

Indigenous

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of CEM

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tribals in India



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EDITORIAL

Philippines: Indispensability of the IPRA for peace in Mindanao

The formation of a new peace panel by the Government of Republic of Philippines on 25 December 2008 for resumption of the stalled peace process with the Moro Islamic Liberation Front (MILF) is welcome. AITPN also takes note of the five-point preconditions announced by the Central Committee of the MILF on 26 December 2008 for resumption of the talks. The talks were stalled following declaration of the Memorandum of Agreement on Ancestral Domain on Bangsamoro Juridical Entity" (MOA-AD-BJE) between the government of Philippines and the MILF as unconstitutional by the Supreme Court on 14 October 2008. What followed were humanitarian disasters, especially for the indigenous peoples, caused by the army and the so-called renegades of the MILF.

The conditions put by the MILF, among others, include (i) having an international guarantee composed of states or association of states to ensure that both the Government and MILF will honor and implement agreement or agreements forged by the parties; (ii) change in the stand of Government over the MOA-AD as 'no deal' and 'unconstitutional' in the aftermath of the Supreme Court judgement of 14 October 2008; and (iii) Malaysia to stay as facilitator of the peace talks.

In fact all the international actors interested in the peace process in Mindanao, in particular, Malaysia, Japan and the United States must recognize the diversity of the conflict in Mindanao and ensure that the rights of indigenous peoples, who are numerical minorities, are not subsumed for peace with the MILF.

Obviously, the legitimate question arises as to who are the indigenous peoples of Mindanao. Many Moros claim themselves as indigenous. AITPN does not dispute their claims. However, the fact remains that the Bangsamoros are not legally recognised as indigenous peoples under the Indigenous Peoples Rights Act (IPRA) of 1997. The IPRA lists 110 ethno linguistic groups of Philippines as indigenous peoples but Bangsamoros are not included. Many Moros opine that their non-recognition as indigenous peoples is an act of discrimination by Christian dominated Filipinos.

At the same time, in the existing Autonomous Region of Muslim Mindanao (ARRM) – a product of the peace process with the Moros, the Indigenous Peoples Rights Act of 1997 is not applicable. The experiences of the indigenous communities of Teduray, Lambangian and Dulangan Manobo of Maguindanao and Sultan Kudarat provinces whose Ancestral Domains of 400,000 hectares were included have not been encouraging. In the ARMM Act, there is no provision for titling of ancestral domains of the indigenous people as provided under the IPRA. Absence of title means lack of tenurial security and therefore lack of ownership. Having the powers of eminent domain, the Regional Government of the ARMM under section 3 of Article V of the ARMM Act has the authority to acquire/take over the ancestral domain of the indigenous people citing public interest.

The IPRA whose constitutional validity has been upheld by the Supreme Court has been relegated to oblivion. The token representation

from indigenous communities has not been helpful. Under Clause 1 under heading "Concepts and Principles" of the MOA-AD-BJE, the Bangsamoro identity is imposed on the indigenous peoples. It provides that, *"It is the birthright of all Moros and all Indigenous peoples of Mindanao to identify themselves and be accepted as "Bangsamoros". The Bangsamoro people refers to those who are natives or original inhabitants of Mindanao and its adjacent islands including Palawan and the Sulu archipelago at the time of conquest or colonization and their descendants whether mixed or of full native blood. Spouses and their descendants are classified as Bangsamoro. The freedom of choice of the Indigenous people shall be respected."*

For indigenous peoples, it is a matter of rights recognized under the IPRA and not freedom of choice that the government of Philippines and the MILF would like to espouse. Any peace agreement with the MILF must explicitly recognize that the Indigenous Peoples Rights Act of 1997 shall prevail. Without such explicit reference, indigenous peoples of Mindanao shall lose their rights.

Unless Bangsamoros recognize the applicability of the IPRA in any future agreement with the government of Philippines, the Moros themselves can be accused of committing the same act of discrimination for which they rightly point the fingers towards the Christian dominated Filipinos.

Recognition of rights of indigenous Peoples through explicit reference to the IPRA remains fundamental.

Philippines: IPRA must be upheld in peace agreement on Mindanao

On 25 December 2008, the government of Philippines formed a new peace panel consisting of three members for negotiation with the Moro Islamic Liberation Front (MILF). On 26 December 2008, the MILF Central Committee announced its preconditions, which, among others, included (i) having an international guarantee composed of states or association of states to ensure that both the Government and MILF will honor and implement agreement or agreements forged by the parties; (ii) change in the stand of Government over the Memorandum of Agreement on Ancestral Domain on Bangsamoro Juridical Entity" (MOA-AD-BJE) as 'no deal' and 'unconstitutional' in aftermath of the Supreme Court judgement of 14 October 2008; (iii) continuance of Malaysia as the facilitator of the peace talks.

While the peace process must resume soon, it is not yet clear as to whether the Memorandum of Agreement on Ancestral Domain on Bangsamoro Juridical Entity" (MOA-AD-BJE) declared unconstitutional by the Supreme Court will form the basis of the peace talks. What is clear is that the rights of indigenous peoples are being abrogated both in the peace process and the final outcome document.

I. MoA-AD-BJE in the present form - a deadly knock for indigenous peoples

a. Total disregard of the Indigenous Peoples' Rights Act

The Indigenous Peoples Rights Act of 1997 provides for the "right to free and prior informed consent".

Unless the Bangsamoros recognize the applicability of the IPRA in any future agreement with the government of Philippines, the Moros themselves can be accused of committing the same act of discrimination for which they rightly point the fingers towards the Christian dominated government.

However, in the whole peace process that culminated in the form of MOA-AD-BJE, both the Government and the MILF failed to ensure respect for the indigenous peoples. This is despite the fact that many indigenous peoples who do not identify themselves as Bangsamoros are supposed to be subsumed in the Bangsamoro identity. As per Clause 2 under the heading "Territory" of the MOA-AD-BJE, the territorial extent of the BJE is identified as three categories of areas viz. (i) Core area of BJE, (ii) Category A areas, and (iii) Category B areas. All the three categories of areas cover vast tracts of ancestral domains of the indigenous peoples in a number of provinces.

Inclusion of indigenous peoples in the peace process has been only a token attempt on the part of both the MILF and the government of Philippines to impress upon the indigenous peoples. While the government of

Philippines does not consider the indigenous peoples including the Lumads as necessary party solely on the ground that they are not engaged in armed conflicts, the MILF sought to assimilate indigenous peoples under the Bangsamoro identity.

b. Imposition of "Bangsamoro" identity on the indigenous people

The MOA-AD-BJE imposes the "Bangsamoro" identity on the indigenous people. This is clear from a simple reading of Clause 1 under heading "Concepts and Principles", the MOA-AD-BJE which reads,

"It is the birthright of all Moros and all Indigenous peoples of Mindanao to identify themselves and be accepted as "Bangsamoros". The Bangsamoro people refers to those who are natives or original inhabitants of Mindanao and its adjacent islands including Palawan and the Sulu archipelago at the time of conquest or colonization and their descendants whether mixed or of full native blood. Spouses and their descendants are classified as Bangsamoro. The freedom of choice of the Indigenous people shall be respected."

The above clause states that all Moros and indigenous peoples of Mindanao have the birth right to identify themselves and accepted as Bangsamoro. However, the 1987 Constitution of Philippines identified the indigenous peoples as Indigenous Cultural Communities (ICCs). In 1997, the IPRA used the term "indigenous peoples" to identify the 110 ethno linguistic groups of Philippines and formally recognized them as

indigenous peoples. The Moros are not listed as one of the indigenous peoples. Yet, the MOA-AD-BJE seeks to subsume the identity of all indigenous peoples of Mindanao under the Bangsamoro identity. This is an attempt of forced assimilation of the indigenous people by the Moro people aimed at destroying their established formal identity.

c. Denial of the right of self-determination of indigenous peoples

The IPRA provides for the right of self-governance of indigenous peoples through a number of rights including the rights to ancestral domains (sections 4-12), rights to social justice and human rights (sections 21-28); right to cultural integrity (sections 29-37) and the establishment of the National Commission on Indigenous Peoples consisting of indigenous peoples.

Section 17 of IPRA specifically provides that the indigenous peoples have the right to determine and to decide their own priorities for development affecting their lives, beliefs, institutions, spiritual well-being, and the lands they own, occupy or use. They also have the right to participate in the formulation, implementation and evaluation of policies, plans and programs for national, regional and local development which may directly affect them.

Section 15 further provides that the indigenous peoples shall have the right to use their own commonly accepted justice systems, conflict resolution institutions, peacebuilding processes or mechanisms and other customary laws and practices within their respective communities.

Section 13 also provides that the government of Philippines

recognizes self-governance and self-determination as inherent rights of indigenous people. It also provides that the State respects the integrity of their values, practices and institutions and shall guarantee the right of ICCs/IPs to freely pursue their economic, social and cultural development.

As no reference to the IPRA Act is made in the MOA-AD-BJE, indigenous peoples are all set to lose their right of self-determination.

d. Regression of all other rights provided under IPRA

For indigenous peoples recognized as such under the IPRA of 1997, the MOA-AD-BJE of 4 August 2008 would have constituted a regression of rights.

Under the IPRA, the right to ancestral domain includes the rights - of ownership; to develop lands and natural resources; to stay in the territories; in case of displacement; to regulate entry of migrants; to safe and clean air and water; to claim parts of reservations; and to resolve conflict.

Self-Governance and Empowerment is recognized as an inherent right of the indigenous peoples and they have the right to determine and decide their own priorities for development affecting their lives, beliefs, institutions, spiritual well-being, and the lands they own, occupy or use. They also have the right to participate in the formulation, implementation and evaluation of policies, plans and programs for national, regional and local development which may directly affect them.

The provisions on social justice and human rights includes- equal protection and non-discrimination of ICC/IPs (section 21), right to special protection and security in periods of armed conflict (section 23), freedom

from discrimination and right to equal opportunity and treatment (section 23), right to basic services of the state (section 25) etc.

The indigenous people have the right to preserve and protect their culture, traditions and institutions (section 29). The state is under legal obligation to provide equal opportunities to the indigenous peoples through a manner appropriate to their cultural methods of teaching and learning. They are also entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights.

However, no such provision has been made under the MOA-AD-BJE.

II. Experiences of Indigenous peoples within ARMM

The experiences of the indigenous communities of Teduray, Lambangian and Dulangan Manobo of Maguindanao and Sultan Kudarat provinces whose Ancestral Domains of 400,000 hectares were included in the existing Autonomous Region of Muslim Mindanao (ARMM) has not been encouraging. Though ARMM Act predates the IPRA, while adopting IPRA and expanding the ARMM, no reference was made about the applicability of the IPRA in the ARMM. In reality, there is no legal bar for applying the IPRA in the ARMM. However, in reality the ARMM authorities only apply the ARMM Act and not the IPRA. Consequently, non-Muslim indigenous communities living under the ARMM were further marginalised.

a. Limited ownership over ancestral domains

In comparison to IPRA, the concept of ancestral domain under the ARMM Act is restrictive and incomplete. Section 1 of Article XI of the ARMM Act excludes "*strategic minerals such*

as uranium, coal, petroleum, and other fossil fuels, mineral oils, and all sources of potential energy; lakes, rivers and lagoons; and national reserves and marine parks, as well as forest and watershed reservations” from the definition of ancestral domain.

Further, in the ARMM Act, there is no provision for titling of ancestral domains of the indigenous peoples. Absence of title means lack of tenurial security and therefore lack of ownership. Having the powers of eminent domain, the Regional Government under section 3 of Article V of the ARMM Act has the authority to acquire/take over the ancestral domain of the indigenous people citing public interest. Under section 2 of Article XI of the ARMM Act, right to ancestral domain in respect of constructive or traditional possession of lands and resources is already dependent upon judicial affirmation, which has not been defined in the law.

The safeguards against transfer/conveyance of ancestral domain to non-indigenous peoples under the ARMM Act are very weak. Section 6 of Article XI of the ARMM Act provides, *“unless authorized by the Regional Assembly, lands of the ancestral domain titled to or owned by an indigenous cultural community shall not be disposed of to nonmembers”* which means that the Regional Assembly is the authority to grant permit for disposing off lands of ancestral domains to non-members (who is not a domain holder). Effectively, indigenous peoples’ rights to ancestral domain/land are at the mercy of the Regional Assembly. But, it is the not case under IPRA, it is the indigenous community who has the right to decide what to do or what not do with their ancestral domain, albeit in conformity with relevant national laws and policies.

Unlike the ARMM Act, the right to ancestral domains under the IPRA is very strong and there are clear and precise provisions on delineation and titling of ancestral domains and ancestral lands by the NCIP by issuance of CADT or CALT. These titles are again registered with the Land Registration Authority.

The requirement of free and prior informed consent acts like shield against any attempt to dispossess or wrongfully deprive the indigenous people of their right to ancestral domains.

b. No right to determine and decide their own development

As discussed above, the ARMM Act recognizes only the indigenous peoples’ right to ancestral domain subject to some limitation and riders. The ARMM Act does not provide for the indigenous peoples’ right to self-governance and self-determination unlike section 13 of Indigenous Peoples Rights Act of 1997.

Section 17 of IPRA further re-enforces the right to self-governance and self-determination.

A con-joint reading to sections 13 and 17 read with section 7 of IPRA, which provides for rights to ancestral domain means that the indigenous people have the right to determine and decide their own priorities for development and it is the duty of the State to guarantee their right to freely pursue their economic, social and cultural development in their ancestral domains and lands. Right from having ownership, the indigenous people have the right to-develop lands and natural resources; stay in the territories; remedies, including compensation in case of displacement; regulate entry of migrants; safe and clean air and water; claim parts of reservations; to resolve conflict.

c. No provisions for affirmative actions for indigenous peoples under the under ARMM Act

The IPRA provides for an array of affirmative action programs in favour of the indigenous peoples. Among others, these include – (i) right to self-governance and empowerment (Sec. 13); (ii) right to participate in decision making (Sec.16); (iii) special measures for basic services (Sec.25); (iv) special provisions for Ancestral Domains Fund (Sec. 71) etc.

On the other hand, except the provision to formulate and implement special development programs and projects, responsive to the particular aspirations, needs and values of the indigenous cultural communities under section 2 of Article XII, the ARMM Act has no other provisions for affirmative action for the indigenous peoples.

III. Self-identification as IPs vs. recognition under IPRA

Self-identification or self-ascription is one of the criteria for determination as indigenous or tribal group. In this regard, Article 1(2) of Convention No. 169 of the International Labour Organisation (ILO) reads,

“Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”

In Section 3 (h), IPRA also provides that indigenous peoples/indigenous cultural communities refer to a group of people or homogenous societies identified by self-ascription or by others.

Undoubtedly, the Moros have an inalienable right to identify themselves as indigenous people of Philippines. But, they have not

been classified as indigenous unlike the 110 ethno linguistic groups who have been recognized under the IPRA.

While the Moros term this exclusion from the list of 110 ethno-linguistic groups as an act of discrimination, the MILF and many other Moro groups have been committing the same act of discrimination against indigenous peoples recognized under the IPRA. It is also the duty of the Government of Philippines and the MILF that the rights of the indigenous people whose rights are recognized and protected under IPRA are not violated while exercising the right to self-determination of the Moros.

Asian Indigenous and Tribal Peoples Network recommends to the government of Philippines and the MILF to ensure the following in any future peace process:

- Make specific reference in any future agreement with the MILF that the Indigenous Peoples Rights Act of 1997 shall apply in any proposed area for Bangsa Moro Judicial Entity;
- include Chairperson of the National Commission on Indigenous Peoples of the Philippines in the Peace Secretariat of the government of Philippines;
- delineated Ancestral Domains of the non-Muslim indigenous communities be recognised and protected in any peace negotiation between the Government and the MILF in the future; and
- include representatives of the non-Muslim indigenous communities in any peace negotiation between the Government and the MILF.

Bangladesh: Q & A session at the UPR

The Working Group of the Universal Periodic Review of the Human Rights Council is scheduled to examine Bangladesh on 3 February 2009. The government of Bangladesh has submitted its report (A/HRC/WG.6/4/BGD/1). As many as 17 stakeholders (civil society organizations), including Asian Indigenous and Tribal Peoples Network (AITPN)¹, have contributed to the process for effective scrutiny of the human rights situation of Bangladesh.

The submission of Bangladesh is economical with the truth and presented a hunky-dory situation in the country while ignoring critical human rights issues facing the country.

Since the submission of the report by the government of Bangladesh and stake-holders, major changes have taken place in the country. The National Human Rights Commission was established through an Ordinance and the Right to Information Ordinance was promulgated.

Most importantly, the Awami League won the national elections held on 29 December 2008 and a new government led by Prime Minister Sheikh Hasina has been formed since then.

In the light of these developments, *Asian Coalition on UPR* submits the following to be raised at the Working Group on UPR:

a. Elections in the CHTs Regional Councils

The parliamentary elections held on 29 December 2008 and the Union

Parishad elections being held should be welcomed.

However, no election has been held in the local bodies of the Chittagong Hill Tracts (CHTs). The CHTs Regional Council established in 1998 did not have any elections. The last elections in the Hill District Councils of Rangamati, Bandarban and Khagrachari were held in 1989 by then President General H M Ershad. The Hill District Councils and the Regional Council are being run by appointees of the authorities in Dhaka.

The government of Bangladesh should be asked as to when the elections in the Hill District Councils and the Regional Council will be held.

The members of the Working Group on UPR should recommend the government of Bangladesh to hold the elections in the Hill District Councils and the Regional Council of the CHTs as early as possible.

b. Implementation of the CHTs Peace Accord

The present government of Bangladesh headed by Awami League is the one that has signed the CHTs Peace Accord in December 1997. In the last 11 years, the CHTs Accord has not been implemented. The army camps have not been withdrawn as required under Section 17 (a) of Part D of the Peace Accord and the CHT Land Commission established under Section 4 of Part D of the Peace Accord failed to take off and not a single case of land dispute has been resolved. A total of 9,780 families out of total

12,222 Jumma families who returned from India following the CHT Peace Accord have not got back their lands, orchards or gardens and homestead. In May 2000, Task Force Committee identified 90,208 Jumma families and 38,156 non-tribal Bengali settler families as “internally displaced families” in CHTs.² In addition, there were some 10,000 tribal IDP families who were left out by the Task Force. By including the non-tribal IDPs, the government sought to legitimize the settlement of the Muslims from the plains in the CHTs under the State-sponsored ethnic cleansing programme. While the Jumma IDPs were not provided any rehabilitation or food aid, educational facilities, health care services, sanitation and safe drinking water etc, illegal settler families have been provided free rations and other facilities by the government since 1978.³

On the other hand, indigenous peoples and their lands continue to be targeted. In 2008, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people sent a joint communication calling the attention of the Government to the alleged illegal seizure of the traditional lands of indigenous communities in the CHT and systematic campaign to support the settlement of non-indigenous families in the CHTs with the active support of the security forces, with the ultimate aim of displacing the indigenous community.⁴

The government of Bangladesh should be questioned as to what measures it will take to fully implement the Peace Accord especially withdrawal of the army camps, functioning of the CHTs Land Commission and addressing the issues raised by the Special Rapporteur. The government of Bangladesh must also be questioned on the steps taken to ensure full and proper rehabilitation of all the

The government of Bangladesh should be asked to make the report of the one-man Judicial Investigation Commission as well as the action taken report including details of punishments awarded to the guilty along with the names and designation of the persons facing criminal proceedings public.

returnee indigenous Jumma refugees and indigenous IDPs.

c. Return of the Enemy Properties:

In 2000 the Special Rapporteur on religious intolerance, after receiving information about appropriation of property under Vested Property Act, recommended the government of Bangladesh to ensure full restoration of properties of the Hindu community and the Hurukh/Oroan tribes.⁵ New Delhi-based Asian Centre for Human Rights (ACHR) in its UPR submission noted that Hindu minorities continued to be targeted and their religious freedoms violated. It is reported that some 1.2 million or 44 per cent of the 2.7 million Hindu households in Bangladesh were affected by the Enemy Property Act, 1965 and the Vested Property Act, 1974 which empowers to identify the Hindus as enemies of the State and seize their properties.⁶ According to an estimate, approximately 2.5 million acres of land of the Hindus was seized under the Vested Property Act until the Act was scrapped in 2001.⁷

The current government of Bangladesh led by Awami League

was the one which adopted **Enemy Properties Return Act 2001** with a view to restoring ownership of the lost land to the Hindu families. But no measure has been taken to implement the Act. According to a recent study by Abul Barkat, professor of economics at Dhaka University, nearly 200,000 Hindu families have lost over 40,000 acres of land since 2001.⁸

The government of Bangladesh should be questioned as to what measures it will take to fully implement the Enemy Properties Return Act 2001 and restore the seized lands of the Hindus.

d. Human Rights Defenders:

AITPN expresses concerns about the persecution of the indigenous human rights defenders in Bangladesh. The government has been seeking to establish an Eco-Park in the Modhupur forest area under Tangail district at the cost of displacement and survival of about 25,000 indigenous Garo and Koch peoples.

On 27 April 2007, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the question of torture asked the government of Bangladesh to investigate the killing of Choles Ritchil and the ill-treatment of Protab Jamble, Piren Simsang and Tuhin Hadima, and prosecute the guilty as well as to compensate the victims and Mr. Ritchil's family. In its reply submitted on 11 October 2007, the government of Bangladesh stated that a one-member Judicial Investigation Commission headed by a retired District Judge has been set up to investigate the killing of Choles Ritchil. Four persons belonging to Armed Forces were awarded punishments, which included removal from service and exclusion

from promotion. Finally, a number of other individuals, including public officials, doctors and forest officials, had also been subject to criminal proceedings.

The government of Bangladesh should be asked to make public the report of the one-man Judicial Investigation Commission and the action taken report including details of punishments awarded to the guilty along with the names and designation of the persons facing criminal proceedings.

e. Accountability for extrajudicial executions

In the stakeholders' summary (A/HRC/WG.6/4/BGD/3) it has been pointed out by several stakeholders that the security forces of Bangladesh have been responsible for systematic and widespread "extrajudicial executions", arrest and routine use of torture with impunity. AITPN noted that the continued presence and expansion of military bases contributes to the ongoing human rights abuses including extrajudicial killings in the Chitagon Hill Tracts (CHT).⁹ According to human rights group Odhikar, a total of 319 persons have been killed by the law enforcement personnel during the first 23 months of state of emergency (11 January 2007 to 11 December 2008). Of them, 155 persons were killed by the Rapid Action Battalion (RAB) and 118 by the police.¹⁰

The government of Bangladesh should be asked what measures are being taken for establishing accountability into the killings by Rapid Action Battalion, the police and other security forces.

f. National Human Rights Commission

The care-taker government of Bangladesh should be welcomed for the establishment of a National

The government of Bangladesh should also be asked what measures will be taken for enactment of a law including guarantees for inclusion of religious minorities and indigenous/tribal peoples as members of the NHRC.

Human Rights Commission and appointment of the members.

The government of Bangladesh should be asked what measures will be taken for enactment of a law including guarantees for inclusion of religious minorities and indigenous/tribal peoples as members of the NHRC.

g. Right to Information Ordinance

On 20 September 2008, the Caretaker government approved the Right to Information Ordinance, 2008 and it came into effect on 20 October 2008 with the publication in the official Bangladesh Gazette.

The Working Group on UPR should ask the democratically elected government of Sheikh Hasina to pass the Right to Information Ordinance in the Parliament and to provide further information about the establishment of the Information Commission provided for under the Right to Information (RTI) Ordinance, 2008 to implement the RTI Ordinance.

h. Cooperation with human rights mechanisms

The government of Bangladesh failed to comply with its treaty reporting obligation to submit periodic reports

to treaty bodies. Bangladesh's twelfth to fourteenth report to the CERD is overdue from 2002 to 2006; initial and second report to CESCR is overdue from 2000 to 2005; initial report to HR Committee is overdue since 2001; first to third reports to CAT is overdue since 1999 to 2007; Second report to OP-CRC-AC is overdue since 2007.¹¹

Bangladesh has also failed to ratify a number of key international human rights instruments including the International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in independent countries.

The government of Bangladesh should be asked to submit its pending periodic reports to the treaty bodies and to ratify the ILO Convention No. 169 and other international human rights instruments which it has not yet ratified.

(Footnotes)

1. AITPN's submission "Bangladesh: We want the lands, not the indigenous peoples" can be read online at <http://www.aitpn.org/UN/UPR-Bangladesh.pdf>
2. Parbatya Chattagram Jana Samhati Samiti, Bangladesh
3. Asian Centre for Human Rights – South Asia Human Rights Index 2008, Bangladesh Chapter
4. Para 39, A/HRC/WG.6/4/BGD/2
5. Para 40, A/HRC/WG.6/4/BGD/2
6. Para 48, A/HRC/WG.6/4/BGD/3
7. Religious minorities vulnerable in Bangladesh: US, Hindu Janajagruti Samity, 17 September 2007, <http://www.hindujagruti.org/news/3028.html>
8. Bangladeshi Hindus loose property: study, Economic Times, 26 May 2007
9. Para 20, A/HRC/WG.6/4/BGD/3
10. 23 Months of State of Emergency in Bangladesh, Odhikar, 12 December 2008 available at http://www.odhikar.org/documents/23months_report.pdf
11. A/HRC/WG.6/4/BGD/2

Malaysia at UPR: OHCHR's summary forgets Sabah and Sarawak

During the upcoming fourth session from 2-13 February 2009, the Human Rights Council is scheduled to examine the human rights situation in Malaysia under the Universal Periodic Review.

On 19 November 2008, Malaysia submitted its national report to the Human Rights Council. Malaysia's national report comprising 114 paragraphs in VI Parts, among others, summarizes Malaysia's efforts for promotion and protection of human rights; its achievements, best practices, challenges, constraints and national priorities; and capacity building.

Various non-governmental organizations – national, regional and inter-national – submitted stakeholders' submission.

In order to bring out the exact situation of human rights of the indigenous peoples in Malaysia, it is pertinent to critically analyse Malaysia's national report vis-à-vis various stakeholders' submissions, reports and the compilation prepared by the Office of the High Commissioner for Human rights.

Summary of Malaysia's national report (on the rights of the indigenous people)

In sub-part B (Challenges, constraints and national priorities) in Part IV of its national report, Malaysia devoted 11 paragraphs to highlight its efforts for uplift of the indigenous peoples and minorities. Malaysia considers lifting indigenous groups from backwardness through assimilation into mainstream society as the most

Since Malaysia has not yet ratified most of the key international human rights instruments, it provides an opportunity to the Working Group on UPR to effectively examine the human rights situation in Malaysia including the situation of the indigenous peoples.

significant challenge. Malaysia states that it has developed comprehensive policies and strategies to uplift the status and quality of life of the indigenous community via socioeconomic programmes as well as through prioritising the preservation of traditional cultural heritage of the indigenous peoples. It particularly highlighted the Constitution, the Aboriginal People Act, 1954; the Department of Orang Asli Affairs, State Committee on Penan Affairs and various programs formulated and implemented under the Committee are Penan Volunteer Corps, Service Centres, Education Assistance, Health and Medical Services and Agriculture Extension Services.

On land rights, Malaysia states about the gazetting of 2,128 hectares of land to the Penans as native customary rights (NCR) by

Sarawak State Government in 1981 and development of these areas for commercial plantation for the benefit of 154 Penans. Malaysia's national report further states that a total of 52,864 hectares of land in the Baram district was allocated to the semi-nomadic Penans for hunting and gathering purposes.

OHCHR's compilation of UN information

Except the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), Malaysia has not ratified any of the major United Nations conventions.

Malaysia has neither issued any standing invitation to any of the Special Rapporteurs nor agreed upon the requests by many Special Rapporteurs to visit the country. A request by the Special Rapporteur on indigenous peoples has been pending since 2005.

The UN Committee on the Rights of the Child has recommended that Malaysia undertake steps to prevent and combat discriminatory disparities against children belonging to vulnerable groups, including the *Orang Asli*, indigenous and minority children living in Sabah and Sarawak and particularly in remote areas.

On 14 January 2008, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and the Special Representative of the Secretary-General on the situation of human rights defenders raised concerns

with the Government of Malaysia on the death of an aboriginal leader involved in anti-logging campaigns in the Upper Baram region.

OHCHR's summary of stakeholders' submissions

From various stakeholders' submissions, the Office of the High Commissioner on Human Rights (OHCHR) summarized the following issues with regard to indigenous people in Malaysia:

"The Orang Asal, or indigenous peoples, consist of more than 80 ethno-linguistic groups, each with its own culture, language and territory, as indicated by the Jaringan Orang Asal Semalaysia (JOAS). Collectively, the 4 million indigenous peoples are among the poorest and most marginalised. SUHAKAM noted that the rights of indigenous people to customary land should be upheld; and existing state legislations should be reviewed. SUHAKAM noted that the Malaysian Court has progressively recognised customary land rights. BCM noted that State Governments have cleared ancestral land and/or alienated land occupied or utilised by aborigines to third parties (e.g. for logging, palm cultivation) and has only offered to pay compensation for loss of agricultural products planted on such land. According to BCM, the GOM has found it difficult to extend to the aboriginal community the right to proper education and health services. 105 COMANGO also indicated that there is also an 'Islamisation policy' that targets the conversion of the Orang Asli community."

For reasons best known, OHCHR, though it confirmed the receipt of the submission by AITPN, has failed to mention AITPN and in this process has omitted a number of critical issues, raised by AITPN, from the stakeholder's summary report. AITPN summarises the concerns with regard to the situation of indigenous peoples in Sabah and Sarawak.

i. Preference for logging and plantations over cultivation in Sabah

In southern part of Sabah, the State has given the lands which lie within the Kalabakan Forest Reserve to several companies against the repeated appeals from the Serudung Murut of Kalabakan. Several indigenous communities have established settlements and farms in forest reserves as more lands are being taken for oil palm plantations. The process of demarcation and recognition of customary lands is very slow, while the alienation of large areas for plantations, logging and protected areas is rapid. The National Human Rights Commission urged the government to consider the problems faced by the villagers who have been residing in the areas since before it was gazetted as a Forest Reserve.¹

In recent years, the government rapidly expanded oil palm cultivation especially in States of Sarawak and Sabah. At least 55-59 percent of oil palm expansion between 1990 and 2005 occurred at the cost of forests. The area of oil palm plantations more than doubled to 3.6 million hectares and at least 1.04 million hectares were converted for the oilseed during the period.²

Further, Native Customary Lands are being converted to corporate monocultures in Sarawak. The

Sarawak's Land and Survey Department signs away NCR lands before communities give prior informed consent. For example, a South Korean-Malaysian joint venture is about to set up a cassava plantation on about 2,000 hectares of Native Customary Rights (NCR) land initially in Balut area in Julau district. The State Land and Survey Department reportedly confirmed the land status. The government states that the project will benefit the people and landowners besides creating jobs and business opportunities, etc.³

As a result of Native Customary Rights (NCR) being continuously eroded, on 20 February 2008, a memorandum containing land claims from 32,352 natives over a collective area of 339,984 acres from 18 districts in Sabah was submitted to Head of State Tun Ahmadshah Abdullah and Chief Minister Datuk Seri Musa Aman.⁴

ii. Targeting the Penans of Sarawak

The conditions of the indigenous Penans in Sarawak State remained deplorable. In July 2007, the SUHAKAM following a fact-finding mission issued statement identifying seven key areas requiring "drastic improvement" by the government in order to improve the situation of the Penans. The SUHAKAM listed the following concerns – land rights; Environmental Impact Assessment (EIA) reports; poverty; personal identification documents; education; health and the duty of the Sarawak State government to protect the rights of the Penans. The SUHAKAM stressed the need to amend the Sarawak Land Code of 1958 as the Code has no provision on the rights of the Penans to land ownership.⁵

Certifying the extinction process:

In 2001, the Malaysian Timber Certification Council (MTCC) started

a dubious method of legalizing its illegal trade of timber by issuing "certificates" in the name of promoting environmentally sound logging practices. The MTCC issues two types of certificates - Certificate for Forest Management and Certificate for Chain-of-Custody. The Certificate for Forest Management certifies that the Forest Management Units (FMU) is sustainably managed and that timber was harvested legally. The Certificate for Chain-of-Custody assures the buyers that timber products originated from MTCC-certified FMUs. MTCC states that participation and consent of local communities, particularly forest-dwelling indigenous people, is a key criterion for issuing of such "certificates".⁶

However, since 2001, the Network of Indigenous Peoples and Non-Governmental Organisations on Forest Issues (JOANGOHutan) withdrew from talks with the government on certification process. The organisation held that the scheme is "only concerned with the sustainability of timber production and not the social-cultural sustainability of indigenous livelihoods". Like elsewhere, participation of indigenous peoples is tokenism at its best.⁷

In January 2007, the Sarawak authorities prevented the indigenous leaders from meeting an official delegation of European Union which visited Sarawak as part of the negotiations between the EU and Malaysia to reach a "Voluntary Partnership Agreement" to control illegal logging and work towards sustainable forest management in Malaysia.⁸

The so-called certification process by the MTCC has been allowing the illegal loggers to flout the sustainable forestry practices and indigenous

peoples' rights over their lands and resources. The MTCC has reportedly certified 4.73 million hectares of Permanent Forest Reserves (PFR) that include eight forest management units (FMU) in the peninsula and the Selaan-Linau FMU in Sarawak. The practice is therefore proving to be disastrous for the survival of the indigenous peoples who are largely dependent on forests produce.⁹

Manipulating Environmental Impact Assessment

Environment Impact Assessments for projects are often manipulated by the authorities. In the Belaga in Sarawak, the Environmental Impact Assessment (EIA) done by JB Agriculture Management Services for an oil palm and forest plantation totally overlook the presence of the Penans by saying that there was no evidence of human settlements in Ulu Belaga forests. However, the Malaysian Human Rights Commission (SUHAKAM) following a fact-finding mission to Sarawak in September 2006 found contradictions and inconsistencies in the EIA on Shin Yang Forest Plantation which stretches between Batang Belaga and Sungai Murum. The EIA of the plantation scheme erroneously declared that there is no human settlement in the 155,930ha project area. Earlier, in 1999, Shin Yang had obtained a 60-year Licence for Planted Forest. The project is divided into 80% forest plantation and 20% oil palm. Suhakam which released its report 'Penan in Ulu Belaga: Right to Land and Socio-Economic Development' in August 2007 revealed that 19% of the Penan population of 15,500 reside in Ulu Belaga, with 20 settlements in the disputed region.¹⁰

Killing as the response

Those who oppose logging were targeted. Many Penans have been arrested and jailed for their actions.

In December 2007, a village chieftain identified as Kelesau Naan (70) was found dead in the jungles of Borneo in Sarawak state. Some of his bones were reportedly fractured indicating that he had been assaulted. He disappeared on 23 October 2007 while checking an animal trap near the remote village of Long Kerong in eastern Sarawak State. Kelesau Naan has been a key figure in anti-logging efforts by the Penans.¹¹ Many supporting activists who carried out fact-finding missions or spoke out against atrocities perpetrated by logging companies, police, etc were banned from entering Sarawak.¹²

On 28 January 2008, an Iban village chief and two others identified as Tuai Rumah Taman Anak Embat (55), Robert Anak Gickson Sawing (23) and Alu Anak Embat (58) were arrested for setting up a blockade to stop encroachment by plantation company, Saradu Plantation Sdn Bhd for logging activities into their Native Customary Rights (NCR) land in Ulu Balingian.¹³

iii. Displacement due to Bakun Dam in Sarawak

In late 2007, the government of Malaysia decided to resume the controversial Bakun Hydro Electric Project in Sarawak to its original design to generate 2,400 megawatts of electricity power.¹⁴ The Dam has already destroyed 23,000 hectares of virgin rainforest and displaced 9,000 indigenous people. The communities claimed that the survey conducted on the ground was not properly carried out. On 9 August 2007, Australia-based Rio Tinto Aluminium signed a deal with Malaysian conglomerate Cahya Mata Sarawak for a joint study to build a US\$ 2 billion smelter in Similajau near Bintulu, 80 km inland from the Bakun Dam.¹⁵ The indigenous people were struggling to survive on resettlement sites due

to unemployment and hunger. The indigenous people displaced by the dam project claimed that they have not been properly resettled and adequately compensated. However, the State government has denied these and claimed that only the older generation had reservations about the resettlement program.¹⁶

(Footnotes)

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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 Peoples¹ 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 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 made 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 involving 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.
- (e) 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, advise 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.

(Footnotes)

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

The Government Committee is Not Enough : CEMA of Vietnam

The Committee for Ethnic Minorities (CEM) is a ministerial level agency of the government of Vietnam responsible for overall development of strategies, planning and implementation of government policies on ethnic minorities and mountainous areas who constitute about 14% of the total population of Vietnam.

The government of Vietnam has repeatedly changed the name, organizational structure and powers and functions of the Committee dealing with the Ethnic Minorities. The Committee for Ethnic Minorities and Mountainous Areas (CEMMA) was created in 1993 only to be replaced by the State Committee for Ethnic Minorities and Mountainous Area Affairs (SCEMMAA) in 1998. Again in May 2003, the government replaced SCEMMAA with "the Committee for Nationalities". Finally, the Committee for Ethnic Minorities was brought in by Decree 60/2008/ND-CP dated 9th May 2008.

The need to frequently change the name, powers and functions of the Committee dealing with the Ethnic Minorities exposes the failure of the Committee and the constant efforts of the government of Vietnam to provide more mandate to the Committee. Yet, a mere Ministerial-level committee like the "Committee for Ethnic Minorities" is totally insufficient and unsatisfactory to fulfill the interests of the Ethnic Minorities.

Evolution of CEM

Ethnic minority issues have been at the core of the government's agenda - albeit primarily from a strategic point of view - since the country's

The need to frequently change the name, powers and functions of the Committee dealing with the ethnic minorities exposes the failure of the Committee for Ethnic Minorities. The the government of Vietnam regularly provides more mandate to the CEM but a mere Ministerial-level committee like the "Committee for Ethnic Minorities" is totally insufficient and inadequate to protect the interests of the ethnic minorities against the onslaught of the majority Kinh.

independence from France in 1945. In September 1946, Socialist Republic of Vietnam decided to create an Ethnic Minority Department under the Office of the Prime Minister, primarily to conduct research and resolve the problems concerning ethnic minorities. In 1959, it was upgraded to Committee status with better defined functions and organizational structure, including a research department, a department of propaganda, culture, and education and a department of security. The Committee was empowered to advise the government in policy making for ethnic minorities and to oversee the implementation of those policies. In 1987, the Committee was dissolved but was re-established in 1990 under the name Office of Mountainous Areas and Ethnic Affairs.

In 1993, the Committee for Ethnic Minorities and Mountainous Areas

(CEMMA) was created. CEMMA was responsible for Ethnic Minority development and for mountainous areas. In 1998, CEMMA was replaced by the State Committee for Ethnic Minorities and Mountainous Area Affairs (SCEMMAA) under Decree No. 59/1998/ND-CP of 13 August 1998 issued by the Prime Minister. The SCEMMAA was "an agency of the Government providing the State management functions in the fields of ethnic minorities and mountainous areas nationwide, and at the same time acting as an advisory agency to the Central Committee of the Communist Party of Vietnam on the guideline, policies towards the ethnic minority groups and mountainous areas". It was headed by a Minister (who is called the Chairman of the SCEMMAA) and the Minister was assisted by the Vice Chairmen who are "nominated or dismissed by the Prime Minister". The Minister-Chairman of the SCEMMAA was accountable to the Government, the Prime Minister and the National Assembly.

Again under Decree No. 51/2003/ND-CP of 16 May 2003, the government of Vietnam replaced SCEMMAA with "the Committee for Nationalities" which is a "ministerial-level agency of the Government".

Finally, on 9 May 2008, the name was changed to "the Committee for Ethnic Minorities" by Decree 60/2008/ND-CP dated May 09, 2008. It is a ministerial level agency under the Government mandated to perform the functions of state management on ethnic minority affairs nationwide, and on public services within its authorities as prescribed by the law.

The Committee for Ethnic Minorities (CEM) is headed by the Chairman who is a Minister in the Union Cabinet. He is assisted by the Vice Chairmen. Presently, there are three Vice Chairmen in the CEM.

Powers and functions

Under Decree No. 60/2008/NĐ-CP dated 9th May 2008, the Committee for Ethnic Minorities is a ministerial level agency under the Government mandated to perform functions of state management on ethnic minority affairs nationwide, and on public services within its authorities as prescribed by the law. The functions of the Committee ranges from *development of laws to implementation of the programmes, their monitoring and acting as inter-agency of different ministries of Vietnam and liaisoning with international agencies.*

Activities of the Committee for Ethnic Minorities

It is pertinent to mention here that although Decree No. 51/2003/ND-CP of 16 May 2003 has “replaced” the Government’s Decree No. 59/1998/ND-CP of 13 August 1998 which established the State Committee for Ethnic Minorities and Mountainous Area Affairs, both the donor agencies (such as World Bank, Asian Development Bank, UNICEF, UNDP and foreign governments etc) and the government of Vietnam continue to refer the Committee as “Committee for Ethnic Minorities and Mountainous Areas” (CEMMA).

The CEMMA and its successors the Committee for Nationalities and the Committee for Ethnic Minorities have been the nodal agency in implementation and monitoring of various ethnic minorities specific projects. The most important programmes implemented in Vietnam for development of the ethnic minorities and mountainous

areas under the aegis of Committee for Ethnic Minorities are as follows: (a) Programme 135: Programme on Socio-economic Development in Mountainous, Deep-lying and Remote Communes with Special Difficulties; (b) Program 826: Policy of Support for Ethnic Minority Households in Extremely Difficult Circumstances; (c) Land and housing for Ethnic Minorities; (d) Technical Assistance Project of ADB; (e) Rural Clean Water and Sanitation Program; (f) Resettlement and Sedentarization Program; (g) Price and transportation subsidies program; and (h) Linking Bank Credit Model project.

That the ethnic minorities have not benefited much from the policies and programmes could be identified from the failure of the government to substantially reduce poverty among the ethnic minorities. While the national poverty rate fell from 58.1% in 1993 to 16% in 2006, poverty remains much higher among the ethnic minorities than among the Kinh and Chinese majority. The ethnic minorities who constitute only 14% of the total population account for 44 percent of the poor and 59 percent of the hungry. In the last 13 years, their poverty rate has been declining at an average of 2.6 percentage points per year, against 3.4 points for the Kinh and Chinese majority. In 2006, 52 percent of ethnic minority people were still living in poverty, compared to only 10 percent of Kinh and Chinese people. The majority Kinh and Chinese have been the major beneficiaries of the policies and programmes targeting hunger eradication and poverty reduction. For instance, the poverty rate of the Central Highlands fell by a remarkable 23 percentage points between 2002 and 2006. However, a closer examination suggests that there has been almost no improvement in living standards for ethnic minorities in that region. Poverty among the

ethnic minority has remained high in both the Northern Mountains and the Central Highlands, poverty among the Kinh and Chinese people in those regions has declined at 4.6 and 2.8 percentage points per year respectively.

Hence, the Committee for Nationalities and the government of Vietnam must reconsider their policies and programmes and ensure that the conditions of the ethnic minorities are uplifted equally.

The present Committee for Ethnic Nationalities which is a ministerial level agency of the government is not enough for the development of the ethnic minorities who live on the lowest rung of the Vietnamese society despite Vietnam being recognized as one of the fastest emerging economies in Asia.

Besides development and access to basic facilities such as food, healthcare, education, sanitation, housing, safe drinking water and communications etc, the ethnic minorities of Vietnam need protection from violations of their basic human rights and fundamental freedoms by the state and majority Kinh or Viets.

Hence, the government of Vietnam must do much more than a mere ministerial level committee which has no independence and resources to protect the rights of the ethnic minorities. Asian Indigenous and Tribal Peoples Network (AITPN) recommends that the government of Vietnam sets up a separate Ministry for Development of the Ethnic Minorities and Mountainous Areas and initiate the process for establishment of a National Commission for Ethnic Minorities and Mountainous Areas for the protection and promotion of the human rights and fundamental freedoms of the ethnic minorities in Vietnam.

The Ministry of Chittagong Hill Tracts Affairs of Bangladesh : An Agency for Discrimination

Article 19, Part 4 of the Chittagong Hill Tracts (CHTs) Accord of 1997 provided for the establishment of a Ministry of Chittagong Hill Tracts Affairs headed by a tribal Minister. Pursuant to the Peace Accord, the Ministry of Chittagong Hill Tracts Affairs was established on 15 July 1998. The Ministry of CHT Affairs is mandated to supervise and coordinate the overall development and administrative activities of the CHT region. An Advisory Committee has also been formed to assist the Ministry.

The CHT Affairs Ministry: Implementing racist policies against indigenous peoples

The Ministry of Chittagong Hill Tracts Affairs for all practical purposes has been reduced to a Ministry for illegal Bengali Muslim plain settlers to discriminate against indigenous Jumma peoples because of their ethnic, religious and linguistic origin.

a. Tribal Minister not heard, Regional Council ignored

The Ministry of CHTs Affairs is headed by a Minister belonging to indigenous groups to oversee and coordinate the work of the various ministries and departments concerning the CHTs. However, the Minister is seldom heard.

According to former Deputy Minister Moni Swapan Dewan, he was allegedly never called in any policy meeting of the government on CHT during his five years term. At least 15 policy meetings were held during his tenure. Budgets involving crores

of Taka were approved from the CHTs Affairs Ministry for various development projects allegedly without his signature!

The government has not framed any rules or issued the necessary directives to the Ministries. As a result, the directives of the Ministry of CHTs Affairs were not complied with by the district and local level administrations.

Further, there is lack of clarification of mandates, responsibilities and authorities of the Ministry of CHTs Affairs vis-à-vis other CHTs institutions. There are no clear operational rules and administrative frameworks for most of the CHTs institutions. For example, the supplementary rules and regulations as well as the administrative orders essential to make the government institutions such as the Regional Council operational, are still to be elaborated/approved by the Government. As a consequence, the mandates and authorities of the respective CHT institutions tend to overlap considerably. This in turn leads to inter-institutional confusion and differences which greatly undermine the delivery of relevant services to the people. The Parliamentary Standing Committee on the Chittagong Hill Tracts Affairs Ministry observed that the ministry was performing poorly because of lack of coordination among its top officials.

There is also lack of coordination between the MoCHTA and other affiliated institutions such as CHT Regional Councils (CHTRC) and

Hill District Councils (HDC). This seriously undermines the functioning of the respective institutions. The CHTRC can not perform its functions properly because of lack of proper support from the Ministry of CHT Affairs. On the other hand, the three HDCs and Chittagong Hill Tracts Development Board (CHTBD) which are directly under the Ministry of CHT Affairs are ignoring the supervisory and coordinating authority of CHTRC over them in violations of the CHT Accord. This tends to create frustrations among the office-bearers and limit their effectiveness in facilitating and supporting development. Consequently, the CHTs Regional Council which were established to resolve the problems of the indigenous peoples have been rendered useless.

The CHTs Illegal Settlers' Development Board!

The military government of Ziaur Rahman sought to pacify the political demands of the Jana Samhati Samiti (JSS) by recognizing the CHT crisis as "economic problem", and set up Chittagong Hill Tracts Development Board in January 1976. But it was rejected by the Jumma peoples. As anticipated, the CHT Development Board failed to bring economic development in the region as it implemented counter-insurgency development projects.

The CHTs Accord stipulates that, "The Chittagong Hill Tracts Development Board shall discharge the assigned duties under the general and overall supervision of the Council. The Government shall give preference to the eligible tribal candidates in

appointing the Chairman of the Development Board" (Clause 10 of Part C).

But Prime Minister Khaleda Zia appointed BNP Member of Parliament from Khagrachari, Wadud Buiyan, an illegal settler, as the Chairman of the CHT Development Board on 11 February 2002. On 20 February 2002, the Jana Samhati Samiti made an appeal to the government against the appointment of Wadud Buiyan but the appeal fell on deaf ears.

Under Buiyan's chairmanship, the CHTDB has been undertaking settler-oriented development programmes instead of tribal welfare programmes. Thousands of illegal settlers were settled into the CHT and provided free rations. The illegal settlers are so indebted to MP Wadud Buiyan that now many villages where they have been settled have been re-named as "Wadud Palli" ("Wadud villages"). When the Deputy Minister for the CHTs Affairs, Mani Swapan Dewan refused to toe the line on the issue of providing rations, he was divested of his portfolio although he remained minister.

b. Implanting the illegal plain settlers

The CHTs Accord did not help to resolve the illegal settlers' issue. Rather, the CHTs Affairs Ministry became the lead agency for implantation of tens of thousands of illegal plain settlers on the lands of indigenous Jumma peoples. They are considered illegal as the Chittagong Hill Tracts 1900 Regulation restricts the entry of non-hill people into the CHTs. Moreover, Article 49 of the Fourth Geneva Convention also prohibits such population transfers.

Further, in the CHTs Accord, the government of Bangladesh agreed to protect the "special character" of

the CHT region as "Tribal inhabited Region". Clause 1 of Part A: General of the CHTs Accord states, "Both the parties, having considered the Chittagong Hill Tracts region as a tribe-inhabited region, recognized the need of preserving the characteristics of this region and attaining the overall development thereof".

However, the indigenous peoples are increasingly being reduced to minority.

One of the first steps taken by the government of Bangladesh was to legalise the illegal settlers who grabbed the lands of indigenous Jumma peoples. In November 1999, after instructions from the Prime Minister's Office, illegal plain settlers who displaced the indigenous Jumma peoples were included in the category of IDPs. Consequently, in 2000, the Task Force under the chairmanship of Dipankar Talukder prepared the list of 1,28,364 IDP families, including 90,208 tribal and 38,156 non-tribal families. It is strange that the illegal plain settlers who have displaced the Jummas in the CHT were included in the lists of IDPs.

On 21 December 2000, the Ministry of CHT Affairs served a notification No. 62/99-587 empowering the Deputy Commissioners of the three hill districts in the CHTs to issue "permanent resident certificate" to the illegal plain settlers.

In September 2003, the government announced a plan to give permanent resident status to 26,000 families of Bangalee settlers living in cluster villages in the CHTs. In line with the directive of the Prime Minister, CHT Affairs Ministry started the process of forming a committee to finalise the proposed plan. The settlers who were relocated from the northern and southern regions of Bangladesh in 1982-83 were promised government

lands as incentive to settle in the trouble-torn CHTs. They were promised free ration of 28,000 tonnes of food grains worth Taka 28 crore a year. The ration was to be withdrawn only upon becoming permanent residents.

In June 2005, it was reported that the government of Bangladesh was planning to sponsor transfer of about 65,000 illegal plain settlers' families from the plains to settle them in Sajek Union under Rangamati district. Following the exposure, Member of Parliament from Khagrachari district, Wadud Bhuiyan, who is himself an illegal plain settler, confirmed that the plain settlers' families had started building houses beside the Sajek road but the army did not allow them on safety ground. A road from Baghaihat to Sajek has been constructed through dense Kassalong reserve forest violating the Forest Act of 1927 and Bangladesh Forest (Amendment) Act 2000 to facilitate the transport of the plain settlers. The government of Bangladesh also proposed to provide free ration to 28,000 more illegal plain settler families in CHTs in addition to 27,000 illegal plain settler families who have been provided free ration since 1978.

On 23 April 2006, the Parliamentary Committee on the CHTs Affairs confirmed that number of people living in the cluster-villages in the three hill districts - Rangamati, Bandarban and Khagrachari - became double and rose to 50,000.

In a letter dated 19 November 2007 Md. Sulut Zaman, Deputy Secretary of the Ministry of Chittagong Hill Tracts Affairs (MoCHTA) directed the Deputy Commissioner of Khagrachari district to illegally settle 812 families into the lands of the indigenous Jummas at Babuchara area, Baghaichari mouza under Dighinala upazila (sub-district) in Khagrachari district.

The implantation of illegal settlers continues unabated and indigenous Jumma peoples continue to be victimised. On 20 April 2008, hundreds of illegal plain settlers backed by Bangladesh army launched pre-planned attacks on seven indigenous Jumma villages namely Nursery Para, Baibachara, Purba Para, Nangal Mura, Retkaba, Simana para and Gangaram Mukh under Sajek Union under Baghaichari upazila (sub-district) in Rangamati district in the Chittagong Hill Tracts (CHTs) of Bangladesh from 9.30 pm to 1.30 am. Besides a church and two UNICEF run schools, an estimated 77 houses of indigenous Jumma peoples were burnt while four indigenous villagers were wounded and hundreds of indigenous Jummas were internally displaced.

c. Supporting land grabbing

The Ministry of CHT Affairs acknowledge that land dispute between Bangalee settlers and indigenous people remains one of the main reasons for communal tensions in CHTs.

The CHTs Accord provides for constitution of a Land Commission headed by a retired Justice to “resolve the [land] disputes in consonance with the law, custom and practice in force in the Chittagong Hill Tracts”. The Land Commission with tenure of minimum of three years has been bestowed full authority to cancel the ownership of those hills and lands which have been illegally occupied by the plain settlers. The decisions of the Commission are final and no appeal can be made against such decisions.

To term systematic land grabbing by illegal settlers as “[land] disputes” is a misnomer and an attempt to justify the legality of land grabbing. In the

CHTs, it was a clear case of land grabbing and there were no questions of disputes as the land belong to indigenous peoples as per “the law, custom and practice in force in the Chittagong Hill Tracts”.

Nonetheless, the Land Commission was formed on 3 June 1999 under the Chairmanship of retired High Court justice AM Mahmudur Rahman. By May 2003, over 35,000 cases had reportedly been lodged with the Commission. But the Commission could not function and its tenure had to be extended up to 1 November 2004. It received second extension for another three years “as the commission failed to finish its task”. Justice AM Mahmudur Rahman complained that the government did not provide adequate staff. On 8 June 2005, the Commission convened its first meeting at Khagrachari. The ineffectiveness of the Commission is evident from the views expressed by its Chairman Justice AM Mahmudur Rahman that he favoured a “tribunal” instead of a commission to settle the land disputes in CHTs.

The government of Bangladesh does not have political will to settle the land grabbing issue in the CHT. In 2001, the Awami League government passed the CHT Land (Disputes Settlement) Commission Act, 2001. The indigenous peoples rejected the Act primarily because of the arbitrary powers of the Chairperson to provide final judgement in the event of lack of consensus among other members; the exclusion of Jumma refugees who returned to the CHTs under the 1992 repatriation agreement from the ambit of the Land Commission; and the exclusion of the internally displaced Jummas from the scope of the Act.

In December 2003, the Parliamentary Standing Committee on the CHT

Affairs Ministry asked the Ministry of CHT Affairs to settle land dispute through the Land Commission.

In 2007, the Advisory Committee in its meeting, among the decisions made was the reactivation of the Land Commission. Besides, the position of chairman remained vacant since its last chairman AM Mahmudur Rahman passed away on 1 December 2007.

On 31 March 2008, Raja Devashish Roy, Special Assistant of Chief Adviser on Ministry of CHT Affairs stated that the government has initiated the process to amend few provisions of the Land (Disputes Settlement) Commission Act and reconstitute the commission for speedy disposal of disputes.

Systematic attacks on indigenous Jummas especially of those villages in whose vicinity the cluster villages of the illegal settlers have increased further since the signing of the CHTs Accord. Further the Bangladesh military has been responsible for forcible seizure of lands of the Jummas in the name of construction of military bases. The government of Bangladesh has undertaken programmes to acquire a total of at least 66,774 acres of land for military purposes respectively 9,650 acres of land in Bandarban for the expansion of Ruma military cantonment which will affect about 1,000 indigenous Jumma families; 11,446.24 acres of land in Sualok Union of Bandarban for establishing an Artillery Training Centre which will uproot 400 indigenous families (each family was provided only a paltry sum of Taka 3,000 to 8,000 as compensation); 450 acres of land in Pujgang under Panchari Thana of Khagrachari district for construction of an army cantonment; 45 acres of land in Babuchara under Dighinala Thana

in Khagrachari district which will affect at least 74 Jumma families in three villages; about 183 acres of land in Balaghata in Bandarban district; 19,000 acres of land in Bandarban for the expansion of an Artillery Training centre and 26,000 acres of land in Bandarban for establishing Air Force Training Centre. These are in addition to the notices to acquire a total of 5,600 acres of land in Chimbuk area of Bandarban district in the name of constructing an Eco Park and 5,500 acres of land in Sangu Mouza of Bandarban district in the name of creating an "Abhoyarannyo" (animal sanctuary). The government officials have also been forcing indigenous Jumma peoples to lease away 40,071 acres of land in Lama, Nikkyong Chari, Alikadam and Bandarban Sadar to private individuals for rubber and tea plantation.

d. Repression on NGOs activities in the CHTs

The Ministry of CHT Affairs controls NGOs activities in the CHTs. In fact,

this is the only functions it has been doing efficiently!

The non-government organizations in CHTs were established after the Peace Accord. These NGOs have been implementing development projects in adherence of the government rules and regulations for NGO activities in CHT. NGOs operating with foreign funds need a No Objection Certificate (NOC) from the Ministry of CHT Affairs.

There was no problem in getting NOC from the Ministry of CHT Affairs for CHT based NGOs to operate project activities with foreign funds as of 2005. However, since January 2006, the Ministry of CHT Affairs blocked NOCs to NGOs for operating in CHT due to use of the words "Indigenous People" in the project documents. According to the Ministry of CHT Affairs, there are no "Indigenous People" or "Minority People" in CHT or other parts of

Bangladesh and such words are not mentioned in the constitution of Bangladesh. While local, national, regional and international NGOs planning to operate or implement project activities with foreign funds in other parts of Bangladesh (excluding CHT regions), were reportedly not required NOCs either from Ministry of CHT Affairs or other Ministries. Moreover, NGOs operating outside of the CHT have been able to use the words "Indigenous People" in their project titles and project documents. On 19 April 2006, the Secretary to the Foreign Affairs Ministry wrote a letter to the Secretary to the CHT Affairs Ministry mentioning that from now people can not identify themselves as "indigenous people." They should be called "tribal people" not "indigenous people."

The Ministry of CHTs Affairs has managed to silence critical NGO activities in the CHTs.

The Department of Orang Asli Affairs, Malaysia : An Agency for Assimilation

The 'Orang Asli' are the indigenous minority peoples of Peninsular Malaysia. 'Orang Asli' is a Malay term which means 'original peoples' or 'first peoples'. It is a collective term introduced by anthropologists and administrators. Orang Asli comprise at least nineteen culturally and linguistically distinct groups. The largest groups are the Semai, Temiar, Jakun (Orang Hulu), and Temuan. In 1999, their population was 105,000 persons representing less than 0.5 per cent of the national population. According to the records of the

Department of Orang Asli Affairs (JHEOA), a total of 147,412 Orang Aslis or mere 0.6% of the national population were living in 869 villages in 2004.

Most of them descended from the Hoabinhians, stone tool-using hunter-gatherers who occupied the peninsula as early as 11,000 B.C.

Orang Asli were once thinly scattered throughout the peninsula. But, as the majority Malay population grew on the coastal plains and major

river valleys most of the Orang Asli were pushed back into the interior montane forests. Majority of Orang Asli still lives in rural and remote areas. Until recently they lived by various combinations of hunting, fishing, gathering, swidden farming, aborigiculture, and trading forest products. Land development projects and government programs have turned many into rural peasants or day labourers.

The Orang Aslis, literally meaning first peoples have been treated as

second class *Bhumiputras*, sons of the soil. The Special Provision made under Article 153 of the Constitution of Malaysia ensures “the special position of the Malays and natives of any of the States of Sabah and Sarawak” and makes no reference to the Orang Aslis. The references to the Orang Aslis under Article 8(5) (c), Article 45(2), Article 160(2) and Article 89 of the Federal Constitution of Malaysia failed to address discrimination against the Orang Aslis.

The Department of Orang Asli Affairs

A. Historical background

Colonial period

After the surrender of the Japanese in 1945, the Orang Asli people suddenly became crucial players to determine as to who controls the country after independence. The British colonial rulers did not want the communists, mostly Chinese, in the government that would be formed in independent Malaysia. On their part, the communists wanted to stake claims in the anticipated post-independence government. Subsequently in 1947, the communists returned to the forests and started an armed insurrection, the “Emergency” which would last from 1948-1960. To prevent the communist guerrillas from winning the support of the Orang Asli people inside the deep forests, the British authorities decided to resettle the Orang Asli like the Chinese squatters. The authorities forced the Orang Asli people residing at accessible villages into camps which were surrounded by barbed wire and constantly guarded but the authorities did not provide basic requirements like proper shelters, sanitary facilities, or nutritionally adequate food. Denial of basic services in the camps resulted in death of large numbers of Orang Asli and some of them who escaped from the camps passed on

The Constitution of the Republic of Malaysia has been indicative of the process of assimilation of the ethnic minorities by the majority. The Constitution defines a Malay person as a person who habitually speaks the Malay language, practices Malay customs, and is a Muslim (Malaysian Government 1982). Since most Malaysians can now speak Malay and Malay customs are variable and ever-changing, the definitive criterion is Islam.

their experiences of ill treatment in the camps back to their relatives still in the forest. This led to increasing antagonism toward the authorities and virtually all the Orang Asli of the central highlands, mostly Temiar and Semai, had turned to the communists for protection against the government by 1953.

Experienced with the setback, the authorities drew the lesson that the cooperation of the Orang Asli people could be won only by being kind to them and not by intimidation or force. This prompted the colonial authorities to allow all camp inmates to go home. Then, the authorities set up “jungle forts” in the areas of Orang Asli which had larger number of communists. Security forces patrolled the Orang Asli villages at regular intervals to provide protection to them and male nurses at the forts delivered basic health care services. The security forces also sold salt, tobacco, and metal tools for small shops they had opened at the

forts. Preceding the setting up of the Department of Orang Asli Affairs, the colonial government established the Department of Aborigines primarily to win the loyalty of Orang Asli. In 1954, the government dramatically expanded the Department of Aborigines and made it responsible primarily for enlisting Orang Asli in the government cause against the communists. Under the Aboriginal Peoples Act of 1954, the Department has been given the control over all matters concerning Orang Asli and henceforth it came to known as Department of Orang Asli Affairs, also known as JHEOA. Field assistants—mostly Malays with some police or military experience—were posted at the jungle forts. They were given the responsibility for medical care while some of them offered informal classes in reading and writing Malay to Orang Asli children.

The efforts of the authorities fructified. They were able to win the support of the Orang Asli to the government side. By the late 1950s the security forces had even formed an anti-guerrilla unit composed mostly of Orang Asli, the Senoi Praak (Fighting Aborigines).

Post independence

In 1961, during the opening of Parliament, the King declared that the nation would not forget Orang Asli even though the Emergency was over. He said his government was adopting a “long-term policy for the administration and advancement of the aborigines” in order “to absorb these people into the stream of national life in a way, and at a pace, which will adopt and not destroy their traditional way of living and culture.” In November 1961, the Government of the Republic of Malaysia made the Department of Orang Asli Affairs permanent and made it responsible for all programs

concerning the Orang Asli. One of the reasons for the single agency approach was that over 60% of Orang Asli still lived in isolated areas, far from normal government services like education and medical care.

Since the end of the Emergency, the established aim of the Government was to bring the Orang Asli into the national "mainstream" but official statements and documents on the issue had ambiguity as to what that meant. The Ministry of the Interior's Statement of Policy of 1961 states that the goal is "their ultimate integration with the Malay section of the community," while it also stated that it prefers "natural integration as opposed to artificial assimilation" and that "special measures should be adopted for the protection of the institutions, customs, mode of life, persons, property and labor of the aborigine people." On the other hand, others advocated for complete assimilation of Orang Asli into the Malay community to the extent that they would cease to exist as a separate ethnic community. Throughout the 1970s, the officials of the Department of Orang Asli Affairs made ambiguous pronouncements about their ultimate goal. However, by the early 1980s, apparently under pressure from the Islamic Affairs Section of the Prime Minister's Department, the Department of Orang Asli Affairs had decisively favoured assimilation of the Orang Asli as the ultimate goal. In 1990, then Director-General Jimin Bin Idris stated that he hoped the Orang Asli would fully integrate into Malaysian society, "preferably as an Islamized subgroup of the Malays."

The policy of assimilation of the Orang Asli into the majority Malay communities cropped up from Malaysia's ethnic politics. The major ethnic groups in Malaysia, the Malays constituting 51% of the total

population, Chinese constituting 30%, and Indians constituting 9% compete for power and wealth through a parliamentary political system and a market economy. Since independence in 1957, the majority Malays have dominated the political arena, while the Chinese have dominated business. One reason to assimilate Orang Asli into the Malay population is to increase the number of Malay voters and control the government.

B. Organisational set-up

The Department of Orang Asli Affairs (JHEOA), a federal government body was established in 1954 under the Ministry of Interior of the colonial government. Depending upon the requirements of the Government, the Department of Orang Asli Affairs has been catapulted from one ministry to another ministry and so forth. The JHEOA had been under the Ministry of Home Affairs from 1955-1956; then under Ministry of Education from 1956-1959; then again under Ministry of Home Affairs from 1959-1964; then under the Ministry of Land and Mines from 1964-1970; then under the Ministry of Agriculture and Land from 1970-1971; then under Ministry of National and Rural Development from 1971-1974; then again under the Ministry of Home Affairs from 1974-1990; then again under the Ministry of Rural Development from 1990-1993. Since 1994, Department of Orang Asli Affairs has been functioning under the Ministry of National Unity and Social Development.

The headquarters of the Department of Orang Asli Affairs is based in Kuala Lumpur. It has 6 state branch offices, 36 district offices and 133 post or project (*projek*) offices. The Director-General of the Department is assisted by three Deputy Director-Generals. The Department has various divisions like Administration

and Personnel Division, Finance and Supply Division, Transport and Communication Division, Socio-Economic Development Division, Research and Information Division, Training Division, and Medical and Health Program. Each Division has a Director who remains under the control of the Deputy Director-Generals.

While the functions of the different divisions in the Department are self-explanatory there is one exception with regard to one division viz. Research and Information Division. This division does not work on any kind of research of its own but collects research reports and publications produced by outside scholars. On the other hand, the Division gathers intelligence on threats to national security and it devotes and spends most of its energy in propagating Islam among Orang Asli.

C. Personnel of the Department of Orang Asli Affairs

Majority of the employees, particularly all in policy-making positions in the Department of Orang Asli Affairs are Malays. The Department seldom gives the exact figure of the Orang Asli employees in the Department and keeps on giving widely varying figures. The high-ranking officials of JHEOA reportedly make blatantly deceiving statements not only on TV but also in the Parliament. For example, in a TV Forum in April 1989 the former Director-General of the Department of Orang Asli Affairs, Jimin Bin Idris stated that 1,000 of total 1,700 staff in the Department are Orang Asli. On the other hand, one month prior to the statement, in a written reply to a Parliamentary question by Democratic Action Party parliamentarian Dr. Tan Seng Giaw, the JHEOA revealed that there were no more than 395 Orang Asli employed in the Department

of Orang Asli Affairs and not 1,000 as claimed on national TV. In 1997, the Director-General said 30% of the staff in the Department was Orang Asli but none at management-level. Chinese or Indian Malaysians are not hired by the Department except occasionally as doctors.

As all senior personnel in the Department of Orang Asli Affairs are Malay, the policies of the Department are influenced and biased in favour of the majority Malays. The Orang Asli face discrimination as the Malays find it difficult to consider the Orang Asli as their cultural equals. The Department refers to Orang Asli religions as “superstitions” (*kepercayaan*) rather than “religions” (*ugama*). Malays do not feel comfortable entering the homes of Orang Asli and usually will not eat with them because of Muslim dietary prohibitions. Malay government employees working with rural Orang Asli generally prefer to live in Malay villages and commute.

Until about 1990, the staffs including the high ranking officials were taken from within the Department of Orang Asli Affairs. Because of this, high ranking officials had a chance to develop some expertise about Orang Asli and from 1961 to 1992 all Director-Generals of the Department had formal training in anthropology. But since 1992, the Public Services Department has been appointing top officers, usually from other government departments and ministries and therefore, recent Director-Generals have little, if any, prior knowledge of Orang Asli.

D. Mission Statement and objectives of the Department of Orang Asli Affairs

The primary Mission Statement of the Department of Orang Asli Affairs is to develop the socio-economic well-

As all senior personnel in the Department of Orang Asli Affairs are Malay, the policies of the Department are influenced and biased in favour of the majority Malays. The Orang Asli face discrimination as the Malays find it difficult to consider the Orang Asli as their cultural equals.

being of the Orang Asli community and to enable them to participate and compete actively in the mainstream economic, social and political development of the country, while at the same time preserving the Orang Asli identity and culture.

The main objectives of the Department are as under: -

- i. Eradicate poverty among the Orang Asli by the year 2020;
- ii. Reduce the gap in income, education, health and access to the basic facilities between the Orang Asli and the other mainstream communities in Malaysia;
- iii. Enhance the capability, confidence and self-esteem, courage and sense of discipline and eliminate all forms of negative stereotyping towards the Orang Asli; and
- iv. Upgrade the health level of the Orang Asli and eradicate all kinds of contagious diseases.

But in the guise of accomplishing its objectives, the Department of Orang Asli Affairs has been pursuing its policy to assimilate the Orang Asli

into the Malay community. Most of these strategies such as resettlement of Orang Asli population in accessible locations, destroying their political autonomy, transforming their economies into market-oriented peasant economies are directed towards its policy of assimilation and converting them to Islam and other features of Malay culture. The Constitution of the Republic of Malaysia has been indicative of the process of assimilation of the ethnic minorities by the majority. The Constitution defines a Malay person as a person who habitually speaks the Malay language, practices Malay customs, and is a Muslim (Malaysian Government 1982). Since most Malaysians can now speak Malay and Malay customs are variable and ever-changing, the definitive criterion is Islam.

The Aboriginal Peoples Act of 1954 has given broad range of powers to the JHEOA. Under section 19 (1) (a-k) of the Act, these include the creation and regulation of Orang Asli settlements, control of entry into Orang Asli abodes, appointment and removal of Orang Asli headmen, prohibition of the planting of any specified plant in Orang Asli settlements, permitting and regulation of felling of forest within traditional Orang Asli areas, permitting and regulation of forest produce, birds and animals from Orang Asli areas, and even prescribing the terms upon which Orang Asli may be employed.

Effectively, all these provisions of the Aboriginal Peoples Act of 1954 are intended for destroying the autonomy of the Orang Asli. Fourteen years after the end of Emergency, in 1974, the Government of Malaysia has amended the Aboriginal Peoples Act of 1954 but these draconian clauses remain untouched although the security concerns of that time are not there any more.

Land Alienation of Tribals in India

Alienation, a euphemistic term for grabbing the lands of the tribal peoples by non-tribals, is widespread in India. The Ministry of Rural Development of the Government of India in its 2007-2008 Annual Report states, "The State Governments have accepted the policy of prohibiting the transfer of land from tribals to non-tribals and for restoration of alienated tribal lands to them. The States with large tribal population have since enacted laws for this purpose."

The 2007-2008 Annual Report further states, "Reports received from various States, indicate that 5.06 lakh cases of tribal land alienation have been registered, covering 9.02 lakh acres of land, of which 2.25 lakh cases have been disposed off in favour of tribals covering a total area of 5.00 lakh acres. 1.99 lakh cases covering an area of 4.11 lakh acres have been rejected by the Courts on various grounds".

However, there are serious causes of concerns. Not a single case *out of 29,596 cases of alienation and restoration of tribal land has been ruled in favour of the tribals in Madhya Pradesh*. In Orissa, an overwhelming 43,213 out of 104,644 cases were decided against the tribals. This was followed by Tripura where an overwhelming 20,043 cases out of the 29,112 cases were rejected.

AITPN reports about land alienation of the tribals in India.

Andhra Pradesh:

Despite having stringent provisions under the Andhra Pradesh Schedule Areas Land Transfer Regulation of 1959 to protect the lands of the tribals

in the Scheduled Areas, the tribals face alienation of their lands.

The rate of alienation of tribal land is alarming in Andhra Pradesh. Non-tribals presently hold as much as 48 per cent of the land in Scheduled Areas of the state. Since the Andhra Pradesh Scheduled Areas Land Transfer Regulation came into effect in 1959, 72,001 cases of land alienation have been filed involving 3,21,685 acres of land in the state. The tribals are losing their legal fight to recover their lands. Of the 72,001 cases registered under the Andhra Pradesh Scheduled Areas Land Transfer Regulation, 70,183 cases were disposed of and 33,319 cases (47.47 per cent) were decided against tribals involving 1,62,989 acres of land. As of January 2007, about 300 cases were pending in Andhra Pradesh High Court involving about 2,500 acres of land under the Andhra Pradesh Scheduled Areas Land Transfer Regulation.¹

Assam:

The All Assam Tribal Sangha (AATS) and other tribal organisations of the State have alleged widespread violation of land transfer rules and regulations in the existing 9 tribal belts and 28 blocks in the State. Cases of transferring of land to non-tribals or non-bonafide people were on the rise.²

Non-tribal and non-bonafide people had bought plots of land individually or in the name of private school, societies, trust etc and they later used the plots for commercial purpose.³

The tribal peoples and their organization blame the State

Government and its agencies, most particularly the Circle Revenue offices for massive alienation of tribal lands to non-tribals and persons of doubtful nationality in complete violation of the Assam Land Revenue Regulation Act 1886.

In May 2007, it was reported that a section of politicians and the local Revenue officials had allotted 22.5 bighas of fertile agricultural land under tribal belts and blocks in Parbotjhora subdivision of Bodo Territorial Council to as many as 34 non-tribal Muslim families. The Assistant Settlement Officer of Bagribari revenue circle had sent a proposal to the Deputy Commissioner of Dubri district to the effect that 22.5 bighas of land should be allotted to these families. Lands in the tribal belts had already been allotted for a burial ground as well as to 13 families of non-tribal religious minorities in Bagaribari revenue circle.⁴

Jharkhand:

In Jharkhand, cases of alienation of tribal land have risen despite two laws - Chotanagpur Tenancy Act and Santhal Paragan Tenancy Act to prevent sale of tribal land to non-tribals in the state. A total of 2,608 cases have been filed by tribals with the Special Area Regulation Court in 2003-2004, which increased to 2,657 cases in 2004-2005 and further to 3,230 cases in 2005-2006. As of January 2007, 3,789 cases have been filed with the Special Area Regulation Court in 2007 for recovery of tribal lands.⁵

Lack of lawyers to take up land-related cases of the tribals further delayed adjudication. Around 5,500 land-

related cases of tribals were pending in various district courts in Jharkhand as of March 2007. The government of Jharkhand had an annual budget of Rs 50 lakh to provide legal assistance to poor tribals to pursue their land-related cases. However, less than 10 per cent of the total allocated budget was spent over the last six years. Lawyers were unwilling to fight cases on behalf of tribals seeking government assistance. The offer of Rs 5,000 per case was cited as one of the main reasons for pendency of land-related cases in courts.⁶

In February 2007, the Supreme Court allowed a tribal petitioner to file a fresh petition before the Jharkhand High Court for recovery of his land from a mining company. In its order, the Supreme Court held that the Jharkhand High Court was wrong to dismiss the petition of Surendra Dehri, a tribal who alleged that over 10,000 acres of "notified tribal land" had been usurped by mining contractors in connivance with the government officials. The High Court had dismissed his petition saying that it involved only "private interest". But a bench of Supreme Court comprising Justices B.N. Agarwal and P.P. Naolekar stated that a clear violation of constitutional guarantees given to the tribals could not be held to be related to "private interest".⁷

The tribals of Jharkhand have also been protesting against the implementation of Koel Karo hydroelectric project by National Hydroelectric Corporation over the Koel and Karo rivers. The project, if implemented, would submerge as many as 256 villages involving 50,000 acres of forest area, 40,000 acres of agricultural land and 300 forest groves (considered sacred by the tribals), 175 churches and 120 Hindu temples.⁸

Karnataka

The state government failed to prevent further alienation of the lands of tribal people. According to the Annual Report 2007-08 of the Ministry of Rural Development, Government of India, a total of 42,582 cases alleging alienation of 130,373 acres of land have been filed in the court in Karnataka. The courts disposed off 38,521 cases out of which 21,834 cases involving 67,862 acres of land have been decided in favor of tribals and 16,687 cases involving 47,159 acre of land have been rejected. About 4,061 cases were pending in the court.⁹

Kerala:

The State government failed to act on alienation of the lands of tribal peoples or to compensate those who have been forcibly displaced. About 500 tribal families were given 'pattayams' (land deeds) by the then Chief Minister E.K. Nayanar in 1999 in lieu of 10,000 acres that was alienated from them in Attappady. The state government of Kerala had failed to allot any land to landless tribals of Attappaddy by December 2007.¹⁰

In November 2007, Communist Party of India (Marxists) cadres forcibly took over lands earmarked for distribution to Adivasis, indigenous peoples in Munnar. In 2003, following killings of the Adivasi protestors at Muthanga, the State government allotted an acre of land each in Chinnakanal to more than 700 tribal families. However after four years, only 540 families have received land. Some 200 tribal families have built makeshift huts on government land in Munnar in protest.¹¹ But on 26 November 2007, they were attacked by CPI-M cadres. Over 2,000 CPI-M cadres captured a 1,500-acre stretch of government land in Munnar's Chinnakkanal area and forced the 200 Adivasi families

to flee. The CPI-M cadres destroyed the huts of the Adivasis and put up party flags to symbolize their victory. They fenced off the area and began constructing their own huts there.¹²

On 20 February 2007, K.P. Rajendran, Minister for Revenue of Kerala Government stated that there were 22,000 tribal families in the State without land.¹³

Madhya Pradesh:

According to Ministry of Rural Development of Government of India, Madhya Pradesh has the distinction of not deciding a single case in favour of the tribals after adjudication of 29,596 cases decided by 2007. Another 24,210 cases were pending in the court. A total of 53,806 cases involving 158,398 acres of land were filed in the court in the Madhya Pradesh.¹⁴

The government of Madhya Pradesh failed to implement the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. Tribal peoples faced evictions from their forest dwellings although they have lived there for generations.

On 19 April 2007, several tribal forest dwellers, including women and children, were injured when the police opened fire on them after they resisted eviction at Gateha village of Teonthar tehsil in Rewa district.¹⁵

In December 2007, forest dwellers from Neapanagar in Burhanpur district were beaten up and forcefully evicted from their villages by the State Forest department authorities after they were treated as encroachers on forest lands.¹⁶

Maharashtra:

Maharashtra has a number of laws, such as the Maharashtra Land

Revenue Code, 1966, that prohibit the transfer of tribal land without prior permission of the District Collector. As the Maharashtra Land Revenue Code, 1966 failed, the government of Maharashtra enacted Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974 which provided that no tribal can transfer his land to a non-tribal, by way of sale (including sales in execution of a decree of a Civil Court or an award or order of any Tribunal or authority), gift, exchange, mortgage, lease or otherwise transfer without the previous sanction (a) of the Collector, in the case of mortgage or lease for a period not exceeding five years, and (b) of the Collector, with previous approval of Government, in other cases with effect from 6th July, 1974.¹⁷

The government of Maharashtra itself admitted that permissions by the District Collectors “appear to have been given as a matter of routine. The tribals were also induced to sell their lands because of indebtedness and poverty.”¹⁸

In order to restore the alienated lands of the tribals, the state government enacted the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974. This Act provides for restoration to a tribal his/her land transferred to a non-tribal during the period from 1 April 1957 to 6 July 1974 as a result of validly effected transfers (including, exchanges).¹⁹

But both the land protection law - Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974 and the land restoration law - Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 have failed to check further alienation of the tribal land or restore alienated lands. According to the Annual Report 2007-08 of the Ministry of

Rural Development, Government of India, a total of 45,634 cases have been filed in the court in the state. 44,624 cases have been disposed of by the court, of which 19,943 cases (44.7%) involving 99,486 acres of land have been disposed of in favor of tribals and 24,681 cases (55.3%) against tribals. 1,010 cases were pending in the court.²⁰

Orissa:

There has been massive alienation of tribal lands in Orissa. According to the Annual Report 2007-08 of the Ministry of Rural Development, Government of India, a total of 105,491 cases alleging alienation of 104,742 acres of land have been filed in the court in Orissa. An estimated 104,644 cases were disposed of by the court. Out of these 61,431 cases were disposed of in favor of tribals and 56,854 acres of land was restored to tribals.²¹

Rajashtan:

The state government failed to check alienation of tribal lands. According to the Annual Report 2007-08 of the Ministry of Rural Development, Government of India, a total of 2,084 cases of land alienation involving 6,615 acres of land have been filed in the court in Rajashtan. 1,257 cases have been disposed of by the court, of which only 187 cases (involving 587 acres of land) have been disposed of in favor of tribals while 53 cases involving 187 acres were rejected.²²

Unless the Central governments and State governments take effective measures to provide effective legal aid for restoration of the tribal lands, the current process of providing legal aid to the tribals to restore their lands could be reduced to legalizing the illegal land grabbing.

(Footnotes)

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4. ABSU: Design to allot tribal land to ‘minorities’, *The Sentinel*, 26 May 2007
5. Tribal land grab cases on rise in Jharkhand, *The Pioneer*, 14 February 2007
6. Jharkhand lawyers not interested in land cases of tribals, *The Hindustan Times*, 5 September 2007
7. SC snubs land order, *The Telegraph*, 12 February 2007
8. Koel Karo: Tribal surge that stalled a dam, *The Times of India*, 5 June 2007
9. see http://rural.nic.in/annualrep0708/anualreport0708_eng.pdf
10. Landless tribals in the lurch, *The Hindu*, 9 December 2007
11. After CPM men attack activist, tribals refuse to vacate Munnar land, *The Indian Express*, 29 November 2007
12. After Nandigram, red terror in Munnar, *The Indian Express*, 28 November 2007
13. Distribution of land to tribal people to be completed soon: Rajendran, *The Hindu*, 21 February 2007
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15. Governor’s intervention sought in Rewa firing, *The Pioneer*, 24 April 2007
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17. Maharashtra Tribal Development, see “MEASURES AGAINST ALIENATION OF LAND BELONGING TO ST’S” available at <http://www.maharashtra.gov.in/english/tribal/>
18. Maharashtra Tribal Development, see “MEASURES AGAINST ALIENATION OF LAND BELONGING TO ST’S” available at <http://www.maharashtra.gov.in/english/tribal/>
19. Maharashtra Tribal Development, see “MEASURES AGAINST ALIENATION OF LAND BELONGING TO ST’S” available at <http://www.maharashtra.gov.in/english/tribal/>
20. see http://rural.nic.in/annualrep0708/anualreport0708_eng.pdf
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22. see http://rural.nic.in/annualrep0708/anualreport0708_eng.pdf

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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