



## **Report of the Regional Conference on the Role of the National Institutions on the Rights of Indigenous Peoples**



ASIAN INDIGENOUS & TRIBAL PEOPLES NETWORK



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**18-19 October 2008, New Delhi, India**

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## Introduction

UN, ICC and Regional  
Forums of NHRIs need  
to take inclusive approach

On 18-19 October 2008, Asian Indigenous and Tribal Peoples Network organised the “Regional Conference on the Role of the National Institutions on the Rights of Indigenous Peoples” in New Delhi, India. This is the culmination point of the project, “*Realisation of Indigenous Peoples Rights at National Level in Asia*” financed by the European Commission under the European Initiative for Human Rights and Democracy.

The Regional Conference inaugurated by Mr Hans Schoof, Head of Operations and First Counsellor of the Delegation of European Commission to India, Bhutan and Nepal, discussed the findings/ results of the project to ensure implementation of the rights of indigenous peoples by strengthening the national mechanisms in Asia.

Among the relevant UN mechanisms, the Regional Conference was addressed by UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Prof James Anaya and member of the UN Permanent Forum on Indigenous Issues, Mr Eugenio A Insigne. Former UN Special Rapporteur on the right to adequate housing, Mr Miloon Kothari also shared his experiences.

Among the National Institutions on the Rights of Indigenous Peoples, Chairman of the National Commission on Indigenous Peoples of the Philippines and member of the United Nations Permanent Forum on Indigenous Issues, Mr Eugenio A Insigne and Member of the Governing Council of the National Foundation for Development of Indigenous Nationalities of Nepal, Mr Arjun Limbu addressed the Conference and informed about the powers and functions and accomplishments of their National Institutions. Another Member of a sectoral national institution, the National Commission for Protection of Child

Rights of India, Ms Dipa Dixit also addressed the conference.

Indigenous representatives presented the findings of the AITPN on the National Institutions on the Rights of Indigenous Peoples in Asia, i.e. National Commission for Scheduled Tribes of India, National Commission on Indigenous Peoples of Philippines and the National Foundation for Development of Indigenous Nationalities of Nepal.

AITPN also presented its findings on the Ministry of Chittagong Hill Tracts Affairs of Bangladesh, the Department of Orang Asli Affairs of Malaysia and the Committee for Ethnic Minorities of Vietnam.

A large number of indigenous peoples representatives also participated in the conference and actively contributed in the deliberations.

Based on the findings of the AITPN studies, presentation made by relevant UN mandate holders, representatives of the National Institutions on the Rights of Indigenous Peoples and contributions made by the indigenous rights activists, the Regional Conference adopted the “*New Delhi Guidelines on the establishment of National Institutions on the Rights of Indigenous Peoples*”.

The *New Delhi Guidelines* are important considering the exclusion of the sectoral National Institutions that has taken place since the United Nations adopted the Paris Principles on National Human Rights Institutions (NHRIs) in 1991. Across the world, a large number of national institutions, more popularly known as National Human Rights Commissions, have been established. International Coordinating Committee of National Human

Rights Institutions (ICC) and regional and sub-regional Forums of NHRIs have been created for compliance with the Paris Principles, increased cooperation and learning from the best practices for protection and promotion of human rights and fundamental freedoms.

However, National Human Rights Institutions on sectoral issues like indigenous peoples, Dalits, minorities, women and children have so far been completely excluded. The presentations made by the representatives of the National Institutions on sectoral issues such as Mr Eugenio A Insigne, Chairman of the National Commission on Indigenous Peoples of Philippines and Ms Dipa Dixit, Member of the National Commission for Protection of Child Rights of India at the Regional Conference highlighted that these National Institutions have been equally, if not more, effective for protection and promotion of the rights of the vulnerable groups.

The sectoral National Human Rights Institutions suffer from a number of shortcomings and exclusion.

First, there are no internationally accepted guidelines for the establishment of National Institutions on Indigenous Peoples or other sectoral institutions which address specific rights and needs of the concerned groups. Therefore, governments like Nepal created semi-academic institution like the National Foundation for Development of Indigenous Nationalities. Most governments also prefer to create government departments to deal with indigenous peoples.

Second, in some cases, the National Institutions on the Rights of Indigenous Peoples like the Aboriginal and Torres Island Commission have been subsumed by the National Human Rights Institutions like Human Rights and Equal Opportunities Commission of Australia. But there are also fully functional National Institutions on sectoral issues like the NCIP of Philippines and NCST of India.

Third, organisations of the NHRIs like the International Coordinating Committee of NHRIs, Asia Pacific Forum of National Human Rights Institutions or ASEAN-Four completely overlooked/excluded sectoral national institutions such as National Institutions on indigenous peoples, National Institutions on the Dalits (National Commission for Scheduled Castes

of India or National Commission for Dalits of Nepal) or National Commissions for Women. Consequently, these sectoral national institutions which have a critical role to play for protection of human rights and fundamental freedoms of the vulnerable groups, have been denied the opportunity to learn from the best practices or increase their capacities.

Fourth, the Office of the United Nations High Commissioner for Human Rights also only focused on the NHRIs and not on the sectoral NHRIs. In many areas, these sectoral institutions are critical and as important as the NHRIs. For example, while the National Human Rights Commission of India is barred from directly investigating the human rights violations by the armed forces under section 19 of the Human Rights Protection Act of 1993, the National Commission for Scheduled Tribes (NCST) is vested with powers of a civil court having authority to “summon and enforce attendance of any person and examine on oath”. What is more important is the fact that while the NHRC of India was created by a parliamentary Act, the NCST is a constitutional body established under Section 339 of the Constitution of India.

AITPN calls upon the relevant UN mechanisms such as the Permanent Forum on Indigenous Issues, Expert Mechanism on the Rights of Indigenous Peoples, the UN Forum on Minority Issues and UN Special Procedures to promote the sectoral National Institutions.

AITPN calls upon the Office of the High Commissioner for Human Rights, International Coordinating Committee of the NHRIs or the Asia Pacific Forum of National Institutions or ASEAN-Four of the NHRIs to include National Institutions on sectoral issues as indispensable and equal partners. Or else, the focus only on Human Rights Institutions will not address the gaps that exist at present for the promotion and protection of the rights of the most vulnerable communities in their programmes.

Finally, AITPN calls upon the governments interested to establish National Institutions on the Rights of Indigenous Peoples to follow the New Delhi Guidelines which reflect the minimum standards for the establishment of any National Institutions on the Rights of Indigenous Peoples.

# New Delhi Guidelines on the Establishment of National Institutions on the Rights of Indigenous Peoples, New Delhi, October 18-19, 2008

## Regional Conference on the Role of the National Institutions on the Rights of Indigenous Peoples

### Introduction

At the Regional Conference on the Role of the National Institutions on the Rights of Indigenous Peoples<sup>1</sup> held in New Delhi, on 18-19 October 2008, the representatives of indigenous peoples participating in the conference unanimously welcomed the contributions made by UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Prof James Anaya; Chairman of the National Commission on Indigenous Peoples of the Philippines and member of the United Nations Permanent Forum on Indigenous Issues, Mr Eugenio A Insigne; Member of the Governing Council of the National Foundation for Development of Indigenous Nationalities of Nepal, Mr Arjun Limbu; Member of the National Commission for Protection of Child Rights of India, Ms Dipa Dixit; Representative of the Delegation of the European Commission to India, Mr Hans Schoof; and former Special Rapporteur on the right to adequate housing, Mr Miloon Kothari.

The representatives of indigenous peoples participating in the conference adopted the following guidelines which they understand to reflect the minimum standards for the establishment of any National Institutions on the Rights of Indigenous Peoples (NIRIPs). These guidelines are designed to be of use to all who are concerned with promotion and protection of the rights of indigenous peoples, in particular, the governments and the United Nations bodies and agencies.

### New Delhi Guidelines on the establishment of National Institutions on the Rights of Indigenous Peoples, New Delhi, October 18-19, 2008

#### I. The significance of National Institutions on the Rights of Indigenous Peoples

1. Since the adoption of the United Nations Paris Principles on National Human Rights Institutions in 1991, a number of National Human Rights Institutions have been established by the governments across the world.
2. A number of National Institutions on the Rights of Indigenous Peoples have also been established by the governments across the world.
3. The establishment of the National Institutions on the Rights of Indigenous Peoples reflects a policy shift of the concerned governments from assimilation of indigenous peoples to recognition and preservation of the distinctiveness of the indigenous peoples and the rights of indigenous peoples to all human rights and fundamental freedoms.
4. There have also been significant legal developments at international level enhancing the rights of indigenous peoples including the UN Declaration on the Rights of Indigenous Peoples, ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries and a number of international instruments which refer to indigenous peoples.
5. It is now undisputed that all human rights are indivisible, interdependent, interrelated

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1. The Regional Conference was organised by Asian Indigenous and Tribal Peoples Network.



and of equal importance for human dignity and that indigenous peoples are equally entitled to all these rights.

6. It is recognized that the National Institutions on the Rights of Indigenous Peoples have an important and crucial role to play for recognition, promotion, protection and implementation of the rights of indigenous peoples including the UN Declaration on the Rights of Indigenous Peoples.
7. The United Nations bodies especially those relating to indigenous peoples like Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples of the UN Human Rights Council have a role to play for promotion and establishment of the National Institutions on the Rights of Indigenous Peoples.
8. The UN agencies should encourage States and include the establishment of the National Institutions on the Rights of Indigenous Peoples in their technical cooperation programmes.

## **Chapter I: Constitution of a National Institution on the Rights of Indigenous Peoples**

1. The National Institutions on the Rights of Indigenous Peoples (NIRIPs) should be constitutional bodies mandated to protect, promote and defend human rights, fundamental freedoms and other rights and interests of the indigenous peoples with due regard to their beliefs, customs, traditions and institutions and shall exercise the powers conferred upon, and perform the functions assigned to it.
2. The NIRIPs shall reflect plurality and representation of indigenous communities;
3. The Chairperson, members and Chief Executive Officer shall be indigenous persons.
4. The NIRIPs shall have offices in the territories of indigenous peoples.

## **1. Criteria /Qualifications**

1. The Chief Commissioner and the Commissioners must have experience and expertise on indigenous peoples' issues including the experience working with an indigenous community for substantial period of time and/or any government agency involved in indigenous peoples' issues, the ability, integrity and standing for selflessness to the cause of justice for the indigenous peoples.
2. The composition of the NIRIPs shall reflect the diversity of the indigenous peoples including gender, ethnicity and geographical regions.

## **2. Procedure of appointment of members**

The members of the NIRIPs shall be appointed by the head of the State on the recommendation of a committee comprising of the representative of the government, leader/s of the opposition in the National Parliament and representatives of indigenous peoples.

The procedures of appointment shall be public through issuance of a notification through publication in all national newspapers and other communication systems like internet inviting recommendations from indigenous communities for appointment and filling up the vacant posts of members of the NIRIPs as well as inviting comments from the indigenous peoples (individuals and organizations) on candidature of all the nominees; and further the details of the nominees including names, address, educational qualifications, work experience etc. before appointment and the information pertaining to all the nominees shall be made public.

## **3. Resignation and removal of members**

1. The members of NIRIPs may, by notice in writing under his/her hand addressed to the Head of State, resign his/her office.
2. The members of NIRIPs shall only be removed from his/her office by the initiative of appropriate authority or upon recommendation by any indigenous community on the ground of proven misbehaviour or incapacity after the apex

court, on reference being made to it by the appropriate authority, has, on inquiry held in accordance with the procedure prescribed in that behalf by the apex court, reported that the members of the NIRIPs, as the case may be, ought on any such ground to be removed.

3. The Head of State on the advice of the appropriate authority may by order remove members of NIRIPs as the case may be;

- (a) is adjudged an insolvent; or
- (b) engages during his/her term of office in any paid employment outside the duties of his/her office; or
- (c) is unfit to continue in office by reason of infirmity of mind or body; or
- (d) is of unsound mind and stands so declared by a competent court; or
- (e) is convicted and sentenced to imprisonment for an offence involves moral turpitude.

#### **4. Procedure to be regulated by the NIRIPs**

The NIRIPs shall regulate its own Rules of Procedure.

#### **5. Officers and other staff of the NIRIPs**

1. The NIRIPs shall be made available:

- (a) an officer who shall be an indigenous person and serve as the Chief Executive Officer; and
- (b) such investigative staff and officers as may be necessary for the efficient performance of the functions of the NIRIPs.

2. The NIRIPs may appoint such other administrative, technical and scientific staff as it may consider necessary.

#### **6. Offices and departments of the NIRIPs**

The NIRIPs, among others, shall have the following offices which shall be headed by indigenous

persons and be responsible for the implementation of the policies hereinafter provided:

- (a) Policy, Planning and Research and Advocacy office will be responsible for formulation of appropriate policies and programs for indigenous peoples such as, but not limited to, the development of a Five-Year Master Plan for the indigenous peoples. The NIRIPs shall endeavor to assess the plans and make necessary rectifications in accordance with the changing situations. The Office shall also undertake the documentation of customary law and shall establish and maintain a Research Center that would serve as a depository of ethnographic information for monitoring, evaluation and policy formulation. It shall assist the legislative branch of the government in the formulation of appropriate legislation on indigenous peoples;
- (b) Education and Culture Office will ensure effective implementation of the education, cultural and health rights of the indigenous peoples. It shall assist, promote and support community schools, both formal and non-formal, for the benefit of the indigenous communities, especially in areas where existing educational facilities are not accessible to members of the indigenous groups. It shall administer all scholarship programs and other educational rights intended for indigenous people's beneficiaries in coordination with the Ministry of Education, Culture and Sports and other related agencies. It shall also undertake special programs to preserve and promote the languages and traditional knowledge of the indigenous peoples.
- (c) Office on Socio-Economic Services and Special Concerns will coordinate with pertinent government agencies specially charged with the implementation of various basic socio-economic services, policies, plans and programs affecting the indigenous peoples to ensure that the same are properly and directly enjoyed by the indigenous peoples. It shall also be responsible for such other functions as the NIRIPs may deem appropriate and necessary.
- (d) Women Rights Cell which, among others, shall design and implement the programmes

of the NIRIPs pertaining to indigenous women.

- (c) Youth and Child Rights Cell which, among others, shall design and implement the programmes of the NIRIPs pertaining to indigenous youths and children.
- (f) Office of Empowerment and Human Rights will ensure the enjoyment of the human rights and fundamental freedoms by the indigenous peoples. It shall, among others, undertake capacity building programmes, participation of indigenous peoples at all levels of decision-making and intervene against violations of the rights of indigenous peoples.
- (g) Administrative Office, among others, shall provide the NIRIPs with economic, efficient and effective services pertaining to personnel, finance, records, equipment, security, supplies and related services.
- (h) Legal Affairs Office shall, among others, advice the NIRIPs on all legal matters concerning indigenous peoples and providing legal assistance to indigenous peoples in litigations.
- (i) Other Offices - The NIRIPs shall have the power to create additional offices or regional offices in all development regions or wherever it may deem necessary.

## 7. Consultative Advisory Committee

- 1. It shall be the duty of the National Institutions on the Rights of Indigenous Peoples to establish a Consultative Advisory Committee of indigenous peoples which shall have the mandate to:
  - (i) advise the NIRIPs on matters relating to the problems, aspirations and interests of the indigenous peoples; and
  - (ii) ensure indigenous peoples participation for appointment of the members of the NIRIPs;
- 2. The Consultative Advisory Committee shall ensure equitable representation of gender, ethnicity and geographical diversity.

## Chapter II: Functions and Powers of the NIRIPs

### 8. Functions and powers of the NIRIPs

- 1. The National Institutions on the Rights of Indigenous Peoples shall be informed and consulted by the government on all major policy matters affecting indigenous peoples.
- 2. The NIRIPs shall have quasi-judicial and quasi-legislative powers and functions and the duty of the NIRIPs shall include:
  - (a) To serve as the primary government agency through which indigenous peoples can seek government assistance and as the primary agency medium, through which such assistance may be extended;
  - (b) To monitor, review, and assess the conditions of indigenous peoples including existing laws and policies pertinent thereto and to propose relevant laws and policies to ensure their proportionate participation in national development;
  - (c) To coordinate, formulate and implement policies, plans, programs and projects of the government for the economic, social and cultural development of the indigenous peoples and monitoring the implementation thereof;
  - (d) To request and engage the services and support of experts from other agencies of government or employ private experts and consultants as may be required in the pursuit of its objectives;
  - (e) To inquire into specific complaints, on receipt of complaints or *suo motu*, with respect to the violations of the rights and safeguards of the indigenous peoples;
  - (f) To receive complaints and/or take *suo motu* action and inquire into non-implementation of the services provided by the government and compel action from appropriate agency;

- (g) To participate and advise on the planning process of socio-economic development of the indigenous peoples and to evaluate the progress of their development;
- (h) To study and make recommendations for sustainable development of indigenous peoples;
- (i) To discharge such other functions in relation to the protection, welfare and development and advancement of the indigenous peoples;
- (j) To discharge such other functions in relation to the protection, welfare and development and advancement of the indigenous peoples as the case may be, subject to the provisions of any law made by Parliament;
- (k) To convene periodic conventions or assemblies of indigenous peoples to review, assess as well as propose policies or plans;
- (l) To update the scheduled list of indigenous peoples through identification and recognition of the unidentified and unrecognized ones;
- (m) To recognize, promote and protect traditional wisdom and knowledge of the indigenous peoples and prevent transfer of such knowledge and wisdom to non-indigenous peoples/ areas without benefit sharing and ensuring full respect for the right to free, prior and informed consent;
- (n) To act as the regulating agency for implementation of programmes or projects by non-governmental organizations and the private sector;
- (o) To promulgate the necessary rules and regulations for the implementation of the rights of indigenous peoples;
- (p) To secure the assistance of the government departments to enforce the orders of the NIRIPs; and
- (q) To constitute one or more Sub-Committees for purposes of research,

investigation, review and monitoring of social, economic, cultural and civil and political rights of the indigenous peoples.

## 9. Powers relating to inquiries

1. The NIRIPs shall, while inquiring into any complaint have all the powers of a civil or criminal court whichever applicable in respect of the following matters, namely:-
  - (a) summoning and enforcing the attendance of any person and examining him on oath;
  - (b) requiring the discovery and production of any documents;
  - (c) receiving evidence on affidavits;
  - (d) requisitioning any public record or copy thereof from any court or office;
  - (e) issuing summons for the examination of witnesses and documents; and
  - (f) any other matter which may be prescribed by the parliament.
2. The NIRIPs shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the NIRIPs, may be useful for, or relevant to, the subject matter of the inquiry and any person so required shall be deemed to be legally bound to furnish such information as legally provided.
3. The NIRIPs or any other officer specially authorised in this behalf by the NIRIPs may enter any building or place where the NIRIPs has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies there from subject as provided under law.
4. Every proceeding before the NIRIPs shall be deemed to be a judicial proceeding and the decisions of the NIRIPs shall be appealable only before the apex court of the country.

## **Chapter III: Procedures**

### **10. Inquiry into complaints**

1. The NIRIPs while investigating into non-implementation of safeguards available to the indigenous peoples under the Constitution or any law for the time being in force may initiate an inquiry by its own investigation department or other agency of the government as the NIRIPs deems fit to inquire into the complaints of violations of the rights of indigenous peoples;
2. Where the inquiry discloses violation of rights of the indigenous peoples or negligence in the prevention of violation of the rights by a public servant, the NIRIPs may take appropriate actions/measures as may deem fit against the concerned person or persons;

### **11. Annual and special reports of the NIRIPs**

1. The NIRIPs shall submit an annual report to the Parliament and may at any time submit

special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.

2. The Government shall submit a memorandum of action taken or proposed to be taken on the recommendations of the NIRIPs and the reasons for non-acceptance of the recommendations, if any.

## **Chapter IV: Finance**

### **12. Financial autonomy**

The National Institutions on the Rights of Indigenous Peoples shall have financial independence:

1. The Government shall after due appropriation made by Parliament by law in this behalf, pay by way of grants such sums of money as the NIRIPs may present in a budget to the Government annually.
2. The NIRIPs can directly receive additional funds from any source as donation, assistance, grants etc.





## Mr. Hans Schoof

Head of Operations and First Counsellor, Delegation of the European Commission to India, Nepal and Bhutan

Thank you very much, Good Morning Ladies and Gentlemen. Let me welcome you. Today's conference is a part of the European Commission funded project namely the 'Realization of the Indigenous Peoples Rights at National Level in Asia'. Today's conference is the culmination point of two years of hard work.

European Union believes promotion and protection of human rights around the world is the legitimate concern of the international community. European Union's policy is based on internationally agreed framework and standards and it continues to work towards the universal ratification and implementation of all major international human rights instruments.

As regards to Union's policy on indigenous peoples, our main guidelines is the European Council - which is composed of the Head of States of 27 members States of the European Union - Resolution on indigenous peoples. This was adopted in 1998 and outlines the main principles in this regards. The Council Resolution calls for the full participation of indigenous peoples in the democratic processes of their countries and it recognizes that the indigenous peoples have the rights to choose their own 'development paths', including 'the right to object to projects, in particular in their traditional areas'. It also specifically acknowledges the importance that indigenous peoples attach to their own self-development i.e. the shaping of their own social, economic and cultural development and their own cultural identities. This resolution assesses and forms the backdrop of all EU's actions regarding indigenous peoples' rights. This is reflected in our policies, coordination and actions as well as in the financial support we provide to initiatives such

as that have been taken by the AITPN, the Asian Indigenous and Tribal Peoples Network.

On a policy level, the European Commission participates in the various UN fora related to indigenous peoples. I mentioned that on the Permanent Forum on Indigenous Issues we are an Observer to the UN Inter-Agencies Support Groups. We have supported the adoption of the UN Declaration on the Rights of the Indigenous Peoples. We defend the interest we believe of indigenous communities in working groups, such as the one on the UN Convention on the Biological Diversity. The European Union also participates in the WIPO, the Inter-governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. In all the initiatives relating to indigenous peoples, inputs from indigenous representatives had formed the basis of our positions.

Apart from policy support, I mentioned financial support that we have been providing to wide range of initiatives in addressing the rights of the indigenous peoples. Today's event is an example of this.

We also have other ways of providing support, like I give the example notably here, in India we provide lot of financial support and cooperation to the Government of India in the areas of primary health care and education. Now in education if I may use as an example, the Sarva Shiksha Abhiyan programme, the SSA. This is a flagship programme for the universalisation of elementary education which has been priority of the European Commission. To achieve this, to bridge the gender and societal gap by 2010 which is the main aim of the SSA programme. To achieve this, EC provides for area specific and time specific interventions

to meet the learning needs of the tribal children. For tribal areas, the SSA focuses on the traditional schools on the motivation of the tribal communities to enroll the children into the schools, on the availability of tribal teachers on the schools, training teachers to teach in tribal languages and to provide free textbooks on the residential schools for girls in remote areas. Another example I should mention is the partnership program that the European Commission has in the state of Chhattisgarh, where as you may know 22 percent of the total population is tribal and also this program is to support integrated approach in the development of tribal peoples. It also supports in India a number of initiatives by civil society organizations such as the Sustainable Tribal Empowerment Project in Andhra Pradesh implemented by CARE

which addressed the marginalization of tribal communities in Andhra Pradesh offering 20 per cent of the tribal population in the state.

So in various ways we have been active in India itself to support the cause of the tribal peoples. Not only in India but also on regional level, the Commission has been trying to be active and provide support for in these important issues. We are also very much aware that today, the representatives of indigenous groups and institutions from across Asia are present here. I would like to congratulate you all on the progress made so far for your communities. I would like to take this opportunity to reiterate European Union's commitment to continuing its support for the realization of the rights of the indigenous peoples across the world.



## Prof. James Anaya

UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people

**D**istinguished representatives of the European Commission, member of the National Commission for Protection of Child Rights, representatives of India and various part of Asia's indigenous world.

This is not the part of the world I am very familiar with. I have been to Asia few times, my first time in India, but I am very glad to be here to learn more about the situation in Asia.

What I would like to focus on my remarks today is precisely on the UN Declaration on the rights of the indigenous peoples and what it represents for the national institutions on the rights of the indigenous peoples. My basic point is that the Declaration represents a new set of understanding globally that should shape the functioning of the National Institutions on the rights of the indigenous peoples both in the internal operations and in their relationship with indigenous peoples. As Suhas (Chakma) said I was involved in the development of the Declaration of the rights of the indigenous peoples along with many other representatives of indigenous peoples and organizations and networks of indigenous peoples who had the right and privilege of getting there during that process in Geneva and other forums for adoption of the Declaration. And what I want to emphasize about this process is that the Declaration really does represent the aspirations of the indigenous peoples themselves. It is not simply a statement of rights and obligations that comes from the United Nations without the inputs of the indigenous peoples. Indeed, it was grounded and it is grounded, on the inputs of the indigenous peoples based on a process that took place over almost three decades.

It was in the mid-70s that the indigenous peoples started to appeal to the United Nations having not gotten sufficient responses from the government

at domestic level, having seen their problems gone unanswered over long periods of times, and having projected a different model of their existence within the States in which they live - a model that rejected simply becoming assimilated into the dominant system, and certainly a model that rejected the kind of ongoing and continuous repression that the indigenous peoples have been suffering for centuries. So with this intention of promoting a new relationship with the State, a new relationship with the world outside the indigenous communities that the indigenous peoples' representatives have been appealing to the United Nations in the 1970s and that resulted initially in a new institution focused on the rights of the indigenous peoples i.e. the Working Group on Indigenous Populations. The Working Group on Indigenous Populations, I am sure some of you are familiar with, had as one of its primary tasks in developing new standards on the rights of the indigenous peoples. One of the innovations of this Working Group was that it invited the participations of the indigenous peoples in its work. So, on an unprecedented scale in the history of the United Nations we had non-governmental entities, organizations and individuals participating in the standard setting works of the United Nations and these were indigenous peoples in this case. The indigenous peoples really forced a new precedent within the United Nations in the level of non-governmental participation. As you know United Nations is made up of States, so most of the deliberations are among the representatives of the States. It has opened up its door to some extent to non-governmental organizations but participation of NGOs has been very limited. The Working Group on Indigenous Populations went a step further and opened its door to virtually any indigenous representatives that could attend its meeting in Geneva. So with that we saw indigenous representatives making alliances among each other,

and with those alliances strategic steps were taken in order to push the agenda of the indigenous peoples through the United Nations system focusing on the development of a new instrument, a declaration that would proclaim indigenous peoples' rights.

It was on September 13, 2007, just a little over a year ago that this process culminated in the adoption by the UN General Assembly of the UN Declaration on the rights of the indigenous peoples. Really I think it was a monumental achievement by indigenous peoples - an achievement that was in doubt, that was open to the very last days of the adoption of the Declaration and I think many saw it open till the last few days of the adoption. It is because of the difficulties that many States still had with the provisions and these difficulties ultimately were overcome. And ultimately, we saw overwhelming majority of member States at the United Nations General Assembly voting in favour of the Declaration. And the vast majority of States from the Asian Region voted in favour, none voted against except for New Zealand and Australia for reasons I will go into a little while. None outside Australia and New Zealand specifically Asian region voted against it. A number of States abstained, but India for example did not abstain, it voted in favour of the Declaration. A significant piece of information I think should be kept in mind is that all the States of the region essentially affirmed the principles of the Declaration - affirming the basic rights of the indigenous peoples that are included in the document that was promoted by the indigenous peoples themselves.

### **The basis and features of the Declaration**

Now what does the Declaration say. First of all the Declaration should be understood to be grounded in basic human rights principles. It is not a statement of new rights of the indigenous peoples in the sense that it created rights that are not available to other segments of humanity. What it does is - it takes basic human rights principles and contextualizes them for the particular circumstances of the indigenous groups that have been suffering histories of colonization and oppression, their claims to the rights to continue to bond themselves with lands and continue to keep the communities intact and within that context affirms these basic human rights as rights that apply to the indigenous peoples wholly and equally in relation to other parts of humanity. So

it takes the principles of the right of equality, the right to self-determination, the right to culture, the right to property and applies to those to specific historical and socio-cultural context of indigenous peoples to affirm indigenous peoples equality with regard to other people, to affirm the right to control their own destinies, affirm the right to continue in relationship with the lands that they have sustained overtime and affirm their right to continue with their culture intact and to develop on that basis, not simply to be assimilated within the larger societies in which they live and have to give up cultures in order to enjoy basic rights, but able to enjoy basic human rights with those culture intact and with that ongoing/**continuing** relationship with lands and resources.

In many of the cases in which I have been involved in the Inter-American System on Human Rights illustrate the relationship between indigenous peoples collective rights or the kind of rights that are affirmed in the Declarations and basic human rights principles. The Inter-American mechanism is comprised of two basic institutions, one is the Inter-American Commission on Human Rights and the other is the Inter-American Court of Human Rights and both of these institutions have as their functions in promotion of human rights throughout the America - North, Central and South America. These mechanisms function on the basis of two human rights instruments - the American Declaration on the Rights and Duties of Man and the American Convention of Human Rights neither of which specifically mentioned indigenous peoples but mentioned a range of human rights including the basic rights of equality, right to property, right to culture etc. And what the Inter-American institutions have done on the basis of the cases that have been brought before them is to interpret these basic human rights principles in the specific context of indigenous peoples. So when addressing a claim of indigenous communities on their ancestral land, the Commission did not say or the Court did not say the indigenous peoples claim does not concern us because the human rights instrument that we deal with does not mention indigenous peoples - it did not say that. It took the basic rights of equality connected with the right to property and said, when we look at those rights and we look at indigenous peoples own system of land tenure, those rights are affirmed, their rights to land, the right to ancestral lands according to their own cultural patterns. The Commission and the Court **took** what they called an evolutionary

understanding of these principles, these basic human rights principles, an understanding that sees these principles not simply wedded into the Western concept of property or equality but sees them as necessarily parts of a diverse world in which diverse perspectives formed the content of these rights and in the context of indigenous peoples own land tenure system formed the content of the right to property. Indigenous peoples own land tenure system are equally entitled to exist, hence the right to equality to support those concepts of indigenous peoples in relation to land and resources i.e. their own property system. So these cases, I can illustrate how indigenous peoples rights, collective rights of land and resources, the very rights we find affirmed in the Declaration are really grounded in basic human rights principles. And that is important to understand because I think many times we hear non-indigenous peoples, people in the government saying we can't accept those because those equates special rights for a certain groups – rights that others will be denied; and that is not what the Declaration is all about. It is about recognizing that indeed these basic human rights that indigenous peoples have been denied apply to indigenous peoples. But, because of indigenous peoples' specific historical, social context they apply in different ways and require perhaps different outcomes, requires special treatment for indigenous peoples because of these specific circumstances. That is the understanding the Declaration is based upon. It is important to keep in mind that as we try to work with the Declaration and see it implemented by various mechanisms including the National Institutions on the Rights of Indigenous Peoples.

An important feature of the Declaration along these lines is what can be described as its remedial character, what the Declaration is seeking to accomplish is to address the historical and ongoing deprivation of the basic human rights of the indigenous peoples. It recognizes explicitly in the preamble that the indigenous peoples have been denied their basic human rights and within that we are going to hear from each of you how that has happened, historically continue to happen. And it is not simply a matter of episodic instances and isolated events. It's a matter of structural elements which we find in the societies where indigenous peoples live. The basic laws, the basic arrangement between the States and the indigenous peoples, the basic pattern of occupation of development by separate societies in connection with indigenous

peoples have caused; and these perpetuate historical and ongoing denial of the rights of the indigenous peoples. The Declaration is the recognition of that, and to that extent a significant step to recognize the historical and ongoing deprivation.

And first and foremost, these require remedial measures. The Declaration sets new standards based on long standing human rights principles, new in the sense that they are addressed to the specific context of the indigenous peoples, but not new in the sense that they are based on long standing human rights principles. The Declaration sets the standards and then requires remedial measures on the part of the States to implement the standards to erase or at least to begin to eradicate the historical and ongoing deprivation of the basic human rights of the indigenous peoples. So with these remedial measures we see specific obligation being placed upon the States and the international community at large.

The Declaration is not simply an instrument to put on a wall and say look how nice it is. It is not an instrument simply to be talked about in forums like this or even for the States to recognize them in their laws - though it would be a good thing for the States to adopt laws recognizing the rights enunciated in the Declaration. But that is not enough, that is not it is all about. The Declaration really mandates certain actions on the parts of the States in conjunction with the international community and with the indigenous peoples in conjunctions with indigenous peoples themselves. To take affirmative step to implement these standards, and eradicate this historical and ongoing deprivation of basic human rights of indigenous peoples.

To do away with these structural elements in the Constitutional framework of the States, in the social relations between the non-indigenous peoples and indigenous peoples, in the patterns of discrimination that have been in existence and to do away with these structural elements in order to move towards a condition where the indigenous peoples are can fully enjoy their rights. It does so on the basis of the core principle of self determination. When I said that the Declaration is based on core principles of human rights and among these, the core principle of self determination. It also conditions and tells us how these measures or reparation, remedial measures are to be implemented.



## **The right of self-determination**

Now the principle of self determination is very controversial and remains controversial for many States. In fact, that was one of the major sticking points in the end in the negotiations in the adoption of the Declaration and ultimately to its vote. The fear of course the affirmation of self-determination for indigenous peoples would imply to have the right to secession or the autonomous existence by which they can defy their authorities or by which indigenous peoples could have illiberal practices or customs that would oppress within their own societies. These were the kind of fears that were expressed, perhaps genuinely in the circumstances or not so genuinely. Nonetheless, these were the kind of things that were said about self-determination in order to question whether or not it should be existed and affirmed in the Declaration. But alternately, the right to self-determination was affirmed in the Declaration as a core principle, as a core principle to set these basic standards applicable to indigenous peoples as well as to conditions the way in which these measures or reparation should go forward. And this principle of self-determination projects a new model of relation between the States and indigenous peoples, one that defies and turns away from old model, one that would see the indigenous peoples as parts but distinct from the States in which they live. One would see them as equal to the other segments of societies in which they live. A model of a multicultural States, a model of States in which it does not simply privilege one social group over another, that does not simply privilege one culture over another, but one that include the mosaic of different cultures within its fervour and celebrate that mosaic character of the society within the States and included in that mosaic or fabric of the indigenous peoples' own culture and patterns. So it really can be described as a new model of self-determination that turns away from the notion that indigenous peoples should simply be assimilated within the broader societies and should be able to enjoy fully their human rights as distinct groups within those societies, within the States in which they live in a partnership with the States they have grown up around it. And when it comes to the obligation of the States to take specific affirmative measures to implement the indigenous peoples' rights, what self-determination means is that these measures should be developed in concert and coordination with indigenous peoples. So there are perhaps institutions at several places or established

by many governments to address indigenous peoples concerns to protect in a sense indigenous peoples' rights and as we know without regards to indigenous peoples own aspirations. They simply develop policies, norms, programmes without consulting adequately or without taking fully into what indigenous peoples themselves want - without including indigenous peoples in the execution of these programmes. What we see in the principle of self-determination as provided in the Declaration is that the programmes the States construct in order to address the indigenous peoples' concern need to be devised in full partnership with the indigenous peoples. Indigenous peoples need to be partners in every steps of the way in the construction of these programmes, in development of these institutions and in the operation of these institutions. That is a very key element of the Declaration, the principle of self-determination that addresses and applies in every aspect of the Declaration and particularly in the construction or development of measures of reparation to address indigenous peoples' historical and ongoing grievances about the deprivation of their rights.

## **The role of the National Institutions on the Rights of Indigenous Peoples**

As I said the Declaration requires concerted actions on the parts of the States and National Institutions on the Rights of the Indigenous Peoples have particularly important roles to play in the development of these concerted actions. What I mean by concerted action is the action which is directed at all organs of the government. Which institution of government does not touch upon indigenous peoples concerns? It is hard to think of the institutions such as judiciary, the executive, the various executive branches of the government those touch upon education, health, natural resources development. All of these institutions of the government touch upon the indigenous peoples concerns, the legislative branches of the government that make laws obviously touch upon the indigenous peoples' concerns. What the Declaration says is that at least these institutions need to incorporate the principles of the Declaration in so far as they touch upon the indigenous peoples concerns. It is not simply paying regards in a terrible sense and says "Oh yes the Declaration is there!" but actually to incorporate principles in the operation of governance, in the operation of judicial functions, in the operation of the executive

programmes and in the making of laws by the legislative branches. The Declaration needs to be taken into account.

What I am suggesting is that the National Institutions on the Rights of Indigenous Peoples have key role to play in ensuring that the various branches of the government do this, take into account the various aspects of the Declaration and operationalise those aspects of the Declaration and make part of the day-to-day activities of the government. So the National Institutions have a promotional function to play - a promotional function in ensuring that the various institutions of governments are aware to the Declaration and operationalise the Declaration in their day-to-day activities.

Secondly, National Institutions on the Rights of the Indigenous Peoples should function as I think most are intended to be a voice for the indigenous peoples. Often the major problem for indigenous peoples is simply not having access to power, indigenous peoples are simply often not heard and that of course is the first step to any kind of change, any kind of development that would address indigenous peoples concern, to ensure that indigenous peoples voices are heard. Many times that isn't the case, indigenous peoples don't have access for one reason or another to the various institutions of the government that touch upon their concerns. And what the National Institutions for indigenous peoples should endeavor to do is to be a voice for indigenous peoples, not just in the sense of hearing indigenous peoples with regard to their own programmes i.e. the programmes of the National Institutions. Indigenous peoples voices can be heard through the national institutions to the other branches of the government in ensuring that indigenous peoples have a voice directly, assisting indigenous peoples directly with the various other institutions of the government. And of course National Institution should also endeavor to ensure their own programs that aim specifically indigenous peoples incorporate these principles of human rights, the new standards of human rights that are incorporated in the Declaration.

It is with some concerns that I have been able to hear from various national institutions on the rights of the indigenous peoples including various government agencies and in my part of the world **in America** and hear from them that they are unaware of these new standards that are

incorporated in the Declaration on the rights of the indigenous peoples. These standards that have been affirmed by the United Nations General Assembly and that have been supported in main cases or most cases, by States that these national institutions are affiliated with and associated with. And I think it is very important that the National Institutions themselves become fully aware of the Declaration and the standards that represent these new understanding about the rights of the indigenous peoples that represent new set of understanding and incorporate these principles in their own programmes in assisting the indigenous peoples. In conclusion, these are the kind of things I think the National Institutions can do to implement the declaration of the rights of indigenous peoples in this new environment. First of all ensuring that various institutions of governments are incorporating the norms of the declaration in their day to day activities as regard to indigenous peoples. Secondly ensuring that indigenous peoples have a voice with regard to the various institutions of the governments, facilitating that voice with regard to the indigenous peoples; and finally incorporating the principles of the declaration for their own specific programmes for assisting indigenous peoples. So I think in the end as I suggested completely a new era of what contrast from what might be described as colonial era in the relationship between States and indigenous peoples.

What I think about the Bureau of Indian Affairs the agency of the United States government that deals with the indigenous issues. The Bureau of Indian Affairs was established itself essentially as the colonial agencies, even the United States had long gained independence, the Bureau of Indian Affairs operated as a colonial agency of the United States vis-à-vis the indigenous peoples in a very classic sense. What was its function, its function was to manage the affairs of the indigenous peoples on a day to day basis. Bureau Affairs agents ran indigenous communities much like the colonial agents of the Great Britain who ran India in the past. Their actions were located on indigenous land, reservation what they call, the territories of indigenous peoples and ran their day to day operations. And these were not done with the objective of seeing indigenous peoples ultimately taking control of their own lives but with the objective of indigenous peoples' disappearing eventually as a distinct cultural group with the idea that they would simply either

die off or become assimilated with the broader societies, to decide what was good for the native people or to simply educate them about the larger societies and to make sure that they don't pass on their culture from one generation to next one because their culture was not good and they are inferior people to culturally dominant societies and pushed indigenous peoples in the direction clearly where they did not want to go in a superior non-indigenous society. The Declaration really turns away from that model and suggest that the kind of model today the indigenous people are able to not just able to control their own destinies. That is the model of paternalism, the colonial model of administration towards indigenous peoples is and should be a thing of the past.

So what does that mean for Bureau of Indian Affairs, these agencies still exists in the United States, these agencies had their colonial urges in the United States, they functions in this way with regard to the native people. It means now the Bureau of Indian Affairs should facilitate the self-determination of the indigenous peoples. That does not mean that they should go away, it means they should now function to facilitate indigenous peoples self-determination, should incorporate indigenous peoples in the development of its programmes and incorporate indigenous peoples in execution of its programmes and eventually diminish its role in the management of the day-

to-day affairs of indigenous peoples as indigenous peoples are able to take on those functions on their own. In the end the role of the Indian Bureau Affairs is to support indigenous peoples in the way as I have suggested in ensuring the policies of the States are address the indigenous peoples concerns in day-to-day operations, in helping indigenous peoples to gain access to power and facilitates indigenous peoples having a voice and to ensure that in its various programmes that assist indigenous peoples include health, education and so forth that the various principles of self-determination are operative and the various principles that are included in the Declaration are fully operative. It's really a new era, it's an exciting one and it's wonderful and we don't any more have to argue I think at least in international level, hopefully at the national level about these basic rights, these principles are the correct one, the principles for which indigenous peoples were fighting and now essentially accepted. But what's need to be done is they are implemented and incorporated at the domestic level and in this context, this Conference is a very important step in that direction and a very important piece of that effort to see that these principles in this new era, that represent this new era are operationalised within the domestic context and specifically in connection with the National Institutions on the Rights of the Indigenous Peoples.

Thank you very much.



## Ms. Dipa Dixit

Member, National Commission  
for Protection of Child Rights  
(NCPCR)

By way of introduction, the National Commission for Protection of Child Rights, was set up by the Government of India about 18 months ago, to address child rights violations and recommend measures to protect and enforce the rights of children, including legislative outcomes and policy reforms. Part of our work on vulnerable child populations has brought us in contact with children who have been adversely impacted by internal displacement and conflict.

Recently we visited relief camps for displaced persons in Assam and in Tripura as well. In Assam, we visited the Chirang and Bongaigaon districts. In Tripura, we went to Ashapara, Naisingpura and Hamsapara. It would be an understatement to say that we were appalled by the sub human conditions under which those people lived. A fact which was highlighted by the testimonials that they gave us where they speak of the enormous tragedies and suffering they undertake on a daily basis.

What struck us was the basic lack of integrated services and support for these children and their families, in particular, the critical lack of health facilities, sanitation and education facilities. A new generation has taken birth in these camps, but, it is as if they do not exist. There is no or very marginal registration of births and deaths, there is hardly any immunization, no health facilities nor Primary Health Centers, no functional schools, no safe drinking water, and very poor sanitation and inadequate rations. Death and disease stalk these children every day.

It is this daily life experience in encampments, which defines these children's sense of identity, belonging and well-being. To cite the odds against which these people live and to humanize what children go through, I thought I should share with you one or two stories that we came across during those testimonials.

We met a father whose abject poverty and despair, had driven him to leave his 4 year old daughter in his tent to die of blood dysentery because he does not have access to medical facility and he does not have money to take her to a private doctor. We met a young woman in Ashapara camp whose husband and 2 children passed away of malnutrition and blood dysentery. She is left with a four year old child, who looks like a 2-years-old from severe malnutrition. She herself is pregnant and the funny thing is that when her two children and husband passed away, the government was very quick to strike their names off the list, they have a list on the basis of which they issue rations. But they failed to include her surviving child. So, on her limited ration, she, her mother, sisters and her sister's family with child and herself lived, if you call that a living. So, on other words, they are basically starving. What really surprises me is that, they are called temporarily displaced people, but in our view they are permanently displaced peoples. They have been here displaced for the last 10 years and they are not even given basic amenities.

These are just some of the stories that surfaced. The need to address this emergency situation and to ensure fundamental human rights of these people and children includes access to all their entitlements as citizens of this country.

The starting point of any discussion on the rights of children, displaced or otherwise, is that children are entitled to and should be given all the rights the citizens enjoy, irrespective of their statehood, their caste, their creed, religion or the region that they belong to. The reason why I say this is that in our interaction with the State governments whether it was Assam or Tripura, we have done lots of work in Chhattishgarh as well which I will talk about just now. The arguments that we were always given are political -that they don't belong to our state and if we give them the facilities that

you (NCPCR) are talking about they will settle here permanently. And our counter to that is as far as we are concerned it should not matter to you whether they belong to Tripura or they belong to Assam or Mizoram. They are children and they belong to India and they should be given food, shelter, clothing and education. We need to look at things in the present in the sense that these children are actually in a permanently displaced situation. As mentioned earlier, these children have taken birth in these camps and they know no other existence apart from what they are exposed to in these camps. So what happens to these children, what impact does it have on their present and do they have any future?

The concern of the Commission in the present is that this temporariness that we keep talking about is that there is permanence that is linked to it and that is the excuse being used in denying them their basic rights.

The rights of children, as we all know, is protected under the UN CRC and the Constitution of India and various other legislations and the state and policy makers need to urgently recognize that the despair and struggle that these people and children live.

As included in my introduction, we looked at children in the last 18 months as a whole. We have intervened in the case of tribal children affected by conflict in Chhattisgarh area, Dantewada and Khamman (Andhra Pradesh), I am not sure how familiar you are with that. We achieved some degree of success in bringing the two State Governments together in addressing

educational and nutritional issues as per as these children are concerned. We are actually sitting on the table now and discussing modalities and action plans on the basis of which we can bring some relief to displaced children.

I am not going into too much detail. In Assam and Tripura, I must be very honest to you, we have just started looking at the problems. We are still familiarizing ourselves with the huge issues and problems that are faced by the peoples in these camps. We have already started interacting with the Home Ministry here because the relief and rehabilitation is actually on the agenda of the Home Ministry. They distribute the funds and the rations. We have also interacted with the state governments indicating what we need to do to provide basics to these peoples. So, we do intend to go back in three months time to see what kind of progress is made.

In conclusion, I think it is important for me to emphasize that as per as the rights of children are concerned, they should be given to them because they are children and not because they belong to particular area or they are planning to send them back to a particular area. I think it is important for us as a fellow human being to ensure that they get it. I would like to assure you that the Commission is committed to that and we are always open to receive complaints. In fact, our visit to Tripura was based on a complaint from this organization - AITPN - in which they indicated 7000 odd children being excluded in the ration list or denied rations.

Thank you very much.





## Mr. Miloon Kothari

Former UN Special  
Rapporteur on the right to  
adequate housing

Let me just reflect for few minutes on the role of the National Institutions. First, I would like to say that we need to have a broader inclusionary approach both in terms of institutions and in terms of instruments of human rights. What I mean is what has been stated here - National Human Rights Institutions hogging the limelight while sectoral ones not being in focus. It is very important to include all the Institutions, pressurize them and monitor their work in upholding the rights of the indigenous and tribal peoples. I think this is something that is slowly is happening and there is greater scope of works for various institutions.

Similarly I very much welcome and I am delighted with the progress made by the Declaration of the indigenous peoples. But I also think that the international instruments that exist – the Covenants, Conventions – also give us a very strong basis to struggle for the rights of the indigenous peoples. Just give you one example, there is the Optional Protocol, a complaint mechanism to the International Covenant on Economic, Social and Cultural Rights which has been adopted by the Human Rights Council. It is going to go before the UN General Assembly for adoption later this year. If that comes true it gives us a major opportunity to file complaints and bring up cases before the UN Committee on Economic, Social and Cultural Rights. So it's very important for us in the kind of the situation we are in - overwhelming evidence of violations against all people and of course disproportionately against the indigenous peoples, that are increasing.

I think we need to find ways to address those violations and overcome them. In my work as Special Rapporteur, I was Special Rapporteur for

seven years, I did 13 missions around the world including three in Asia, Cambodia, Pakistan and Australia. As per my experience, actually the National Institutions are natural counterparts for the Special Rapporteurs. They are very-very useful in many ways which Prof James Anaya has already touched upon.

Let me refer to others. When Special Rapporteurs carry out missions the National Institutions become very important forum to provide the space for their work. In my mission I have found an opportunity to engage with National Institutions to organize seminars for awareness raising and standard setting. The National Institutions play a crucial role in following up to missions and carrying forward the recommendations of the Rapporteurs.

I also found the work of the National Institutions very useful for standard settings. Some of you may know we worked for four years with you to come up with the guidelines on development and market-based displacement. These guidelines were published in my report to the Human Rights Council last year. Already two National Human Rights Institutions have taken them up and translating them and are using them as human rights education. The National Human Rights Institutions play an important role both in terms of existing standard setting and also new standard setting. And the point that Prof Anaya made about expanding the notions of the rights is not just expansion of indigenous peoples but many others too in the area of self determination. It is very important that the human rights institutions are made aware of that and made to understand and what they can do with standard settings. It's also

very important in my experience the human rights institutions can contribute to the development of curricula in human rights education including on the rights of indigenous peoples.

These are some of the comments I had. I think that its very important that all of us to continue to engage with the UN Special Rapporteurs. One of the very positive memories that I have of my works in the last years was the possibility to actually

engage with a number of rapporteurs in collective. In Prof Anaya you have an excellent person. But its important for you to relate with the Special Rapporteurs on food, on health, on housing, on violence against women etc given that there is more coordination amongst the rapporteurs both in terms of taking up joint communications, joint missions and taking up specific cases as well. So I think how that is to be done is perhaps something that could be touched on.



## Mr. Eugenio A. Insigne

Chairperson, National Commission  
on Indigenous Peoples of  
Philippines (NCIP)

Distinguished guests, fellow resource persons, participants and organizers of this noble undertaking: Greetings of peace, prosperity and harmony from the Indigenous Peoples of the Philippines!

I cannot proceed well with my presentation without first expressing my most sincere gratitude to the Asian Indigenous and Tribal Peoples Network who invited us to share the Philippine experience on the struggles of Filipino Indigenous Peoples in their progressive quest for accelerated recognition, protection, promotion and fulfillment of both their collective and individual human rights.

The National Commission on Indigenous Peoples of the Philippines is represented here today by Yours Truly. I am the current Chairman of the NCIP and an indigenous person belonging to the Tingguian tribe of the Cordilleras in Northern Philippines. I also had the honor to be elected as one (1) of the sixteen (16) members of the United Nations Permanent Forum on Indigenous Issues (UNPFII). I represent the State Sector of the Asia-Pacific Region for the period covering January 2009 to December 2010.

I am accompanied by Director Masli A. Quilaman of the Office of Empowerment and Human Rights of the NCIP. He is also an indigenous person of Bago-Appalai descent from Northern Philippines but who grew up amongst Indigenous Peoples in Southern Philippines.

I am supposed to confine my presentation on the definitive Role of National Institutions in addressing the plight of Indigenous Peoples. However, I am forced by passion and impetus, being an IP myself, to go beyond by presenting vital historical information and insights before plunging on the very subject matter. By this we

will clearly understand and better appreciate the experiences and struggles that the Indigenous Peoples in the Philippines had experienced molding them as distinct peoples and leading them to their current struggles for redress of rights.

As reflected in the presentation outline, we will deal on the evolution of Filipino Indigenous Peoples and the recognition and non-recognition of their rights by the government from colonial times to the present. We will focus on the constitutional provisions recognizing the rights of Indigenous Peoples and dissect the Indigenous Peoples Rights Act (IPRA) of the Philippines as to purpose, recognition of rights, and implementing mechanism.

We then proceed in describing the NCIP and its strategies in addressing the issues, concerns, and aspirations of Indigenous Peoples. And lastly we reflect on some challenges and come out with future steps for NCIP to undertake to improve its services.

While we walk through the presentation process we hope to provide you with concrete and realistic information on the Role of National Institutions, with the NCIP as a concrete representation in addressing IP rights, issues and concerns.

Prior to the coming of the European colonial rulers, Filipinos already had and exercised their own forms of governance, justice systems, traditional ways of life and defined the boundaries of their respective territories. They managed their own economies and traded with other nations.

The coming of the Spaniards in 1521 introduced the concept of *jura regalia* that all lands colonized by Spain belong to the Crown, or to the government. Subsequently, Filipinos who are mostly located

in the coastal and low lying areas embraced colonial rule. This was entirely different in the case of Filipinos in the hinterlands who valiantly resisted colonial occupation and retained their own customary ways, held on to their traditional beliefs, leadership structures, forms of governance, justice systems and stood ground in protecting their ancestral domains.

Christianized Filipinos waged a war of independence against their colonial masters but this failed by the coming in 1898 of another colonial master, the United States of America to whom Spain ceded its colonial rule over the Philippines.

It was during the American occupation when the Indigenous Peoples' "Native Title" to their ancestral domains was recognized by the government. This landmark decision by the US Supreme Court was handed down on the basis that the territories of the Indigenous Peoples, then called as the non-Christian tribes/tribal communities/tribal minorities had never been subjugated by Spain and thereby were never part of the public domains under Spanish rule, and thus were privately owned by the Indigenous Peoples.

However, while the US insular government upheld the IPs' ownership of their ancestral domains, the truth was still far from reality. Since the American regime, rampant encroachment through legal usurpation had been imposed by the government and migrating mainstream Filipinos into the lands of the hapless Indigenous Peoples. By way of legislated acts, presidential decrees and proclamations, waves and waves of migrants settled into the lands of the Indigenous Peoples while multi-national corporations and big domestic businesses came to occupy and operate vast portions of these lands.

The Filipino IPs also suffered the brunt of adverse militarization during and even after the Martial Law Regime in the Philippines. Their territories had become stages of armed engagements between the State and the Non-State Actors. Human rights violations were rampant.

During these times, and while the government tried to assimilate the IPs into the mainstream society, there were wanton disregard of the IPs civil, political, social, economic and cultural rights.

With the historical facts of the Indigenous Peoples non-subjugation by the Spaniards, the recognition of ancestral domains ownership by the Indigenous Peoples during the American occupation and with the continued neglect, discrimination and violations of the rights of the Indigenous Peoples by both the government and the mainstream Filipinos evolved the concept of Indigenous Peoples/Indigenous Cultural Communities, pertaining to homogenous communities who have become historically differentiated from the majority of Filipinos and who have retained their customary ways in traditionally defined territories since time immemorial.

This explains that while all Filipinos belong to just one race we differentiate as mainstream and indigenous by way of our historical experiences.

Currently, there are 110 IP groups in the Philippines who are located all over the Philippine Archipelago. They number about 14, 184, 645, or 16 percent of the total Philippine population of 86 million.

During the transition period from the Martial Law Regime towards the quest for enlightened democracy in the Philippines and in response to the growing clamor for the recognition and respect of the rights of the Indigenous Peoples from the ranks of IP leaders coupled with the growing support from the Civil Society Groups, the 1997 Freedom Constitution of the Philippines was passed provisions which recognize and promote the rights of Indigenous Peoples within the framework of national unity and development.

The IP related provisions of the 1987 Freedom Constitutions became the basis for the government to legislate and approve Republic Act 8371 or the Indigenous Peoples Rights Act, a landmark legislation which primarily seeks to correct historical injustice, enforce constitutional mandates, and comply with international human rights standards.

Basically, the Indigenous Peoples Rights Act recognizes, protects and promotes both the collective and individual rights of IPs. It created the National Commission on Indigenous Peoples. It establishes implementing mechanisms, appropriates funds and other purposes serving the greater interests of Indigenous Peoples.

IPRA provides the Indigenous Peoples' with four (4) bundles of rights:

1. The Right to Ancestral Domains;
2. The Right to Self-Governance and Empowerment;
3. Social Justice and Human Rights; and
4. Right to Cultural Integrity.

The Rights to Ancestral Domains provides the IPs with security of tenure and sustainable use of their ancestral domains/lands. It likewise protects the territorial integrity of the ancestral domains and the general welfare of its owners.

Ancestral Domain refers to all areas generally belonging to Indigenous Cultural Communities. It is held under a claim of ownership, occupied or possessed by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present, and is necessary to ensure their economic, social and cultural welfare.

Ancestral Domain includes: ancestral lands, forests, pasture, residential, agricultural, hunting grounds, worship areas, bodies of water, minerals and other natural resources.

On the other hand, Ancestral Land refers to land occupied, possessed and utilized by individuals, families and clans who are members of the Indigenous Cultural Communities, since time immemorial, by themselves or through their predecessors-in-interest under claims of individual or traditional group membership continuously up to the present, except when interrupted by war, force majeure or displacement by force, deceit, stealth, and as a consequence of government projects and other dealings between government and private corporations.

The concept of Native Title refers to pre-conquest rights to lands and domains which, as far back as memory reaches, have been held under a claim of private ownership by ICCs, have never been public lands and are thus indisputably presumed to have been held that way since before the Spanish Conquest.

For the Indigenous Cultural Communities, ancestral domains and all resources found therein

shall serve as the material bases of their cultural integrity. Ancestral domains are the ICCs private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed. The concept covers sustainable traditional resource rights.

The Rights to Self-Governance and Empowerment ensures that indigenous socio-political, cultural and economic rights are respected and recognized. It ensures that capacity building mechanisms are instituted and IPs are afforded every opportunity to participate in decision-making processes.

On the otherhand, the Rights to Social Justice and Human Rights ensures non-discrimination in all its forms against IPs. It provides the enjoyment of basic human rights norms and standards by the IPs.

And lastly, the Rights to Cultural Integrity ensures the proper documentation, management, preservation and promotion of the historical and archeological artifacts of the IPs including their community intellectual rights, indigenous knowledge systems and practices as well as biological and genetic resources.

The National Commission on Indigenous Peoples was purposely created to implement the provisions of the Indigenous Peoples Rights Act.

NCIP is mandated to protect and promote the interest and well-being of indigenous peoples with due regard to their beliefs, customs, traditions and institutions.

It is the primary government agency that formulates and implements policies, plans and programs for the recognition, promotion and protection of the rights and well-being of Indigenous Peoples with due regard to their ancestral domain and lands, self-governance and empowerment, social justice and human rights, and cultural integrity.

As enabling partner and lead advocate, the NCIP envisions genuinely empowered IPs whose rights and multi-dimensional well-being are fully recognized, respected and promoted towards the attainment of national unity and development.

The NCIP has 3 major functions: **quasi-judicial, quasi-legislative and executive.**



As a quasi-judicial body NCIP:

- Approves and awards Certificates of Ancestral Domain and Land Titles
- Hears and decides cases arising out of IPRA
- Promotes the primacy of customary law
- Maintains Regional Hearing Offices
- And, observes its rules and procedures

It attends to cases involving:

- Ancestral Domains
- Violation of the Free and Prior Informed Consent
- Violation of employment rights to just compensation and conditions of employment
- Defacing, removing or destroying cultural sites and artifacts
- And, cases on property rights

As a quasi-legislative body NCIP promulgated the Implementing Rules and Regulation of IPRA. It promulgated and continuously come out with Operational Guidelines and other issuances to realize the provisions of IPRA.

As an Administrative and Executive Body NCIP plans and implements programs, projects and activities while sustaining a human resource component to execute the mandates of the organization. Its programs are focused on:

1. Formulation of policy guidelines, plans and programs;
2. Advocacy and coordination services;
3. Adjudication and legal services;
4. Ancestral domains and lands delineation and titling services; and
5. IP development services.

These programs are translated into various projects and activities which include the following:

1. The Ancestral Domain/Ancestral Land Delineation and Titling ensures domains/land security for the IPs;

2. The Formulation of Ancestral Domains Sustainable and Development and Protection Plan serves as the blueprint for development and empowerment of the IPs without compromising the needs of future generation.

The sustainable development and protection of the ancestral domain by the Indigenous Cultural Communities themselves is the manifestation of their rights to self-governance and self-determination. To guarantee the exercise, enforcement and realization of these rights, the Indigenous Cultural Communities shall prepare their own ADSDPP in accordance with their customary practices, laws and traditions.

The formulation of the ADSDPP is a tool for the empowerment of the Indigenous Cultural Communities towards the fulfillment of the general well-being of the current ICC/IP generation without compromising the needs of future generations.

ADSDPPs serve as the blueprint of the IP community for their preferred development agenda.

3. The Free and Prior Informed Consent is the consensus of all members of the Indigenous Cultural Communities which is determined in accordance with their respective customary laws and practices that is free from any external manipulation, interference and coercion and obtained after fully disclosing the intent and scope of the plan/program/activity, in a language and process understandable to the community. The FPIC is given by the concerned Indigenous Cultural Communities upon the signing of the Memorandum of Agreement (MOA) containing the conditions/requirements, benefits as well as penalties of agreeing parties as basis for the consent.
4. The Indigenous Peoples Consultative Body is composed of traditional leaders, the elderly and representatives from the women and youth sectors serves as the voice of the Indigenous Peoples at all levels in relation

to their problems, needs, interests and aspirations;

5. The IP Civil Registration System ensures the rights of IPs to a name, identity and nationality; and
6. And, the Educational Assistance Program which seeks to uplift the educational development of the IPs to be at par with the mainstream Filipinos.

The NCIP is composed of seven (7) Commissioners each representing an ethnographic region as reflected in the map. Two (2) of the seven (7) must represent the women sector and another two (2) must be lawyers. One (1) of the seven (7) shall be appointed as Chairperson of the Commission.

The Commission is headed by the Chairperson. He is assisted by six (6) Commissioners.

The Executive Director serves as the Secretariat to the Commission.

There are seven (7) bureau offices at the NCIP Central Office which serve as the backbone of the Commission in terms of its support to operations functions.

There are twelve (12) Regional Offices, forty-six (46) Provincial Offices, and 108 Community Service Centers nationwide. They all function as the frontline, or operational arms of the NCIP.

The total human resource component of NCIP is 1,588.

The Medium Term Philippine Development Plan for Indigenous Peoples served as NCIP's blueprint in operationalizing its mandate for FYs 2004 to 2008.

The Organizational Performances Indicator Framework, or OPIF succeeds the Medium Term Philippine Development Plan as NCIP's operational framework in carrying out its mandate.

Immediately upon passage of the Indigenous Peoples Rights Act in 1997, its constitutionality was questioned before the Supreme Court by forces who have vested interests in the exploitation of the rich natural resources within the

expense of the ancestral domains of the Indigenous Peoples.

It was only in December 2006 that the Supreme Court upheld the constitutionality of IPRA.

However, despite this legal setback and the very meagre budget allocation being provided to NCIP, it has rendered substantial delivery of services to its constituency.

To mention a few from the powerpoint display:

NCIP has already issued 84 Certificates of Ancestral Domain Titles covering 2,024,312.8252 hectares and 184 Certificates of Ancestral Land Titles covering 6,420.5007 hectares, or an aggregate of 2,030,733.3259 hectares out of the estimated 7,747,932.9390 hectares nationwide which is 25% of the total national land area of 30M hectares. On-going AD titling activities covers 3,145,889.3634 hectares. It is hoped that by the end of 2008 NCIP will have titled a total of 5,170,202.1886 hectares which is roughly 67% of the total ancestral domain areas in the country.

It was able to facilitate 70 Ancestral Domains Sustainable and Protection Plan with 104 ADSDPPs on-going formulation.

It has constituted 66 Provincial Consultative Bodies nationwide.

It has issued 154 Certificates of Precondition with FPIC and 678 Certificates of Non-Overlap (CNO).

It has served 25,637 Educational Assistance grantees for SY 2001 to 2008.

It assisted 66,923 IPs for health services.

It provided legal services to 1,656 clients, and resolved 295 legal cases.

The NCIP also exerted efforts to be at par with the big agencies and offices of government in representing Philippine domestic affairs in the United Nations and other International Bodies.

In December 2006, it was designated to be the lead agency in monitoring and reporting State compliance on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). It was also designated to be a member-

agency in the preparation of the Philippine Report for the Universal Periodic Review as well as in the preparation of the National Human Rights Action Plan of the Philippines which is to be founded on State compliance to international human rights commitments.

In its commitment to serve not only the interests of Filipino Indigenous Peoples, it helped in the lobbying for the adoption of the UN Declaration on the Rights of Indigenous Peoples and represented the Philippine government during the September 13, 2007 adoption of the instrument by the UN General Assembly.

Just recently, the NCIP through its Chairman was elected as one (1) of the 16 expert-members of the United Nations Permanent Forum on Indigenous Issues.

NCIP has also been launching projects that seeks to preserve and promote the rich and colorful cultures of the Filipino Indigenous Peoples through the educational system and cultural roadshows. It has also embarked on health and livelihood projects as well as employment in areas usually and predominantly occupied by non-IPs.

In order to augment the very limited operational funds of NCIP, it entered into partnerships with international funding institutions to include:

1. The United Nations Development Program
2. Japan Social Development Fund for Indigenous Peoples
3. International Fund for Agriculture Development
4. World Bank
5. International Labor Organization
6. And, the United Nations International Children's Emergency Fund

In order to efficiently and effectively implement its mandate, the NCIP passed several operational guidelines for CADT Delineation and Titling, ADS DPP Formulation, The FPIC Process, Constitution of the IPCB, and the Rules on Pleadings, Practice and Procedure before the NCIP.

And while NCIP is implementing its mandate, it usually comes into cases of overlapping policies with other agencies of government. In order to address this concern, it embarked on a continuing dialogue and harmonization of policies with concerned agencies of government to include:

1. The Department of Environment and Natural Resources
2. The Department of Agriculture
3. Department of Agrarian Reforms
4. Local Government Units
5. And, other entities.

Currently, NCIP is faced with the following challenges in its continuing efforts to accelerate its services to the IPs:

1. Titling of ancestral domains using meticulous process of delineation
2. Negotiating for equitable benefit sharing
3. Conflict with other laws and policies on tenurial security and resource rights
4. Conflicts on IP leadership, territorial claims, priorities for development, etc.
5. Multi-sectoral interpretation and appreciation of IPRA
6. Conflicting territorial claims (Bangsamoro vs. non-Islamized IPs)
7. National development priorities – revitalization of mining industry vs agricultural development
8. Ratification of ILO 169

For its future actions, the NCIP is geared towards addressing the following:

1. Accelerate delineation and titling of ancestral domains and lands
2. Maximize equitable benefit sharing for IPs to translate to poverty reduction
3. Standardization of AD recognition systems and processes
4. Improved transparency on FPIC process

5. Increase competence of IPs as development partners
  6. Strengthen the capability and involvement of IPs in governance, and human rights issues and concerns
  7. Step-up formulation and integration of ADSDPPs in local and national development plans
  8. Widespread exercise of conflict resolution mechanisms making use of customary laws and traditional agreements
  9. Social mobilization and external resource accessing
  10. Focused NCIP capability building
  11. Strengthen collaboration with the civil society organizations to include NGOs, the church, academe and IPOs
  12. And, accelerated involvement in international advocacy initiatives.
- Lastly, I hope that you were able to get more than what you have expected in this presentation. I will no longer spell out the specific Roles of National Institutions in addressing the concerns of IPs but leave with you to identify and determine what you think should be the Role of National Institutions based on the presentation and on your own experiences in your respective areas of origin.
- With this, thank you very much and **MABUHAY PO TAYONG LAHAT!**

## Mr. Arjun Limbu

Member, National Foundation  
for Development of Indigenous  
Nationalities (NFDIN)

### Establishment of NFDIN: Background

- Nepal is multi-lingual, multi-cultural, multi-ethnic and multi-religious country.
- According to census 2001, there are 92 distinct languages spoken and 101 different ethnic groups in Nepal.
- Indigenous nationalities' population is 37.2% out of the total population of nearly 25 million
- Indigenous nationalities had been restricted to pursuing their language and culture.
- National Foundation for Development of Indigenous Nationalities (NFDIN) was established through an Act ,2002.
- NFDIN ACT 2002 identified 59 ethnic groups of Nepal as indigenous nationalities.

### NFDIN'S Objectives

- To work for the overall development of the indigenous nationalities by formulating and implementing programs relating to the social, educational, economic and cultural development and elevation of the indigenous nationalities,
- To preserve and promote the numerous languages, scripts, cultures, arts, and histories of the indigenous nationalities,
- To preserve and promote the traditional knowledge, skills, technologies and special know-how of the janjatis and to guide and provide assistance in its vocational use,
- To create a conducive atmosphere for the janjatis to participate in the overall national

development of the country by winning their hearts and minds and assuring them of the State's sincerity, and endeavoring to build a harmonious relationship between different indigenous groups, caste, tribes and religious communities of Nepal, and

- To provide assistance in the making of an equitable society through the social, economic, religious and cultural enhancement of the janjatis.

### Governing Council of NFDIN: Composition

- It is Supreme body of NFDIN.
- Its most important responsibility is to formulate overall policies and programs related to indigenous nationalities overall development.

NFDIN ACT 2002 section 7 (1) delineates the composition of the Governing Council of NFDIN:

- |  |               |
|--|---------------|
| • Prime minister                       | Chairman      |
| • Minister of Local Development        | Co-chairman   |
| • Nominated by the Chairperson         | Vice-chairman |
| • Six members from lower house         | Members       |
| • Three members from upper house       | Members       |
| • Vice-chancellor of Nepal Academy     | Member        |
| • Member, National Planning Commission | Member        |



- |   |                  |  |                  |
|---|------------------|--|------------------|
| • Secretary, Ministry of Local Development                                | Member           | • Joint secretary from Ministry of Local Development | Member           |
| • Secretary, Ministry of Finance  | Member           | • Member secretary of Governing Council              | Member Secretary |
| • Secretary, Ministry of Culture  | Member           |  |                  |
| • Secretary, Ministry of Education  | Member           |  |                  |
| • Representatives from each IPOs  | Members          |  |                  |
| • Women (Two from each development region)                                | Members          |  |                  |
| • Industrialists and businessman among Indigenous Nationalities community | Members          |  |                  |
| • Members, Executive committee of NFDIN                                   | Members          |  |                  |
| • Individual nominated by Co-Chairman on recommendation of vice-chairman  | Member Secretary |  |                  |

There are 93 members in the Governing Council of NFDIN.

### Executive Committee of NFDIN: Composition

- It is implementing body of NFDIN.
- Its main function is to implement policies and programs as decided by the Governing Council and to initiate actions benefiting the overall development of the indigenous nationalities.

Section 10 of NFDIN Act 2002 stipulates the composition of executive committee of NFDIN:

- |   |          |
|---|----------|
| • Vice-chairman of the Governing Council  | Chairman |
| • Individuals (one male and one female) nominated by Co-Chairman on the recommendation of committee formed by Governing Council | Members  |

### Mandates of NFDIN

- With the approval of the Nepal Government to allow foreign scholars who want to study and research the languages, cultures, histories, literatures, arts, traditional technologies, to make studies or researches in affiliation with the NFDIN (Section 6 (h)).
- To establish relations with foreign or international associations having similar objectives, and to exchange cooperation with them (Section 6 (k)).
- To provide consultancy services on the issues of indigenous nationalities (Section 6 (l)).
- To prepare lists of indigenous nationalities with regard to their social, economic and cultural differences, varieties and discrepancies existing between the indigenous nationalities (Section 6 (n)).
- NFDIN can invite Nepali or foreign scholars to its governing council's meeting as an observer (Section 7(4)).
- NFDIN can make necessary rules and regulations to implement the objectives of the NFDIN (Section 24).
- The Nepal government can change indigenous nationalities by adding or reducing from the list of indigenous nationalities on a recommendation of NFDIN publishing in Nepal Gazette (Section 25).
- NFDIN can also generate its own fund. In the case of loans, it has to take prior approval from the government whereas for donations, financial assistance, grants from individual or donor agency or INGOs, it has to inform the government (Section 16 (2)).
- NFDIN has been given mandate to monitor the implementation regarding social inclusion programs of Interim Three Years Plan (2007-10).

## **Main Areas of Intervention**

- Preservation and development of mother tongue, script, culture and skills
- Human resource development
- Awareness raising
- Preservation of cultural heritage
- Socio-economic upliftment
- Socio-economic upliftment of highly marginalized indigenous nationalities groups
- Publication of action research materials
- Indigenous peoples organizations (IPO) institutional strengthening

## **Resources**

- Regular annual budget from the government
- Financial assistance and grants from bilateral government and donor agencies

## **Proposed Indigenous Nationalities Rights Commission**

### **Background**

- NFDIN has mandate to work for the overall development of indigenous nationalities. However, it has been consulted regarding formulation of government policies to the indigenous nationalities.

- The Indigenous nationalities movement raised voice for the establishment of separate body to protect and promote indigenous nationalities rights.
- The Nepal government has agreed to set up a body and initiate due process for the establishment.
- The government had asked NFDIN for advice on the establishment of the commission and its functions.
- NFDIN organized a consultation meeting with stakeholders and leaders of political parties for the establishment of the commission.

## **Conceptual Framework**

- Indigenous Nationalities Rights Commission should be a Constitutional body with a mandate of semi judicial power.
- It should be the body to protect and promote the indigenous peoples rights.
- It should have the mandate to recommend government regarding the implementation of indigenous peoples' human rights.
- It should have mandate to study existing laws in relation to indigenous peoples rights and if required recommend for their amendment.
- Composition and function of the commission are under discussion among stakeholders, policy makers and leaders of political parties.



## Mr. Edtami Mansayagan

### AITPN's findings on the National Commission on Indigenous Peoples of Philippines

At the National Seminar on “*National Institutions on Indigenous Peoples: The Experience of the Philippines*” organised by Asian Indigenous and Tribal Peoples Network in Manila on 29-30 March 2008, participants discussed the obstacles faced by the National Commission on Indigenous Peoples – the implementing agency for the Indigenous Peoples Rights Act of 1997 – from various governmental department. It was clear that putting NCIP under the Department of Agrarian Reform has undermined its independence and effectiveness.

Then came the order of President Gloria M. Arroyo on 23 May 2008 to put NCIP under the Department of Environment and Natural Resources. Transferring from one government department to another is unlikely to improve functioning of the NCIP.

The statement of Ms. Myrna Caoagas, Director, Ancestral Domains Office of NCIP at the National Seminar on the problems faced by NCIP while approving survey plans for Certificate of Ancestral Domain Title (CADT) is instructive:

“NCIP faced problems for approving survey plans. Other agencies including the Department of Natural Resources (DENR) questioned the authority to approve the surveys. Therefore, NCIP had to hold several meetings to sort out the differences because according to the DENR, it is the only competent authority to approve surveys. Again when the NCIP registered the CADTs, the Land Registration Authority (LRA under the Department of Agrarian Reform) created problems saying as to how they can register Ancestral Lands and ancestral waters. They cited the lack of appropriate reference book saying that in the Presidential Decree there is no reference to the Ancestral Domain and Ancestral Land. So, the LRA people would ask what book we are going

to refer for registration of Ancestral domains and Ancestral waters. And again, we had to sit down with them to solve the problems through memoranda and agreements.”

Indigenous Peoples Rights Act of 1997 is the first law which recognized the right to ancestral domains/ancestral lands, right to Self-Governance and Empowerment, Social Justice and Human Rights and Cultural Integrity. Undoubtedly, IPRA has been ahead of its time in Asia.

The IPRA further provided for the establishment of the National Commission on Indigenous Peoples (NCIP) as the implementing agency of the IPRA Act.

It is clear that the NCIP has failed to meet the expectations of the indigenous peoples. There are a number of reasons:

First, the mandate of the NCIP is too broad without commensurate human and financial resources. It has quasi-legislative, quasi-judicial and administrative/executive functions. From development of Indigenous Peoples Development plant (the tasks of an development agency) to quasi-judicial power (its decisions can only be challenged before the Supreme Court. But its resources have been meager.

Second, the placement of the NCIP under a department actually subsumes the identity of the NCIP. Its functions are often subject to executive caprice.

Third, from 1998 to 2003, NCIP did not have resources to fulfill its mandate of issuing Certificates of Ancestral Domain Titles. There is no financial autonomy.

Fourth, the selection and removal procedures are not stipulated, thereby making it not independent.

Fifth, there is no direct involvement of indigenous peoples.

Let us examine of the issues of concerns in detail.

### **Flawed appointment procedure**

The appointment procedures as laid down in the Implementing Rules and Regulations (IRR) of the IPRA for the appointment of the 7 Commissioners of the NCIP are vague and provide for executive caprice.

But the IRR does not clarify as to what procedure(s) the President will adopt or abide by if there is more than one recommendation of names for appointment as Commissioner from a particular ethnographic region. A particular ethnographic region may consist of several different indigenous communities, indigenous peoples' organizations or groups and they would like to nominate candidates of their choice. In a true democracy, everyone has the right to submit his candidature if he or she meets the eligibility criteria.

In the event of multiple recommendations/nominations for the post of the Commissioner from a single region, there is simply no provision as how the Commissioner from that region will be appointed.

In addition, there is no procedure for appointment of the Chairperson of the NCIP. Both in the IPRA (Section 40) and IRR (Part III, Section 2), provide that the NCIP shall be composed of seven Commissioners "one of whom shall be the Chairperson". The IRR is silent on the procedure of appointment of the Chairperson by the President which leaves a lot of room for politicization of the issue.

### **Removal without investigation**

The procedures for removal of the Chairperson and other members of the NCIP are too simplistic. Part III, Section 7 of the IRR provides that "Any member of the NCIP may be removed from office for cause, after due notice and hearing, by the President on his own initiative or upon recommendation by any ICC/IP community before the expiration of his term and after complying with the due process requirement of law." Section 8 of Part III provides the reasons on the basis of which a Commissioner may be removed – "The removal for cause of any Commissioner shall require the

following: a) A formal petition or complaint shall be filed by any indigenous community to the Office of the President in Manila or any of its regional field offices; and b) The petition or complaint shall include, but not be limited to, a narration of facts and circumstances describing the crime, illegal act/s, or other act/s contrary to customary law which subject the indigenous community to unnecessary risks that threaten their territorial and cultural integrity, which were committed by the Commissioner/s. The petitioners shall attach the necessary documents supporting the petition or complaint."

Although there has been commitment that "due process of law" would be followed in the removal of the accused Commissioner (Part III, Section 7 of the IRR), the IRR does not lay down any provision for requirement of an impartial investigation into the allegations as may be contained in the petition or complaint from the indigenous community, composition of such investigation team etc.

That the President can initiate "removal" procedures against any Commissioner on his (President's) own initiative threatens the independence and functioning of the National Commission on Indigenous Peoples.

This reflects that all the members including the Commissioners are subservient to the President. It could act as an impediment in formulating plans and policies for the indigenous peoples independently.

### **Broad mandate**

NCIP has been provided broad mandate. It meets the Paris Principles.

However, the NCIP has failed to effectively implement its mandate till date. Most importantly, it failed in its primary role for ensuring the rights of indigenous peoples with regards to delineation and titling of ancestral domains. This was largely due to inadequate funding, bureaucratic hitches, inexperience of the NCIP itself and some external constraints such as the lack of awareness of the IPRA by the indigenous peoples, limited involvement of Local Government Units to NCIP projects, distrust, and discrimination of indigenous peoples in society coupled with the insincerity of the national government to pursue social justice for indigenous communities.

This is despite the fact that the law has provided for: “offices within NCIP” for the implementation of the policies (Sec. 46). These included- a) Ancestral Domains office; b) Office on Policy, Planning and Research; c) Office of Education, Culture and Health; d) Office on socio-Economic Services and Special Concern; e) Office of empowerment and Human Rights; f) Administrative Office and g) Legal Affairs Office. The NCIP has also given power to create additional offices as it may deem necessary subject to existing rules and regulations (Sec.47).

Let us examine two critical issues further.

## Right to Ancestral Domains

Titling of lands under Certificates of Ancestral Domain Titles (CADTs) and Certificates of Ancestral Land Titles (CALTs) remain one of the many challenges that the NCIP is confronted with. The performance of the NCIP in respect of titling of ancestral domains and lands has not been satisfactory. Many indigenous groups view the IPRA as an obstacle to the process of titling (identification, delineation and recognition of ancestral domain and land claims).

In its Budget Briefing for 2008, NCIP stated that the total estimated area of Ancestral Domain (AD) was 6,323,195 Hectares while the total number of applications for Ancestral Domains received were 540 covering 5,201,899.9390 Hectares.

The NCIP issued Certificate of Ancestral Domain Claim (CADC) for 181 applications covering 2,546,033 Hectares while the total number Certificate of Ancestral Land Claims (CALC) areas numbering 147 is 10,095.8882 Hectares. Of these, 494,648.9448 Hectares of CADC areas have been converted to 30 Certificate of Ancestral Domain Titles (CADTs) while a total of 167,4169 Hectares of CALC areas have been converted to 109 Certificate of Ancestral Land Titles (CALTs). CADT has been issued in respect of a total area of 1,116,439.3620 Hectares involving 57 ADs while the total area of CALT issued is

4,855.6990 Hectares involving 172 Ancestral Claims. Grand total of CADTs and CALTs issued is 1,121,295.0610 Hectares.<sup>1</sup>

According to Cagaoas, NCIP has issued a total of 150 Certificates of Ancestral Land Titles (CALTs) and 56 Certificates of Ancestral Domain Title (CADTs) comprising an area of 1,114,857.17 hectares as of 4 January 2007.<sup>2</sup>

According to the 2006 Annual Report of the NCIP, a total area of 3,770,286 hectares of land constituting 81% of the total target area is pending titling at different stages of the process.<sup>3</sup> On the other hand, the implementation of Department Administrative Order 2 by the DENR resulted in the issuance of 181 Certificate of Ancestral Domain Claims (CADC) covering more 2,532,000 hectares of ancestral domains from 1993 until 1997, in half of the period of 6 years between 2001 and 2006 which NCIP took in issuance of slightly more than half of the lands that DENR had completed titling in 3 years time.<sup>4</sup>

During the Fiscal Year 2006, the NCIP could issue only 18 CADTs covering 269,049.4201 Hectares to 50,847 indigenous peoples and 109 CALTs covering 1,011.6464 Hectares to 1,681 indigenous peoples.<sup>5</sup>

The process of titling of CADTs and CALTs by the NCIP is extremely slow. After his visit to the Philippines in 2002, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples noted, *“whilst some progress has been made in this respect, it is also clear that the legal recognition of ancestral domains and land titles has been a slow and cumbersome process, full of pitfalls and ambiguities, which often drive indigenous communities to despair of the usefulness of IPRA as an effective legal instrument.”*<sup>6</sup>

The NCIP officials admitted the observation of the Special Rapporteur but they cite lack of adequate funds as the major constraints for being not able to expedite the process of titling of CADTs and CALTs at the desired pace.<sup>7</sup>

1. NCIP's Fiscal Year 2008 Budget Briefing Folio

2. Agency set to give more domain titles, 15 February 2007, Sun.Star Baguio, available at: <http://www.sunstar.com.ph/static/bag/2007/02/15/news/agency.set.to.give.more.domain.titles.html>

3. See NCIP Annual Report of 2006

4. See Chapter 1 of ILO's Report titled “A Journey of Hope” 2005, volume 1

5. NCIP's Fiscal Year 2008 Budget Briefing Folio

6. Human Rights Records of the Philippines, Spectacular on paper, ACHR, November 2003

7. Interview of Chairperson, Commissioners and the Bureau directors of the NCIP by AITPN representative between 4-10 March 2008



## Free and Prior Informed Consent

Section 59 of the IPRA categorically prohibit all departments and governmental agencies governmental agencies from issuing, renewing, or granting any concession, license or lease, or entering into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. The section clearly provided that no certification shall be issued by the NCIP without the free and prior informed and written consent of ICCs/IPs concerned. It also provided that no department, government agency or government-owned or controlled corporation may issue new concession, license, lease, or production sharing agreement while there is a pending application for a CADT and that the ICCs/IPs shall have the right to stop or suspend any project that has not satisfied the requirement of this free and prior informed consent.

Literally, the requirement of FPIC read with the provision for Certificate Precondition provided under section 59 of the IPRA serves as strong safeguards against encroachment into ancestral domains of the ICCs/IPs. However, an assessment of effectiveness of these provisions as tools against violations of the rights of ancestral domains of the indigenous peoples shows otherwise. It has been found that the requirements of FPIC have been violated routinely.

As of 16 May 2007, the NCIP has issued 671 Certificates of Precondition under section 59 of IPRA on applications without ancestral domain overlap and 67 Certificates Precondition with issued Free and Prior Informed Consent by indigenous peoples.<sup>8</sup>

In 2003, the NCIP issued its first guidelines on the process of obtaining free, prior and informed

consent. Reportedly under pressure from the Federal Government in view of the government's determination to increase mining activities, the NCIP revised its 2003 Guidelines in 2006 vide its Administrative Order No. 01, Series of 2006 titled *The Free and Prior Informed Consent (FPIC) Guidelines of 2006*.<sup>9</sup> Indigenous communities alleged that the revised guidelines made the process easier for companies, especially mining companies to enter into ancestral domains.<sup>10</sup> The new guidelines shortened the period for completion of the FPIC process from 180 days to 90 days<sup>11</sup> and the requirement of consensus within the affected communities has been reduced to consultations within the Council of Elders. The revised guidelines also limited the FPIC process only to the officially recognized indigenous lands (indigenous territories included on the NCIP's primary list).<sup>12</sup> It is also found that the NCIP has been imposing the new FPIC guidelines upon the communities to secure FPIC for the mining companies. Some of the glaring examples included two cases in the ancestral domain of the Subanons in Canatuan, Siocon where TVI Resource Development Phils. Inc (TVIRDPI) applied for two new Mineral Production Sharing Agreements (MPSA) and another three cases in the ancestral domain of the Subanons in Bayog, Zamboanga del Sur where three mining companies are applied for MPSA and Exploration Permits. In all these five cases, the NCIP refused to hold the Consultative Council Assembly for FPIC at venues desired by the indigenous peoples and excluded the participation of all those communities of the same ancestral domain but not directly affected with the proposed MPSA.<sup>13</sup>

There are many issues which are discussed in our findings. The only silver lining is that NCIP is in good hand of Chairperson, Eugenio A Insigne who is trying to implement the IRPA against all the odds described above.

8. Statement of H.E. Bayani S. Mercado, Deputy Permanent Representative of the Philippine during the Sixth Session of the Permanent Forum on Indigenous Issues on the theme "Indigenous lands, territories and natural resources", available at: <http://www.un.int/philippines/statements/20070517.htm>

9. IWGLA's *The Indigenous World-2007*

10. Indigenous folk see govt as pro-mining, By Ellen Red, *InsideMindanao.com*, available at: <http://www.manilatimes.net/national/2006/dec/25/yehey/prov/20061225pro4.html>

11. Mining Firms Scramble for Lands in Central Luzon, by Jhong Dela Cruz, *The Bulatlat*, Vol. VI, No. 27, August 13 - 19, 2006

12. IWGLA's *The Indigenous World-2007*

13. SUBANON LEADERS QUESTION NCIP GUIDELINES ON FPIC PROCESS, *Bulatlat.com*, 18 August 2007, available at: <http://dcmiphil.org/dcmi/2007/08/18/subanon-leaders-question-ncip-guidelines-on-fpic-process/>



## Mr. Chandra Singh Kulung

### AITPN's findings on the National Foundation for Development of Indigenous Nationalities of Nepal

In 2002, after a decade of struggle for recognition by the Janjatism, indigenous peoples, the government of Nepal established the National Foundation for Development of Indigenous Nationalities (NFDIN) through a parliamentary Act for upliftment of indigenous peoples of Nepal. There are no minimum standards for the establishment of National Institutions on Indigenous Peoples. Nor these institutions have any serious engagement with indigenous peoples and United Nations bodies dealing with indigenous peoples. However, the indispensability of these national institutions for realisation of the rights of indigenous peoples is beyond doubt.

Asian Indigenous and Tribal Peoples Network (AITPN) undertook the study to evaluate the effectiveness of the NFDIN. In the absence of any guidelines on the establishment of the National Institutions on Indigenous Peoples, AITPN used the United Nations Paris Principles on National Institutions to evaluate these National Institutions.

AITPN examined NFDIN's autonomy - legal, financial, composition and through appointment and dismissal procedures; its powers, functions and jurisdiction; accessibility of NFDIN to indigenous peoples; level of awareness among the indigenous peoples about the NFDIN; level of cooperation between the NFDIN and indigenous peoples; operational efficiency of the NFDIN including staffing, representative nature and impartiality, and procedures for establishing accountability of NFDIN.

When NFDIN was established, Nepal was caught in full-blown war with the Maoists. It could not play any effective role.

The proposal on “*NFDIN Institutional Strengthening*” submitted by the NFDIN to

the Department for International Development (DFID) of the United Kingdom lucidly explains the acute lack of financial and human resources of the NFDIN and how it has caused ineffectiveness of NFDIN.

The NFDIN in its proposal stated:

“NFDIN is a newly established institution facing many challenges ...It has limited financial, human, material, and informational resources and is working amidst serious policy gaps and inconsistencies concerning ethnic issues.

Although it has received a reasonable amount of government funding it lacks funds for institutional development including training its current staff and the staff it plans to recruit. Delays in approving the foundation's recently drafted rules are preventing the recruitment of much needed staff. It particularly lacks high level officer staff with only one out of the planned nine first and second class gazetted officers in post. Most governing council members, especially the IPO representatives, have a limited capacity to carry out their responsibilities and influence decision-makers. Also, it has yet to establish an out of Kathmandu presence, as envisaged in the government policy document, while it is focusing on building up its central presence. Lack of human and financial resources has led to the foundation's main problems of:

- lack of strategic planning and unsatisfactory short term planning;
- lack of capacity to manage and monitor programmes and projects;

- poor monitoring and inadequate information management;
- limited policy input to the government;
- weak functional linkages to encourage ministries, local government and other governmental and donor agencies to work to benefit Janajatis; and
- lack of initiatives to empower IPOs.”

We think the proposal of NFDIN candidly admitted its failure.

Yet, it is essential to further highlight the failure of NFDIN.

## **I. Failure to include the excluded indigenous peoples**

The NFDIN Act provided for identification of many indigenous peoples. Only 69 groups were included. Many of the Kirati sub-groups were not included in the list as Janjatis.

## **II. Mandate: A governmental agency**

Under Section 5 of the NFDIN Act, NFDIN has no mandate to address the violations of the rights of indigenous peoples. The objectives provided under Section 5 which define the mandate of the NFDIN Act only provides for “promotion and preservation” of the social, cultural, economic and educational development of the indigenous peoples.

Similarly, Section 6 of the NFDIN Act relating to “functions, duties and powers of the Foundation” has no reference to rights provided under the Constitution of Nepal and international human rights law. Nor is there any reference to land rights which is crucial for social, economic and cultural development of indigenous peoples.

### **b. Most powerless National Institution**

The NFDIN is the most powerless National Institution in comparison to the National Human Rights Commission and National Dalit Commission of Nepal. A national institution must have the power to intervene against violations of rights and failure to take appropriate measures by the State.

Contrary, the National Human Rights Commission established under the Human Rights Commission Act of 1997 have the powers to conduct inquiries and investigations upon a complaint from the victim or any person on his behalf or upon information received from any source, or on its own initiative.

Even the National Dalit Commission (NDC) which was not created by any statute has a broader mandate than that of the NFDIN. Among others, the mandate of the NDC includes to suggest timely changes in legal and policy arrangements for Dalit rights, make recommendations to implement international instruments to which Nepal is a party, monitor and coordinate NGOs on dalit upliftment, launch programmes on social awareness to end social discrimination and untouchability, receive petitions and act as per the existing law, and draft a bill to make legal arrangements concerning the National Dalit Commission.

Unlike the National Human Rights Commission or the National Dalit Commission which can issue directions to the governments, Section 22 of the NFDIN Act provides that Nepal Government may give necessary directions to the NFDIN!

## **III. Composition**

### **a. Governing Council: Too large to be effective**

Following intense lobbying by the indigenous peoples, the Government accommodated one representative from each of the 59 recognized indigenous communities in the Governing Council. There are 93 Governing Council members at half of the total them shall have to be present in order to form quorum for a meeting of the Council.

The Governing Council is so disproportionately large that it rendered the NFDIN ineffective and useless. Any major decision of the Governing Council should be passed in any of the only two annual meetings in which at least 50 percent of the Members are present.

### **b. Prime Minister to report to the Local Development Minister**

There are no criteria for selection of the 59 indigenous members of the Governing Council of NFDIN. Neither the NFDIN Act nor the Rules of Procedures define the criteria or procedure for selection of the indigenous members.

The government members of the Governing Council are Secretaries to the Government of Nepal and being employees of the government, they cannot play any independent role.

The Chairman of the Governing Council is the Prime Minister and co-Chairman is the Minister/State Minister of the Ministry of Development. It was hoped that the Prime Minister will bring necessary authority for enforcing the decisions of the Foundation on the government. However, no Prime Minister ever attended any meeting of the Governing Council of the NFDIN.

What is more bizarre is the Section 23 of the Act which mandatorily requires the NFDIN to liaise with the Government of Nepal through the Ministry of Local Development. Therefore, the NFDIN's Governing Council which is headed by the Prime Minister grotesquely makes itself subservient to the Local Development Minister!

### **c. Pluralism does not include gender!**

The Governing Council comprising of 93 persons should ideally ensure pluralism. But there are no procedures to ensure representation from different fields which fall within the mandate of NFDIN.

There is no mandatory provision for gender representation. Consequently, majority of the Governing Council are men.

## **IV. Resources**

### **a. Lack of financial resources**

The meager amount of budgetary allocation received annually by the NFDIN explains as to why it has failed. It was allocated Nepalese Rupees 16 million during the Fiscal Year 2002-2003; NPR 22 million during the Fiscal Year 2003-2004; NPR 24 million during the Fiscal Year 2004-2005; NPR 33 million during the Fiscal Year 2005-2006; and NPR 33 million during the Fiscal Year 2006-2007.

However, even the same would be much lesser if it is calculated on the basis of the grant actually released to the NFDIN. NFDIN actually received only NPR 5.6 million during 2002-2003; NPR 20 million during 2003-2004; NPR 22 million during 2004-2005; and NPR 26 million during 2005-2006.

### **b. Lack of personnel**

The posts of the Vice-chairperson and Member Secretary are full time executive posts. However, the Vice-Chairperson has been appointed only about six months ago and the posts were lying vacant and the administration of NFDIN was being run by a junior officer of the rank of a Deputy Secretary, who by any yardstick does not have the required experience, expertise and influence.

As of July 2004, NFDIN had only 26 staff, all of whom were hired on temporary basis while it needed at least 52 staff for normal functioning.

Because of the delay in approving its Rules of Procedure by the Governing Council, no staff could be appointed. It had only one high level officer against a planned strength of nine posts of first and second class gazetted officers. Till the approval of its Rule of Procedures in 2006, the functions of the National Foundation were carried out by temporary staffs.

The situation has not improved much even after approval of the Rules of Procedures in 2006. The total sanctioned staff strength of the NFDIN in 2007 was 52.

In its Report of 1996 titled, *“Establishment of the Foundation for the Upliftment of Nationalities”*, the Task Force stressed upon the need for financial autonomy of the National Foundation through self-reliance. To achieve financial sustainability, Task Force proposed that “NFDIN should create a Trust Fund and accumulate at least NPR 10 billion within five years a Trust Fund”.

But none of the recommendations made by the Task Force was implemented.

## **VI. Awareness among indigenous peoples on the NFDIN**

Public education/dissemination of information on the rights of the victims or the probable victims is one of the important responsibilities of NHRIs.

## **VII. Conclusion**

Among the achievements of NFDIN, the only visible one is the recognition of the existence of indigenous peoples/nationalities in Nepal. Otherwise, NFDIN has failed to accomplish any of its objectives as provided in Section 5 of the NFDIN Act.

The National Foundation for the Development of Indigenous Nationalities cannot be considered as a national institution under any yardstick. Apart from pluralistic composition of its members, the NFDIN Act does not conform to any of the other basic requirements provided under the Paris Principles.

The NFDIN has neither the mandate of a national institution aimed at protecting and promoting the rights nor autonomy over resources

nor does it has the required expertise to effectively protect and promote the rights of indigenous peoples. It merely serves as an instrument of the government to coopt indigenous leaders. It is not mandated to protect and promote the rights of the Janjatis.

Hence, a weak institution like National Foundation for Development of Indigenous Nationalities should not have any place in the post conflict Nepal.





## Santosh Chakma

### AITPN's findings on the on the National Commission for Scheduled Tribes of India

**T**he National Commission for Scheduled Tribes (NCST) of India is a statutory body which came into existence with effect from 19 February 2004 consequent upon the bifurcation of erstwhile National Commission for Scheduled Castes and Scheduled Tribes (NCSCST) into two Commissions namely National Commission for Scheduled Castes and National Commission for Scheduled Tribes through the Constitution (89th Amendment) Act, 2003. The Constitution (89th Amendment) Act, 2003 inserted a new Article 338A establishing the National Commission for Scheduled Tribes.

The NCST has the mandate to protect and promote the rights of the over 84.3 million Scheduled Tribes (tribals) of India.

Despite having enormous powers, the NCST has been hamstrung because of the lack of independence in terms of several aspects, some of which are given below:

**First**, the NCST has framed such “Rules of Procedures” which has made it subservient to the State authorities. The NCST has to take prior permission from the concerned State government in order to investigate any case of human rights violations in that particular State. This has severely affected the independence of the NCST more than anything else.

**Second**, the NCST has a flawed procedure of appointment of its members. The President, who acts and exercises his/her constitutional powers on the advice of the Council of Ministers headed by the Prime Minister, appoints the members of the Commission on the basis of vaguely formulated criteria. Hence, in effect it is the Minister of Tribal Affairs who recommends the appointment of the members of the Commission in absence of any Recommendation Committee.

**Third**, despite of having plurality in the representation in the Commission the plurality has been narrowed down by the political appointments in the Commission.

**Fourth**, the NCST does not have financial autonomy. Its budget is decided by the Ministry of Tribal Affairs.

**Fifth**, the NCST is not equipped with adequate staff to carry out its functions effectively.

Let us examine in detail.

### Independence

Independence of the national institution is the core issue in the establishment of any effective National Human Rights Institution.

The National Commission for Scheduled Tribes is a statutory body established through the Constitution (89th Amendment) Act, 2003. It is a constitutional body.

However, the Commission has framed such Rules of Procedures which make it subservient to the State authorities and eroded its independence. Rule 83 of Rules of Procedure of the NCST - *“All rules, regulations and orders issued by the Central Government and applicable in the Ministries/ Departments will also apply in the Commission”* which has undoubtedly reduced the National Commission for Scheduled Tribes into another department of the Government of India.

### Appointment and dismissal procedures

There is no independence and transparency in the appointment of members of the NCST. The Chairperson, Vice Chairperson and three other members of the NCST are appointed by the

President of India. While on paper, the appointment of members by the President may appear independent, under Article 74 of the Constitution of India the President acts and exercises his/her functions on the advice of the Council of Minister headed by the Prime Minister.

NCST's appointment procedure is a clear departure from the appropriate appointment procedure such as the one ensured in the case of National Human Rights Commission. Under the Human Rights Protection Act of 1993, the members of the NHRC are appointed by the President of India on the basis of recommendations of a Committee consisting of the Prime Minister as Chairperson and Speaker of the House of the Lok Sabha (Lower House of Indian Parliament), Minister in-charge of the Ministry of Home Affairs, Leader of the Opposition in the Lok Sabha, Leader of the Opposition in the Rajya Sabha (Upper House of the Indian Parliament) and Deputy Chairman of the Rajya Sabha as members.

Because of these loopholes, there are always the chances of political considerations in the appointment of the members of the NCST.

All current members of the NCST are ruling Congress Party workers.

## **Plurality**

The National Commission for Scheduled Tribes has been envisioned as a pluralistic institution. Out of total five members (including the Chairperson) it has been provided that at least three should be Scheduled Tribes and at least one of the total five members of the Commission must be a woman.

## **Dismissal or removal procedures**

No one has been dismissed so far. But the Procedures for removal is flawed.

First, AITPN is of the opinion that having two different sets of dismissal procedure for the Chairperson in one side and the other Members (including the Vice Chairperson) on the other are not justified. In case of the NHRC the dismissal or removal procedures are the same for all the members including the Chairperson.

Second, the condition for removal by the President if a member "refuses to act or becomes incapable of acting" as contained in sub clause d of Clause 8(3)

is deeply flawed. It means if any member refuses to follow the orders of the President by a member of NCST can be a reason for his/her removal from office?

## **Absence of privileges and immunities**

Further there is no privilege for the members and it makes them extremely vulnerable.

In fact, non-appointment of Chairperson, Vice-Chairperson and members on time is a major problem. A con-joint reading of Clause (2) of Article 338A of the Constitution (Eighty-Ninth Amendment) Act, 2003 and Rules 46 and 47 of the Rules of Procedures of the NCST it is mandatory that any resolution/decision of the NCST with regard to all matters provided under Rule 47 to be legally binding and effective has to be passed/taken by at least three members including the Chairperson and/or Vice-Chairperson.

However, since the constitution of the first Commission in February 2004, there were a number of occasions when the NCST did not have the number of Members required to constitute the quorum. During 4 -10 March 2007, after the resignation of Smt. Prem Bai Mandavi, Member on 03 March 2007, the NCST had only two Members namely Shri Gajendra Singh Rajukheri, Vice- Chairperson and Shri Buduru Srinivasalu, Member and during 11 March - 31 May 2007, Shri Gajendra Singh Rajukheri, Vice-Chairperson was the only Member in the NCST after the resignation of Shri Buduru Srinivasalu, Member on 10 March 2007. At present, one post of member is lying vacant.

Most of the time, the NCST remain without quorum because of non-appointment of either the Chairperson or the Vice-Chairperson or the Members on time.

## **Adequate Powers, Restrictive Rules**

The NCST is a constitutional body. The power of the NCST to "summoning and enforcing the attendance of any person from any part of India and examining him on oath" is enforceable even to investigate the violations committed by the members of the armed forces over whom the National Human Rights Commission (NHRC) does not have any jurisdiction. Hence, in a way, NCST is more powerful than the NHRC of India.

As stated, NCST is more powerful than the NHRC. But the Commission has framed such Rules of Procedures which not only limited its powers but also made the Commission compromise its independence by being subservient to the State authorities during investigation of complaints of human rights violations. The NCST has been weakened by its own Rules of Procedure notified on 17 September 2004.

According to Rule 27 of Rules of Procedure, *“When a decision for direct investigation is taken, an officer not below the rank of Research Officer/Section Officer along with necessary staff may be attached to the Member(s) entrusted with such investigation or enquiry and they shall take all steps to arrange such sittings.”* However, the Investigating Team of the NCST must have to obtain prior permission and communicate about “the matter, purpose, scope and procedure of the investigation or inquiry” to the concerned state government officials where the NCST team is investigating a case as per the Rule 34 of the Rules of Procedure.

Rule 34 of Rules of Procedure states, *“The Investigating Team may visit the area concerned after observing due formalities for obtaining approval of tours and other administrative requirements and after giving information to the concerned local authorities regarding the matter, purpose, scope and procedure of the investigation or inquiry. The Investigating Team may enlist the help of the officers and staff of the concerned State Office but the responsibility of preparing and presenting the report shall rest with the head of the Investigating Team.”*

Rule 18 goes a step further to make it compulsory for the members of the NCST to obtain prior permission from the concerned state government officials and simply to follow “the norms laid down by the State Governments regarding security/travel/accommodation etc, during such tours”.

Obviously, the State government officials will ensure a “guided tour” to NCST investigating team. And that is what happening.

### **Limited powers of Regional Offices**

The Regional/ State Offices of NCST have been termed as the “eyes and ears” of the Commission. But the Regional Offices have been largely ineffective as they have been given limited power to investigate. Under Rule 39 of “Rules of

Procedure” of NCST, the Regional Office has to take prior permission from the Headquarters in Delhi by submitting a special report with full facts to the Secretariat of the NCST before investigating into a case of human rights violation.

Rule 39 of Rules of Procedure of NCST states, *“If during the course of investigation or inquiry, the Head of the State Office feels that it is necessary to invoke the powers of the Commission to require the production of any document or compelling the attendance of a person, he may make a special report with full facts to the Secretariat of the Commission. On receipt of such special report, the matter shall be placed before the Secretary/Member in-charge of the subject/State/ UT who may make an order that necessary legal process to compel attendance or to require production of any document may be issued. The summons and warrants issued for the purpose may be served on the person concerned either directly or through the officer-in-charge of the State Office as may be directed by the Secretary/Member authorizing issue of such legal process.”*

### **Accessibility**

The NCST is mandated to protect the rights of over 84 million tribal and indigenous peoples of India. The Constitution has vested the NCST with enormous powers to deal with human rights violations of the tribals. But most indigenous tribal peoples remain unaware of the NCST.

The Headquarters of the National Commission for Scheduled Tribes is situated in New Delhi. Hence, it is physically accessible only to the people living in and around Delhi and NGOs based in Delhi. It has only six Regional Offices set up across the country.

### **Inadequate resources**

#### **a. Personnel**

The NCST suffer from acute shortage of staff. As per the information obtained by AITPN by filing a RTI application, the sanctioned strength of staff is only 124 in its Headquarter in Delhi as well as the six Regional Offices in Shillong, Jaipur, Bhubaneswar, Ranchi, Bhopal and Raipur. But the actual strength of staff never reached the sanctioned strength during the last five years of its functioning. There were only 89 staff in position as on 1 December 2004; only 85 staff in position

as on 31 December 2005; only 83 staff in position as on 31 December 2006; and only 83 staff in position as on 31 December 2007.

The situation of the regional offices is worse.

## **b. Financial resources**

The NCST does not have adequate financial resources. Often, lack of funds is commonly cited by constitutional as well as statutory bodies/commissions as one of the major problems for non-implementation of a proposed welfare scheme. It is a fact that unlike the National Human Rights Commission and the Election Commission of India, the National Commission for Scheduled Tribes do not get adequate amount of funds enough to meet the desired targets. But there are problems within the NCST itself. It does not have the ability or willingness to utilize the whole of the sanctioned grant received annually.

## **Transparency and accountability**

The NCST also suffers from lack of accountability and transparency. Rule 41 of the Rules of Procedure of NCST states, *“The Commission may, through a decision at a meeting or otherwise, direct that the contents of any report made on any matter shall be kept confidential and shall not be revealed to any person other than those who have been authorized access to such report.”* Thus, this rule gives NCST the absolute right to deny access to any report or a part of a report to the victim or anyone. The rule has

not laid down any procedure as to what and which contents of a report constitute “confidential” and cannot be disclosed.

This rule is contrary to the intent and spirit of the Right to Information Act, 2005. The rule does not make it mandatory for NCST to provide any reason for making any report as “confidential”, thereby denying access to the public.

None of the Annual Reports of the NCST has been made public as yet. When we filed an RTI application, the Annual Reports were denied on the ground that these reports have been submitted to the President of India for laying in the Parliament but since the President has not yet laid these reports of the NCST before the Parliament, they cannot be disclosed to any member of the public.

In response to another RTI application of AITPN, the NCST refused to provide information about the functioning of the Commission stating that **“Moreover, this Commission has acute shortage of manpower to deal with the normal duties of the Commission, viz. investigation into specific complaints relating to violation of safeguards for Scheduled Tribes and in case it concentrate on compiling the voluminous information sought by you, the entire work of the Commission will virtually come to halt and it will totally hamper the functioning of the Commission as per the constitutional mandate”** !

That is quite something!

## AITPN

AITPN's studies on the Ministries and Departments dealing with indigenous peoples in Bangladesh, Malaysia and Vietnam

### I. The context

A few countries in Asia (India, Nepal and Philippines) have established National Institutions on Indigenous Peoples (NIIPs). A few other countries of Asia have refused to establish NIIPs for the protection of the rights of the indigenous peoples but have set up Ministry, Department or Cabinet level Committee to deal with the affairs of the indigenous peoples/ethnic minorities of their respective countries.

The Ministry of Chittagong Hill Tracts Affairs (MoCHTA) of Bangladesh, Department of Orang Asli Affairs (JHEOA) of Malaysia and the Committee for Ethnic Minorities (CEM) of Vietnam are such interim institutional arrangements in absence of NIIPs. As these institutions are not National Institutions, they do not meet the standards of Paris Principles. But their role remains crucial as they are often highlighted as governments' commitment towards indigenous/tribal peoples.

As a part of its project, "*Realisation of Indigenous Peoples Rights at National Level in Asia*" financed by the European Commission under the European Initiative for Human Rights and Democracy, Asian Indigenous and Tribal Peoples Network (AITPN) conducted studies on the MoCHTA of Bangladesh, JHEOA of Malaysia and CEM of Vietnam.

These studies on the MoCHTA, JHEOA and CEM exposed numerous shortcomings of the Ministries and departments dealing with indigenous peoples. AITPN has come to the conclusion that these interim arrangements (MoCHTA, JHEOA and CEM) in absence of NIIPs suffer from common flaws which have made them ineffective.

1. They serve under the government and hence **lack independence, impartiality and objectivity**. Instead of protecting the rights

of the indigenous peoples, they are reduced to agencies implementing the anti-indigenous/minority policies of the government. This is evident from the implantation of Muslim peoples from plain areas to the Jumma peoples' lands in CHTs of Bangladesh which has threatened the very existence of the indigenous Jumma peoples, and the implantation of the Kinh majority from the lowlands to the Central Highlands in Vietnam to the effect that the Kinh people's population increased from 5% in 1945 to 70% of the total population of Central Highlands at present. The Department of Orang Asli Affairs has become a mechanism of the Government of Malaysia to regulate and control the Orang Asli and not to develop them.

2. **These Ministries are not headed by indigenous peoples and do not have true representation from the indigenous peoples.** MoCHTA is controlled by the Prime Minister while JHEOA's top level office bearers belong to majority Malays. CEM is headed by a Minister who may not be from ethnic minorities. Hence, MoCHTA, JHEOA and CEM are more concerned about what the government wants rather than what the indigenous peoples need.
3. **There is no transparency and accountability.** Only in a rare case, in December 2000 then Chairman of the Committee for Ethnic Minorities and Mountainous Areas (predecessor of CEM), Minister Hoang Duc Nghi was summoned to the National Assembly for the involvement of CEMMA officials in corruption and was severely reprimanded. The investigation also led to dismissal of several provincial level officials but the central officials went scot free.



4. **They do not have financial independence.** They cannot determine their own budget and their financial strings are controlled by the government which make them highly vulnerable and dependent upon the government
5. In the composition **there is no plurality and proportionate gender representation.** The composition of the members of MoCHTA, JHEOA and CEM is determined by the interests of the ruling party.
6. Assimilation of the ethnic minority/ indigenous peoples into the mainstream society remains the main agenda. It is the truth in case of Orang Asli of Malaysia, Jumma peoples of CHTs or 53 ethnic minorities of Vietnam
7. The areas of indigenous peoples have been **under strict government control.** The freedom of the press has been curtailed by the Aboriginal Peoples Act of 1954 which prohibits entry or circulation of any thing including films capable of “suggesting words or ideas” in Orang Asli areas in Malaysia. In CHTs of Bangladesh, freedom of the press and speech of the indigenous peoples have been under tight control of the government. **Further, CHTs-based NGOs working on uplift of the region are not allowed to use the term “Indigenous Peoples” in their project documents.**
8. As the indigenous peoples demand various degree of autonomy or self determination, the indigenous areas have turned into virtual security prison due to huge presence of military. High militarization violates the daily routines and human rights of the indigenous peoples as the security forces primarily target the indigenous population. MoCHTA, JHEOA or CEM do not have any mandate to protect the indigenous peoples/ethnic minorities against human rights violations by the security forces or the members of the majority.

The experience of India shows that a Ministry for Tribal Peoples (not to speak about Department or Committee) is not adequate by itself. Therefore, India has also established a National Commission for Scheduled Tribes. The experience of the Philippines has shown that a National Commission on Indigenous Peoples is not adequate by itself as its independence is subsumed by the departments or the Ministry under which the Commission is placed.

The National Institutions on Indigenous Peoples established with UN Paris Principles on National Human Rights Institutions remain indispensable for the realisation of the rights of indigenous and tribal peoples in Asia.



## **Asian Indigenous & Tribal Peoples Network**

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### **Regional Conference on the Role of National Institutions on the Rights of Indigenous Peoples**

**India Islamic Cultural Centre, 87 - 88, Lodhi Estate  
New Delhi - 110 003, India**

**18-19 October 2008**

#### **Agenda**

#### **Day 1: 18 October 2008 (Open for public)**

##### **Opening Session:**

10 am to 11.30

Welcome address: **Mr Suhas Chakma** on behalf of the organisers

Opening Address: **Mr. Hans Schoof**, Head of Operations and First Counsellor, Delegation of the European Commission to India

Keynote address: **Prof James Anaya**, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people

Special Address: **Ms Dipa Dixit**, Member, National Commission for Protection of Child Rights (NCPDR) – on the Internally Displaced Children in India

Special Address: **Mr Miloon Kothari**, former UN Special Rapporteur on the right to adequate housing

##### **Working Session I: Interactive session with the UN Special Rapporteur**

11.30 am to 1 pm

Facilitator : Mr Suhas Chakma

- Presentation from Bangladesh

- Presentation from India

- Presentation from Nepal

- Presentation from Philippines

1pm to 2 pm : **Lunch break**

**Working Session II: National Institutions on the Rights of Indigenous Peoples in Asia**

2pm to 4 pm

Chair: **Dr Sukendu Debbarma**, Member, Board of Trustees, AITPN

**Mr Eugenio A. Insigne**, Chairperson, National Commission for Indigenous Peoples (NCIP), Philippines – on the working of the NCIP

**Mr Arjun Limbu**, Member, National Foundation for Development of Indigenous Nationalities (NFDIN), Nepal – on the mandate of NFDIN, its activities and the on-going exercise of drafting a Bill for a possible National Commission on Indigenous Nationalities

Questions and answers

4 pm to 4.15 pm

: Tea Break

4.15 pm to 5.30 pm

**Working Session III: Findings of AITPN's studies on the National Institutions on the Rights of Indigenous Peoples in Asia**

Chair: Dr Sukendu Debbarma

**Presentations**

Mr Edtami Mansayagan (Philippines)

Mr Santosh Chakma (India)

Mr Chandra Kulung (Nepal)

Questions and answers

5.30 pm to 6.00 pm

**Working Session IV: Draft Principles Relating to the Establishment of National Institutions on the Rights of Indigenous Peoples**

Chair: Mr Suhas Chakma

Presentation by AITPN

General discussion for adoption of the *“Draft Principles Relating to the Establishment of National Institutions Relating to the Rights of Indigenous Peoples”*

**Day 2: 19 October 2008** (Closed door session for indigenous participants and national institutions on the rights of indigenous peoples)

Chair: Mr Suhas Chakma

10 am to 1. pm

Continued discussion and adoption of the Draft Principles Relating to the Establishment of National Institutions on the Rights of Indigenous Peoples

Vote of thanks

1 pm

End of conference and lunch break



## Participants

Sl. No	Name	Organisation	Country
1	Mr. Hans Schoof	Head of Operations and First Counsellor, Delegation of the European Commission to India	
2	Ms. Renuka Srinivasan	Adviser - Thematic Budget Lines Delegation of the European Commission to India	
3	Prof. James Anaya	Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people	
4	Ms Taryn Lesser	Office of the UN High Commissioner for Human Rights	
5	Ms. Dipa Dixit	Member, National Commission for Protection of Child Rights on the Internally Displaced Children in India (NCPCR)	India
6	Ms Sarah Webster	ILO, Delhi	
7	Mr Arjun Limbu	Member, National Foundation for Development of Indigenous Nationalities (NFDIN)	Nepal
8	Mr. Miloon Kothari	Former UN Special Rapporteur on the right to adequate housing	India
9	Mr. Eugenio A. Insigne	Chairperson, National Commission for Indigenous Peoples (Philippines) & Member, UN Permanent Forum on Indigenous Issues (NCIP)	Philippines
10	Mr. Masli A. Quilaman	National Commission for Indigenous Peoples (Philippines) & Member, UN Permanent Forum on Indigenous Issues (NCIP)	Philippines
11	Mr. Edtami Mansayagan	Board of Trustees Foundation For The Philippines Environment (FPE)	Philippines
12	Mr Chandra Singh Kulung	Association of Nepal Kirat Kulung Language and Cultural Development	Nepal
13	Mr Ram Bahadur Thapa Magar	Nepal Federation of Indigenous Nationalities (NEFIN) Federal Council Secretariate	Nepal
14	Mr Bhim Rai	LAHURNIP - NEPAL	Nepal
15	Mr Rupan Chakma	UPDF	Bangladesh
16	Mr Swapan Debbarma	AITPN	India
17	Dr. Sukhendu Debbarma	Indigenous/Tribal Peoples Dev. Centre (ITPDC)	India
18	Mr Mangal Debbarma	AITPN	India
19	Ms Anthony Debbbarma	Borok People's Human Rights Organisation	India

Sl. No	Name	Organisation	Country
20	Mr Elvis Chorkey	MBDPF	India
21	Ms. Ammie Lunpuui	CPD	India
22	Ms Shiluina Jamir	Centre for Research, Documentation and Peoples Action (CRDPA)	India
23	Mr Shabda Rabha	ICITP-NEZ	India
24	Ms Dashalene R. Kharbetang	Tura Bar Association, Jura	India
25	Mr. Babloo Loitangbam	Executive Director Human Rights Alert ( HRA )	India
26	Ms C. Luithui	NPMHR	India
27	Mr Phamhring	NPMHR	India
28	Ms Alana	BCD	Burma
29	Sumshot Khular	CARD	India
30	Chochong	NCERT	India
31	Plato	CHRO	Burma
32	Thang Luai	CSYF	Burma
33	T. Ningreichon	NPMHR	India
34	Mr Sachin Kumar	Journalist, Jharkhand Jagran	
35	Mr T. Bobby	SIPHRO	India
36	Ms Grace T. Shatsang	NWUM	India
37	Ms. Neikesanuo Sorhie		India
38	Ms. Achan Mungleng		India
39	Mr. Mahipal Bhuriya	Director, Centre for Tribal Culture and Art	India
40	Elizabeth Jamatia		India
41	Mr. Suhas Chakma	ACHR	India
42	Mr. Tejang Chakma	AITPN	India
43	Mr. Chandrahash Chakma	AITPN	India
44	Mr. Prantap Kalra	Total Legal Solutions (TLS)	India
45	Mr. Amal Chakma	REEN	India
46	Mr. Santosh Chakma	AITPN	India
47	Mr. Jagdish Rawat	AITPN	India
48	Mr Onil K Shetrimayum	REACHOUT	India
49	Mr Jyotilal	REACHOUT	India
50	Mr L. Mandir Singh	RYDP – Hierk Manipur	India
51	Ms Hamari Jamatia	Indian Express	India
52	Mr Subimal Chakma	AITPN	India
53	Mr Weilesanuo Inlie	NPMHR	India
54	Mr Arup Debbarma	ACHR	India
55	Mr Nitesh Kumar Singh	Lawyer	India
56	Ms Gina Shangkhram	Indigenous Women Forum Nei	India
57	Ms Valleyrok Hungyo	TSL	India
58	Ms Hakshtri Jamatia		India

The Asian Indigenous and Tribal Peoples Network (AITPN) is an alliance of indigenous and tribal peoples' organisations and individual activists across the Asian region. It seeks to promote and protect the rights of indigenous and tribal peoples in Asia:

- by providing accurate and timely information to national human rights institutions, the United Nations and its specialised mechanisms, as appropriate;
- by conducting research, campaigning and lobbying on country situations or individual cases;
- by increasing the capacity of indigenous peoples through relevant training programmes for indigenous peoples' rights activists and community leaders;
- by providing legal, political and practical advice to indigenous peoples organisations;
- by providing input into international standard-setting processes on the rights of indigenous peoples; and
- by securing the economic, social and cultural rights of indigenous peoples through rights-based approaches to development.

AITPN has Special Consultative Status with the United Nations Economic and Social Council (ECOSOC).

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