

Submission to the Committee on the Elimination of all forms of
Racial Discrimination regarding

Discrimination against the Subanon of Mt Canatuan, Siocon,
Zambonga del Norte, Philippines in the context of large-scale gold
mining on their ancestral domain.

Committee on the Elimination of all forms of Racial Discrimination
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Executive Summary.

The Philippine Government last submitted a report to CERD in 1997. Among the concerns raised by the Committee were the impacts of development projects and the issuance of mining licences on indigenous peoples' lands¹. That same year the Philippines finally passed into law the Indigenous Peoples Rights Act (IPRA) (R.A. 8371). This was heralded as the enacting legislation to fulfil the promise of the 1987 Constitutional recognition of Indigenous Peoples' Ancestral Land rights. IPRA was modelled closely on the aspirations contained in the UN Draft Declaration on the Rights of Indigenous Peoples.

The Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples, Professor Rodolfo Stavenhagen, visited the Philippines in 2002 and highlighted the gap between the legislation and its implementation. He noted 'the human rights implications for indigenous communities of economic activities with the 'long-term devastating effects' of open-pit mining being 'of particular concern'². The Human Rights Committee echoed similar concerns regarding the lack of implementation of IPRA in relation to mining operations on indigenous peoples' lands³. The Special Rapporteur's follow up visit in 2007 confirmed that this implementation gap remains a serious issue⁴. Nowhere is this gap more evident than in the government's current policies with regard to mining on indigenous peoples' lands.

It is our submission that the case of the Subanon on Mount Canatuan is, in effect, acting as a test case for the Government of the Philippines in their efforts to develop a 'model' for dealing with indigenous communities that enables mining developments to proceed even where communities have not granted their consent.

The Subanon have pursued every avenue within the law since 1987 to gain government recognition of their rights to their ancestral domain. As a result of their on-going effort, they were among the first indigenous communities in the Philippines to be awarded a Certificate of Ancestral Domain Title. However, mining has been permitted to proceed on their ancestral lands without their consent, resulting in the violation of their rights, inter alia, to land and resources, to free prior informed consent (FPIC), to culture, to self-determination, to security, to a healthy environment, to livelihoods, to food, to health, to property, to development and to religion.

¹ Concluding observations of the Committee on the Elimination of Racial Discrimination : Philippines. 15/10/97. CERD/C/304/Add.34. (Concluding Observations/Comments) para 17 and Summary record of the 1219th meeting : Philippines. 11/08/97. CERD/C/SR.1219. (Summary Record) para 57

² Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mission to Philippines (2002) E/CN.4/2003/90 /Add 3

³ In 2002 the Human Rights Committee expressed concern 'human rights implications for indigenous groups of economic activities, such as mining operations' requesting that the IPRA be effectively enforced, the capacity of the NCIP be strengthened and that 'indigenous peoples' land and resource rights enjoy adequate protection in relation to mining and other competing usage'. Concluding observations of the Human Rights Committee: Philippines : Philippines. 01/12/2003. CCPR/CO/79/PHL. (Concluding Observations/Comments) para 16

⁴ Oral statement by Mr. Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. 6th Item On The Agenda: Half-Day Discussion On Asia. New York, 21 May 2007 pg 3 'But experience has shown that, even when specific legislation exists, such as the 1997 Indigenous Peoples Rights Act in the Philippines...there still remain serious problems with regard to their effective implementation' Cordillera Peoples Alliance 'UN Special Rapporteur on Indigenous Peoples The Pattern of Human Rights Violations of Indigenous Peoples Continues' February 8, 2007 reported that the Special Rapporteur described 'a deterioration in the human rights situation of indigenous peoples' and 'a legal framework of current economic policies that favour the dispossession of indigenous lands and resources for the benefit of a handful of international corporations or other private interests'

Under the 1995 Mining Act (R.A. 7942), indigenous peoples must give their prior consent⁵ before any ancestral lands can be opened to mining. At Mount Canatuan, a mining permit was issued in 1996 without the Subanon's consent even being sought. IPRA, enacted in 1997, requires FPIC for any development projects on indigenous peoples' ancestral lands.

In 2002, the National Commission on Indigenous Peoples (NCIP) - the government agency mandated under IPRA to uphold and protect indigenous peoples' rights - facilitated the creation of a new body with no status in indigenous structure, which was supposedly 'representative' of the Subanon at Canatuan. This body, named the 'Siocon Council of Elders' (CoE), subsequently entered into a Memorandum of Agreement with TVI Resource Development Phils, a subsidiary of the Canadian mining company, TVI Pacific, enabling mining operations to proceed. This was done despite the objections of the recognised indigenous Subanon leadership and many of the ancestral land holders, and without adherence to the provisions of FPIC under IPRA requiring 'respect for customary law' and decisions based on the 'consensus of all'.

Concerned with these violations of their customary laws, the Subanon's highest judicial body, the Gukom of the Seven Rivers⁶, convened in 2004. It demanded that the traditional leaders be respected and that FPIC be sought. It instructed the NCIP to declare the Siocon CoE 'null and void' and to nullify all agreements entered into by it. The NCIP has, to date, taken no action on the clear instructions it received from the Subanon judicial body. Instead, it has continued to recognize the illegitimate Siocon CoE and thereby allowed mining to proceed in contravention of the expressed wishes of the ancestral land holders and Subanon customary law.

Mount Canatuan has been, since time immemorial, the sacred mountain of the Subanon; its peak was their altar. Its sacredness was communicated to the NCIP and the Department of the Environment and Natural Resources (DENR), the Government bodies and agencies responsible for ensuring the mining application process respects indigenous peoples' rights. IPRA guarantees respect for indigenous peoples' right to 'maintain, protect and have access to their religious and cultural sites'. However, despite the repeated cries of the Subanon to protect their sacred site, mining operations at Mount Canatuan were allowed to proceed to destroy it and to deny its religious significance.

The Zambonga peninsula is a recognised conflict zone. The World Bank Extractive Industry Review strongly recommended against mining in such conflict areas, particularly when on indigenous peoples' lands⁷. The Special Rapporteur on Indigenous Peoples noted on his visit to the Philippines that 'militarization of indigenous areas is a grave human rights problem', making explicit reference to the 'so-called paramilitaries' that are employed at Canatuan. TVI has occupied the Subanon's land and secured its presence by deploying a 160 strong heavily armed paramilitary force, paid by the company but armed, trained and supported by the Philippine military. This force stands accused of numerous human rights abuses. Even the Philippines' Commission on Human Rights has documented these, but to date no effective action has been taken.

⁵ Section 16 of the 1995 Mining Act (Republic Act 7942) which requires that 'No ancestral lands shall be opened for mining operations without the prior consent of the indigenous cultural communities'

⁶ In the Pito Kodolongan (seven rivers) area where Mt Canatuan is located this body is the 'Gukom of the Seven Traditional Councils of the Seven Rivers' (here shorten to the 'Gukom of the Seven Rivers'). It is the highest Subanon judicial body in this area and comprises of all the timuay (leaders) in the area.

⁷ The World Bank Extractive Industry Review (pg viii) included in its minimum core criteria, when determining countries where mining should be supported, 'the absence of armed conflict or of a high risk of such conflict' and 'recognition of and willingness to protect the rights of indigenous peoples'.

The Subanon have used every legal avenue available to them to protect their rights and to seek redress for violations perpetrated against them. These actions, including injunctions filed against mining and quo-warranto cases challenging the legitimacy of those claiming to represent the Subanon, have been rendered useless through court inaction. As was evident in the highly controversial reversal of the Supreme Court decision involving mining on B'laan tribal land, this discrimination appears to extend even to the highest courts.

The influence of the increasingly discriminatory position of the government towards indigenous peoples can be traced through the constant revisions of the FPIC implementing guidelines which have gradually evolved into a set of rules that impose restrictions on the time, manner and process of FPIC which are not in conformity with the customs, laws and traditional practices of indigenous communities. These FPIC rules work against the spirit and the letter of the IPRA. Instead, they seem to be more a reflection of the government's policy in relation to the promotion of extractive industries.

TVI is already profiting from operating its mine. The company is now seeking to expand both at Canatuan and in other adjacent areas covered by other ancestral domain claims, without any resolution of the previous abuses and the on-going disputes at Canatuan. The company is supposedly obliged to acquire the FPIC of all the Subanon groups covered by the expansion but, due to their past experience and the weakening of the FPIC implementing guidelines, the Subanon are gravely concerned that their opposition will once again be disregarded.

The Government of Canada has been unhelpful by being directly and uncritically supportive of the company, and has even commended TVI's paramilitary force.

Irreparable harm has already been caused to the Subanon people. The Philippine Government's actions continue to constitute serious on-going violations of its obligations under the Convention. It is the opinion of the submitting organizations that the current mining plan of the Government of the Philippines poses a grave and immediate threat to the rights of the Subanon and of many indigenous peoples in the Philippines. We believe urgent action is necessary in this new era of respect for indigenous peoples' rights if these rights, now increasingly recognized and guaranteed in law, are not to be rendered useless by the discriminatory economic policies and vested interests of their governments.

The submitting groups believe that the following actions would help address the immediate concerns of the Subanon and other indigenous peoples in the Philippines and prevent continued serious violations of the Convention.

1. Urge the Philippine Government to call a halt to current operations on Mount Canatuan and any planned expansions in the surrounding area.
2. Call on the Government of the Philippines to adhere to its obligations under CERD to provide a timely country report addressing the violation of the Subanon's rights, what measures it has taken to uphold and protect indigenous peoples and their access to justice and the role of indigenous judicial systems.
3. Urge the NCIP to revoke the discriminatory provisions in the FPIC implementing rules and regulations and guidelines.
4. Urge the Government of the Philippines to ensure that its agencies and bodies function in accordance with their mandate, and are held accountable for breaches thereof.
5. Urge the Philippine Government to respect and uphold the ruling of the indigenous courts, and specifically the ruling of the Gukom promulgated in June 2004.
6. Reaffirm the Committee's recommendation to the Government of Canada in relation to

holding its transnational corporations to account. Also, request that the Government of Canada investigate TVI's actions, ensuring the involvement of all affected parties in such an investigation, and until such a time as this investigation is completed to avoid any support for TVI.

7. Address the issue of discrimination with regard to indigenous religions and beliefs, and call for the respectful restoration of Mount Canatuan based on plans overseen by the local Subanon.
8. Draw the attention of the UN Secretary General, the Human Rights Council, the Permanent Forum on Indigenous Issues, the Office of the High Commissioner for Human Rights and the appropriate Special Rapporteurs to the serious and urgent situation facing indigenous peoples in the Philippines who are affected by mining developments.

Submitting Organizations

This Submission is being made by the following seven organizations. They represent a combination of local, national and international Indigenous Peoples organizations, as well as national and international NGOs and one academic institution:

Apu Manglang Glupa' Pusaka (AMGP) is the Subanon community who holds the relevant Certificate of Ancestral Domain Title, which covers 8,213 hectares, including Mt. Canatuan. They are the descendants of Apu Manglang, and members of the greater Subanon territory that is the Pito Kodolongan (Seven Rivers). They have been continuously asserting their rights as indigenous peoples against TVI Resource Development Inc. who operates an open pit mine within their ancestral domain without their consent, and against the government agencies and bureaus who facilitated this violation. Address: Sitio Paduan, Brgy. Candiz, Siocon, Zamboanga del Norte

Tupo Nog Pito Kobogolalan Pogokbit Nog Gulal Sog Pito Kodolongan (Gukom of the Seven Traditional Councils of the Seven Rivers), or simply Gukom, is composed of the timuays of all the dulongans, or rivers, of the southern regions of the bangsa Subanon (Subanon Nation). The Gukom sits as a judicial body of the Subanon traditional justice system. The Gukom hears and decides controversies involving different Subanon Timuay within the Seven Rivers area, or those affecting the whole region. Address: Baliwasan Chico cor. San Jose Road, Zamboanga City

Pigsalabukan Bangsa Subanon (PBS) or Confederacy of the Subanon People is an organization of indigenous Subanon people in the whole Zamboanga peninsula. It aims to unite, empower and improve the lives of the Subanon people by securing their rights and control over their ancestral domain and exercising self-governance based on their culture and tradition in their territories. Address: Purok Quezon, Sto. Nino District, Pagadian City. Tel No: +63 62 353 1480

Legal Rights and Natural Resources Center /Kasama sa Kalikasan/Friends of the Earth Philippines (LRC-KsK/FOE Phils.) is a policy and legal research and advocacy institution. The Center's main advocacy has been that recognition and protection of the rights of indigenous peoples, rural communities and other long-term occupants of forests and uplands should be the main, if not the primary components of any program on sustainable development. Address 26 Matalino St., East Central District, Diliman Quezon City Philippines, Tel No. +63 2 928 1372 Website: www.lrcksk.org

Tebtebba Foundation Indigenous Peoples' International Centre for Policy Research and Education is an indigenous peoples' organization born out of the need for heightened advocacy to have the rights of indigenous peoples recognized, respected and protected worldwide. Address No. 1 Roman Ayson Rd., 2600, Baguio City, Philippines Tel No. +63 74 4447703 Website: www.tebtebba.org e-mail: tebtebba@skyinet.net

Indigenous Peoples Links is a human rights organisation based in the United Kingdom and founded in response to a request from Indigenous organisations in the Philippines. It is focused on providing support for Indigenous Peoples in the protection and promotion of their rights. Address: 72 Chute House, Stockwell Park Estate, London SW9 0HG, Tel No: +44 207 326 0363 email: geoff@piplinks.org

Irish Centre for Human Rights is dedicated to the study and promotion of human rights and humanitarian law. Address: Irish Centre for Human Rights, National University of Ireland, Galway, Ireland. Tel No: +353 91 493948, E-mail: humanrights@nuigalway.ie Website: http://www.nuigalway.ie/human_rights/index.html

Introduction.

1. The total population of the Philippines is now approximately 90 million. Up to 15 percent of this total are members of one of more than 90 indigenous groups. They are historically distinct from the majority of Filipinos, in their success in resisting or avoiding incorporation into the Spanish colonial administration of the Philippines. Indigenous peoples are still in effective occupation of their ancestral lands throughout the archipelago, especially in interior mountainous areas. The 20th Century saw an increased acceleration of dispossession of indigenous peoples from their lands and exploitation by outsiders of their land, forestry, mineral and hydro resources to fuel development for others. In terms of basic standards of educational attainment, infrastructure and social service provision, income and other indicators indigenous peoples in the Philippines continue to be among the most marginalized and deprived.

2. One major concentration of indigenous populations is found in the southern island of Mindanao. These include the Subanon peoples on the Zamboanga peninsula. The estimated Subanon population is in excess of 330,000. This makes them one of the more numerous of the Philippine indigenous groups. The traditional religion of the Subanon remains strong in many regions, including the area around Canatuan which is the focus of this submission. Much ancestral land has been lost to encroachment by settlers and expropriation for various developments. The peninsula was, and is, a conflict zone. There is a history of armed conflict especially between the Government and the Moro Islamic peoples.

Philippine Government measures.

3. The Philippine Government last submitted a report to CERD in 1997. That same year the Philippines finally passed into law the Indigenous Peoples Rights Act (IPRA) (R.A. 8371). This was heralded as the enacting legislation to fulfil the promise of the 1987 Constitutional recognition of Indigenous Peoples' Ancestral Land Rights. IPRA contains provisions that closely parallel the UN Draft Declaration on the Rights of Indigenous Peoples.

4. In its concluding observations to the Philippines Government in 1997 the CERD committee raised its concerns in relation to the negative impacts development projects were having on the country's indigenous peoples⁸. The Committee requested that the State party cover these issues in its subsequent periodic report. The Government has since failed to file a report.

5. As this submission attempts to highlight, in the intervening decade discrimination against indigenous peoples, particularly in the context of development projects, has become increasingly pervasive. This is highlighted by, but sadly not confined to, the case of the Subanon of Canatuan. The Government of the Philippines has continued to fail to adhere to its obligations under the CERD and under its own Constitution and national legislation to protect, respect and fulfil the rights of its indigenous peoples. The impact of this lack of respect and protection of indigenous peoples' rights, which is premised on discriminatory attitudes towards them, is particularly acute in the context of extractive industries.

6. During the 1997 discussion with the Government of the Philippines, the CERD country rapporteur stated that "*a reply to his question about the requests by the Lumads for the revocation of permits secured by companies and individuals to operate logging and mining operations, inter alia, within the tribal territories, would also be useful.*" The State party was also urged to address

⁸ Para 17. In connection with article 5 (d) (I) (v) of the Convention, concern is expressed at reports of forced evictions and displacements of indigenous populations in development zones, as well as at reports that specific groups of indigenous peoples have been denied by force the right to return to some of their ancestral lands.

this issues in its next periodic report. The Subanon at Mt Canatuan were one of the Lumad groups requesting that the mining permit on their land be revoked. They are still making the same request today

Mining in the Philippines

7. The search for gold was a major force behind colonial annexation of the Philippines. Much of the country's mineral wealth is found within indigenous peoples' territories. Mining has a long and very poor record in the Philippines as a result of the massive social and environmental problems it has caused historically. Records kept by the United Nations Environmental Programme (UNEP) reveal the Philippines to be among the worst countries in the world with regard to the failures of contained mining waste (known as tailings).

8. In spite of this, since the early 1990s, the Government of the Philippines, supported by such organisations as the World Bank, the Asian Development Bank, has been pursuing an aggressive policy to revitalize the mining industry, by attracting foreign investment through tax benefits and other incentives. Billions of dollars in investments have been promised and a total of 2,000 mining permit applications are pending. The government has promised that mining will be carried out to the highest international standards. Yet conditions in the country make such a commitment difficult to uphold. The Philippines is relatively small in land area, made up of many islands, suffers strong seasonal typhoons, is subject to seismic activity and is densely populated with many millions, including the Indigenous populations, depending heavily on the health of the environment for their survival.

9. Critics of the mining plan say there is scant evidence of economic benefit to the Philippines at the national level. At the local level, evidence of the detrimental economic, environmental and social impact is widespread. The 'streamlining' of the mining application process has become synonymous with a relaxing of environmental laws, combined with attempts to undermine the legal protections afforded to indigenous peoples.

10. By law⁹, it is required that indigenous peoples give their free, prior, informed consent (FPIC) before any projects proceed within their territories. However, reports from communities of legal guidelines being violated and consent being 'engineered' are all too common. In addition, discriminatory clauses have been introduced into the FPIC implementing guidelines that go against the intent of the law. Mining is also pursued in conflict zones, such as at Canatuan, a practice contrary to the recommendations of the World Bank-commissioned Extractive Industry Review (EIR).

11. The submitting organisations believe the Government's current mining plans pose a grave and immediate threat to the rights of the Subanon and of all indigenous peoples across the Philippines. It is our submission that the case of the Subanon on Mount Canatuan is in effect acting as a test-case for the Government of the Philippines in their efforts to develop a 'model' for dealing with indigenous communities' that enables mining developments to proceed even where communities have not granted their consent.

12. We believe urgent action is necessary in this new era of respect for indigenous peoples' rights if these rights, now increasingly recognized and guaranteed in law, are not to be rendered useless by the discriminatory economic policies of their governments and the vested interests of multinational corporations.

⁹ Mining Code R.A.7942 1995 and Indigenous Peoples Rights Act R.A.8371 both require indigenous consent to mining.

Self Determination and Decision Making

13. The Philippines has ratified the major UN human rights treaties¹⁰ and these international law instruments form part of the laws of the land. The 1987 Constitution of the Philippines, in line with international law, recognizes and promotes the rights of indigenous cultural communities. International law instruments such as the ILO Convention 169 and the UN Draft Declaration on the Rights of Indigenous Peoples form the basis of its provisions related to indigenous peoples.

14. The Constitution upholds **the right to practice their customary laws governing their ancestral domain** (Article XII Section 5 - *The Congress may provide for the applicability of customary laws governing property rights and relations in determining the ownership and extent of ancestral domain*) and guarantees **respect for their traditional institutions** which are necessary for the administration and promulgation of same. (Article XIV, Section 17 *'The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions'* and Article II, Section 22 *'The state recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development'*)

15. The Indigenous Peoples Rights Act (IPRA) was enacted to facilitate compliance with these obligations and requires (SEC. 13. Self-Governance) that ***'the State recognizes the inherent right of ICCs/IPs to self-governance and self-determination and respects the integrity of their values, practices and institutions'***. It also requires recognition of indigenous customary law *'The State shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social and cultural well being and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.'* (General Provisions Section 2 b).

16. IPRA also requires that where development projects impact on indigenous peoples that their FPIC be sought *'in accordance with their respective customary laws and practices'*. Furthermore, it requires that negotiations with regard to *'the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures'* be pursuant to customary laws.

17. The Subanon indigenous peoples have occupied, used and protected their territories, including

¹⁰ The Philippine has ratified all of the UN Human Rights Treaties (see Appendix 9 Human Rights Treaties for ratification dates).

Common Article 1 of the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights guarantees the right to self-determination to all peoples. The bodies responsible for elaboration of the normative content of these covenants, the Human Rights Committee (HRC) for the ICCPR and the Committee on Economic Social and Cultural Rights (CESCR) for the ICESCR have recognized the right as being applicable to indigenous peoples.

In its General Comment No 23 the Committee on the Elimination of Racial Discrimination highlighted indigenous peoples right to 'practice and revitalize their traditional cultural traditions and customs', their right to free, prior, informed, consent and their right to sustainable development 'compatible with their cultural characteristics'.

The UN Declaration on Indigenous Peoples, as adopted by the UN Human Rights Council in 2006 contains requirements to respect customary laws and traditional institutions, requiring for example that legal recognition and protection accorded to indigenous peoples lands, territories and resources shall be 'conducted with due respect to the[ir] customs, traditions and land tenure systems' and that States ensure 'due recognition to indigenous peoples' laws, traditions, customs and land tenure systems'.

Likewise ILO Convention 169, while not ratified by the Philippines represents an authoritative reference on Indigenous and Tribal Peoples rights, requires that 'In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws' and that indigenous peoples 'shall have the right to retain their own customs and institutions'.

Mount Canatuan, since time immemorial. The Canatuan area is part of the southern Subanon region. They are linked genealogically and culturally to the Seven Rivers region and Seven Rivers Council (Tupo Nog Pito Kobogolalan Pogokbit Nog Gulal Sog Pito Kodolongan) which is their recognised authority for dispute settlement and collective action.

Traditional Subanon Institutions and Customary Law

18. Subanon indigenous institutions and organisations are still in operation in the Canatuan area, as they were when the mine was first proposed. Each territory is led by a Timuay, who is chosen on the basis of genealogy and certain other criteria in accordance with Subanon customary law. He is supported by a group of leaders, whom he appoints and who are validated by the community.

19. In 1987 a new Philippine Constitution was formulated and adopted. For the first time recognition of ancestral land rights was included in its provisions. The Subanon of this region pursued all available legal means, fulfilling the requirements of successive legislative acts, to secure recognition of their land rights. They applied for a Community Forestry Stewardship agreement (CFSA) in 1992, converted it to a Certificate of Ancestral Domain Claim (CADC) in 1993 as soon as the associated bureaucratic procedures made this possible. This was granted by the DENR in 1997. Immediately following the enactment of IPRA, the Subanon applied to have their CADC converted into a Certificate of Ancestral Domain Title (CADT)¹¹. As a result of their efforts they were among the first indigenous communities in the Philippines to be awarded a Certificate of Ancestral Domain Title in 2003.

20. The entry of large-scale mining operations into Mount Canatuan was facilitated through a parallel process during the 1990s by which the government offices within the DENR granted mining rights within the ancestral lands of the Subanon, but did so without their agreement. TVI first occupied the area in 1994. The deployment of armed security and other controversial tactics were used to secure their presence, resulting in human rights abuses and creating divisions within the community.

21. Both the 1995 Mining Act and IPRA require indigenous peoples consent before mining can proceed on their ancestral lands. The Subanon leadership filed petitions and raised legal challenges to try to make the outside world aware of their sustained opposition. Their appeals to the law were rendered completely ineffective due to court inaction. In 1999, the local Subanon staged a picket to prevent the entry of company hired drilling equipment onto their ancestral lands. They were beaten, tied and corralled by a mixed force of police and company security. During 2000 and 2001, the Subanon sent representatives to Canada and to the United Nations Working Group on Indigenous Populations (UNWGIP) in Geneva to register their sustained opposition to mining and invited the Canadian Government and UN to visit and investigate the real situation.

22. As a result of the Subanon intervention at the UNWGIP the Philippine Commission for Human Rights sent an investigative team to the area in 2002. Among the conclusions reached by the team were that the problems stemmed from “*The approval of the MPSA [mining permit] by the DENR on October 23 1996 covering an area of 508.34 hectares within the ancestral land of*

¹¹ Successive legislation included the 1982 Presidential Decree No. 1260 or the Integrated Social Forestry Program (ISFP) providing for CFSA application; January 1993 DENR Administrative Order No. 02 series of 1993 (DAO 2 – 1993) entitled, Rules and Regulations for the Identification, Delineation and Recognition of Ancestral Land and Domains providing for CFSA to CADC conversion and October 1997 Indigenous Peoples Rights Act providing for CADC to CADT conversion

*the Subanon in Tabayo Siocon Zambonga del Norte;
The violation committed by TVI and its personnel to include the company guards and the Special Civilian Armed Auxiliary (SCAA) who are assisting the company guards;
The failure of the TVI to obtain free prior consent from the indigenous people as the law requires”¹²*

23. An earlier report by the Commission had concluded that *‘at the root of the problem is the granting of Mineral Production Sharing Agreement with the TVI. The latter’s presence and occupation in the area is opposed by majority of Canatuan residents specially the Subanons who believed that the impending mining activity in the area will possibly destroy their area and so with their environment which they all cherish...it is believed that [the cancellation or revocation the MPSA] will finally restore peace and tranquillity in Canatuan’¹³*

Failure of Government Agencies to Protect

24. As recognized by the CHR, it was the failure on the part of the responsible Government bodies that resulted in the denial of the Subanon’s right to informed consent prior to the granting of the MPSA at Mt Canatuan, which in turn was the cause of the subsequent violations of the Subanons rights. The Subanon had held the mountain since time immemorial. They had filed their CFSA and CADC applications with the DENR prior to the approval of the mining licence (MPSA) and there was therefore an obligation on the Government to ensure the consent of the Subanon was obtained under the Constitution, the 1995 Mining Act¹⁴ and in accordance with their rights as CFSA and CADC applicants. Even though the Subanon had been actively engaging with the DENR and other government agencies throughout the 1990s, the MGB still failed to consider the presence of an indigenous community when considering and granting the application of TVI for the MPSA in 1996.

Representation – The ‘Rightful’ Subanon

25. In 2001 a pro-company group, predominantly consisting of Subanon from outside ancestral domain, emerged to oppose the Subanon traditional authority thereby creating a division in the community. In 2002 the NCIP, faced with these counter claims took the initiative of creating a so-called “Siocon Council of Elders” (CoE)¹⁵. This group incorporated both the indigenous leadership opposed to the mine and a pro-mining group including some Subanon employees of the company. In initiating the creation of this Council of Elders the NCIP effectively declared itself competent to unilaterally determine questions of legitimacy of indigenous leadership.

26. IPRA’s FPIC guidelines lay down the criteria to be followed when seeking the consent of indigenous communities. To safeguard the rights of indigenous peoples, the FPIC guidelines, in addition to requiring adherence to customary law, require that all meetings ‘be conducted within the host community’ and that the leaders conduct a consensus building exercise ‘with their members in the community employing their own traditional consensus building processes’. In September 2002, the NCIP convened the first meeting of this new grouping. In accordance with the standards laid down in the IPRA law, this meeting took place within the ancestral domain and before the whole community¹⁶.

¹² Commission on Human Rights Case No IX 2002-1770 Resolution In the matter of investigation conducted on the Subanon Case at Tabayo, Siocon, Zambonga del Norte 27 May 2002. The team also concluded that ‘The influence by the small-scale miners to the indigenous community which further aggravate and complicate the situation’

¹³ Interview with Leo Jasareno MGB Chief of Mining Tenements Management Division

¹⁴ Section 16 1995 Mining Act RA7942

¹⁵ This was a recommendation of a joint fact finding mission of the NCIP and the Office of the Presidential Assistance for the Peace Process.

¹⁶ The outcome was the adoption of a consensus-based resolution rejecting destructive mining

27. In October 2002, a second meeting was called by NCIP. However, the venue, being in a hotel in Zamboanga City, was far removed from the ancestral domain and did not include community observers. It was claimed that the location was chosen to facilitate the attendance of a dignitary to take part in a largely ceremonial inaugural programme. At this meeting a motion was proposed by a TVI employee to allow the mining operations of TVI. Despite strong objection to this proposal, a vote was forced in contravention of IPRA's requirements as well as Subanon traditional practices. 16 out of the 30 members voted in favour and the resolution allowing mining was adopted in the absence of a consensus being reached.

28. Despite the legal anomalies and the manipulation of the process by those in favour of the mine, the bare majority vote at this meeting, was immediately recognised and accepted by the NCIP and the Mine and Geosciences Bureau (MGB) / DENR and other government agencies. It forms the basis of claims of the company, the government and others that the project has the legitimate consent of the Subanon. The resolution passed at this meeting was used as the basis for the Memorandum of Agreement (MoA) subsequently signed between TVI and the CoE, to which the NCIP was also a party.

29. In 2003, the Gukom of the Seven Rivers, the highest Subanon judicial authority in the area, informed the NCIP of its concern over the manipulation and misuse of indigenous structures and processes and determined to examine the case. IPRA provides for indigenous determination over counter claim of leadership in the community. The legal office of the NCIP formally recognized the authority of the Gukom to settle the dispute according to their customary law and also stated that *'any judgment arrived at by the Gukom may be referred to the NCIP for enforcement'*. The Gukom met in January and February 2004 to hear statements and determine the lineage and entitlements of the "council of elders" members. In June 2004, it ruled that the Siocon Council of Elders formed at the instigation of the NCIP in 2002 was illegitimate on the grounds that it had no precedent in Subanon traditional culture, the vast majority of its members, 21 out of a total of 30, were not of timuay lineage and a number of its members were not even from the Canatuan area.

30. In the ruling the Gukom described the Siocon Council of Elders as *'illegitimate, illegal and an affront to the customs, traditions and practices of the Subanon'*. It instructed the NCIP to *'immediately declare that Siocon Council of Elders NULL and VOID and to restrain it from representing the Subanon community of Canatuan and within areas covered by CADT No. R09-S10-04-03-00005 specially in dealing with TVI'* adding that *'Since it was created under the auspices of NCIP'* that the NCIP *'should officially and immediately cause its disbandment and the official nullification of all agreements, contracts or other instruments entered by it'* In the Gokum's eyes failure to do so was *'tantamount to [the NCIPs] self-repudiation of its General Mandate'*

31. The Gukom also verified the lineage of Timuay Jose Boy Anoy and his status as a traditional leader at Canatuan and stated its strong belief that the CADT recognized the legitimate Subanon leaders *'whose existence predates the issuance of TVI's MPSA, hence, the need for TVI to secure the FREE and PRIOR INFORMED CONSENT from the legitimate Subanon leaders.'* (see Appendix 2: Gukom Assembly Resolution)

32. The decision of the Gukom was forwarded to the NCIP. However, no action was taken. Moreover, rather than adhere to its obligations under its mandate to protect and uphold Subanon's rights, the NCIP instead continued to bestow legitimacy on the CoE by attending its monthly meetings and continuing to acknowledge the CoE - signed MoA as a manifestation of the Subanon's consent.

Reliance on Discriminatory Clause in IPRA

33. While IPRA has been recognized as a landmark piece of legislation, its progressive provisions on Ancestral Domain rights are, to a certain extent undermined, by a clause pertaining to prior vested rights which is discriminatory against indigenous peoples constitutionally guaranteed property rights, right to due process and equal protection of the law (Section 56 Existing Property Rights Regimes). This clause, to which indigenous peoples rights to their ancestral domain are made subject to, requires that ‘property rights within the ancestral domains already existing and/or vested upon effectivity of this Act, shall be recognized and respected’.

34. However, the rights of indigenous communities while elaborated in the 1997 IPRA legislation do not stem from, or start with, that legislation. The 1987 Constitution clearly “recognises” ancestral land rights rather than granting these rights. The requirement to consult with, and seek the consent of, the community within an ancestral territory is based on the long-standing right of the people as original owners of the land since time immemorial. The Subanon have consistently upheld this point.

35. While IPRA does not explicitly state that the right to FPIC is subject to Section 56, this the interpretation advocated by the mining companies, including TVI. Rather than challenge this discriminatory interpretation of IPRA’s Section 56 and its implications for FPIC, the NCIP has instead affirmed it. Such a stance from the body mandated to uphold indigenous peoples rights is of particular concern.

36. It is this discriminatory interpretation that has been invoked by the Canadian company operating in Mt Canatuan which has argued that, as it had obtained a mining concession one year before the passage of the IPRA in 1997 it is not obligated to honour its provisions and did not need to secure FPIC.

37. The company’s opinion pertaining to its obligations under IPRA, notwithstanding it is clearly obliged to obtain the consent of the ‘rightful’ Subanon under Section 16 of the 1995 Mining Act which requires that *‘No ancestral lands shall be opened for mining operations without the prior consent of the indigenous cultural communities’*. The 1987 Constitution of the Philippines also formally recognizes Indigenous Peoples ancestral land rights.

FPIC – Implementing Rules and Regulations

38. The CERD committee in its General Recommendation 23 recognized the need for States to obtain the Free Prior Informed Consent (FPIC) of indigenous peoples in decisions pertaining to their lands and natural resources. Leading academics, such as James Anaya, have put forward the case that we are witnessing the development of an international norm requiring the consent of indigenous peoples when their property rights are impacted by natural resource extraction¹⁷. The increasing level of attention given to FPIC at various international, regional and national fora in recent years has led the Working Group on Indigenous Populations to conclude that this *‘underscores the evolution and crystallization of this right [to FPIC] as a norm and a standard to be applied in relation to indigenous peoples in pursuit of social and environmental justice, and*

¹⁷ James Anaya Indigenous Peoples’ Participatory Rights in Relation to Decisions about Natural Resource Extraction: The more Fundamental Issues of what right Indigenous Peoples have in Lands and Resources 22 (2005) Arizona Journal of International and Comparative Law p7

*human rights for all.’*¹⁸

39. The Philippines is one of the States where legislation has been enacted guaranteeing the right to FPIC. The 1995 Mining Act and the 1997 Indigenous Peoples Right Act both require FPIC of indigenous peoples in the context of mining operations on their lands. The Indigenous Peoples Right Act of 1997 defines Free Prior and Informed consent as *“the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices free from any external manipulation, interference, coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community - Sec. 3(g).*

FPIC Implementing Guidelines

40. Since the issuance of the Implementing Rules and Regulations (IRRs) in 1998, the FPIC implementing rules and regulations have been revised on two occasions, first in 2002 and subsequently, in 2006¹⁹. The process followed by the NCIP in the revision of the guidelines lacks transparency and does not provide for sufficient participation of indigenous peoples. The 2006 FPIC revisions followed promises made in the Executive Order 270 / 270-A, the National Policy Agenda on Revitalizing Mining in the Philippines and the Mineral Action Plan to the mining industry to further ‘streamline’ mining permitting processes and ‘harmonize’ IPRA with the Mining Act.

41. As with the original IRRs and the 2002 revisions, the 2006 FPIC Guidelines are symptomatic of the NCIP’s lack of understanding and appreciation of indigenous peoples’ cultures and identities. As a result of this failure or unwillingness on the part of the NCIP to respect the principles of FPIC embedded in IPRA, its implementing guidelines have gradually evolved into a highly discriminatory set of rules which impose restrictions on the time, manner and process of FPIC which are not in conformity with the customs, laws and traditional practices of indigenous communities. They clearly work against the spirit and the letter of the IPRA on FPIC and instead reflect the government’s shift of policy with regard to indigenous communities in relation to extractive industries.

42. Among the recently introduced discriminatory requirements are the following:

a) Exclusion of non-titled Ancestral Domains from FPIC processes: The new guidelines provide for a ‘Master List of Ancestral Domain Areas’ on which only those known indigenous communities, i.e. those who have obtained or applied for their ancestral domain titles, will appear. These will be provided with the opportunity to exercise their right to FPIC. In all other cases it will be assumed that there is no overlap of mine application with an ancestral domain unless ‘it be found later that there is’. This violates the very essence of Native Title / Carino Doctrine which is acknowledged by IPRA as the basis for ancestral land rights. It utterly discriminates against the inherent rights of indigenous peoples to lands they traditionally occupy, use or otherwise acquired. It represents a fundamental change from the previous requirement to assume there is an indigenous territory ‘unless otherwise proven’, and shifts the burden of proof and responsibility from the Government to the indigenous community. The non-initiation of an FPIC process simply due to lack of formal claim or title is clearly discriminatory against indigenous peoples and increases the risk of granting mining permits without obtaining their consent.

b) The new guidelines require that in cases where the outcome of the FPIC process is to deny

¹⁸ WGIP Standard-Setting Legal Commentary on the Concept of Free, Prior and Informed Consent Expanded Working Paper submitted by Mrs. Antoanella-Iulia Motoc E/CN.4/Sub.2/AC.4/2005/WP.1 14 July 2005 para 6

¹⁹ NCIP Administrative Order No. 3 Series and NCIP Administrative Order No 1, 2006

consent, indigenous communities are required to ‘issue a Resolution of Non-Consent containing the reasons for such denial’ to which the applicant can provide a counter proposal. *‘If the reasons for the denial of the consent is something that the applicant can readily address or a counterproposal or new proposal is made by the applicant’* the community has to decide within only 15 days if they accept the proposal. This requirement effectively shifts the burden to the community to come up with a ‘valid’ reason for denial of their consent and increases the leverage that the applicant has to pressurise indigenous communities and leaders into acceptance of their proposals.

43. Other aspects of the 2006 guidelines, which go against the underlying principles of IPRA and customary law, relate to rules specifying which members of an ancestral domain should be involved in FPIC process, the requirement for indigenous peoples to submit a written petitions in order to exercise priority right within their own ancestral domains and the introduction of a less stringent FPIC process for ‘small scale’ activities. (See Appendix 6 Critique on the 2006 Free Prior Informed Consent Guidelines for further analysis of the current guidelines).

44. The 2002 Guidelines introduced a discriminatory imposition of minimal timeframes on each step of the FPIC process. This is a practice that is clearly incompatible with the underlying premise of IPRA that FPIC ‘be determined in accordance with their respective customary laws and practices’. The 2006 version of the guidelines includes additional time restrictions. The implementing rules and regulations also provide for the transfer of FPIC, without community consent or consultation, from one entity to another in the event of corporate merger, acquisition or transfer of rights.

Destruction of a Sacred Site

45. Sustainable development in the context of indigenous peoples has particular and fundamental attributes that are recognized by both international law and the legislation of the Philippines. These attributes are commensurate with the unique problems that indigenous peoples face. One such attribute recognized in international human rights law is the requirement to ensure protection for indigenous peoples sacred sites. One of the major problems arising in extractive projects on indigenous lands, when implemented without their Free Prior Informed Consent, is the lack of respect for the religious beliefs and practices of indigenous peoples. Failure to protect against the associated discriminatory practices has resulted the desecration and, as was the case at Mt Canatuan, the destruction of indigenous peoples sacred sites.

46. International law recognizes the right to non-discrimination with regards to religious practice. The Universal Declaration of Human Rights requires that "Everyone is entitled to ... rights... without distinction of any kind... to manifest his religion or belief in teaching, practice, worship and observance...." ²⁰. CERD requires that there be no discrimination with regard to the rights to the ‘freedom of thought, conscience and religion’ (Article 5 vii) and to equal participation in cultural activities’ (Article 5 f). Similar provisions with regard to the right to manifest religion or belief exist in the International Covenant on Civil and Political Rights²¹, the International Covenant on Economic, Social and Cultural Rights²² and Convention on the Rights of the Child which specifically refer indigenous religions²³.

²⁰ Universal Declaration of Human Rights, Articles 2 and 18

²¹ International Covenant on Civil and Political Rights, Articles 2, 4, 18, 24, 27

²² International Covenant on Economic, Social and Cultural Rights, Article 2

²³ Convention on the Rights of the Child, Articles 2, 14, and 30

47. In its resolution on Religious Freedom of Indigenous Peoples, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, emphasized ‘the relationship of traditional lands with the practice of indigenous religion’. It recommended that the Special Rapporteur on religious intolerance address *‘the specific problems faced by indigenous people relating to the destruction and violation of their sacred sites and religious ceremonies’* and *‘examine the history of events which are responsible for the violation of these communities’ right to freedom of religion and religious practice... explor[ing] in depth the impact that outside influences have on these communities’ ability to practise their religion.’*²⁴

48. A range of other international instruments have recognized the rights of indigenous peoples to practice their religious beliefs and to their sacred sites²⁵. Primary among these are the Convention on Biodiversity and associated Akwé Kon guidelines²⁶ and the UN Declaration on Indigenous Peoples Rights²⁷. UN Agencies and International Financial Institutions have also recognized the need for respect of indigenous beliefs²⁸.

49. However, as highlighted at the recently concluded 6th session of the UNPFII²⁹, this recognition of the need for non discrimination against indigenous peoples with regard to their right to religion and protection of their sacred sites has not everywhere translated into actual practice³⁰. The CERD Committee drew attention to this when addressing the case of the Western Shoshone in 2006, recognizing the impact of open pit gold mining on the Shoshone’s sacred sites. The Committee described the information it received as indicating that ‘destructive activities are conducted and/or planned on areas of spiritual and cultural significance to the Western Shoshone peoples, who are denied access to, and use of, such areas’.

50. Article III of the Constitution of the Philippines, the enumeration of the Bill of Rights, guarantees the freedom of religion³¹. The Indigenous Peoples Rights Act (IPRA), if implemented in accordance with the spirit and intent of the law, affords many of the necessary protections required to ensure non-discrimination in the exercise of the indigenous peoples right to religion. The state is obliged to respect indigenous peoples rights to ‘use, manage, protect and conserve’ their sacred sites; and areas of ceremonial value ‘in accordance with their indigenous knowledge,

²⁴ Religious Freedom of Indigenous Peoples, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1996/36

²⁵ See for example The UNESCO/IUCN Guidelines for the Conservation and Management of Sacred Natural Sites, see also Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief Proclaimed by General Assembly resolution 36/55 of 25 November 1981

²⁶ The Akwé Kon guidelines require that Environmental Impact Assessments address the issue of sacred sites of indigenous peoples. This requirement was further elaborated on in the Declaration on the Role of Sacred Natural Sites and Cultural Landscapes in the Conservation of Biological and Cultural Diversity International Symposium “Conserving Cultural and Biological Diversity: The Role of Sacred Natural Sites and Cultural Landscapes” Tokyo, Japan, 30 May to 2 June 2005.

²⁷ UN Declaration on Indigenous Peoples adopted by the Human Rights Council in 2006. Articles 12 and 25.

²⁸ The World Bank safeguard policies require consideration of religious beliefs of indigenous peoples in the context of funding development projects.

²⁹ Statements made by United Nations Human Settlements Programme (UN-HABITAT), UNESCO and permanent forum members highlighted the need for protection. See <http://www.un.org/News/Press/docs/2007/hr4917.doc.htm> ‘Indigenous Peoples Distinct Cultures Eroded Without Respect For Rights Over Lands, Territories, Natural Resources’.

³⁰ A recent example of a court upholding indigenous peoples right to protect their sacred sites was the recent United States 9th District Court decision disallowing the treated sewage effluent on the Peaks on the grounds that it would ‘desecrate the mountain’ and ‘impose a substantial burden on their exercise of religion’

³¹ Constitution of the Philippines Article III Section 5 2 “No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights”.

beliefs, systems and practices³². Furthermore, embodied within the very concept of Ancestral Domains, as recognised under IPRA, is the recognition that ancestral domains include ‘the spiritual and cultural bonds’ indigenous peoples have to their lands³³.

51. A clear and designated sacred site has been destroyed by mining operations at Mt Canatuan. According to the Subanon belief the mountain and in particular, its peak, had been considered sacred for generations by the Subanon and ‘not for occupation, flamboyant use, or architectural manifestations’.

52. Prior to the arrival of large-scale gold mining on their lands, the Subanon had successfully opposed logging and effectively regulated small-scale mining activities that would have had a potential impact on the peak of Mt Canatuan. They had informed the relevant government agencies of the sacred nature of the mountain and made numerous statements regarding the sanctity of Mt Canatuan and its importance to their spiritual and physical health, as a place of worship and source of the medicinal plants. These included statements to the UNWGIP in 2001 and 2005 (see Appendix 5 UNWGIP Statements).

53. Under Philippines legislation, the applicant for a mining permit is obliged to conduct an Archaeological Impact Assessment as part of the Environmental Impact Statement (EIS). According to the report produced in 2004 ‘no visible archaeological resources’ were found on Mt Canatuan. However, the report mentions that the Subanon “Buklog”, which is their highest ritual for thanksgiving, was celebrated there every seven years. In 2004, an ‘urgent memorandum’ sent by the chairman of NCIP to the secretary of the DENR listed the sacred nature of Mt Canatuan as one of the reasons why the mining operations should be temporarily halted. The DENR subsequently failed to take any action to protect the site and, instead, authorised mining operations to proceed.

54. The failure of the Government to respect the sanctity of the Subanons’ sacred place has led to its destruction. It has done irreparable harm to their spiritual and physical well-being and seriously jeopardises the preservation of their culture. The Governments continuing failure to acknowledge its sacredness and ensure adequate redress constitutes an on-going violation of the Subanon’s right to religion.

55. As was clear in their 2005 statement to the UNWGIP, in addition to the Government of the Philippines, the Subanon Traditional leadership also hold the company and the Government of Canada responsible. *‘The destruction on Canatuan is clear for all to see. This mountain is sacred to us Subanon, ... TVI, which seems to claim to be an instant expert in our traditions denies that the mountain is sacred to us... we give notice to TVI, that you have violated our hospitality and our laws. You have desecrated our land. The Canadian embassy has collaborated with TVI in this. We fear they promote mining by Canadian companies with no regard for the wishes of the affected people’.*

Militarization and Right to Security

³² IPRA Section 3 Definition of Sustainable Traditional Resource Rights; IPRA Section 7. Rights to Ancestral Domains a) Right of Ownership, ‘sacred places’ must be ‘be recognized and protected’; IPRA Section 33. Rights to Religious, Cultural Sites and Ceremonies, guarantees ICCs/IPs their ‘right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access to their religious and cultural sites

³³ IPRA Section 4. Concept of Ancestral Lands/Domains

56. Article 3 of the Universal Declaration of Human Rights guarantees the right of persons to life, liberty and security. This is further affirmed in Art. 9(1) of the International Covenant on Civil and Political Rights (ICCPR). In the Philippine setting, the Bill of Rights (Art. III, 1987 Philippine Constitution) guarantees these rights.

57. The Human Rights situation in the Philippines has become an increasing cause of international concern in recent years. The UN Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Professor Philip Alston, visited the country in 2007. This followed mounting expressions of international concern at the proliferation of unsolved extrajudicial killings numbering more than 600 since President Arroyo came to power. Those killed include indigenous campaigners for rights and environmental values.

58. Canatuan in the municipality of Siocon is within a recognised conflict zone in the decades old struggle between Government forces and Moro separatists. In May 2003, the town Centre of Siocon was attacked by Moro rebels, more than 20 people were killed and the market was burned down. In December 2002, a truck belonging to TVI carrying Subanon passengers was ambushed on the highway and 13 local people were killed. International mining best practice is to avoid mining in such zones of conflict³⁴. A gold mine is a ready target for attack, extortion³⁵ or raids to secure weapons, and local people become the likely victims. The Philippine Government, despite its stated commitment to the highest standards in mining, has responded to the armed intrusions with escalating military support for the mine.

59. When TVI arrived in Canatuan in 1994, it employed security forces composed of “blue guards” (employees of a security agency) and the paramilitary Special Civilian Armed Auxiliary (SCAA). To protect their interest, *“TVI authorities immediately established checkpoints in all entry and exit points of Canatuan proper. Said checkpoints are manned by company blue guards (security guards)...assisted by the SCAA...who are trained and supplied with firearms by the Armed Forces of the Philippines Southern Command”*³⁶. These checkpoints closed off what was previously the public highway, and surround the pre-existing communities. Some checkpoints were established and were maintained even outside the area of the company’s “mining rights”, and control passage along the public highway. TVI established a set of rules and procedures that determine who are allowed or denied entry to the TVI complex. Local residents and visitors experienced cases of detention at the checkpoints or denial of entry to or access areas within their ancestral domain. Recent examples include people being prevented from proceeding to their homes (see Appendix 11 Affidavits concerning Vivian Anoy).

60. TVI claims that the SCAA³⁷, currently consisting of 160 heavily armed guards³⁸ surrounding

³⁴“Shifting the Balance” The final report of Extractive Industries Review prepared by Dr Emil Salim, 2003, recommended to the World Bank to stop the funding of Extractives projects in conflict zones.

³⁵ Mining in the Philippines has long been associated with the payment of protection money to terrorist groups. Allan Laird, a former project manager from the KingKing Mine Inc (a mine located in Southern Mindanao and controlled by Echo Bay Mines, with TVI as junior partner) claimed before the Canadian parliamentary hearing in 2005 that it had been the practice for the mine, in 1995, to make illegal payments of protection money to a range of terrorist and military groups. See Ottawa Kingking Mines Inc. Corporate Support of Terrorism in the Philippines, Statement by Allan Laird to the Subcommittee on Human Rights and International Development of the Standing Committee on Foreign Affairs and International Trade Meeting May 18, 2005.

³⁶ Philippines Commission on Human Rights IX Memorandum, May 2, 2002

³⁷ At the time of the recently concluded Human Rights Impact Assessment the company reported they maintained 169 SCAA

³⁸ Human Right Impact Assessment, Rights and Democracy p11

the company, actually provides security protection to the community. In 2005, a Memorandum of Agreement (MOA) was executed between TVI Resources Development Corporation, Philippines and the 1st Infantry Division, Philippine Army. It clarifies that the latter shall organize and assign SCAA *“to render security guarding services, maintain peace and order, guarding and protecting the installations and properties of the company... and such other places that may agreed upon... from theft, pilferage, robbery, arson and other unlawful acts by employees and/or other threat groups”*, placing the SCAA directly under the supervision of the Armed Forces of the Philippines (AFP). In the IPRA legislation of 1997, it specifically stated that FPIC is required before a military force can enter an ancestral domain. In this case, no permission was sought or given.

61. There are countless acts of harassments and violence committed by both the military and paramilitary forces operating in and around Canatuan. These include participation in forced evictions, destruction of subsistence farms, confiscation of materials used for extension of the local school, harassment and prevention of access of health workers, shooting incidents and participation in food blockades (see Appendix 8 Acts of Harassment). These seriously belie the claims of community protection made by TVI. The Office of the Commission on Human Rights had conducted several investigations involving these issues and found cause to recommend the thorough investigations on the acts of violence and the possible filing of criminal and administrative charges before the AFP Southern Command. Despite these official recommendations, the AFP failed to take the necessary steps to cause disciplinary actions or mete out punishment against the perpetrators of violence.

62. It is ironic that for all these records of acts of violence and intimidation perpetrated by an armed security force operating within an ancestral domain, and many investigations and recommendations, the government was not able to resolve the issues. Instead, it fortified its position of favouring “militarization”. The NCIP recently passed the FPIC guidelines (2006) which contains provision on occupation of military or paramilitary forces within the ancestral domain. Any operation made in connection with hot pursuit operations, securing vital government installations, programs and projects against clear and imminent danger now does not require FPIC.

Access to Justice

63. The 1987 Philippine Constitution, as the highest law of the land, has laid down the structure of the legal system. All laws are subordinate, and any legal provision that runs counter to it is deemed unconstitutional, and therefore, null and void. It also prescribes the form of government, separating the power of the independent and co-equal branches of government: executive, legislative, and judicial, providing a system of check and balance. Rules and procedures have been defined to provide a system of justice.

64. The issues surrounding the struggle of the Subanon community have reached the courts but this did not lead to the resolution of the cases. One severe limitation on access to justice is the imbalance in wealth between an indigenous subsistence community and a corporation. These problems are made worse by extensive delays in the conduct of cases often causing poorer plaintiffs to lose hope.

65. The case filed by the traditional leader of the Subanon (Timuay Anoy) against TVI for damages as a result of their operations, and injunction with preliminary injunction to stop the operations to prevent further damages, had reached its seventh year without resolution. Delays are attributed to delaying tactics and the lack of regular court judges. The legal case is rendered useless because the damages, which the injunction sought to prevent, had already happened. No

further remedy is in sight.

66. A quo-warranto case, which questions the legal right of Juanito Tumangkis and other officers of the Siocon Subanon Association, Inc. who are parties to the Memorandum of Agreement that gave the FPIC to TVI, was also filed by Timuay Jose Anoy in 2002 and is still unresolved. Aside from the fact that the case could not be heard within the required period because of lack of regular court judges in the Siocon circuit court, the SSAI held another election and the set of officers had changed, thereby rendering the case moot and academic, but the issue of the legality of the representation still remained unresolved.

67. The demand of the Subanon community members for the cancellation of the mining permit before the Panel of Arbitrators at the Mines and Geo-sciences Bureau of the DENR had been filed in April 2006 but is not yet acted upon, allegedly because the Panel of Arbitrators cannot be constituted, and therefore, cannot be heard.

68. The case for damages and temporary restraining order against TVI for establishing checkpoints and causing damages against people and their rights to travel, security, abode, and food had been filed at the NCIP Region IX in 2003 but until now is still unresolved pending the appointment of a Regional Hearing Officer. Other cases remain filed and unresolved.

Supreme Court Ruling

69. In January 2004 the Supreme Court finally ruled on a seven-year old case advanced by the LaBugal-B'laan Tribal Association and others claiming that certain provisions of the Mining Act of 1995 covering the granting of a licence for a mining project affecting the LaBugal and other Indigenous communities breached the constitution of the Philippines. The Court ruled that these provisions were unconstitutional. However, the Government, backed by the Chamber of Mines, appealed that decision and mounted a strong campaign for a reversal.

70. In December 2004, the Supreme Court reversed its own decision. The new ruling contains statements that explicitly weigh the protection of the rights of Indigenous peoples with the promised, if unsubstantiated, calculations of national economic gain and development that might flow from mining. These claims of economic benefit are widely disputed, both in the Philippines and around the world. Of even greater concern than the questionable economic benefits of mining was the Court's highly discriminatory characterisation of indigenous peoples' rights as "parochial interests".

71. The following are extracts from the December 2004 revised Supreme Court decision:

*'The Constitution should be read in broad, life-giving strokes. **It should not be used to strangulate economic growth or to serve narrow, parochial interests**'*

Epilogue to the ruling:

"We must never forget that it is not only our less privileged brethren in tribal and cultural communities who deserve the attention of this Court; rather, all parties concerned -- including the State itself, the contractor (whether Filipino or foreign), and the vast majority of our citizens - - equally deserve the protection of the law and of this Court. To stress, the benefits to be derived by the State from mining activities must ultimately serve the great majority of our fellow citizens. They have as much right and interest in the proper and well-ordered development and utilization of the country's mineral resources as the petitioners.

Whether we consider the near term or take the longer view, we cannot overemphasize the need for an appropriate balancing of interests and needs -- the need to develop our stagnating mining industry and extract what NEDA Secretary Romulo Neri estimates is some US\$840 billion (approx. PhP47.04 trillion) worth of mineral wealth lying hidden in the ground, in order to jumpstart our floundering economy on the one hand, and on the other, the need to enhance our nationalistic aspirations, protect our indigenous communities, and prevent irreversible ecological damage...

Verily, the mineral wealth and natural resources of this country are meant to benefit not merely a select group of people living in the areas locally affected by mining activities, but the entire Filipino nation, present and future, to whom the mineral wealth really belong. This Court has therefore weighed carefully the rights and interests of all concerned, and decided for the greater good of the greatest number."

72. Despite the controversies surrounding mining development and its negative or positive real impacts, the administration and business interests have continued to promote mining investments even in areas where legal challenges remain unresolved. The Speaker of the House of Representatives, Jose DeVenecia, told international mining investors in London about his role in the controversial reversal of the Supreme Court decision on the La Bugal-B'laan Tribal Ass'n v. Ramos case of 2004. He announced that, together with the Chamber of Mines, 'we mounted a strong campaign to get the Supreme Court to reverse itself. It was a difficult task to get 15 proud men and women of the Supreme Court to reverse themselves. But we succeeded. Finally, the law was declared constitutional.'³⁹

Indigenous Peoples Right to Development

73. The Supreme Court ruling, weighing national development against the rights and interests indigenous communities, to the detriment of the latter, would appear to be at odds with the Principles of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993. The declaration stated that '*while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights*'. The Human Rights Committee has instructed states that under Article 27, there should be no margin of appreciation in relation to indigenous peoples' rights in the context of national development⁴⁰. Likewise, the CERD committee has emphasised that national development, particularly resource extraction, must proceed consistently with indigenous peoples rights⁴¹.

74. The Government of the Philippines is currently pursuing an aggressive campaign promoting mining based on the claim that it will deliver sustainable national development. Ambitious claims for the financial returns from mining have been projected, however, they fail to account for the potential negative impacts. Experience of indigenous peoples in the Philippines who are dependent on the environment for their livelihoods has shown that rather than bring prosperity and development, mining has become synonymous with increased poverty and environmental degradation.

³⁹ Statement made at the Philippine government's mining roadshow in London in June 2005, See Minesite.com Speech of Jose DeVenecia 17 June 2005, London,

<http://clients.westminster-digital.co.uk/minesite/microsite/events/philippines/index.aspx>

⁴⁰ HRC I. Lansman et al. vs. Finland (Communication No. 511/1992), CCPR/C/52/D/511/1992, 10.

⁴¹ CERD CO Suriname 2004 CERD/C/64/CO/9 28 April 2004 para 11.

75. In the case of the Subanon the Government is already implicated in the violation of their right to development with its facilitation of the removal of the Subanon's decision-making power with regard to their natural resources. Of major immediate concern to the ancestral landholders is the manner in which the development of their ancestral domain is being even further removed from their control.

76. The development of ancestral domain areas is covered by a Government required Ancestral Domain Sustainable Development and Protection Plan (ADSDPP). IPRA defines the ADSDPP as the *'plan formulated and adopted by a particular IP community that embodies the vision, framework, goals, objectives, and strategies of ICCs/IPs for the sustainable management and development of their ancestral domain and all resources therein, including human and cultural resources'*. ADSDPPs should be a manifestation of that aspect of the right to self-determination by virtue of which indigenous peoples are entitled to *'freely pursue their economic, social and cultural development'*. For the Subanon, this aspect of their right to self-determination is inseparable for its other aspect, which recognizes their right to freely determine their political institutions. This political or governance aspect implies that for ADSDPPs to serve their role in the operationalization of the right to self determination, they should be developed by, and be coherent with, the Subanon's own models for organizing themselves and taking decisions in accordance with their customary practices, leadership and decision making structures

77. The Government is currently compounding the violation of the Subanon's right to development by providing the mining company, and the company recognized representatives of the community, a central role in the development of the Subanon's ADSDPP. This has met with strong objections from the legitimate Subanon leadership and community members as they view it as a further attempt to deny them their right to development and their right to self-determination. It is feared that the plan will inevitably include plans for mining operations at the current site and expansion areas.

Canadian Government Involvement and Responsibilities

78. The Canadian government has taken an active interest in promoting Canadian mining operations in the Philippines. Indigenous representatives have met with government officials in Manila and Ottawa to complain and appealed for help in controlling and regulating Canadian companies. However, despite the concerns arising from the Canatuan situation the Canadian Government has continued to publicly support TVI. Two Canadian ambassadors⁴² have made direct visits to the TVI site. On each occasion they were hosted by TVI. Despite entering the lands of the Canatuan Subanon neither Ambassador made a prior request, nor made even a courtesy call on Timuay Anoy or other recognised indigenous leaders.

79. In April 2001, Ambassador Robert Collette visited the site. In July 2001 he also wrote to the President of the Philippines to object to the fact that the permit of another highly controversial mining operation of another Canadian company, Crew Gold, had been revoked by the Philippine Government. In this case, the permit had been revoked due to its negative impacts on the environmental and failure to secure community consent from the Mangyan indigenous peoples. In 2006, Ambassador Peter Sutherland again attended the mine site. He stated the importance of working with indigenous host communities adding that "we are very pleased that TVI has set a good example here in the Philippines". Sutherland also awarded a certificate of completion of the Human Rights special training program to the SCAA security force.

⁴² The embassy also sent a senior trade commissioner to participate in a "dialogue" with the local people. However, the session broke down with the Subanon walking out complaining of a pro-mining bias and culturally insensitive process.

80. The Embassy and the Canadian International Development Agency CIDA have provided funding for community development projects through the most unusual method of releasing funds to and through TVI's Community Development office. This had the result of increasing company patronage in a disputed situation at a critical time.

81. A Standing Committee of the Canadian Parliament on Foreign Affairs and International Trade investigated the impact of Canadian mining companies, and in particular that of TVI, on indigenous peoples overseas. It stated in its 2005 report to the Canadian Parliament that it was *'deeply concerned about the possible impact of the activities of TVI Pacific Inc., a Canadian mining company, on the indigenous rights and the human rights of people in the area'* and recommended that the Government of Canada *'Conduct an investigation of any impact of TVI Pacific's Canatuan mining project in Mindanao on the indigenous rights and the human rights of people in the area and on the environment, and table a report on this investigation in Parliament within 90 days'* and *'ensure that it does not promote TVI Pacific Inc. pending the outcome of this investigation.'*

82. The Government response was unsatisfactory to the Subanon as it failed even to meet with, or gather evidence from, any of the indigenous people and groups raising concerns. Since that time a Roundtable process in Canada has taken more evidence concerning the operations of this and other Canadian companies operating overseas. The need for effective Canadian government action remains.

Suggestions

83. Encroachment of mining on indigenous peoples' lands combined with the distorted application of the laws requiring FPIC are leading to the widespread imposition of unwanted and damaging projects upon indigenous communities throughout the archipelago. We believe that the case of the Subanon on Mt Canatuan is in effect acting as a test case for the Government of the Philippines in their efforts to develop a 'model' for dealing with indigenous communities' that enables mining developments to proceed even where communities have not granted their consent. It is symptomatic of a widespread pattern of discrimination against indigenous peoples, in the context of national development and resource extraction, throughout the Philippines.

84. We therefore respectfully request that the Committee consider the situation described herein under at its 71st session to be held in August 2007. In particular, the submitting organizations respectfully suggest a number of actions, which they believe, would help address the immediate concerns of the Subanon and other indigenous peoples in the Philippines and prevent continued serious violations of the Convention.

1. Urge the Government of the Philippines to call a halt to current operations on Mount Canatuan, and not to entertain any new applications for mining operations of TVI within the CADT or in adjacent Ancestral Domain areas pending the resolutions of all conflicts within the TVI Canatuan area.
2. Call on the Government of the Philippines to adhere to its obligations under CERD to provide a timely country report and therein address the following
 - a. the situation pertaining to the violation of the Subanon's rights;
 - b. measures taken to uphold and protect indigenous peoples as guaranteed under IPRA, including the right to FPIC, particularly in the context of the of the mining sector
 - c. indigenous peoples access to justice and recognition of and respect for

indigenous judicial systems

3. Urge the National Commission for Indigenous Peoples, as a matter of urgency, to revoke the discriminatory provisions in the FPIC implementing rules and regulations and guidelines that work against the true intent of IPRA.
4. Urge the Government of the Philippines to ensure that its agencies and bodies, in particular the NCIP and the DENR, function in accordance with their mandate and are held accountable for breaches thereof.
5. Urge the Philippine Government to respect and uphold the ruling of the Indigenous courts, and specifically the ruling of the Gukom promulgated in June 2004 declaring the so-called “Siocon Council of Elders” as illegitimate and all agreements it made, null and void.
6. Reaffirm the Committee’s recommendation to the Government of Canada in relation to holding its transnational corporations, which affect the enjoyment of indigenous peoples’ rights, to account⁴³. Also, request that the Government of Canada make a good faith effort to comply with the recommendation made by its own Standing Committee on Foreign Affairs and International Trade with regard to investigating TVI’s actions⁴⁴, by ensuring the involvement of all effected parties and until this investigation is completed, avoid promoting TVI.
7. Address the issue of discrimination with regards to indigenous religions and beliefs by endorsing the call made at the 6th session of UNPFII for the formulation of ‘comprehensive policies based on recognition of religious, political, social, cultural and spiritual rights, including of indigenous peoples sacred sites’. Specifically, we urge the Committee to call for the respectful restoration of the mountain peak based on plans overseen by the local Subanon.
8. Draw the attention of the UN Secretary General, Human Rights Council, the Permanent Forum on Indigenous Issues and the Office of the High Commissioner for Human Rights and the appropriate Special Rapporteurs to the serious and urgent situation facing the indigenous peoples in the Philippines affected by mining developments.

⁴³ CERD/C/CAN/CO/18 25 May 2007 para 17 ‘to take appropriate legislative or administrative measures ... and explore ways to hold [these companies] accountable’; see also *Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade 38th Parliament 1st Session* recommends that the Government of Canada ‘Conduct an investigation of any impact of TVI Pacific’s Canatuan mining project in Mindanao on the indigenous rights and the human rights of people in the area and on the environment, ... Ensure that it does not promote TVI Pacific Inc. pending the outcome of this investigation’ Section II para’s 9 and 10

⁴⁴ ‘The Standing Committee on Foreign Affairs and International Trade recommended that the Government of Canada ‘Conduct an investigation of any impact of TVI Pacific’s Canatuan mining project in Mindanao on the indigenous rights and the human rights of people in the area and on the environment’ and ‘ensure that it does not promote TVI Pacific Inc. pending the outcome of this investigation.’