all of Nepal, and our people get only 2% of the electricity. Revenue generated by this electricity is not discussed. Indigenous peoples are demanding that they also benefit from the development of these resources in their communities.

To conclude, I have a couple of remarks. Credit given to the fact that the ILO Convention 169 has come so far should be given to the indigenous people's movement, for all of their hard work in bringing this to Nepal and nurturing its development in government. However, indigenous peoples in Nepal are currently dispersed, and sometimes fragmented in different political parties and organizations, and often co-opted by powerful groups and parties in the government. Despite that, the indigenous people's movement is very important in Nepal and has established itself as major actor in the democratic movement, raising issues which are fundamental to a just society– secularism, linguistic and cultural rights, ethnic equality etc. all through peaceful means. Perhaps the greater role of the indigenous people's movement should be in bringing all actors together for a meaningful consultation and participation process.

Thank you.

Summary of Roundtable discussion by the U.N. Human Rights Council's Expert Mechanism, AIPP, IWGIA, Gáldu, Centre for Peace Studies and present representatives of national indigenous organizations

Gáldu

The speaker from *Gáldu* believes this conference to be an important meeting place for Norwegian development policy. It is a meeting place between academics, decision makers, development organizations and of course, indigenous peoples and students, to discuss the issues as related to development. In Norway there is a guideline policy developed and called the Indigenous Peoples Questions. This speaker feels that these guidelines are quite good, in text, but when we see what really happens in action, we start to raise questions. First of all, there has been a study done by three development organization officials trying to follow the money that has been devoted to indigenous peoples. This is an interesting study, as we see that much of the money has found itself in places not related to indigenous peoples at all. Looking at the goals and the issues actually stated in the guidelines, what has been fulfilled is very minimal. One of the main goals is human rights for indigenous peoples. If you look at development organizations in Norway, and you see who is involved in these development projects, there are very few of them, maybe one or two, who have actually committed to upholding the human rights of indigenous peoples.

Additionally, examination of the participation list that is sent out to every organization in Norway, shows that there are very few of these important development agencies taking part in this Forum. When asked, they say that they do not deal with the Indigenous Peoples Questions, but their projects take place in indigenous peoples' areas, so of course they affect indigenous peoples. This cannot be denied. Many of these areas where these projects take place are not only highly concentrated with indigenous peoples, but some of the most marginalized areas in the world. Still, companies say that they do not "deal with indigenous peoples' issues." There is a need for these types of organizations to take part in forums like this one. It is important to mention one more case: it is that of Norfund, a cooperation between industry, mostly the power-plant industry, and the Norwegian government. There are eight state programs, most of which take place in indigenous areas. They have no ethnicity guidelines at all, so in many ways Norwegian policy when it comes to development policy and indigenous peoples begins to seem very questionable. NORAD is also absent from this conference, as are other decision makers, whose participation is necessary for dialogue regarding the situation for indigenous peoples around the world.

Centre for Peace Studies (CPS)

There is a need to coordinate with more NGO organizations and give NORAD and the Foreign Ministry a clear understanding that they are wanted and expected as active participants in this kind of forum. Very particular questions must be presented to these

agencies and governmental organizations regarding where they are going in regards to indigenous peoples' issues. One question should be regarding the revision of the guidelines and who will be invited to take part in the preparatory formulation process. The Forum Board has offered the Foreign Ministry the contributions and recommendations of this Forum, but so far has not gotten any positive response. Questions important to ask ourselves include how to influence the guidelines and the revised guidelines, and how to follow up on particular serious cases that this conference has addressed. There is also the more overall question of how the Forum should work to fulfill its overall mandate. To answer this question we would like serious input from our audience members: how could we not just consolidate but become more effective as a Forum? We do have institutional numbers, so how can we more fully mobilize those? They are very crucial in their own right, such as IWGIA and the Rainforest Foundation, so it is fair to say that there is some very under-used potential here at the Forum. Also, the very fact that we are doing an evaluation of the Forum through this year's survey as well as through other means, gives us some momentum to become an even more vital organ along the lines of our mandate.

International Working Group for Indigenous Affairs (IWGIA)
Thanks the administrators and feels that the conference has been well structured by first providing a legal framework and then going into the conceptual analysis of particular cases. It is always very useful to have the whole picture, which helps to realize the potentials and realities available to indigenous peoples. IWGIA is very committed to the Forum, to work together to make this Forum something very important. A shift of priorities at an international level is something that should be considered and questioned… we cannot know if that is the reason why NORAD and the Foreign Ministry are not present at the conference, but IWGIA has seen a shift in priorities from the international community of governments. Even in the Nordic governments, who have been the main supporters of indigenous peoples' rights, of development cooperation between companies and indigenous communities and has historically supported indigenous peoples at an international level, there is a shifting of priorities. While these entities may endorse their support of indigenous peoples, at a concrete level of enacting this support they are less and less engaged. This of course is shown in financial and political commitment, as well as in negotiations on climate change. Even governments who have been quite vocal on indigenous peoples' rights have been quiet when it comes to the issue of climate change negotiations. It is important for Forums like this one and many others to join forces and maintain the importance of the engagement of Nordic governments and the promotion of indigenous peoples' rights. In Denmark for instance, the government has adopted a new cooperation policy just some months ago, and although they refer to indigenous peoples' rights and maintain their priority to human rights, the reality is that they give much more priority to markets, and the private sector, and economy issues, even the promoting of private property. We should be aware of this and join efforts because there is a danger of the profile of these issues going down in priority. The Forum can play a very large role in this, and like most of our indigenous partners we need to strengthen our efforts, because at the same time we are struggling with implementation issues. These governments have been very instrumental in all the developments that we have achieved thus

far: in the creation of institutional space for indigenous peoples, in the development of legal frameworks and in the awareness-raising about the situation of indigenous peoples. We've established the institutional and legal frameworks, but now we have an implementation gap. How do we put good intentions and nice words into practice? How do we make a difference in the real lives of indigenous peoples? This is at the heart of our struggle, and we need to push, lobby and advocate all governments, particularly the Nordic governments, because they have this responsibility.

Asia Indigenous Peoples Pact (AIPP)

Regarding the role of companies in providing basic social services to communities… it is clear that in developing countries this is actually a trap. Governments say that they need foreign investors to be able to develop and to provide services to marginalized communities, including those of indigenous peoples. It has been often happened in our engagement with mining and dam corporations that they say, "It is the government who has asked us to come here and invest, and because of our investment you will get your schools, your roads." This is the kind of thinking that they put forward. In the context of developing countries who are dependent on foreign investment, this is a challenge. At the same time, in cases where Free Prior and Informed Consent is being required it now goes beyond just consulting people, and indigenous peoples are actually getting the opportunity to present a different development paradigm. They say, "This is not the way that you want to develop us- this is not the way that we want to be developed." These opportunities allow indigenous peoples to begin mainstreaming another development path than that which corporations promote. In this way, it can present opportunities to change the kind of mindset which states "The only way that we can develop is like that of the Western world." Western-based development paradigms are heavily on dependent on resource extraction, which is the kind of development that we do not like to have happen in our territories. Currently there are a number of medium and smaller-sized companies entering into ethical investments, which respect human rights and protect the environment. There is hope that this is one way to make the shift as to how corporations behave so that they are not violating human rights, and at the same time, promote a different approach to development.

On FPIC: there is some focus on grasping the principles related to FPIC, and that is precisely because this has been subjected to a lot of interpretation, distortion and manipulation, as seen in the case of the Philippines. Of importance now is awareness regarding the intent of FPIC, especially the element of consent. In order to move ahead in terms of avoiding distortions and manipulations, one of the things that can be done is to closely monitor and document how FPIC is being implemented in different countries. Take the good examples, the bad examples, and show them to the world… pointing out the right and wrong ways to go- from the ground up. Examples of actual experiences will demonstrate to the international community the way to move forward in implementing FPIC in ways that stay consistent in respecting the rights of indigenous peoples and in the promotion of sustainable development and equity.

There is an urgent need to implement an independent recourse mechanism- one which will not only monitor how FPIC is being implemented but which will be able to act effectively

in addressing the concerns of indigenous peoples, especially in conflict areas, where violence is taking place because of unrest surrounding this issue. To emphasize, in setting up a recourse mechanism, it is important to engage and involve indigenous experts, and to make sure that the monitoring and addressing of these issues is in line with the respect of the rights of indigenous peoples.

Finally, in terms of representation in decision making and the establishment of a mechanism for participation in decision making: the issue of representation. How are we being represented? At least at an international level we have what we call a self-selection process, where we select amongst ourselves who is going to represent us. This is a good system because we can deliberate about what our criteria should be and how we choose to go about it. Beyond this is the issue of accountability, which is an issue that maybe did not come out strongly at this conference. How can we make our representatives accountable? There should be a way to go about this, because in our own processes we value collective decision making, which is always present in our traditional systems. In our ways leaders do not just make decisions on their own. But in modern decision making, big decisions can be decided by individuals based on their own interests or agenda. We need to breech the engagement of indigenous peoples in a collective decision making process, through their representative, which should be linked to a system of accountability. The participation to decision making becomes even more meaningful, because then you have accountability, you have a system of feedback, and you have engagement with the people concerned, which should always be at the forefront in any decision making process.

Expert Mechanism

We would like to join those that express concern regarding the absence of NORAD and the Ministry of Foreign Affairs at this conference. It is very regrettable as I looked forward to having discussions and dialogues with the representatives of the Norwegian government, especially the Foreign Ministry, in regards to the topic of indigenous peoples rights to participation in decision making. The UN Human Rights Council has mandated a study of this issue, with recommendations to be submitted to the council. It would have been very useful to have had discussions with the representatives of the government, particularly due to the fact that this Forum is a creation of NORAD and the Ministry of Foreign Affairs, established as a kind of "think tank" on indigenous peoples issues. When talking about indigenous peoples' participation in decision making, we would like to reiterate that it is very clear that there is already the necessary normative framework for this to be a reality on the ground but that the problem is the so-called implementation gap. In too many states there is simply a lack of political will at a national level to make the international standards a reality in practice. The question is, how do we address this gap? The Expert Mechanism is trying to have a dialogue between states and the Human Rights Council on this particular issue. At the last session of the Mechanism in July we recommended to the council, in line with Article 38 in the Declaration on the Rights of Indigenous Peoples, that the council should encourage states to take appropriate measures, including legislating measures, to achieve or implement the Declaration on the ground. We were pleased with the fact that the Council did so in their resolution on indigenous peoples and human rights. This is a sign that the Human Rights

Council recognizes that the normative framework is there and it should be implemented, and that the question of how to go about creating the ability to implement is of utmost importance. In our context, and in international development cooperation, we feel that there is a need to put greater emphasis and focus on the right to participation at the national level. In other words, move towards strengthening the capacity of states to ensure that they have proper mechanisms and procedures that facilitate indigenous peoples participation in decision making. There should also be a push to move towards the strengthening of indigenous peoples to claims their rights, because it is obvious that if indigenous communities do not have that capacity it is much harder to implement and create real change.

One issue that may not have been addressed at this conference but which is important to note in terms of the right to participate in decision making, is possible remedies for infringements of indigenous peoples' collective and individual rights, past, present and future. This is very applicable in relation to the right to participation. For instance the UN Declaration contains a number of provisions establishing an obligation for states to provide remedies for such violations of indigenous peoples' rights. There are a number of articles specifically referring to situations in which indigenous peoples have not given their Free Prior and Informed Consent, and in these instances there should be mechanisms for remedy and redress. We consider these to be urgent priorities in regards to indigenous peoples' right to participation as have been specifically asked for and are breaking new ground in the arena of indigenous peoples' rights.

Generally regarding indigenous peoples' rights and human rights: having been involved at an international level for 20 years, I am very bothered by the fact that the climate has clearly changed among UN member states. It is so much harder to get support from member states and to see proactive in support of indigenous peoples' rights. We feel that indigenous peoples' rights are at a greater degree today being addressed as individual rights, and that collective rights are being overlooked. Collective rights are essential to the survival of indigenous peoples. Due to this recent shift, indigenous peoples have been trying to address their needs through ordinary human rights, applicable to anyone. Of course individual human rights are also important to indigenous peoples, but for indigenous societies to survive they need the protection of the provisions guaranteeing their collective rights. It is also noticeable that it is much easier to get states to be positive on softer issues, such as language issues, language rights, cultural rights, but the struggle starts when it comes to land and recourses and territorial rights. Personally, I feel this is related to the fact that the world is scrambling for natural resources, and these resources are located in indigenous territories. Needless to say, there are economical reasons for why we are experiencing this shift in levels of support at an international level.

Mainyoito Pastoralist Integrated Development (MPIDO)

Forum presenter Ole Joseph Simel presents these questions to the Forum Board: Are you happy with the results of the Forum? Why was the Forum created? Have the needs that this Forum was developed to meet been addressed? Mr. Simel believes that the absence of the Norwegian government at the conference should not be discouraging because it is the

character and the nature of most governments all over the world. The Norwegian government is very actively putting money into programs in developing countries, and this money is likely to have a very serious impact. If there are no guidelines set, then this money could potentially create many problems for indigenous peoples. When we talk about money, without any guidelines, without consultation, without the meaningful participation of indigenous peoples, the outcomes may turn out very badly for indigenous groups, whether we are discussing Africa, Latin America, or other countries. My concern is whether the Norwegian government is not courageous enough. I think we should provide a way for leadership to say, "If you are implementing a program in indigenous peoples' territory, take into account that the Declaration exists." At this time they seem to be running away from the implementation and recognition of the Declaration. I think that we need to find a way of bringing the Norwegian government back to the table. When we were fighting for the 2nd liberation in Kenya, and this was in the 90's, the Norwegian ambassador to Kenya was expelled by the Kenyan government. The reason was that he was supporting the democratic movement in Kenya. So in Kenya the Norwegian government and the Norwegian people were highly respected in the issues of human rights, because they supported the Kenyan people during the 2nd liberation. Knowing Norway, Denmark, those who have previously supported human rights struggles, I find it concerning that they seem to missing; they are not visible in the way that they used to be visible.

That being said, I think there has been a lot of progress as well as room for concern. I come from Africa, and the Commission on Human Rights has passed a resolution on indigenous peoples in Africa, adapted by the head of governments in Africa. We need to be proud of these accomplishments and our governments should be proud too. I want the government of Norway to provide some guidelines to tell other governments that the way that money is used must have input from indigenous peoples- and their consultation on this must be ensured. FPIC! We are concerned that FPIC is not part of the discussion when the Norwegian government talks about donating money. I would suggest that at the next meeting, you might need to have a short face-to-face conversation with the government representatives and NORAD before you actually have the conference. You need to get a serious commitment from them before you set a date, and be sure that they will be present. I think that the Centre for Sami Studies should be thinking beyond the Sami people, and maybe work instead as an indigenous people's centre, because information on Latin America, Africa and other countries should fit into the program. I think that there is a lot of documentation missing as far as indigenous peoples issues is concerned. The Centre should provide a link to other indigenous peoples.

Center for Peace Studies (CPS)

In answer to Mr. Simel's questions: I have only been the chair of the Forum for two years. We had a meeting in Oslo this summer to follow up with key concerns on our topic from last year, and the conclusion of that meeting was that Norway's policies in India and Bangladesh highlight the relative absence on human rights and also on indigenous rights. Instead there has been a very large focus on the private sector and some on causes promoting the environmental dimension- but in no way trying to connect this to indigenous peoples' rights.

We did highlight this tremendous gap, but I wouldn't say that we got any very convincing reaction from NORAD and the Foreign Ministry in regards to our pinpointing these gaps. I think this brings us back to what we have been talking about… that perhaps we are entering into a very sensitive type of contradiction on how Norway operates internationally and our priorities as a gas-producing nation. I appreciate your suggestion about gaining commitment to attend the conference from the Norwegian government and think that we should seriously look into how we can do this, both prior to conferences and regarding meeting in between the conferences. We should not think of the Forum as only a body that is providing these conferences, but actually a true Forum from which we can regularly pull from when we need solid complimentary expertise from members that are involved in diverse and unique aspects of indigenous rights promotion around the world.

Another general comment: when we speak internationally in terms of a low priority on human rights, I think that we have to remind ourselves that there are certain very significant changes in policy levels in terms of international politics at this time. We've had a recent change of government in some European countries, and there is a kind of return to liberalist politics with drastic slashes in public sector spending, which have already had massive effects, and a re-emerging of street based politics, especially in Europe. We have had a crude backlash in some respects towards what we call the 'multicultural model' in many European countries. Many things can be said about this liberalist model in terms of indigenous peoples' rights; and we can learn from the way that governments have tried to respond to implications of these politics, like pulling people out of segregated communities in very crude ways, through citizenship certificate, demanding people learn majority languages, etc. I think that we should look at these examples and learn from them- about how to think within our own field, the relationships between individual and collective rights, and indigenous and minority rights.

Norwegian Centre for Human Rights (NCHR)
Expresses interest in your proposals for different working models of the Forum itself, and in particular guidelines being talked about that are under revision. The Forum procedure must be discussed thoroughly. The guidelines developed by the World Commission on Dams, may actually provide some guidance on how to do this. It is not light work- it is hard work to produce anything that is substantial, as we can see from the presentation by the Philippines and others.

Rainforest Foundation
I agree with the points that have been raised in terms of more concerted advocacy. Some of our organizations that are based in Oslo are much closer to the government offices, but we lack the frequent contact with academics at organizations in Tromsø and in Finnmark, and I think that we could have a closer cooperation. I have a few concrete suggestions for this: two years ago, the Rainforest Foundation, together with others, conducted a study which looked at development assistance to indigenous peoples. We found that less that 20% of the development assistance reported as benefiting indigenous peoples was found to have anything to do with indigenous peoples at all. In that report we recommended that the Ministry of Foreign Affairs should make a thorough evaluation on its assistance to indigenous

peoples, which is a concrete recommendation we have repeated every year, with no answer. If the Ministry of Foreign Affairs will not do this themselves maybe we could, as a Forum, devise a way to provide funding to do it ourselves? Another idea is to have a seminar early next year, to attempt to clarify the actual current Norwegian government's policies are on indigenous peoples internationally and in Norway. We have vague assurances that the rights of indigenous peoples are high on Norway's agenda internationally, but we see time and time again, that this is not being carried out in practice. When NORAD's contact for indigenous peoples' rights is in Geneva, as is the case right now, no one is picking up that role. This is a clear example of a lack of mainstreaming within the organization. These are the two suggestions I would like to make: an evaluation of the Ministry's assistance to indigenous peoples, and a seminar with actual high level officials present with the intent to discuss how indigenous peoples' rights are being mainstreamed in development policy.

One last point is that we have mentioned Norwegian economic interests abroad, affecting indigenous peoples in the Philippines, and we have mentioned the generous Norwegian funding for rainforest protection for climate reasons, so I would like to draw attention to the double role Norway is playing in the rainforests today. Norwegian funds are invested in a number of organizations which drastically and negatively are impacting indigenous peoples' rights, and the Rainforest Foundation has a campaign called 'Flytt Tusenlappen Min'- Move My Thousand Kroner… money which every Norwegian has invested in rainforest destroying companies, most of them oil companies. A Spanish oil company is currently engaged in oil exploration in the territories of indigenous, isolated communities in Peru and our organization is attempting to gather 10,000 signatures to be presented to the Finance Minister, protesting this matter. Please help us with this campaign by giving your signature which can be found at rainforest.no.

Ministry of Reform, Administration and Church Affairs

As an employee working in the department of Sami and Minority Affairs, I cannot answer on behalf of the other ministries or on behalf of NORAD, but I can bring your views back to Oslo, especially regarding feelings that the Norwegian government should be more highly represented here. As the topic of the roundtable discussion is 'the realization of participation', I would like to make a couple remarks regarding the speeches yesterday, both of which talked about the consultation agreement. In the government's view we have had a very positive experience with the consultation agreement, for instance regarding an increased knowledge on the right of the Sami Parliament to be consulted before a decision is made that might affect Sami interests. In 2009 there were nearly 50 consultations between the Sami Parliament and the different ministries. The speaker from *Gáldu* discussed consultations connected to the Mineral Act, and its true that the government and the Sami Parliament did not reach an agreement on this issue. But the parties did manage to reach agreements on several other parts of the Act and there were also consultations with the Reindeer Herding Association. It was a large and long-enduring process in which Sami interests were heard, and their interests made a difference in how the Act looks now. Of course there is room for improvement in the Consultation Agreement, but we do believe that the consultation agreement can be a good

framework for realizing the participation of indigenous peoples in other countries in addition to our own.

Norwegian Students' and Academics' International Assistance Fund (SAIH)
First a concrete question to Ms. Carling of the AIPP: when talking about the need for recourse mechanisms to hold companies accountable- where should such a mechanism be placed? In which type of organization would it be most effective? We are one of several organizations that has been working on issues such as these with the Norwegian companies and government, and at this time we really have nowhere to go with our complaints. We are trying to lobby the Norwegian government to create a place for an arraignment that holds Norwegian companies accountable when they violate human rights, including the rights of indigenous peoples. Of course, it would be better to have an international mechanism, but we do not know where it should be placed.

Additionally, I want to talk about the lack of attendance by the Ministry of Foreign Affairs and NORAD. This is my third Forum and I would like to express my disappointment that there is no one here from either NORAD or the Ministry of Foreign Affairs. This is the first time that no government representatives have been present at the conference. I think that my first conference there were 6 or 7 representatives here. The Forum was actually organized by NORAD, because they saw a need to have meeting places between Sami organizations, Norwegian development organizations, members of the academic community and policy makers. This is the year that they are reviewing the Guidelines, thus, this is the meeting place where they should come and have the first hearing regarding input on the guidelines. We sent an email to NORAD about a month ago, asking for more information on the guidelines and also suggesting that they come to Tromsø and give us an update if it was not possible to have an actual hearing here. As previously mentioned, many of us are located Oslo, and what we see in SAIH, in our daily meetings with NORAD and the Ministry of Foreign Affairs, is that there is a lack of knowledge when it comes to Sami affairs. There is a huge need to get more channels of information from the Sami experiences and into the Norwegian Ministry of Foreign Affairs. One concrete example is that during our meeting at the end of September with the State Secretary of the Ministry for Foreign Affairs, and with those from NORAD working with Oil for Development, SAIH had to inform them that the Sami University College has been offering a course for many years about impact assessment with indigenous perspective. I find it sad that we have been working with the Oil for Development program for many years and that the Norwegian government has not looked North to utilize the experiences and knowledge of the Sami people. Finally, I have a challenge to the Forum. It has been a very interesting Forum, but there has no real focus on development cooperation. I think that if you divide the conference into more parts, it may attract more development organizations, and there also may be more attendance from NORAD. It has been a very academic Forum, which is good, but if we are thinking about our target group and our goal, maybe it will be easier for NORAD to prioritize being here if we worked harder to bring development to the forefront.

Norwegian Peoples Aid

We cooperate with indigenous peoples' organizations, many in Latin America: Bolivia, Chile, Ecuador and Guatemala. I have learned a lot about participation and the challenges related to this topic during the conference. It is a pity that the Norwegian government is not present, but I think that we should also think a little bit about the fact that development cooperation could be limited in the future of our societies. We can like it or dislike it, but we are living in a time of rapid transitions in many ways, and I think some indigenous organizations are good examples of being political actors in their own rights, and in many ways independent of development cooperation. This is a very important phenomenon to think about. I am not trying to say that development cooperation is unimportant, but I think that it is important not to concentrate too much on the State, as they have limited capacity and resources, and we have so many other resources. For example, we have several Norwegian companies being promoted to work abroad. Why don't the indigenous organizations of Norway put more resources on training and teaching the Norwegian companies about indigenous rights? I'm sure indigenous organizations do it but to provide an example, Oil For Development needs more competence on indigenous issues. Of course you can invite them to conferences, but you can also go and ask for a meeting and offer training. There are so many resources concentrated in this Forum and I believe they can be used even more actively.

Sidsel Saugestad, Forum Advisory Board/University of Tromsø

In response to John Henriksen: you talked about a different kind of climate change within the international community and explained that support is much harder to get from states. You are working on a very important level, and your assessment of 20 years in this field has very informative for us. I'm teaching about indigenous peoples' rights and I keep saying that on a global or international level, things are going well, but that the problem is implementation. Maybe this is what you are referring to. When it comes to implementation and the role of this Forum the climate has not changed much from when we started. I think that the problem remains, and our analysis keeps being confirmed that there is no clear office or institutional basis for the policy on indigenous issues. When I came back from Botswana in the early 90's we wrote a letter to the Ministry of Foreign Affairs, offering the capacity of the University of Tromsø to be an advisor on indigenous issues, which was probably one of the first steps for the creation of this Forum. That letter was lost, and months later we sent another letter, and the Ministry apologized. This is how it has been going since then, up until this meeting that Tone referred to in Oslo last summer. Someone asked for a meeting to get the actual answers to get the Ministry's stance on the revision of the policy. We had that meeting, but somehow it became a meeting, I felt, between the Forum and organizations. Unfortunately, the people involved in this revision did not have time for the meeting. We need to remember the importance of what organizations, both NGOs and the Sami organizations are doing, but I would still like to play a part in improving Norwegian policy, and would like us not to give up on that aspect of our work.

Else Grete Broderstad, University of Tromsø
We have talked about private companies and their impact on local communities, and I would like to provide another link- that this is also the case in Northern Russia, where oil and gas companies are providing basic services and basic needs for local communities. The question has been raised about relevance of the ILO 169 when it comes to Norway's actions abroad. I want to make you aware of a report that was produced in 2003. We were a couple of Sami members working on this report and we had a lengthy discussion on Norwegian companies' role in indigenous areas. The English summary of the report says that Norway must pursue a clear policy requiring companies and authorities in the petroleum field to take into account the interests of indigenous peoples in accordance with the consultation requirements in the ILO 169. In the main report we have a clear recommendation saying that public and private petroleum actors in indigenous areas *must* base their activities on the ILO Convention. This is a recommendation that could be referred to within these discussions.

Norut
Formal regulations of the agreement between the Sami Parliament and the government create obligations for the government and possibilities for indigenous peoples. The Sami people have the potential for influence. When there are windows of opportunity towards influence the agreement is important. I would like to ask John Bernhard Henriksen of the Expert Mechanism how is this shift in the international climate expressed? Are there are other aspects besides the implementation gap that you can describe? Is it a continuum or is it a concrete shift? And finally, how can indigenous peoples neutralize the negative aspects of this shift?

Middlesex University
One question: is the Sami Parliament able to bring this issue to the ILO supervisory mechanism within their engagements with the institution?

Expert Mechanism
Responding to the comment from Norut and the Forum Board: when talking about the 'change of climate' towards human rights and indigenous peoples' rights in particular, I think that the shift has been very closely related to the fact that there has been a general political shift in many countries and a greater importance put on the value of markets. At the normative level we have reached a stage where we have very comprehensive provisions providing guarantees for indigenous peoples' rights including the Human Declaration on the Rights of Indigenous Peoples. We are now, in many ways, in the implementation phase of all those standards, and this is where the problem actually lies. All too often the necessary political will strong enough to implement these standards is absent at national levels. Very frequently, I see processes going on outside the mechanisms and bodies which the states have created themselves; we have a number of examples in which the states create parallel processes where they work on the interpretation of certain key concepts like the concept of Free, Prior and Informed Consent, instead of leaving it up to the U.N. to define the scope and

content of those principals. I do not endorse that method, as it contributes to the undermining of the human rights regime which has been created by UN member states.

AIPP
To respond to the question regarding the appropriate location for a recourse mechanism to hold companies accountable: in many of our workshops we provide two suggestions. First, we say that there should be an immediate recourse mechanism at the project site, so that complaints can be immediately addressed and that communities can have instant access. Secondly, we recommend that there is a mechanism created at a national level with the possibility for participation by international organizations who may wish to raise concerns on behalf of communities. These are the two levels that are possible, and they should always be complimentary in the conduct of their work.

IWGIA
I would like to call attention to the report that the Expert Mechanism is preparing. This report is very important and it will be a key tool for indigenous peoples. We know that governments lack the political will to implement, so this will become a tool available for indigenous people to utilize. Finally, a question: it has been suggested that the report should come with some concluding observations and reflections, so how can we all advocate for and use the report as an instrument to promote implementation of indigenous peoples' rights to participate in decision making?

Expert Mechanism
The mentioned report regards the study on Indigenous Peoples' Right to Participate in Decision-Making. We are now in the second phase of that study and we are going to submit the final document to Human Rights Council in June of next year. It will contain a comprehensive set of general recommendations, very much along the same lines that the U.N. Treaty Body produces as recommendations. These recommendations address state obligations and indigenous peoples' rights to participate in decision making. As soon as the report is submitted to the Council I think that the issues will in many ways be at the hands of indigenous peoples and advocates of indigenous peoples to begin to utilize this report as a tool to promote indigenous peoples' right to participate in decision making.

Saami Council
I will focus on the Norwegian Development Policy. I am sorry to tell you that the Sami Council does not do any development projects anymore. It is not possible for us. First of all, the problem begins with the conditions: for example, a demand for contribution when it comes to financing. This discussion may be one of the most difficult ones, because when it comes to indigenous peoples' issues there is one concern- funding. The funding indigenous peoples' development work is difficult, because the Sami Parliament gets all of its funding from the state. When it comes to Sami civil society- like the Sami Council, it is even more difficult, even to get funding for our own organizations, let alone to begin our own development or training projects. In terms of funding, the amounts available are not going

up… they are going down, and these are not small cuts. Of course one of the main things when we talk about indigenous peoples' rights is the financial commitment and the financial tools, and to be honest there are a lot of resources in our areas, but we don't have the chance to actually get our hands on our own resources.

If there is going to be a renewing of the guidelines, I am wondering why the Sami Council did not know about it. When it comes to indigenous people's participation, I will focus on some of our projects in Africa. We tried to establish umbrella organizations together with different African indigenous peoples organizations, but to establish an organization like that you need to think in a time-frame of ten or twenty years, minimum. The financial system, and the system when it has come to development is the opposite. One thing that I have found is that as indigenous peoples you are not allowed to fail at all. If you fail as indigenous peoples you have all of your funding cut immediately. Under the circumstances it is difficult to find indigenous peoples who have had the chance to raise their voices, particularly in Africa and Asia, in any forum such as this or in the international community. How do we create mechanisms so that these people can be heard and bring their cases to the world? We are willing to do something to help, but we have challenges of our own because of the current systems in place.

Center for Peace Studies (CPS)

I would like to acknowledge that there have been some very interesting recommendations to the Forum, and we are very grateful for them. We'll need to go through all of these very specific recommendations and see what we can achieve through some self-critical discussions. To pinpoint what some of the others have said: we are at the beginning of immense transformation at a global scale. It is not like the nation is going to collapse suddenly, but it will be put under enormous new kinds of pressures, and development aid as we know it is becoming a rather minor parenthesis in how we are dealing with international affairs. In this, tremendous prospects for transformation, even within our lifetimes are at our fingertips. I think that the kinds of knowledge and networks, and basic vitality of the world's knowledge systems are to a large degree are managed by indigenous peoples, and by ethnic peoples, living often in what is now called 'border regions' because the national borders are cutting them. So what will happen in the next twenty years to these border regions? Many of them can become extraordinarily important, if we as a global society come out of this without a major collapse of civilization as we know it today. That is why in my presentation I called for reflective thinking on the nation state and how we are working within an inclusive democracy, because I think that there are some very much under-utilized opportunities for how we can encourage sub-regional and regional cooperation. Indigenous peoples on all sides of these borders should have a large role in this.

Forum Update

"Regional National Autonomy in the People's Republic of China (PRC) – a means of effective participation?"

Anna Maria C. Lundberg, the Norwegian Centre for Human Rights (NCHR), University of Oslo

I am here to present to you to a positive possibility that we see in having a process of participation by different stakeholders. I will be presenting the beginning of the recommendations for the protection of linguistic minorities. These recommendations are the result of works between different scholars in Europe as well as in China, which are developed in the framework of the China Autonomy Programme (CAP) at the Norwegian Centre for Human Rights. The CAP has existed for about 10 years and is a program with research cooperation which deals with the research-based promotion of human rights, in particular minority rights, including indigenous rights. We are now in the third period, which will last until 2014 and will address the following three areas:

Special measures and preferential treatment in law and in practice for minority rights protection in China:

Three areas:

1 Natural resource exploration

2 Environmental protection

3 Minority (identity) rights protection: this includes both indigenous and minority rights to linguistic expression

I must say that in our program, we don't see this switch in the international climate of support for indigenous rights, which has been talked about and which I very much acknowledge, as a hindrance but as an opportunity. In our areas, we deal with special measures and preferential treatment in the above three areas. We are trying to find crossroads. In the Chinese context I do not think that this so-called 'switch' will be a very negative one.

The purpose of this presentation relates to participation in policy making: ideals, realities and possibilities. I would like to try and show you a positive example: the Beijing-Oslo Recommendations on the Protection of the Rights of Linguistic Minorities, which is actually a possibility of cooperation of different stakeholders at the state level and at the organizational level, as well as at the indigenous or minority level. We have to be aware that China as a state does not recognize the notion of indigenous peoples, yet it has an extensive application of the idea of ethnic minorities, actually including ideas of minorities having lived for generations and generations, which is a distinction which reminds us of indigenous peoples' participation.

I will start by talking about the realities. During recent days there have been many protests, by Tibetans and by Tibetan students. This picture shows Tibetan students protesting in Rebkong, Tongren County, Qinghai Province, a province of China in which Tibetans live.

They are protesting against a policy-shift, which is the promotion of the majority language, which we can now call 'hard language.' Tibetan students are protesting for the maintenance of their mother-tongue in Tibetan areas. The protests are spreading and are now also happening in Beijing.

Background:

The protests are sparked by Chinese educational reforms which stipulate that:

- The Tibetan language centered education system should be canceled in all the schools in Tibetan areas
- All subjects will be taught in Chinese and all textbooks will be in Chinese
- Tibetan language education above primary school is set as an optional subject
- These reforms have already been implemented in other areas across the Tibet

Autonomous Region

The reality is that we must think about these policies in one way or another as its relationship to the state. Who is the state and what does it consist of? As you can see the linguistic diversity of China is enormous.

5 language families

Sino-Tibetan (Chinese, Tibeto-Burman, Miao-Yao…)
Indo-European (Tajik…)
Altaic (Turkic, Mongolian, Tungus…)
Austronesian or Malayo-Polynesian (Amis…)
Austro-Asiatic (Wa, De'ang…)
-more than 80 (or 129) languages

100 million minority people,
- 60 million of them use their own languages

28 written languages still in use and recognised by the State
- about **40 written languages are used by the people** (created by western missionaries) but outside popularization by the state.

30 minority languages are shared with people in other countries

It is a challenge to determine how to manage the linguistic policy, and ensure, while implementing this policy, the effective participation of indigenous and minority groups in decision making.

Much of the linguistic policy for both minority and indigenous peoples in China is implemented through the regional and national autonomy system in China. There are 155 areas which are autonomous areas, in which autonomous authorities should be able to exercise their regional rights to decide matters which fall firmly within the concern of their region. Whether this functions in practice or not is something that we have been researching. One of the bases for our research project is that we try to specify this so-called implementation gap. We try to look at the institutional constraints, and discuss why these ideals and standards can't be implemented in practice.

China: the legal framework

- The Preamble of the 1982 Constitution proclaims that China is a unitary multi-national state built up jointly by the people of all its nationalities.
- Art. 4 of the 1982 Constitution:

1 Equality among nationalities
2 The freedom of the nationalities to use and develop their own spoken and written languages and their freedom to preserve and reform their own folkways and customs.
3 Autonomy in areas where nationalities live in concentrated communities

Regional National Autonomy Law

- RNAL:
  - state fully respects and guarantees the rights of the national or ethnic minorities to manage their internal affairs
  - law and decision-making power: in accordance with the particular circumstances
  - Article 21 RNAL:
  - While performing its functions, the *organs of self-government* of the national autonomous area shall, in accordance with the regulations on the exercise of autonomy of the area, *use one or several languages commonly used in the locality*; where several commonly used languages are used for the performance of such functions, *the language of the nationality exercising regional autonomy may be used as the main language.*

Article 21 shows us that at a lower regional level, you have the possibility of seeing many different languages among the languages used as official languages. Also, these autonomous areas have the law-making and decision-making power to allow schools to develop their own education plans which fit their particular circumstances.
As you can see from the picture of the Tibetan students demonstrating, these regional freedoms have been run over by the central government, in this case by the Educational Ministry. One wonders how these people can be ensured effective participation in policy-making? Do they need to exercise a certain amount of social disobedience, or do they have other venues to get their needs met?
The Beijing-Oslo Recommendations are necessary and they particularly fit the situation in China, which has its law making and decision making powers at different levels. They particularly fit that kind of complex situation. In order to make such recommendations, with the inclusion of different stakeholders, takes a lot of time and it takes a lot of knowledge. It has been shown that the knowledge is held by the numerous participants present at this conference, but the question is whether you have the time; we worked on these Recommendations for about three years. This was an organization between the one of the research centers for the central government of China, and the China Autonomy Programme (CAP). May I say that if you want to develop a project such as this, having government involvement in the project is valuable. The Recommendations very much resemble the European Charter for Regional and Minority Languages.

Possibilities: Beijing-Oslo Recommendations

- Beijing-Oslo Recommendations on the Protection of the Rights of Linguistic Minorities
  - Recommendations on policy and law
  - Protection of the rights of linguistic minorities
  - Resulting from of a research cooperation between organizations, and individuals in and outside China

Beijing-Oslo Recommendations-Content

- Part I: Purposes, Principles and Definition
- Chapter I Purposes and Principles
- Chapter II Definition
- Part II: Measures to Promote the Use of Minority Languages and Protect Minority Language Rights
- Chapter III State Organs
- Section 1 Legislative Organs
- Section 2 Administrative Organs
- Section 3 Judicial Organs
- Chapter IV Names of: Places, National or Ethnic Minorities and Persons belonging to National or Ethnic Minorities
- Chapter V Education
- Chapter VI Examination and Assessment
- Chapter VII Elections
- Chapter VIII Economic, Social and Cultural Life
- Chapter IX Media
- Chapter X Creation and Reform of Written Languages and Protection of Endangered Languages
- Chapter XI Trans-frontier Exchanges
- Part III: Guarantees
- Chapter XII Remedies and Guarantees

The Menu System-Process:

Is the Menu System an advantageous way of dealing with these issues or not? The Menu System provides an option for you to pick and choose and I think that this may actually be a way of addressing Free Prior and Informed Consent. You need a large of amount of comparative practice, because even if the general principal or the ideal is there, you will not have an actual way of implementing anything- which was shown in the Philippine case presented here. In this case we were shown a large amount of comparative lists but this needs to be further developed and adapted. If the Forum plans to do something in one year I wish you a great deal of luck because it is a heavy-duty job. In the case of Nepal, as was discussed today, there was some question as to whether linguistic protection should be developed on a territorial basis or non-territorial basis. Additionally we have to be creative in our thinking about territorial vs. non-territorial based linguistic protection due to the fact that we have scattered minorities and territorially concentrated minorities. Therefore our recommendations are realized in three different ways:

- Division on territorial basis
    - Concentrated areas
    - Autonomy areas

    - Non-concentrated areas

How did we ensure effective participation? It is important to note that these recommendations are not made by the central government but by individuals. In our process we tried to utilize:

- Research and expertise of scholars and practitioners, acting in their personal capacity
- Exchange of comparative practice and theory on domestic and international policy and law

Ways that we did this:
- Conferences in Beijing and Lhasa
- Study trips and visits to learn from European and Chinese practice and law
    - International organizations
    - Relevant ministries and autonomous areas and bodies in China and Europe
    - Relevant research institutions
    - Drafting meetings in China and Norway

Further comments on process and communication:

- The HCNM of the OSCE and Council of Europe
- Relevant ministries in China, Norway and Sweden
- Autonomous areas and bodies
    - Guangxi Zhuang Autonomous Region, PRC
    - Tibet Autonomous Region, PRC
    - Liangshan Yi Autonomous Prefecture, Sichuan, PRC
    - Oroqen Autonomous Banner, IMAR, PRC
    - Xishuangbanna Dai Autonomous Prefecture, Yunnan, PRC
    - Sami Parliaments in Norway and Sweden
    - Catalan government, Spain

- Research organizations/bodies

UNESCOCAT, Linguapax, NIAS, Sami Research Centre, UiT, Central University of Nationalities, Chinese Academy of Social Sciences

- 5. Individual experts

Ideals

Moving on to our ideals: our 108, developed over three years, perhaps gives some kind of basis for starting to discuss the concrete measures on how we are going to implement, in an

active way, the linguistic rights of ethnic minorities, including indigenous people. These are based on the following values and principles:

Values

- The respect and protection of human rights
- The recognition of the value of cultural diversity
- The promotion of comprehensive and sustainable development for all
- The promotion and protection of peace and stability

Principles

1. Individual freedom and dignity
2. Non-discrimination
3. Effective participation in public life
4. Autonomy
5. Mutual respect, exchange and learning from each other
6. State obligation of special measures, including financial assistance
7. Effective remedies
8. Protection of intangible cultural heritage

One important principle is the standardization of languages. Who will be involved and who will decide on the standardization of language in these processes? Also, for indigenous peoples in general, the last point, number 8: the protection of intangible cultural heritage, is very important for indigenous peoples' claims to retain their culture.

International instruments and domestic law

- Universal instruments addressing minority/indigenous rights
    - Article 27 of the International Covenant on Civil and Political Rights, ICCPR (1966)
    - Article 15 of the International Covenant on Economic, Social and Cultural Rights, ICESCR (1966)
    - Article 30 of the Convention on the Rights of the Child, CRC (1986)
    - The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Minority Declaration (1992)
    - UNESCO Convention Against Discrimination in Education (1960)
    - ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)
    - The UN Declaration on the Rights of Indigenous Peoples (2007)
    -
- European instruments:
    - European Charter for Regional and Minority Languages (1992)

- Framework Convention for the Protection of National Minorities (1995)

- Organisation for Security and Cooperation in Europe, OSCE
- The protection of cultural heritage
  - Convention for the Safeguarding of the Intangible Cultural Heritage (2003)
  - Convention on the protection and Promotion of Cultural Expression (2005)

- Domestic law and practice – China and European countries

Article 27 ICCPR Article 4 Indigenous Declaration

- Article 27 of the ICCPR:

  In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language

- Art. 4 of the Declaration on the Rights of Indigenous Peoples (UN, 2007):

"Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as means for financing their autonomous functions.

Indigenous movements in Guatemala and Bolivia- different experiences in making the multicultural democracy work

Ingrid Hovda Lien, the project "Democracy and Indigenous Rights" (between UiT and Sami University College) PhD student in political science, UiT

"From resistance to political power" This was the name of the third summit for the indigenous civil movements' organisations in Latin America, which took place in Ixichimche, Tecpan, Guatemala in 2007. I was participating as an observer at the summit and some of the ideas for today's short presentation come from there. In this summit indigenous groups from all over the continent shared their experiences, and it was very clear that there were quite large differences between the groups when it came to levels of empowerment. The indigenous groups representing Bolivia were both highly admired by their sisters and brothers and they themselves were also eager and proud to present the large steps made in Bolivia, when it comes to indigenous rights, participation and the current situation. The starting point for my research was 'what lessons could the Mayans in Guatemala, as well as other indigenous groups, learn from their sisters in Bolivia'? Additionally what are the reasons for these differences between the two countries, Guatemala and Bolivia?

Has there been a development from resistance to political power among the indigenous movements' organisations?

During the past two decades we have seen the emergence of various political actors in Latin America for whom indigenousness is their basic social identity; in my two cases we see it in the Peace Accords from 1996 marked with a multicultural accent in Guatemala and the intense mobilisation of Aymara and Quechua organisations in Bolivia via the Movimiento Pachakutik and the Movimiento al Socialismo (MAS). What has happened to make this "awakening" come up?

Salavdor Marti I Puig comes in a newly published article in Latin American Perspectives with some external explanations for the awakening. The first aspect is linked to the theory of governance. Governance reflects a new scenario in which the way of dealing with public matters and satisfying social demands is no longer controlled by government because policy making is increasingly the result of the interaction of a wide variety of actors.

Examples of governance politics can be the implementation of:

- Territorial decentralization
- New public management
- The market economy
- In some cases outsourcing and privatization of services

All of these aspects have produced a displacement of power and state control *upwards* (to international organizations, transnational networks, and big global companies), *downwards* (to local governments, departments and regions) and *outwards,* (to communities and non-profit organisations "delivering" public services as NGOs and quasi-autonomous NGOs).

The emergence of the political actors based on ethnicity has been to a great extent the result of the structure of political opportunities produced by governance, which have crystallized alliances that have given these actors greater capacity for applying pressure through relationships.

Another highly important aspect that has influenced the awakening of the indigenous movement is coming from outside. The presence and support of outsiders might be said to be an element of social capital that was necessary for the empowerment of indigenous movement.

It was the pressure made by advocacy networks that made the rights of indigenous peoples transnational!

However it is important to be aware of the enormous gaps that exist between nominal rights and effective rights and the policies designed to put them into practice.

Let's get started on my two cases Guatemala and Bolivia. First, some numbers so that you can get the general picture; Boliva and Guatemala are two quite unique countries in the world since both countries have indigenous majority populations. Numbers are hard to find however, because there are large differences in censuses, but we know that there is an indigenous population of between 50-75% within the two countries. Bolivia has an indigenous population of 55% mainly Queschuas and Aymaras, and Guatemala is believed to have similar numbers, although the censuses do vary. In Guatemala the indigenous population is divided into 23 different ethnic groups. The two countries have also been through large periods of dictatorship and military regime, as has the whole region, but in the 1980's democratic regimes were installed; in 1982 in Bolivia and in 1986 in Guatemala. Both countries are also known for high levels of poverty among their populations and the situation is even worse among indigenous peoples, with high levels of analphabetism and a small elite that are very powerful both politically and economically.

However, I am not going to focus on these similarities today, but try to understand the large level of differences that one can see when it comes to level of influence and political power among the indigenous movement in the two countries. In Bolivia the last three presidents have been forced leave office as result of large social unrest organized by the indigenous movements and other representatives from the civil society, mainly workers' organizations. When Evo Morales became the first indigenous president in Latin America it was because of the support from the indigenous movements together with the large sector of the civil society. In Guatemala on the other hand, the impression is that the Mayan movement is fragmented and divided, lacks organizational structure to secure good dialog with the groups that they are supposed to represent, and have been accused of corruption. One of my informants, Leandro Yax, representing Fodigua, a semi-state development agency, describes the civil society including the indigenous movements in Guatemala in the following way:

"I know of many cases, and I regret it, where indigenous organizations have sold their soul so that some of their leaders could "climb up" in political position in national political institutions."

There are of course several reasons for these differences, but since time is limited in this presentation I will focus on three of the key aspects that I analyze when trying to understand the differences. The first one is in the literature called **maturity of the civil movements' organization**, the second one focuses on what is called an **inclusive indigenous discourse**. And the last but perhaps not the least, is the role of **international donor community**.

Maturity of the civil movements' organizations

Maturity of indigenous organizations is a key factor for being an important political actor. One evident method of measuring the maturity of an organization is to look at the years in existence of the highest level of an organization. Another way to measure organizational maturity is through the unity of organization (however this is sometimes hard to measure). When comparing Guatemala and Bolivia the differences in organizational maturity are quite obvious and large. In Guatemala up until the end of the civil war in 1996, it was very hard if not quite impossible to organize civil society and the indigenous movement. Most activists in Guatemala fled the country or were killed during the 36 year long civil war. The indigenous population was not acknowledged as a people until the 1986 constitution in Guatemala. In Bolivia on the other hand, because of the mineral activity and early industrialization, workers organizations were established as early as the 1960's. The first farmer organization was created as early as 1936. At the end of the 60's it became clear that the route of liberation for the indigenous peoples in Bolivia was not through making the indigenous population into farmers, and as a result of this the Katarisimo movement evolved. One of my informants, Luis Mack, says this when comparing Guatemala and Bolivia:

> *"In Bolivia, to make Evo Morales win the election they had a whole process of constructing the social movement and negotiations between the social movement and the political parties… a work that was developed over many years with the final idea of getting political power. In Guatemala we have never had this kind of work, I would rather say on the contrary we have had a fragmentation of the social movement after the peace accords. The movement has lost their strength."*

Inclusive indigenous discourse

According to Marti y Puig, for an identity to be successful an inclusive "indigenity" must be created. One of the aspects that is often mentioned when analyzing the Bolivian civil societies' success is the red thread that has been made between ethnic claims, proletarian claims and anti neoliberal claims. In Guatemala one often gets the impression that everyone is eager to destroy the others so that one's own group might gain power and money. Rigoberto Queme Chay, the first indigenous mayor in Guatemala and a Mayan activist, says this about his and others' work in the indigenous movement:

"I have come to the conclusion that we as the Maya movement, the only thing that we are doing is looking for funding and money to make any kind of event, reunion etc. As I see it we have fallen into the economical trap, we use the indigenous flag just to do superficial stuff… having meetings and make general declaration. But we do not have any political agreements, no political organizations, nor visions."

International donor community

The last aspect that I find very fruitful when analyzing the awakening or lack of awakening of the indigenous movements in Guatemala and Bolivia is the role of the international donor community. As mentioned earlier the international network has been important for the indigenous movement all over the world, but I am now speaking about the economical support given by international donor to development programs for indigenous movement organisations and in indigenous communities. After the Peace Accord in Guatemala in 1996 the whole world of NGOs and state-to-state agencies were in Guatemala. For example in Quiche, more than 24 international NGOs started developing some sort of development programs in the area. This I will argue had large implications on the possible development of civil movements in Guatemala as opposed to in Bolivia. Of course, in Bolivia there has also been international donors supporting programs, but not to the same scale as in Guatemala. One of my informants says this about the international community in Guatemala:

"The international communities have been very bad for us... it has generated a whole sector of NGO functionaries that only moves in the direction where there is money, very pragmatic. And to gain this economical support we have to make social development projects, not political ones. In a way the donors stops us from making any proper political agenda."

"From Resistance to Political Power" was the title of this paper, and I will sum it up by saying that the road from resistance to political power is long and that there are several aspects such as organisational maturity, openness in the "indigenous" discourse and the role of international donors, that influences how steep and at what cost the road to empowerment is going be. However, it is not possible to copy a model from one country to another, so the Mayan in Guatemala need to find their own formula.

Thank you very much.

Intercultural gender perspective in higher education in Latin America -Summary from conference in Cochabamba, Bolivia

Ragnhild Therese Nordvik, SAIH

Dear friends,

First of all, I am very happy to be given this space to inform you a little bit about the important work going on in Latin America when it comes to the subject of intercultural education and gender perspectives in higher education. I only have fifteen minutes, so I won't be able to go into the subject with much depth; however I hope to be able to give you an appetizer so that you will be interested in looking into it further after we finish here today.
My name is Ragnhild Nordvik, and I am the director of SAIH– Norwegian Students' and Academics' International Assistance Fund. Due to the short time I have I will not go into who we are and how we work, so if you want to know more about us I will advise you to look at our website, www.saih.no or contact us.

What I will talk about here today is based on a conference that was arranged in the Bolivian city of Cochabamba last October, by SAIH together with three of our partners FUNPROEIB ANDES (Fundación para la Educación en Contextos de Multilingüismo y Pluriculturalidad), the university URACCAN (Universidad de las Regiones Autónomas de la Costa Caribe Nicaragüense) and their Centre for the study of Multiethnic women (Centro de Estudios e Información de la Mujer Multiétnica), CEIMM. The conference report was just launched two weeks ago in Bolivia, and an electronic version will be published on the internet. In SAIH's office we have a few hardback copies, so please contact us if you would like a copy.

The background for the conference is that more and more women are finding their ways into Latin-American universities, and now make up the majority of students on the continent. There is also an increased focus on indigenous and Afro-descending youth and their access to higher education. When seeing these two in relation, we can tell that there are still challenges when it comes to access to universities for indigenous and Afro-descending women, both when it comes to enrollment and graduation rates. Also, we must look at the quality of the education that indigenous and Afro-descending women receive, and how the universities deal with the intersection of ethnicity and gender. If we aspire to secure equal access to higher education for all indigenous, Afro-descending and non-indigenous men and women, the universities and institutions working with higher education must ask themselves questions such as:

-What kind of gender perspectives are the universities transmitting?

-What kind of visions regarding gender relations do indigenous youth bring with them to the universities? What visions do non-indigenous youth bring with them?

-What are the different challenges facing indigenous and Afro-descending women at universities? What changes do universities lead to in their personal, family and work lives? In their communities? In the bigger society? How do indigenous and Afro-descending men

experience women's presence in higher education? How do non-indigenous men experience the presence of indigenous and Afro-descending women at universities?

It was in this context that the idea for this conference emerged among us as organizers. We saw a need to combine interculturality and gender perspectives.

Interculturality

Moving on, I would like to explain shortly what is meant by interculturality. It is a concept that is gaining ground, both in academia and in civil society, in different parts of the world, including in Norway to some degree. However, SAIH's opinion is that interculturality is not being sufficiently included in Norwegian policies and actions, both when it comes to development cooperation and when it comes to national policies of integration of indigenous and non-indigenous minority groups.

Interculturality goes beyond pure relations between different cultures and groups. It presupposes the recognition of "the other" or "the others" AND the affirmation of oneself. It is a dual concept. Of course this separates it from what we call assimilation, which is unilateral. But, *interculturality* is also different from multiculturality. They are close but they are not the same. Multiculturality has its roots in advocating for "tolerance" and the peaceful co-existence of different cultural and ethnical groups. Interculturality goes beyond this "tolerance"; it implies methodologies, actions and policies to ensure a social transformation that includes everyone in society. It is a process that involves more than one part, and which demands action on all sides. In the Latin American context, interculturality relates actively to the existing power relations between groups and individuals in society.

When it comes to higher education, an important discussion is how to achieve access to universities, meaning that indigenous youth shall have equal access to universities and to relevant higher education. Interculturality goes beyond just talking about access to the existing institutions. Of course, access to higher education is extremely important, and it is a demand that is raised by many indigenous groups and organizations. However, "access" in itself is not enough. Florencio Alarcón, a Quechua leader from Raqaypampa in Bolivia and ex-director of the Educational Council for the Quechua nation said, in a meeting with the public university: *"I don't know why you are so worried about what you call access to the university. We have been present at universities during many years now, but you can't see us. That is not the issue. The problem is that we enter as indigenous and leave as whites. That is the issue that the university should attend now."*

In other words: indigenous and Afro-descending groups in Latin America are not only demanding access to higher education, they are also demanding transformations of the educational system to ensure intercultural education. At the conference, Luis Enrique López emphasized that *"indigenous agency that is increasingly stronger and present with a voice of its own in different fora, and that is questioning not only politics but power and knowledge in Latin America. It is this indigenous force, all over the continent, with varied and distinct expressions, that pose a serious challenge to the Latin American university today*."

Examples of such indigenous demands are:

-The establishment of public indigenous universities (as seen in Bolivia today and also the unique experience in Norway with the Sámi University College)
-The inclusion of indigenous knowledge systems in the curriculum of public universities, replacing or in combination with the existing academic knowledge system
-The inclusion of indigenous leadership, both male and female, in academic committees and within the authorities at universities
-The challenging of existing methodologies of teaching, learning and doing research in higher education

The list goes on. The ongoing international processes of joint accreditation of higher education are factors that further complicate these already complex and complicated debates on local and national levels. To provide all youth, both men and women, with an education that is locally relevant and adapted to the student's own reality, and at the same time provides an education that can be accredited and accepted by universities on the other side of the globe, is, to make an understatement, not an easy task.

So it is within this framework and after years working with interculturality that SAIH and our partners in Bolivia and Nicaragua decided to organize this conference in October 2009, to bring out experiences and opinions that exist between indigenous organizations, NGOs, public and private universities, other civil society organizers and also the government. We hoped to bring out experiences and analyze to what extent ethnical and cultural perceptions of gender are included in higher education, and gain input on the continuing work within these fields. Present at the conference were representatives from universities, government officials, indigenous and Afro-descending organizations and other civil society organizations. Unfortunately, there were no representatives from Norway or from the Sámi present.
The results of this can now be seen in the conference report, as mentioned earlier, which can be obtained by contacting us in SAIH.
Thank you very much for your attention.

Conference Summary

Jennifer Hays

Indigenous Participation in Policy-Making: ideals, realities and possibilities.
Presentations at this years Forum for Development Cooperation with Indigenous Peoples all recognized the current strengthening of indigenous rights at global, regional and national levels – as evidenced by the growing body of documents outlining comprehensive ideals for indigenous rights. These are laid out in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) the International Labour Organization Convention 169 (ILO 169), and in other global, regional and national documents recognizing indigenous rights. Many of the presentations also gave concrete examples of how these ideals are easily bypassed by governments and corporations when they are inconvenient for them, and what other challenges can arise in efforts to implement indigenous peoples right to participation. What are the possible solutions? What is the way out of the 'implementation gap' as many referred to it? How can we move forward productively in a way that allows for indigenous peoples to really participate in decision-making processes that affect them – not only those are defined as 'indigenous' but at all levels? These were the questions that the conference presentations addressed.

Ideals

Conference participants referred frequently to the most well-known international mechanisms addressing indigenous rights, the ILO 169 and the UNDRIP. A common distinction made between the two is that the former (which has been ratified by 20 countries) is binding, while the latter (signed by 147 nations as of December 2010) is not. However, as *John Henriksen* (from the Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples) and others pointed out, the UNDRIP is in fact coherent with widely-ratified international human rights standards that *are* binding. He emphasized that one reason why recognizing this is important is because there is a much stronger emphasis in the UNDRIP on self-determination – which is central to the issue of indigenous participation in decision-making.

The notion of Free Prior and Informed Consent (FPIC) was also central to the conference discussions, and interpreted in light of self-determination. *Joan Carling* of the Asia Indigenous Peoples Pact (AIPP) presented a useful outline of the essential characteristics of the notion of the four components of FPIC:

Free:
- collective decision-making defined by indigenous processes;
- absence of coercion, intimidation and manipulation or external influence;
- authority must be recognized and accountable.

Prior

- Informed consent *before* the start of activities affecting IP;
- ensuring sufficient time for full consultation as compatible with the situation of the IP

Informed

- full and legally accurate disclosure of *all* relevant information in a form and language both accessible and understandable to IP
- no *mis*information

Consent:

- element of a decision-making process obtained thru genuine consultation and participation
- is an outcome, and consultation is the process – consultation should not be confused with the outcome
- if consent is based on wrong information, manipulation, coercion, it must be considered invalid.

The distinction between consultation and consent is critical – indigenous communities are often perfunctorily consulted by governments, corporations or others, and projects continue even if the community expresses reservations – or even if they say 'no'.

Country and regional specifics

Several speakers described recent processes of national recognition of the rights of indigenous peoples, and improvements in indigenous participation in decision-making processes in their countries. These changes include acknowledgment of international indigenous rights mechanisms, and the incorporation of these principles into their own constitutions and policies; they are also the result of intensive activism. The Guatemalan Minister of Culture and Sports, *Jeronimo Lancerio*, described improvements in indigenous peoples' participation in policy making in Guatamala as a gradual process – and one that had not come easily. Early indigenous rights activists sacrificed a great deal in the fight for their recognition – some gave their lives. He emphasized the importance of international cooperation, giving the example of the indigenous movements in South America as important partners for Guatemala. Although he was optimistic about the process, Minister Lanceria emphasized that there is still a lot of racism, discrimination, and extreme poverty – the poorest in Guatelmala are indigenous peoples. While it is important to have indigenous peoples working from within the system – as he is – the minister also recognized that there are constraints upon politicians that limit political action from within. For this reason, there must be people working from many different angles.

The importance of *process* was also noted by *Ingrid Hovda Lien* from the University of Tromso, who compared the indigenous movements in Bolivia and Guatemala. Lanceria described indigenous progress in Guatemala – but he also acknowledged that there are many obstacles, including divisions in the indigenous movement. Hovde Lien identified three

factors that facilitate the movement "from resistance to political power". These include the maturity of indigenous organizations (Bolivia has a very long history of constructing the social movement, while organizations in Guatemala are young); an inclusive discourse, rather than a divided movement; and lower reliance on external financial aid and other assistance (she describes a much greater presence of foreign aid in Guatemala as compared to Bolivia). This kind of comparative study is very useful for identifying relevant characteristics of "successful" indigenous political movements.. As Hovde Lien emphasizes, this does not mean we can simply copy a model from one situation to another – for each situation indigenous groups need to "find their own formula."

Joseph Ole Simel described the process of constitutional Reform in Kenya and the intense lobbying and efforts by indigenous peoples and their supporters to ensure that they were included. These included campaigns to increase voter registration, both through mainstream channels and those specifically targeted at indigenous voters. Translation of the constitution into indigenous languages was one important aspect of these efforts. The result has been a constitution that includes the definition by the African Commission of Human and Peoples Rights (ACHPR) of 'indigenous peoples', as well as provisions for freedom from discrimination – some of which are specifically inclusive of indigneous peoples. Ole Simel views these developments with optimism, but recognizes that this is only a first step, and there is a need for ongoing monitoring to ensure that indigenous peoples voice continues to be heard.

In Nepal, the IP movement has established itself as a major actor in the democratic movement, highlighted by the country's ratification of ILO 169 in 2007. *Mukta Lama Tamang* from Tribhuvan University highlighted possible positive changes, if the ILO 169 is used as a tool for peace and inclusion. The protection of indigenous rights has the potential to: end violent conflict, be an instrument for inclusive political processes and democratic representation; function as a a mechanism for enriching equitable development; and provide protection of human rights and fundamental freedoms for indigenous peoples. However, he also pointed out the delay in the implementation of this convention, indicating – as did many speakers – that ongoing activism and monitoring is crucial to ensuring that indigenous participation continues to move towards real democratic representation.

Presenters describing the Phillipines, inlcuding *Joan Carling, Jeff Rafa* (ALAMIN) and *Cathal Doyle* (University of Middlesex) described the Indigenous Peoples Rights Act, one of the most comprehensive national policies recognizing indigneous peoples and their rights – in particular their right to consultation. Unfortunately, it has proven to be quite easy for corporations to get around this – the situation of the Phillipines is described in the section below.

Referring primarily to the Norwegian context, *Else Grete Broderstad* (University of Tromsø) emphasized the *procedural* aspect of indigenous rights (see section below for more on the Sámi Parliament). Although citizenship and equality are often read as an acceptance of indigenous peoples to become the same as the majority population of a state, Broderstad turned this around and argued that perspectives of *indigenous* autonomy and self-determination need to be included in the debate on citizenship. Furthermore, indigenous

participation does not only mean participation in indigenous issues – it should also apply to participation in all national decisions.

Cathal Doyle from the University of Middlesex pointed out that we should be clear about in what sense the standards set by these mechanisms are "ideals." Most countries currently fall far short of these standards – thus they are something to strive for. However, they should be recognized as *minimum standards*- not as lofty, unreachable goals. Unfortunately, the realities of indigenous participation and self-determination are often very far from the "ideal" of achieving minimum standards,.

Realities of participation in different regions:

The existence of the Sámi Parliament in Norway is often considered internationally to be a realization of ideals of indigenous participation in political and other decision-making processes. However, presenters at the 2010 Forum conference also referred to problems in the "realities" of participation through the Sámi Parlimaent. Speakers noted constraints, including those based on financing (and its effects on indigenous decision making processes); a lack of cooperation between the Sámi Parliament and other regional and national bodies also representing Sámi interests; lack of effective communication with the public; and misunderstandings of indigenous rights as "special rights." *Magne Ove Varsi* of Galdu made the point that the Sámi – like indigenous peoples around the world – have been forced to mobilize to participate in decision-making processes that affect them, even if their own traditional leadership structures are not sufficient to do this. This presents a major barrier for indigenous participation in national and international political arenas.

Ole-Bjørn Fossbakk (University of Tromsø) and *Eva Josefsen* (Northern Research Institute) both discussed the splits in Sami politics revealed by close examination of the Finnmark Act in Norway. Josefsen described the process of the development of the Finnmark Act, and the ways in which this contributed to significant strengthening of the formal relationship between the Norwegian government and the Sami Parliament. However, cooperation between the Sámi Parliament and the Finnmark County Council was weak, and the public was largely excluded from this process. This has resulted in mistrust of the Finnmark Act on the part of the public. Fossback examines the ethnic dimensions of resistance to the Act, and argues that, contrary to what is often assumed, it is not only Norwegians who resist, or even "assimilated Sámi," but also by those who feel themselves to be Sámi but who do not feel that their ethnicity should be the basis for special treatment. There are many in this category who also reject the Sami Parliament as a representative body. He attributes this in part to a misunderstanding of the issue of indigenous rights as "special rights." He argues that both the Sami parliament and the Norwegian Government need to take into consideration the range of political ideologies held by Sami, and find ways to enter into more productive dialogue with those whose political views do not align with the Sami Parliament.

The realities of indigenous participation were most thoroughly discussed for Asia. *Tone Bleie*, of the University of Tromso made the very important point that these discussions of indigenous rights and participation are taking place in a rapidly changing world, and that notions of democracy, state, citizen ship are evolving around the world, and concepts pf

rights, both as individual and collective, are central to these processes. In these debates, Asia is becoming increasingly important and rising rapidly as a global economic and political force. In Asia, however, recognition of indigenous rights is very weak, especially in terms of ratifying international instruments. Bleie emphasizes that we need to pay close attention to how concepts of indigenous rights are being developed, and to the practical implications in different regions.

A specific case illustrating the harsh realities of indigenous participation was that of mining in the Philippines addressed by *Jeff Rafa* of ALAMIN, and *Cathal Doyle* (University of Middlesex). Doyle described how, although the constitution of the Phillipines has incorporated the UNDRIP, in reality the interpretation of the Indigenous Peoples Rights Act (1997) is distorted and interpreted in a way that allows for mining companies to proceed with operations in the face of clear dissent on the part of affected indigenous communities. Giving the example of the creation of a new 'tribe' whose 'leaders' were bought off by the mining company, he suggests that in this case, FPIC might mean "Framed, Procured and Invented Consent".

Rafa described the effects of ongoing mining activities as affecting not only indigenous peoples, but the Phillipines as a nation, and, ultimately as an issue of global concern. Indigenous peoples experience displacement, destruction of their land, and immediate food insecurity, but the Philippines in general will be affected by impacts on the environment and on biodiversity, and general national food security. A hunger strike on the part of the affected Mindoros has been successful for the time being – but the mining company is aggressively seeking a way around it and local groups and their supporters must remain vigilant in their opposition. These presentations highlighted the extreme vulnerability of indigenous peoples in the face of powerful companies, the importance of legal mechanisms to appeal to in making cases for indigenous rights, and the absolutely critical role of ongoing activism and monitoring.

Thus, while some countries are moving closer to the greater indigenous political participation, everywhere the realities on the ground are complex, problematic and full of contradictions – and far from the ideals – or even minimum standards. Some presenters attributed the complexities to historical trajectories; *Joseph Ole Simel* noted that Kenya inherited a colonial regime that prioritizes individual rights, and was also left with a legacy of wide economic disparity and wealth concentrated in the hands of a few elites creating serious challenges for grass-roots, collective movements. *Magne Ove Varsi* noted that the Sámi were forced to mobilize at a time when traditional leadership structures not sufficient to this. How can indigenous peoples balance traditional structures with the need to participate in modern structures and to address historical legacies and current power imbalance?

Based on his experiences from Nepal, Mukta Lama Tamang outlined a set of emerging issues and challenges for indigenous peoples participation in decision making processes. Many of these were also are relevant to global concerns. The following list of questions includes many from his list and some noted consistently by other speakers:

- what is proper process or mechanism for consulation?
- how to determine legitimate group and/or leaders for consultation?

- how to adapt traditional decision making processes to requirements of government?
- how to deal with communities in mixed settlements?
- how do we distinguish between 'indigenous peoples' and 'local people'?
- how do we deal with diversity of opinion among indigenous peoples?
- how is benefit sharing determined?
- who is the ultimate owner of natural resources?
- what recourse do indigenous peoples have when their rights are violated, especially by powerful actors like corporations?

Specifically in terms of Free Prior and Informed Consent, and companies acting in indigenous areas, one particular concern frequently voiced was: *How can we avoid the manipulation of indigenous peoples by more powerful stakeholders*? It can be very easy for companies to "buy" consent by asking the community "what is your price?" The result is that the companies become service providers – using a power that they should not have in the first place – as it is the state who has obligations to provide these services.

Possibilities: The way forward

Throughout the conference, several suggestions were put forward as strategies and areas of focus in order to move towards the goal of increasing indigenous participation in decision-making processes.

- Need for recourse: more bodies and organizations with oversight of issues and a mandate to address the problems. The OECD is one such organization and indigenous groups from the Phillipines are appealing to them in the ALAMIN case – but progress can be slow.
- Need for *respect* for modes of indigenous organization, both traditional/modern – there are many different ways that IP organize themselves and they should not be expected to conform to a standard model.
- Need for awareness of local specifics, at the same time that we are looking for overarching standards and mechanisms.
- Need for a comparative approaches that help to identify both local specifics and global standards. *Ingrid Hovda Lien* and *Anna Maria Lundberg* (The Norwegian Centre for Human Rights) both provided useful analysis based on comparative approaches.
- Need for awareness of *interculturality,* as described by *Ragnhild Therese Nordvik* (Studentenes og Akademikernes Internasjonale Hjelpefond) – to go beyond mere "access" to institutions – educational, political, economic – to *transformation* of the systems in ways which recognize the validity of indigenous values, knowledge systems, leadership, relationship to the environment, and economic priorities.
- Finally, there is an *urgent need for a new paradigm of development.*

This last point was emphasized by Joan Carling, who noted that the issues discussed at the conference present an enormous challenge the foundation of the modern global economic system, which is based on resource extraction and the accumulation of wealth. She identified this as the fundamental challenge, underpinning all of the other challenges faced by indigenous peoples – and there are no simple, clear solutions. There is strong resistance to this challenge from powerful actors who are not easily moved. Indigenous peoples themselves are not always in agreement and often have differing goals. this as the fundamental challenge, underpinning all of the other challenges faced by indigenous peoples – and there are no simple, clear solutions. There is strong resistance to this challenge from powerful actors who are not easily moved. Indigenous peoples themselves are not always in agreement and often have differing goals.

As very many speakers pointed out, we have to recognize this movement as a process, and to determine the most appropriate and constructive ways to contribute to it – as academics, activists, donors and policy makers – in order to move towards a new paradigm in which indigenous peoples can exercise their fundamental right of self-determination, as individuals, as groups, and as active participants in larger national, regional, and global communities. This goal should not be seen only as something that will benefit indigenous peoples – but as a search for better and healthier ways to live together on this planet.

The goal of the Forum Conference is to provide a platform for researchers, development workers, and Sámi organisations to meet and discuss these urgent issues, with the goal of improving the quality of Norway's development co-operation with indigenous peoples elsewhere. The recommendations on the issues discussed at this years conference will be brought forward to Norwegian ministries and international donors.

Programme

Sunday 24.10.2010

20.00: Reception at Árdna**,** the Sámi cultural building located at the University campus, close to "Labyrinten", The Sámi turf hut and the Administration building.

21.30: Bus departure from the University to Radisson Blu Hotel

Monday 25.10.2010

Opening of conference

08.30: Taxi/Bus departure from Radisson Blu hotel to the University

08.45-09.15: Registration, at University Campus, Teorifagbygget, Hus 1, Auditorium 1.

09.15-09.25: Opening by rector at the University of Tromsø: Jarle Aarbakke

09.25-09.45: Egil Olli, President of the Sami Parliament, Norway.

09.45-10.00: Opening by Tone Bleie, Chair, Forum for Development Cooperation with Indigenous Peoples*: "Indigenous Participation in Policy-making: Ideals, Realities and Possibilities."*

Session 1:

Introduction: Stetting the Agenda

10.00-10.30: Jeronimo Lancerio, Minister of Culture and Sports of Guatemala: *"Indigenous Participation in Policy-making: Experiences from Guatemala."*

10.30-11.00: John Bernhard Henriksen, "The Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples": *"Indigenous Peoples' Right to Participate in Decision-Making"*.

11.00-11.30: Discussion.

11.30-11.45: *Coffee*

11.45-12.15: Joan Carling, Secretary General, Asia Indigenous Peoples Pact: "Indigenous Peoples' right to free, prior and informed consent (FPIC) in policy making and development"

12.15-12.45: Discussion

12.45-14.00: *Lunch*

14.00-14.30: Magne Ove Varsi, Galdu: "The Sami Parliament- its relevance as a model in democratic and undemocratic states".

14.30-15.00: Tone Bleie. Forum for Development Cooperation with Indigenous Peoples: *"State sovereignty, human rights and peoples participation".*

15.00-15.30: Discussion

15.30-15.45: Coffee.

Session 2:

The Realities of Participation in Different Regions.

15.45-16.15: Joseph Ole Simel, Mainyoito Pastoralist Integrated Development (MPIDO), Kenya: "*A case of indigenous peoples' participation and involvement in constitution review*"

16.15-16.35: Else Grete Broderstad, University of Tromsø: *"Indigenous rights and citizenship rights: contradictory or coherent?".*

16.35-16.55: Eva Josefsen, Norut (Northern Research Institute): *"The Finnmark Act and afterward – Sámi Political influence under different premises".*

16.55-17.15: Ole-Bjørn Fossbakk, University of Tromsø: *"Below the public policy surface: Local reality and popular resistance against the Finnmark Act".*

17.15-17.45: Discussion

18.00: Bus departure from the University to Radisson Blu hotel

20.00: *Dinner at Radisson Blu Hotel*

Tuesday 26.10.2010

Session 2 continues:

The Realities of Participation in Different Regions.

08.30: Taxi/Bus departure from Radisson Blu hotel to the University Campus.

09.00-09.30: Jeff Rafa of ALAMIN, Philippines: “The situation for Indigenous Peoples at Mindoro Island”.

09.30-10.00: Cathal Doyle, Middlesex University: ”The effectiveness of legal and non-legal remedies for addressing the rights of Indigenous Peoples at Mindoro Island and elsewhere”.

10.00-10.30: Mukta Lama Tamang, Central Department of Sociology/Anthropology, Tribhuvan University: "Indigenous peoples' movement and challenges of ILO C 169 implementation in Nepal”.

10.30-11.00: Discussion

11.00-11.15: Coffee

11.15-11.30: Introductions

11.30 -12.45: Urgent priorities for realising participation

Roundtable discussion by the Expert Mechanism, AIPP, IWGIA, Galdu, Centre for Peace Studies (CPS) and present representatives of national indigenous organizations.

Forum update

12.45-13.00: Anna Maria C. Lundberg, The Norwegian Centre for Human Rights (NCHR), University of Oslo: “Regional National Autonomy in the People's Republic of China (PRC), - a means of effective participation?”.

13.00-14.00: Lunch

Forum update continues

14.00-14.15: Ingrid Hovda Lien, The project "Democracy and Indigenous Rights" (between UiT and Sami University College): *"Indigenous movements in Guatemala and Bolivia - different experiences in making the multicultural democracy work?"*.

14.15-14.30: Ragnhild Therese Nordvik, SAIH: "Intercultural gender perspective in higher education in Latin America – summary from conference in Cochabamba, Bolivia".

Summing up

14.30-15.00: Summing up

15.00-15.15: Closure of the Forum Conference 2010.

Paticipants

Adam	Stepien	University of Lapland, Rovaniemi, Finland
Agata	Slowikowska	The University of Gdansk
Alberto	Aprile	University of Tromsø
Amjad	Nazeer	University of Tromsø
Angelika	Laetsch	University of Berne/University of Tromsø
Angshu	Fouzder	University of Tromsø
Anna	Afanasyeva	University of Tromsø
Anne	Natvig	
Arne Kjell	Raustøl	Norwegian Missions in Development
Berit Nystad	Eskonsipo	University of Tromsø
Bjørg	Evjen	Forum for Development Cooperation with Indigenous Peoples
Bjørn	Hatteng	University of Tromsø
Bård	Lahn	Friends of the Earth Norway
Camilla	Brattland	University of Tromsø
Carina	Sandvik	University of Tromsø
Carlos	Vásquez	República de Guatemala
Cathal	Doyle	Middlesex University
Cecilie	Haare	Norwegian Ministry of Government Administration, Reform and Church Affairs
Cecilie	Lindvall	
David	Bergan	Norwegian People's Aid
Dean	Nicolai	University of Tromsø
Demkina	Tatyana	
Dik B	Rai	University of Tromsø
Egil	Olli	The Sámi Parliament
Elena	Leontyeva	
Elena	Nechushkina	L'auravetl'an Information and Education Network of Indigenous People (LIENIP)
Elisabeth	Sandersen	University of Tromsø
Ellen	Blind	Reindeer Peoples' Ambassadors
Else Grete	Broderstad	University of Tromsø
Erik	Christensen	University of Tromsø
Espen	Wæhle	International Work Group for Indigenous Affairs (IWGIA)
Eva	Josefsen	Northern Research Institute Norut Alta - Áltá
Eva Maria	Fjellheim	Norwegian University of Science and Technology (NTNU)
Evy Ann	Eriksen	Utdanningsforbundet (Union of Education Norway)
Femi	Oyeyemi	
Geir Tommy	Pedersen	Forum for Development Cooperation with Indigenous Peoples
Georges	Midre	Forum for Development Cooperation with Indigenous

		Peoples
Gloria	Sanic	República de Guatemala
Gro	Dikkanen	Finnmarkskommisjonen
Gulvayra	Shermatova	L'auravetl'an Information and Education Network of Indigenous People (LIENIP)
Hans Petter	Hergum	Norwegian Church Aid
Haruka	Shiramizu	University of Tromsø
Heidi	Salmi	Gáldu - Resource Centre for the Rights of Indigenous Peoples
Henry	Minde	University of Tromsø
Hildegunn	Bruland	University of Tromsø
Håkon	Fottland	University of Tromsø
Ingrid	Cooper	University of Tromsø
Ingrid	Hovda Lien	Forum for Development Cooperation with Indigenous Peoples
Isidora	Stakic	University of Tromsø
Ivalu	Søvndahl Pedersen	University of Tromsø
Ivar	Evjenth	Interpreter
Jacobo	Bolvito Ramos	República de Guatemala
Janne	Hansen	Gáldu - Resource Centre for the Rights of Indigenous Peoples
Jayson	Lamchek	University of Tromsø
Jeff	Rafa	ALAMIN, Alliance Against Mining Philippines
Jennifer	Hays	Forum for Development Cooperation with Indigenous Peoples
Jeronimo	Lancerio	República de Guatemala
Joan	Carling	Asia Indigenous Peoples Pact (AIPP)
John Bernhard	Henriksen	The Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples
John Erland	Boine	Church of Norway Sami Council
John Richard	Stokbak Sciaba	Interpreter
Joseph	Chimbuto	University of Tromsø
Joseph Ole	Simel	Mainyoito Pastoralist Integrated Development (MPIDO), Kenya
Juan	León	República de Guatemala
Kari	Wattne	Samisk vgs., Karasjok/Sámi joatkkaskuvla Kárášjogas
Kevin	Johansen	Bodø University College
Kine	Fristad	The Latin America Solidarity Organisation in Norway (LAG)
Kishore Kumar	Chhetri	University of Tromsø

Kjersti K.	Lie	The Latin America Solidarity Organisation in Norway (LAG)
Kristian	Aambø	University of Tromsø
Kristin	Evju	University of Tromsø
Kristin R	Solberg	University of Tromsø
Kristine Tjåland	Braut	University of Tromsø
Kyrre	Pedersen	
Leif	Dunfjeld	The Sámi Parliament
Lilly	Martinsen	University of Tromsø
Line Alice	Ytrehus	NLA University college
Line M.	Skum	Kirkelig Utdanningssenter i Nord
Lisa	Jåma	The Norwegian Ministry of Agriculture and Food
Lisbeth Vesterheim	Skoglund	The Sámi Parliament
Lola	García-Alix	International Work Group for Indigenous Affairs (IWGIA)
Lydia	Radoli	Human Rights Practice - Universitetet i Tromso
Magne Ove	Varsi	Gáldu - Resource Centre for the Rights of Indigenous Peoples
Marci	Macomber	University of Tromsø
Maria	Borda	
Maria	Lundberg	Norwegian Centre for Human Rights, University of Oslo
Maribel	Garcia Retana	República de Guatemala
Marie	Kvernmo Valkeapää	University of Tromsø
Marit	Langmyr	Travel for Peace
Marte	Skogsrud	University of Tromsø
Marthe	Olsen	University of Tromsø
Md. Zahid	Hassan	University of Tromsø
Mekonnen Zeleke	Gedefaw	University of Tromsø
Mikkel	Berg-Nordlie	Norwegian Institute for Urban and Regional Research (NIBR)
Mona	Solbakk	University of Tromsø
Mukta	Lama Tamang	Central Department of Sociology/Anthropology, Tribhuvan University
Maayan	Geva	University of Tromsø
Nils Ole	Gaup	Interpreter
Ole D.	Mjøs	University of Tromsø
Ole Mathis	Hetta	The Norwegian Directorate of Health
Ole-Bjørn	Fossbakk	University of Tromsø
Pau	de Quadras	University of Tromsø
Per	Hætta	University of Tromsø

Klemetsen		
Peris	Jones	Norwegian Institute for Urban and Regional Research (NIBR)
Priscilla Akua	Boakye	University of Tromsø
Rachel Issa	Djesa	The North/South Coalition
Ragnhild Therese	Nordvik	Norwegian Students' and Academics' International Assistance Fund (SAIH)
Richard	Skretteberg	The Norwegian Refugee Council
Risten Birje	Steinfjell	University of Tromsø
Rita	Lindvall	
Rolf Egil	Haugerud	Nordic Council for Reindeer Husbandry Research (NOR)
Rudy	Camposeco	República de Guatemala
Sarah	Auffret	University of Tromsø
Sayali	Patwardhan	University of Tromsø
Shanley	Swanson	University of Tromsø
Sidsel	Saugestad	Forum for Development Cooperation with Indigenous Peoples
Silja	Somby	Interpreter
Siri	Austeng	Namibiaforeningen
Siri	Damman	Rainforest Foundation Norway
Siri	Johnsen	University of Tromsø
Sivapalan	Kasinather	Norwegian Tamil Health Organization
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