

The UN Permanent Forum on Indigenous Issues, 10th Session

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Statement by the Arctic Caucus

Mr. Kirt Ejesiak

Agenda Item 3 (c) Free, prior and informed consent

Thank you Mdm Chairperson,

This statement is on behalf of the Arctic Caucus. The concept of free, prior and informed consent is on a local level, closely linked to indigenous peoples' property rights to land and natural resources, and on a peoples level to our right to self-determination. In this intervention, the Inuit Circumpolar Council and Saami Council wishes to address the peoples' aspect of free, prior and informed consent.

Following recent developments in international law, the Arctic states, rather naturally, formally recognize that the indigenous peoples of the Arctic are beneficiaries of the right to self-determination. For instance, Sweden has in country reports to both the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights affirmed that indigenous peoples can constitute such peoples that fall under joint Article 1 of the 1966 Covenants, and that the Saami people constitutes an example of such peoples. The Arctic Caucus commends the states for this recognition.

But having formally recognized that the Arctic indigenous peoples enjoy the right to self-determination, some of these states have put forward an implausible and unacceptable interpretation as to the scope of this right. For instance, Finland, Norway and Sweden have all submitted that the Saami people's right to self-determination implies:

- (i) a genuine right to self-determination in affairs that only concerns the Saami, i.e. where the state and the majority population have no interest whatsoever; and
- (ii) in all other matters, a mere right to consultation.

The Saami Council and the Inuit Circumpolar Council submits that this narrow interpretation of the right to self-determination makes little sense. It follows already from the definition of “right” that the suggestion that Saami self-determination is a genuine right to determine in our affairs only in such instances where the state/majority population have no interest in the matter cannot be correct. “A right” presupposes a relationship between at least two legal subjects. Someone must enjoy a claim etc. against someone else. When only the indigenous people, and no one else, has a vested interest in an affair, no such relationship exists. In such instances, the indigenous people will of course decide as we please without there being a need, or even possible, to invoke a right. Consequently, Finland’s, Norway’s and Sweden’s suggestion that indigenous peoples enjoy a genuine right to self-determination merely in affairs that only concerns us cannot be correct. The argument is a contradiction in terms.

These states’ second suggestion, i.e. that indigenous self-determination amounts to nothing more than a right to consultation, does not withstand scrutiny either. As mentioned in an earlier intervention, indigenous peoples’ right to consultation has been well established in international law for decades. Whether the right to self-determination, on the other hand, applies to indigenous peoples has been subject to debate until quite recently. For instance, in the negotiations on the UN DRIP, Article 3 – which proclaims that indigenous peoples have the right to self-determination – was one of the most controversial provisions. It would appear unlikely that Article 3 would have been that controversial, had the provision, as the Nordic states suggest, merely reaffirmed the existence of a right that been well established in international law for two decades or so. Further, pursuant to the Vienna Convention on the Law of Treaties Article 31, a treaty provision shall, absent compelling evidence to the contrary, be given an understanding that follows from an ordinary meaning of its wording. The normal meaning of the wording “*[i]ndigenous peoples have the right to self-determination*” is that indigenous peoples have the right to self-determination. Had the intention been to confirm indigenous peoples’ right to consultation, Article 3 would probably have been given a wording something in line with “*{i}ndigenous peoples have a right to consultation*”.

Mdm Chairperson, Finland’s, Norway’s and Sweden’s submission on the scope of indigenous people’s right to self-determination constitutes an illogical and illegal attempt to diminish a right to something less than a right. The Arctic Caucus calls on the Arctic states not to pursue any such further attempts to escape their international legal obligations towards the indigenous peoples of the Arctic in the context of our right to self-determination. Instead, they should – without further delay – engage in a constructive dialogue with the respective

indigenous peoples to ensure an effective implementation of our *genuine* right to self-determination. That is a right that entails not only a right to participate in decision-making processes, but also to determine the outcome of such processes, also when the indigenous people's position is contrary to that of the state and/or majority population.

As a final note, the Inuit Circumpolar Council and the Saami Council wants to underline that we are not against process rights as such. On the contrary, they are important, as long as they are not substituted for material rights. When it comes to process, the Arctic Caucus wants to emphasize that the principle of free, prior and informed consent implicitly requires a process with a certain sequence. We need to look specifically at both the "free", the "prior" and the "informed" parts of this concept. All three of those criteria have to be fulfilled prior to the actual decision making by the community or people.

We thank you, Mdm Chairperson.