

# Indigenous

Rights Quarterly

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## Abuse of justice

Litigations against the  
rights of indigenous peoples

### Orang Asli's rights:

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### Narmada Dams:

No judicial euphemism

### Out in Africa:

Methods of extinguishing Bushmen's rights

### Catching the missed MDG Bus:

Permanent Forum or Perfunctory Forum?

# Indigenous Rights Quarterly

## Editorial Collective:

Asian Indigenous and Tribal Peoples Network is presently in the process of constituting an International Advisory Editorial Board of *Indigenous Rights Quarterly*.

## Submit articles/letters/news:

*Indigenous Rights Quarterly* welcomes articles ranging from 1200 to 2000 words. Any article submitted to the *Indigenous Rights Quarterly* must be exclusive - the article must not have been published or submitted to other publications.

If you have news on indigenous issues, please send them to us for reporting under "*Indigenous World*" section of IRQ.

You can also send comments, clarifications or letters to the articles published.

IRQ reserves the right to edit with the final approval of the writers/authors.

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## Message from the Editorial Collective

Welcome to the first issue of *Indigenous Rights Quarterly*.

*Indigenous Rights Quarterly* (IRQ) is being published at a time when the rights of indigenous peoples are all set to be a part of international human rights law. On 29 June 2006, the Draft Declaration on the Rights of Indigenous Peoples was adopted by the UN Human Rights Council and the UN General Assembly is expected to consider it at its forthcoming 61st session. For too long, indigenous peoples have been considered as peoples/issues of concerns for the anthropologists and the sociologists only. Therefore, mainstreaming, a favourite buzzword in the lexicon of human rights, has not been commonly used in the context of the rights of indigenous peoples.

Across the world, indigenous peoples are on the lowest rung of the society. Many indigenous communities have yet not been touched by telephone and telegraph, leave alone technologies of modern day. At the same time, it is also a fact that the use of fax machines has almost become minimal. At the press of a button, entire global community can be communicated. Information comes in plenty and becomes old within a short period.

In this era where monthly magazines are almost out of fashion, if not circulation, is there any added value of *Indigenous Rights Quarterly*?

Obviously, in this era of information overload where common people are citizen journalists; activists are bloggers; yahoogroups/google groups are the debating and consultation forums, and mainstream news agencies like Reuters' *AlterNet*, BBC's *tribe*, Inter Press Service's new focus on indigenous peoples, the UN's *Reliefweb* etc provide latest dispatches on crises, *Indigenous Rights Quarterly* cannot simply be another source of primary news on indigenous issues or discussion forum on specific thematic issues, communities, regions or a medium to report the activities of AITPN. Therein also lies IRQ's strength.

Even without the deadlines of media, issues covered in the IRQ must have certain contemporariness. IRQ must cater to the interests of myriad readers - indigenous peoples, indigenous support groups, media personnel, government officials, diplomats, NGO activists, academics, students or lay readers etc. It must provide new ways to think about and understand the trends and patterns of violations of rights, policies, programmes, laws and court judgements etc affecting indigenous peoples worldwide. There is space for incisive and provocative commentary with clear, concise and accurate contents. Through *Indigenous Rights Quarterly*, we at the AITPN, will continue to address the thorniest debates on indigenous issues not only with the familiarity of indigenous peoples but also from the critical distance of an impartial observer.

For AITPN, to even remotely suggest that IRQ heralds the arrival of THE MAGAZINE on indigenous issues would of course be preposterous. It is essentially another forum - of the indigenous peoples, for the indigenous peoples and by the indigenous peoples - to participate, agitate, consolidate, articulate and advance the rights of indigenous peoples. If critical indigenous issues are given sufficient illumination, context, insight, analysis, may be the decision makers/policy makers across the world would do something to ensure the rights of the indigenous peoples. ■

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## EDITORIAL

## ABUSE OF JUSTICE

An indigenous President, Evo Morales! An expected United Nations Declaration on the Rights of Indigenous Peoples. Finally, indigenous peoples rights are moving!

Unfortunately, it ends there itself. Across the world, indigenous peoples rights are being abrogated through abuse of justice.

India, with constitutional guarantees for "land for land" rehabilitation, has been responsible for displacement of millions of tribals without any rehabilitation and re-settlement. Since 1999, the Supreme Court of India has sanctioned successive increases in the height of the controversial Sardar Sarovar projects against its own injunction in *B.D.Sharma Vs. Union of India* that rehabilitation and re-settlement of the project affected persons must be completed six months in advance of any likely submergence. Presently, the dam reportedly towers at 119 metres while rehabilitation and re-settlement remain incomplete at 85 metres. The latest order to increase the height came, as we go to the print, following Prime Minister's submission not to suspend construction of the dam - virtually justifying continued displacement without rehabilitation and resettlement of the victims - for "larger public interest".

Malaysia still holds the obnoxious position that its aborigines, the Orang Aslis are only mere tenants of the land they occupy as per the Aboriginal People's Act of 1954. Federal Court of Malaysia is expected to give its judgement in the Sagong Tasi case under which Selangor state government, United Engineers Malaysia, Malaysian Highway Authority and Malaysian government are essentially urging to deny the protection of common law such as the Land Acquisition Act of 1960 and Constitution of Malaysia to the aborigines, otherwise enjoyed by other citizens.

Equally disingenuous has been the Botswana government's proposal to repeal section 14(3) of its constitution - which recognises the rights of the Bushmen - to pre-judge the outcome of the petition filed by the Bushmen against their forcible eviction from their ancestral home, the Central Kalahari Game Reserve (CKGR). Having forcibly evicted the Bushmen in the first place, the government now justifies that since there are no Bushman in the CKGR, there is no need for Section 14(3)!

Kalahari is the barometer of measuring extreme poverty in the world. About 50% of the Orang Aslis are officially designated as the '*rakyat miskin*', the poorest-of-the-poor. The conditions of the Adivasi children in India have recently been found below sub-Saharan standards.

These most impoverished people on the wretched of the earth have been forced to fight the mighty power and resources of the State in the court of law. The petition of the Bushmen has already become the most expensive litigation in the history of Botswana. Often, cases are filed at the lower courts. By the time they reach the Supreme Courts, many original complainants die, while justice continues to elude the descendants of the original complainants. For indigenous peoples, accessing justice has often turned out to be abuse of justice at their expense. ■

## Orang Asli's rights: Malaysia's Federal Court faces acid test

As we go to the print, Malaysia's Federal Court has not yet delivered its judgement in the case of *Sagong Tasi & 6 Ors vs Kerajaan Negeri Selangor & 3 Ors* involving the land rights of the Orang Aslis, the indigenous peoples of Malaysia. The survival of the indigenous peoples in Peninsular Malaysia, to a large extent, hinges on this keenly awaited judgement.

On 19 September 2005, the Court of Appeal of Malaysia upheld the historic judgment of the High Court sitting in Shah Alam, Selangor of 12 April 2002 in the case of *Sagong Tasi & 6 Ors vs Kerajaan Negeri Selangor & 3 Ors* (2002, 2 AMR 2028). The High Court had ruled that the Temuan tribes are the customary owners of the 15.39 hectare (38 acres) plot of land in Kampung Bukit Tampoi village under Dengkil district in Selangor state. These Orang Aslis were forcibly evicted by the Selangor state government in 1995 in order to build a highway linking to the Kuala Lumpur International Airport.

The judgment of the Court of Appeal is consistent with its earlier judgements on similar issues. In the case of *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor of 1998*, the Court of Appeal upheld the decision of the High Court that recognized the right of the Orang Aslis over their traditional land and awarded compensation in accordance with Article 13(2) of the Constitution of Malaysia for the losses of fruit and rubber trees which were planted on their traditional lands. The Federal Court dismissed the state of Johor's leave application to appeal.

Despite settled position in law, Selangor state government, United

Engineers Malaysia, Malaysian Highway Authority and Malaysian government moved the Federal Court of Malaysia against the decisions of the High Court and the Court of Appeal in the case of *Sagong Tasi & 6 Ors vs Kerajaan Negeri Selangor & 3 Ors*.

### Non-recognition of land rights and forcible evictions

Orang Aslis literally means the first peoples and they are the indigenous peoples of Peninsular Malaysia. Yet, they are treated like second class *Bhumiputras*, sons of the soil. Only the ethnic Malays are considered as first class *Bhumiputras*.

There are an estimated 1,49,723 Orang Asli indigenous peoples in Malaysia and they possess about 1,38,862.2 hectares of land. However, they are not recognized as the lawful owners of the lands. The Malaysian government maintains the obnoxious position that the Orang Aslis "have no rights in the land itself" as they are mere "tenants" on the lands they occupy which

the authorities may at any time seize or take under its control by providing compensation for the loss of whatever grown on the land under Section 12 of the Aboriginal People's Act of 1954. Section 12 of the Act provides that "if any land is excised from any aboriginal area or aboriginal reserve or if any land in any aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any aboriginal area or aboriginal reserve granted to any aborigine or aboriginal community is revoked wholly or in part, the State Authority may grant compensation therefore and may pay such compensation to the persons entitled in his opinion thereto or may, if he thinks fit, pay the same to the Director General to be held by him as a common fund for such persons or for such aboriginal community as shall be directed, and to be administered in such manner as may be prescribed by the Minister."

Under this Act, indigenous Orang



Aslis have been victims of systematic discrimination and forcible evictions by the State and the private companies.

### Forcible evictions of Temuan Orang Aslis

In 1995, the State government of Selangor forcibly acquired 38 acres of land from 23 families belonging to indigenous Temuan tribe for the construction of the Nilai-Banting highway linking with the Kuala Lumpur International Airport. Their dwelling houses and standing plantations of oil palm, rubber and fruit trees were indiscriminately destroyed. The eviction was done in haste so as to complete the highway project in time for the 1998 Commonwealth Games held in Kuala Lumpur.

The displaced Temuan tribes were given nominal compensation only for trees, fruits, crops and houses in accordance with section 12 of the Aboriginal People's Act of 1954.

Sagong Bin Tasi and 6 other affected Temuan Orang Aslis filed a case against the Selangor state government, United Engineers Malaysia, Malaysian Highway Authority, and Federal Government of Malaysia. As stated above, on 12 April 2002, the High Court sitting in Shah Alam declared that the land belonged to the Orang Aslis because it was their customary and ancestral land. The High Court ordered the Selangor government to pay compensation for the land in accordance with the Land Acquisition Act 1960, and also ordered United Engineers Malaysia and Malaysian Highway Authority to pay damages for trespassing.

All four defendants appealed before the Court of Appeal against the High Court judgment. The Court of Appeal upheld the verdict of the High Court that the displaced families be given compensation under the Land Acquisition Act 1960 and acknowledged

them as owners of that land, not mere occupiers. Court of Appeal Judge Datuk Gopal Sri Ram held that the State, which is enjoined by the law to protect the aborigines, had treated the Temuan indigenous peoples "in a most shoddy, cruel and oppressive manner". Justice Ram also confirmed that some of the Temuan landowners of Bukit Tampoi village were brought to the police station and forced to accept their compensation cheques in front of the District Officer, the Officer in-Charge of Police Department and the State Assembly representative. Judge Ram held that forcible eviction of the families was violative of Article 13(2) of the Federal Constitution which provides that "no law shall provide for compulsory acquisition or use of property without adequate compensation".

The judgment of the Court of Appeal is consistent with the Department of Orang Asli Affairs' 'Statement of Policy Regarding the Administration of Orang Asli of Peninsular Malaysia' of 1961. It states: "The special position of aborigines in respect of land usage and land rights shall be recognized, that is, every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring them economically in line with other communities in this country. Aborigines will not be moved from their traditional areas without their full consent."

### Abuse of justice

The four defendants - the Selangor state government, United Engineers Malaysia, Malaysian Highway Authority, and Federal Government of Malaysia - have now challenged the judgement of the Court of Appeal before the Federal Court of Malaysia. Since then, the hearing has been postponed a few times.

On 5 April 2006, one of the senior judges of the Federal Court, Datuk Richard Malanjum, recused himself

from the bench on the ground that he did not want "parties to submit before a person who has set up his mind in this case". Earlier on 8 July 2005, proceeding in a similar case *viz. Superintendent of Lands and Surveys, Bintulu versus Nor Anak Nyawai and others* at Miri Appeal Court, he had passed a verdict in favor of the native tribes.

When the hearing resumed on 27 April 2006, senior federal counsel Datuk Mary Lim told the Federal Court that the Orang Aslis "have customary rights over items on the land, but not the land itself", and therefore they would only be compensated for the loss of their fruit trees, crops and houses, if and when the government needed to acquire their land. Datuk Mary Lim also submitted that prior to the tribe residing in Kampung Bukit Tampoi in Dengkil for about 210 years, it belonged to the Selangor Sultanate. So they could not have held a native or customary title to it.

The arguments put across by the Federal Counsel are essentially racist. If the Orang Aslis are to be denied their land rights, it would mean that they do not have protection under the common law like the Land Acquisition Act of 1960 and the Constitution of Malaysia at par with other citizens of Malaysia. It will also mean that Aboriginal People's Act of 1954 will prevail over the Constitution and extinguish the rights accorded under the Constitution.

The Federal Court of Malaysia may as well uphold the judgement of the Court of Appeal. But, three of the seven plaintiffs have already died and the others have become quite old. The Federal Court must not only uphold the supremacy of the Constitution but it must also consider that the petition of the defendants is a fit case to be dismissed with exemplary damages for abuse of justice against the '*rakyat miskin*', the poorest-of-the-poor in the country. ■

## Despair of the Hmong refugees in Thailand: Laos must allow international supervision

As this issue of IRQ goes to the print, the personnel of the Third Army Region of Thailand, which oversees security in the north, have reportedly started the process of finalising the classification of the Hmong refugees who sought asylum following their escape from Laos in 2004 and 2005. Caretaker Prime Minister Thaksin Shinawatra has assigned the responsibility to classify the refugees to Internal Security Operations Command. More than 4,000 out of 6,058 Hmongs at Phetchabun's Ban Huay Nam Khao village were found to have come from Laos. The rest are long-term residents of the recently closed Wat Tham Krabok refugee camp in Saraburi.

The aim of the classification is to facilitate the return of the Hmong refugees to Laos, as soon as possible, according to the Thai government officials. According to the Deputy Chief of Internal Security Operations Command, General Panlop, some of the Hmongs who worked for the United States during the Vietnam war would be assisted in migrating to a third country, particularly to the US and the rest are to be repatriated to Laos.

Therein lies the problem. The Laotian government refuses to accept the Hmong refugees in Thailand as its citizens. The Government of Laos stated that the Hmongs in Phetchabun are Thailand's domestic problem! It has accused Thailand of failing to prove that they are citizens of Laos. According to Ambassador of Laos to Thailand, Hiem Phommachanh, the Hmong refugees came to Phetchabun only in the hope of resettlement to the United States and that Hmong community leader Vang Pao, who has been living in the US since

the end of the Vietnam War in 1975, has been responsible for influx of ethnic Hmong refugees into Thailand.

The repression on the Hmongs of Laos requires little introduction. Despite their repression in Laos, the Thai government is willing to flout international law to deport the refugees. In the present process of classification, the Thai government officials insisted that they would not refole the Hmong refugees. But there are few takers.

On 28 November 2005, Thai police in Phetchabun's Khao Kho district arrested 29 Hmongs, mostly teenagers from Ban Huay Nam Khao while they were returning from a religious service at a nearby church. Authorities deported 27 of them across the Mekong River at Nong Khai to Laos' Bolikhamxay province. Two others were detained at Khao Kho district police station and have since been awaiting trial. Another six Hmong refugees, including a 50-year-old widow, See Her from the Saisomboun Special Zone in western Laos were arrested for illegal entry into Thailand after they ventured out of Ban Huay Nam Khao village to seek food. They were being detained in Khao Kho police station.

The status of these refoled Hmongs, mostly children, remained unknown despite interventions of the international community.

In July 2005, the Thai authorities forced the local land owners in Phetchabun's Khao Kho district to expel the Hmong asylum seekers or face charges of sheltering illegal immigrants, which carry maximum penalties of five years in prison and a 50,000-baht fine. In a meeting in early July 2005, the National Security Council and the Police

Immigration Bureau decided to forcefully repatriate the Hmongs. On 4 July 2005, one of the refugees reportedly attempted suicide and 10 others threatened to kill themselves after being evicted from temporary shelter. Five Hmong refugees died of diarrhoea and several had fallen sick after they were forced out of temporary shelters to stay along a road.

It was only after the intervention of the National Human Rights Commission on 8 July 2005 that the Royal Thai Government halted its plan of forceful repatriation of the Hmong indigenous refugees to Laos. The decision was taken reportedly following a meeting of security agencies, including the National Security Council and National Human Rights Commission, with Deputy Prime Minister Chidchai Vanasatidhya.

The Royal Thai Government, although not a party to the 1951 Convention Relating to the Status of the Refugees, has obligations for protection of the refugees staying in its soil, including the Hmongs.

There are no past records to show that Laos has either acceded to any request by the international community for respecting the human rights of the Hmongs or that it implemented any of the recommendations made to it by the UN chartered bodies. On 18 April 2005, the CERD Committee after examining the report of the government of Laos expressed concerns "at reports that serious acts of violence have been perpetrated against members of the Hmong minority, in particular allegations that soldiers brutalized and killed a group of five Hmong children on 19 May 2004" and urged Laos to

"provide more precise information about the bodies responsible for investigating these allegations and allow United Nations bodies for the protection and promotion of human rights to visit the areas in which members of the Hmong minority have taken refuge". But no action has been taken by the government of Laos to implement these recommendations.

The government of Laos does not provide protection to those who are returned to the country. Returnee refugees are subjected to greater scrutiny by the authorities than the other citizens.

The Office of the UN High Commissioner for Refugees (UNHCR) has been denied permission to re-establish its mission in the country to monitor the reintegration of former refugees who returned under UNHCR's resettlement program.

If the Hmong refugees currently sheltered in Thailand were to be returned to Laos, the involvement of UNHCR and ICRC is indispensable. Or else no repatriation of the Hmongs to Laos should be undertaken. (*Reprinted with the permission of Asian Centre for Human Rights, New Delhi*) ■

## Orwell's Animal Farm: Status of the returnee Montagnard refugees

Refugees, under the definition of the 1951 Convention Relating to the Status of Refugees, is a term applied to persons who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". The 1951 Convention has been criticized as an instrument to recognize those who could jump over now fallen Berlin Wall. With the fall of the Berlin Wall, UNHCR apparently believes that the definition of refugees has changed and the Orwell's *Animal Farms* have been closed down.

Following the crackdown of the protest by the Montagnards in February 2001, hundreds of them were forced to flee their villages in the Central Highlands of Viet Nam and cross over

to Mondulkiri and Ratnakiri districts of neighboring Cambodia. UNHCR was later given permission and it opened two relief camps, one each in Mondulkiri and Ratnakiri districts sheltering about 400 refugees. By January 2002, when the Tripartite Agreement between Viet Nam, Cambodia and the UNHCR was signed, at least 1000 refugees fled to Cambodia. However, not many of the refugees were repatriated to Viet Nam, as the United States had accepted 932 refugees for resettlement in the US starting in June 2002. This slowed down flow of refugees to Cambodia and UNHCR closed down the two refugee camps. However, flow of refugees, though intermittent, continued despite closure of the UNCHR camps.

By January 2005, some 750 Montagnards took shelter under UNHCR's care in Cambodia. Cambodian authorities not only denied permanent asylum to the refugees but also threatened to forcibly deport them. It was against this backdrop that Vietnam, Cambodia and UNHCR met in Hanoi on 24-25 January 2005 for the first time in three years to discuss a new

agreement. Hanoi presented a draft Memorandum of Understanding (MoU) asserting that it would not prosecute the returnee Montagnards. UNHCR presented a counter proposal, which eventually became the final MoU that was agreed upon and signed by the parties. Since then, according to UNHCR, 190 Montagnards have returned to Vietnam - 96 voluntary returnees and 94 rejected asylum seekers. While 605 have been resettled in the US, 204 remain in Cambodia.

Between March 2005 and 28 April 2006, representatives of the UNHCR, including its Assistant High Commissioner for Protection, Erika Feller, undertook 12 visits to the Central Highlands and met the returnees from Cambodia. UNHCR reported that only a few of these visits have taken place without the presence of the Vietnamese government officials. Yet it had no problem to conclude that it "has no serious concerns about the conditions of the returnees".

Human Rights Watch in its report, *No Sanctuary: Ongoing Threats to Indigenous Montagnards in Vietnam's Central Highlands* of June 2006 alleged that Vietnamese authorities have been detaining, interrogating and even torturing Montagnard asylum seekers who returned to Viet Nam from Cambodia. The report urged United Nation High Commission for Refugees (UNHCR) to review its participation in the return exercise, called its monitoring 'flawed' and accused the UNHCR of making public statements appeared to be 'calculated' to gain greater access to Viet Nam's Central Highlands, the Montagnards' place of origin.

Some of the key findings of the HRW's report, *No Sanctuary: Ongoing Threats to Indigenous Montagnards in Vietnam's Central Highlands*, are as follows: -

- Vietnamese officials continue to violate the right to religious

freedom in some parts of the Central Highlands. Officials continue to pressure ethnic minority Christians who belong to independent house churches to sign pledges renouncing their religion or to pledge loyalty to the officially recognized ECVN. Authorities also restrict peoples' movement between villages for the purpose of religious undertakings that are not authorized by the government. In some areas large Christian gatherings continue to be banned, unless they are presided over by officially recognized pastors;

- Vietnamese government continues to criminalize peaceful dissent, unsanctioned religious activity, and efforts to seek sanctuary in Cambodia by arresting and imprisoning Central Highlanders for their religious or political beliefs. More than 250 highlanders have been imprisoned since 2001. The arrests are ongoing: during 2005, at least eighty people were arrested and 142 people—some of whom had been in pre-trial detention for as much as a year—were sentenced to prison terms of up to seventeen years;
- Vietnam has also violated a January 2005 Memorandum of Understanding (MoU) with the United Nations High Commissioner for Refugees (UNHCR) by detaining, interrogating, and severely mistreating some Central Highlanders who had fled to refugee camps in Cambodia and then returned to Vietnam, either voluntarily or under duress;
- In April, May, and December 2005 Human Rights Watch received credible reports, including first-hand accounts of officials detaining and beating Central Highlanders who had returned to Vietnam from

UNHCR sites in Cambodia. Immediately upon return to Vietnam some returnee refugees were detained in dark cells in the provincial prison in Pleiku for five to seven days. They were interrogated every day about why they had left Vietnam and pressured to renounce their religion. They were beaten and tortured during interrogation;

- The value of monitoring missions remains questionable because the Vietnamese government still manages to maintain control over what monitors see and hear—if not by the obvious presence of official escorts, then by the intimidation of villagers out of direct sight and hearing of the monitors;
- Many of the visits by UNHCR and other international delegations have been conducted in the presence of government officials and uniformed and undercover police officers;
- Many Central Highlanders remain fearful of speaking frankly with visitors about abuses, only feeling safe enough to do so when they have left Vietnam and are safely in another country; and
- UNHCR's choice to make public statements praising Vietnam's treatment of returnees appears to be calculated to encourage the Vietnamese government to grant it greater access.

UNHCR rejected HRW's accusations dubbing its report as unbalanced. According to the UN refugee body, HRW's allegations do not tally with UNHCR's first-hand experience of the Montagnard caseload in Cambodia, or with its 12 monitoring missions to visit returnees in the Central Highlands. UNHCR spokesperson Ron Redmond claimed that HRW's report also do not tally with the visits of foreign diplomats, regional bodies and other respected human rights advocates and

that it draws very generalized conclusions from essentially the accounts of five people whose stories cannot be verified by any objective means.

UNHCR's statement raises more questions than it answers.

Which statements of foreign diplomats, regional bodies and other respected human rights advocates UNHCR have been referring to? UNHCR's spokesman does not even know that there is no regional human rights instrument or regional human rights body in Asia. AITPN at least has not seen any statement or report by any regional human rights advocate of repute certifying that returnee Montagnard refugees have not been subjected to the human rights violations as reported by the Human Rights Watch.

When UNHCR has been denied free and unfettered access to the returnee refugees before, during and after repatriation under the MoU of January 2005, can repatriation be termed as voluntary?

Can the MoU which sets one-month deadline for refugees to decide to resettle in a third country or return to the country from where they fled be considered as ensuring voluntary repatriation?

Does UNHCR believe that the returnee Montagnard refugees who escaped from atrocities in Vietnam; mal-treated by the Cambodian authorities and abandoned by UNHCR and presently live under the close watch of the Vietnamese officials after their return will actually have the courage to narrate their ordeal freely to UNHCR officials who are often accompanied by the government officials?

UNHCR has chosen unidentified foreign diplomats, regional bodies and other respected human rights advocates to defend itself. George Orwell's *Animal Farm* could still serve as a guidebook for dealing with refugees in Indo-China. ■

## Victims of Barbed-Wires: Chakmas' existence in Mizoram threatened by Indo-Bangladesh Border Fencing

The tribals in India have been the disproportionate victims of the projects undertaken by the State or the private companies in the name of development or national interest. Millions of them have been displaced across India and then left to lurch. Thousands of impoverished indigenous peoples, mainly the Chakmas living along the international border in Western and South-Western side of Mizoram state are the new additions.

The government of India has been erecting fencing along its 4096.7 km-long border with Bangladesh running through five Indian states of West Bengal, Assam, Meghalaya, Tripura and Mizoram in order to stop infiltration, smuggling and other alleged anti-India activities from across the border. As in March 2006, 2,187 km have been fenced. The border fencing project has received top priority and its completion has been advanced from 2007 to 2006.

The fencing has created numerous problems especially relating to survival of the displaced persons. In March 2006, the state government of Meghalaya temporarily suspended the border fencing works following protests by the indigenous peoples in Khasi and Jaintia Hills as their villages have fallen on the other side of the border due to demarcation of the boundary.

Yet, fencing of 318 km-long stretch in Mizoram sector is going on in full swing despite calls from the Indo-Bangladesh Border Fencing Affected Families Resettlement Demand Committee (IBBFARDCOM) of Mizoram to immediately halt construction of the border fencing until all the affected families are "fully and properly" rehabilitated. Such calls have

fallen on deaf ears of the authorities in New Delhi.

### Extent of displacement

A house to house survey conducted by IBBFARDCOM of Mizoram found that the fencing will displace a total of 5,790 Chakma tribal families consisting of 35,438 persons from 49 villages. These villages are located on the banks of four rivers, viz. Thega, Karnaphuli, Harina and Sajek, which form the natural boundary between India and Bangladesh.

Most of the 49 villages affected by the border-fencing project will have to be entirely relocated due to their proximity to the international border. Apart from loss of their immovable houses and properties, the villagers will lose already developed wet rice cultivation lands, horticulture gardens, gardens for growing vegetables and other cash crops, tree plantations of high commercial values like teak etc, community/government assets like schools, health sub-centres, community halls, market places, places of worship, play grounds, cemetery/ grave yards, water ponds, water supply, and other government/council office buildings, etc.

### Life without access to rivers

The Chakma inhabited areas along the Indo-Bangladesh border are extremely backward and most of the villages are inaccessible due to the absence of roads. The rivers have been the lifelines for survival of the Chakmas. Apart from drawing water for drinking, washing and other purposes, the Chakma villagers also use the rivers to conduct business and commerce, as there are no other means of transportation.

They also perform the last rites of the deceased on the river banks. The river banks are fertile and used for cultivations of the paddy, vegetables and others cash crops. As the fencing will be erected up to 150 yards inside India, these rivers will fall outside the territory of India, and hence will be no longer accessible to the inhabitants. This will further break the backbone of the Chakmas who are already weak economically. They cannot think of their lives without the rivers; but now they will have to learn hard to try to live without access to the rivers.

### Blatant violations of the laws

The Ministry of Home Affairs of the government of India issued guidelines for acquisition of the lands prior to construction of the fencing. In its various communications to the four implementing agencies, the Ministry of Home Affairs clearly stated that the four construction companies "shall be responsible for liaising with the State Government/ local authorities for acquisition of land and getting forest/environment clearance for carrying out the fencing & related works", and that they "shall finalize the alignment of the fencing in consultation with BSF (Border Security Forces) & DM (District Magistrate) of the area where the fencing is proposed".

However, the four construction companies which were accorded the contracts in Mizoram sector, namely Engineering Projects India Limited, National Projects Construction Corporation Ltd., Border Roads Organization and National Building Construction Corporation Ltd had started acquiring lands and erecting the fencing in their respective portions

without any consultation with the tribal inhabitants or the local authorities, including the DM and the BSE.

Despite complaints by the IBBFARDCOM, the Government of India has maintained an astounding silence and has not taken any corrective measures.

Following submission of representation by the IBBFARDCOM to the Chief Minister of Mizoram, the state government constituted a "State Level Co-ordination Committee on Border Fencing" on 21 April 2006 to

ensure that the victims received proper compensation and rehabilitation. But the Co-ordination Committee did not include any Chakma representative. This reflects the extent of apathy on the part of the authorities towards the plight of the border-fencing victims.

The implementation of the Indo-Bangladesh border fencing project is all set to break the backbone of the already impoverished Chakma tribals. As we go to the print, government of India has failed to take any corrective measures while the fencing continues gather pace. ■

government of Gujarat, the tribals constitute 79% of the total Project-Affected Families (PAFs) in Gujarat. In Maharashtra, the tribals constitute 100% while in Madhya Pradesh, they constitute 30% of PAFs.

### SSP: A project wholly misconceived

Prime Minister Jawaharlal Nehru considered the dams as the engines of development. All studies carried out by the Central Water and Power Commission since 1955 on the development of the Narmada basin not surprisingly only highlighted the hydroelectric potential without giving due consideration to all other issues involved in the process.

When the SSP was proposed, the Ministry of Environment and Forest (MoEF) declined to give clearance to the project till 1985-86. The MoEF stated that the rehabilitation plan was not ready, the land had not been surveyed, the areas of land use capability and water availability had not been identified and the land being suggested for rehabilitation prima facie appeared to be infertile. The MoEF even feared granting a conditional clearance as construction would proceed apace and environmental and rehabilitation measures would become secondary and be neglected. Ultimately, on 24 June 1987, the Ministry of Environment and Forests had to give provisional environmental clearance to the SSP as construction had already begun.

In February 1986, villagers of Gadher village formed the Narmada Dharangrast Samiti to protest against the SSP. The Narmada Bachao Andolan was subsequently formed as an umbrella organisation of those affected by the dam.

The World Bank which was funding the SSP faced severe criticisms. It appointed an independent review committee headed by Bradford Morse to assess various aspects of the project.

The Morse Committee in its report

## Narmada Dams : No Judicial euphemism

Following Narmada Control Authority's (NCA) permission to raise the height of the Sardar Sarovar Dam from 110.64 metres to 121.92 metres, representatives of Narmada Bachao Andolan (NBA) met India's Prime Minister Dr Manmohan Singh on 25 March 2006 asking for the rehabilitation of remaining 35,000 Project Affected Families displaced by the Sardar Sarovar Projects (SSP) in Gujarat. When the Prime Minister's Office did not respond by 28 March 2006 as promised, leader of NBA, Ms. Medha Patkar and two of her colleagues went on an indefinite hunger strike the next day. On 5 April 2006, Ms Patkar was forcibly hospitalised when her condition became critical.

NBA alleged that the NCA gave clearance on the basis of false reports and the decision to increase height of the dam will cause destruction of the homes, fields and livelihood in about 220 villages in Maharashtra, Madhya Pradesh and Gujarat. This decision is not just a blatant violation of Supreme Court orders, but makes a mockery of the human rights of lakhs of people living in the submergence area as on April 2006.

Development at the cost of displacement of the marginalised is nothing new to India. The construction of 30 large, 135 medium, and 3,000 small dams across Madhya Pradesh, Maharashtra and Gujarat on the Narmada river and its tributaries was bound to make more victims. The government of India does not have any track record of providing proper relief and rehabilitation. Add the ultra-nationalist fervor such as the recent boycott of the Bollywood film, *Fana* of actor Amir Khan, for merely meeting the NBA demonstrators, the tyranny of the majority becomes clear.

Amongst the dams in the Narmada valley, the Sardar Sarovar Project (SSP) on the Narmada has been the most controversial one. The estimated cost of the SSP is about \$10 billion i.e. about half of the budget spent on irrigation in postcolonial India. The 133-mile-long reservoir of the SSP is estimated to drown 91,000 acres of land and the canal network will damage another 200,000 acres. The reservoir will directly displace 200,000 people and affect another 200,000 people. A staggering 56 per cent of them are Adivasis, indigenous peoples. According to the

in June 1992 exposed many shortcomings in the SSP. Amongst others, the main findings of the Morse Committee were - (i) the World Bank and India both failed to carry out adequate assessments of human impacts of the Sardar Sarovar Projects, (ii) there was virtually no basis, in 1985, on which to determine what the impacts were that would have to be ameliorated, (iii) the inadequate understanding on the part of the Governments and the World Bank was compounded by a failure to consult the people potentially to be affected, (iv) the failure to consult the people has resulted in opposition to the Projects, on the part of potentially affected people, supported by activists and this opposition has created great obstacles to successful implementation, (v) the measures to anticipate and mitigate environmental impact were not properly considered in the design of the Projects because of a lack of basic data and consultation with the affected people; and (vi) the World Bank's appraisal took no account of the fact that environmental clearance in India was not forthcoming in 1983 from the Ministry of Environment and Forests because of insufficient information.

A review committee by the name of "Five-Member Group" headed by then Planning Commission Member Dr. Jayant Patil constituted by the Central Government on 5 August 1993 to re-examine the SSP also agreed with the findings of the Morse Committee.

Based on the recommendations of the Morse Committee, the World Bank withdrew. But, India decided to pump in its own resources. Since then the dam has proceeded, often at gunpoint, displacing millions of peoples.

### Inadequate resettlement and rehabilitation

As *Indigenous Rights Quarterly* goes to the print, the height of the SSP has reached 119 meters. In its website, the

Narmada Control Authority (NCA) maintains that in total, there are 51,447 Project affected families (PAFs) in the States of Madhya Pradesh, Maharashtra and Gujarat and 43,021 of these are in Madhya Pradesh alone. According to a Status Report of Narmada Control Authority of 31 December 2005, the number of PAFs up to 121.92 meters dam height was 28,742. Of these, the NCA claims that 17,197 PAFs - including 4,729 in Gujarat and 12,468 in Madhya Pradesh, have been resettled. A total of 24778 PAFs, including backlog of 13,233 PAFs at 110.64 meters were yet to be resettled as on 31 December 2005. On the other hand, as per the estimates of NBA, over 40,000 families are still to be resettled as on 1 April 2006.

The lack of rehabilitation and resettlement of the PAFs has been the hallmark of all dams in India. It has been acute in the case of the SSP. Various public interest litigations filed before the Supreme Court since 1994, the Group of Ministers' (GoM) report of 9 April 2006, and very recently, the report of the Oversight Group (OSG) headed by Mr.V. K. Shungulu, former Comptroller and Auditor General of India vouch it.

In April 2006, as NBA continued protest in New Delhi's Jantar Mantar, the GoM comprising of Union Minister of Water Resources, Saifuddin Soz, Union Minister of Social Justice and Empowerment, Meira Kumar and Minister of State in the Prime Minister's Office Prithviraj Chauhan visited the resettlement and rehabilitation and submergence sites at Khalghat, Dharampuri, Lakhangaon, Borlai 1, 2 and 3, Awalda, Piplud, Nisarpur and Picchodi in Madhya Pradesh on 7 April 2006. In their report, "*A Brief Note on the Assessment of Resettlement and Rehabilitation (R & R) Sites and Submergence of Villages of the Sardar Sarovar Project*" to the Prime Minister on of 9 April 2006, the GoM held that the

rehabilitation and resettlement of oustees (Project Affected Families) of Sardar Sarovar Dam have not taken place in consonance with the orders of the Supreme Court.

The ultra-nationalism reached fever pitch after submission of the GoM report. Prime Minister Dr Singh then constituted Over Sight Group (OSG) headed by V.K. Shungulu ostensibly to over-write the report of the GoM of his own cabinet. The OSG euphemistically held that the lack of relief and rehabilitation and other deficiencies in most sites can be removed by developing uneven plots and proper maintenance and repair of roads and buildings etc. These tasks, which appear quite simple to the OSG, have not been done by the authorities in the last two decades.

The OSG has rewritten the Narmada Waters Disputes Tribunal (NWDT) award and the Supreme Court judgement of 2000. In its award of 16 August 1978, NWDT had in Clause XI sub-clause IV (6)(ii) specifically awarded that "in no event shall any areas in Madhya Pradesh and Maharashtra be submerged under the Sardar Sarovar unless all payment of compensation, expenses and costs as aforesaid is made for acquisition of land and properties and arrangements are made for the rehabilitation of the oustees there from in accordance with these directions and intimated to the oustees." The Supreme Court in its judgement of October 2000 reiterated a clear link between rehabilitation and construction for the future, inter alia ruled that ".....Further raising of the height will be only pari passu with the implementation of the relief and rehabilitation and on the clearance by the Relief and Rehabilitation Sub-group...."

In *B.D.Sharma Vs. Union of India* (1201 of 1990), the Supreme Court ruled that resettlement be completed in all respects at least six months in advance of any likely submergence. However,

since 1999, the Supreme Court has sanctioned successive increases in dam height against its own injunctions in *B.D.Sharma Vs. Union of India* (1201 of 1990). As of today, the dam towers at 119 metres while resettlement and rehabilitation remain incomplete at 85 metres. In spite of this, the environment subgroup of the monitoring agency, Narmada Control Authority, has given the permission to raise the height of the SSP to 121.92 metres in 2005, while the

resettlement and rehabilitation subgroup is yet to decide. As the dam rises, the reservoir swells to submerge more and more villages.

Based on the findings of the OSG, Prime Minister Dr. Manmohan Singh submitted to the Supreme Court that it would not be appropriate to pass any direction or orders at this stage stopping the construction of the dam that is designed to serve the larger public interest. Taking the Prime Minister's

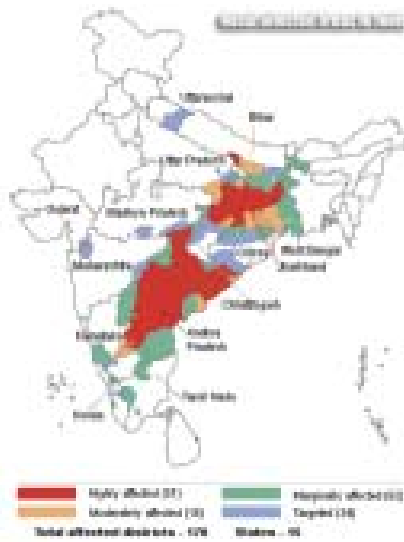
submission into consideration, the Supreme Court in its latest order delivered as IRQ goes to the print, declined to stop the construction of the dam and allowed raising its height evenly up to 119 meters in all blocks.

The question is who are "larger public"? Obviously, it does not include the displaced. Any system that seeks to provide development for the majority by trampling the rights of the voiceless is unjust, unfair and unacceptable. ■

## Adivasis: Victims of India's Red Spectre Sandwiched in the Naxalite conflict

In his address to the Second Standing Committee Meeting of the Chief Ministers of the Naxalite affected States on 13 April 2006, Prime Minister of India, Dr. Manmohan Singh called Naxalism the "single biggest internal security challenge ever faced by our country". Naxalism named after ultra left wing armed movement in Naxalbari area of West Bengal in late 1960s had been brutally suppressed. After the suppression of the Naxalite movement in West Bengal, the Peoples War Group was the first Naxal group formed in Telengana region of Andhra Pradesh in 1980. Lately, it has risen like a spectre and has spread to over 160 districts out of a total 604 districts of India. During January - June 2006 alone, at least 453 persons were killed in nine Naxalite-affected states, including 90 security personnel, 182 alleged Naxalites and 181 civilians. Majority of the victims were Adivasis, the indigenous peoples of India.

The Naxalites on their part have also been responsible for violations of the rights of the Adivasis. However, in the areas where the Naxalites are active, the edifice of the State structure does not exist. Protests against the dictat of the Naxalites were violently silenced.



### Salwa Judum: Adivasis caught between the devil and the deep blue sea

In June 2005, episodic resentments against the Naxalites took organised shape under the leadership of Mr Mahendra Karma, the Member of Legislative Assembly and Leader of the Opposition in the Chhattisgarh State Legislative Assembly. Mr Karma, an Adivasi himself, christened it in a local Gondi language, "Salwa Judum" or Peace Initiative. It soon received the State sanction and became part of Chhattisgarh government's experiment

with counter-insurgency operations to tackle the Naxalites. The civil war began in earnest.

The *Salwa Judum* has been far from a peaceful campaign with hundreds of the cadres (3200 in Dantewada alone) being given full military training as Special Police Officers. It has created a civil war where one is either with the Naxalites or with the Salwa Judum. As the Naxalites followed the policy of forcibly recruiting one cadre from each family, in numerous cases, members of the same family have been pitted against each other.

The Adivasis have been caught between the devil and the deep blue sea. While the security forces and the Salwa Judum cadres have been terrorizing the innocent villagers if they do not support the Salwa Judum campaign against the Naxalites, the Naxalites retaliated by intensifying attacks against the tribal civilians irrespective of whether they support Salwa Judum on their own volition or by force. On 28 February 2006, the Naxalites exploded landmines at a group of civilians who were returning from a Salwa Judum meeting, killing 28 Adivasi civilians at Darbhaguda village in Dantewada district of Chhattisgarh. On 25 April

2006, Naxalites abducted 52 Adivasi camp inmates, including 13 women from Manikonta village in Dantewada district of Chhattisgarh and brutally killed 15 of them.

Chhattisgarh has turned into the epicenter of the Naxalite conflict.

Salwa Judum campaign has resulted into sharp increase of killings of civilians. Yet, the Central government, bereft of any strategy, has decided to instruct the police of the affected states and other Central forces to actively support "Salwa Judum" type counter insurgency operations.

### Plight of the IDPs

Salwa Judum campaign has become synonymous with displacement of the tribals from their villages and providing them temporary shelter in government managed camps with a view to disconnect the Maoists from the populace. More than 50,000 Adivasis have been displaced and have been provided shelter in 27 relief camps. An unknown number of tribal villagers have also taken shelter in the camps run by the Naxalites in the areas controlled by them. Many have fled to neighbouring States like Andhra Pradesh and Orissa. As the conflict intensifies, the displacement also increases.

The situation of these internally displaced persons is deplorable. The relief camps lack basic facilities. Most of

the makeshift camps are roofed with leaves of trees and open from all sides while only a few have tarpaulin roofing. Life becomes more difficult during the rainy days as water pours in through the roofs and all sides. In the name of ration, the inmates get a square meal of rice and dal, which is thin and watery. Many of those displaced tribals were starving and desperate in the relief camps. They have been left without any work, and the government provided little monetary assistance.

There are little medical facilities in the camps. Educational facilities are non-existent.

Most importantly, there is no security around the camps. There have been a couple of attacks by the Naxalites at the camps. On 16 April 2006, at least 10 security personnel, including 6 special police officers (SPOs), were killed in a Naxalite attack at the Murkinar relief camp in Bijapur police district in South Bastar. The Naxalites also looted arms and ammunition including AK-47 rifles, grenades and rocket launchers from the security forces.

### Need for accelerated socio-economic development

In its latest Annual Report, the Ministry of Home Affairs acknowledged the fact that "Naxalism is not merely a law and order problem but has deep socio-economic dimensions." Prime

Minister Manmohan Singh in his address on 13 April 2006 has also pointed out that "Exploitation, artificially depressed wages, iniquitous socio-political circumstances, inadequate employment opportunities, lack of access to resources, under developed agriculture, geographical isolation, lack of land reforms, all contribute significantly to the growth of the Naxalite movement."

However, apart from Karnataka and West Bengal, other State governments such as Bihar, Chhattisgarh, Jharkhand, Orissa and Uttar Pradesh only announced security measures. Special programmes undertaken for the upliftment of the tribal areas seldom reach the beneficiaries. The Planning Commission's evaluation of Integrated Tribal Development Projects found misutilization and diversion of funds meant for the tribals. But, these issues have not been addressed. In many rural areas including those vacated because of Salwa Judum campaign, the edifice of the State structure simply does not exist to implement any programme. The so-called socio-economic programmes are unlikely to have any positive effects without a "Ministry for Development of the Naxalite-affected States" which will accelerate socio-economic development in the Naxalite-affected states on war footing.

With the state governments recruiting more Adivasi youths from the Naxal-affected areas into the armed forces exclusively to fight the Naxalites, the war has come home. Tribals in the Naxalite affected areas do not necessarily share the ideology of the Naxalites. But dispossession, deprivation and exploitation against them provide the classical situation for the ultra-leftist uprising. The problem cannot be addressed by more displacement, more bad governance, sub-human conditions and hunger inside the government-run Salwa Judum camps. ■



## Then and Now: Repression on indigenous Jummas

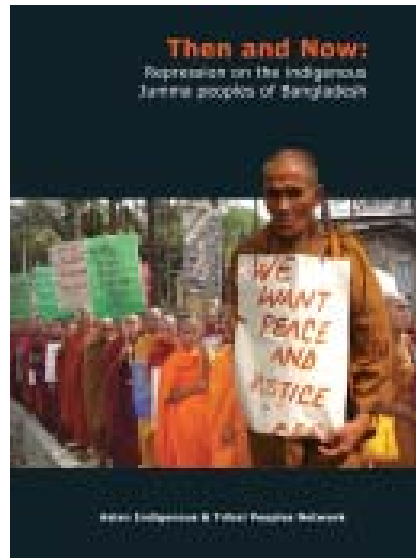
### Excerpts from AITPN report

Until the signing of the Chittagong Hill Tracts (CHTs) Accord on 2 December 1997 between the Jana Samhati Samiti and the government of Bangladesh, the region was known for its gruesome human rights violations. After the surrender of the Parbattya Chattagram Jana Samhati Samiti (known as JSS) and its armed cadres belonging to the Shanti Bahini pursuant to the Accord, the government had done little to implement the Accord and repression continues unabated. The indigenous peoples of the CHTs, collectively known as the Jummas, have struggled hard to draw attention of the international community. The conflict between the Jana Samhati Samiti and the United People's Democratic Front, two representative political organisations of indigenous Jumma peoples, over the CHTs Accord has been exceptionally self-destructive.

The Awami League government which signed the Peace Accord in 1997 did little to implement the Accord. The Bangladesh Nationalist Party had vehemently opposed the Accord. In the general elections held in October 2001, Awami League was voted out. The BNP consistently sought to undermine or sabotage the Accord. The next general election is slated to be held by March 2007 with no signs of the Accord being implemented. For all practical purposes, the CHTs Peace Accord has become a "Dead Accord".

#### a. Land grabbing by the government and illegal plain settlers

Systematic attacks on indigenous Jummas especially of those living in the



vicinity of the cluster villages of the illegal settlers have increased further since the signing of the CHTs Accord. Illegal settlers are often assisted by the Bangladesh army personnel to forcibly occupy the lands of indigenous Jumma peoples. Many of the illegal settlers who came in 1970s and 1980s have been elected to the local government bodies like Union Council and they have been in the forefront of the attacks on the indigenous Jumma peoples. The latest attacks took place on two indigenous Jumma villages at Maischari on 3 April 2006 with a view to grab the lands of indigenous Jummas.

Apart from directly assisting the illegal plain settlers to grab the lands of indigenous Jummas, 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.

The Land Commission established under the CHTs Accord was mandated to resolve the land disputes. It met only once in eight and half years after the signing of the CHTs Accord. As the government of Bangladesh continues with its policy to grab the lands of the indigenous Jumma peoples through the security forces, illegal settlers, forest

department etc., how could the Land Commission be made functional?

### **b. Militarisation and human rights violations**

The Chittagong Hill Tracts is one of the heaviest militarized zones in the world. Approximately one-third of the Bangladesh military is deployed in the CHTs. The government reportedly spends an estimated US\$125 million per year for the continued presence of the military in the region.

The military personnel have been responsible for torture, rape and other gross human rights violations.

Many Jummas have also become victims of lust of the army and the police personnel to obtain "quick promotion". On 5 March 2006, security forces led by one Captain Zahid entered into Khagrachari District Court and took away two Jummas, Shuchil Kanti Chakma and Kamala Ranjan Chakma, without the permission from the sitting judge. These two Jummas were arrested from Mahalchari the previous day. Captain Zahid then photographed them after putting weapons in their hands. Khagrachari District Bar Association condemned the incident, but no action was taken against the delinquent officer. Indigenous Jummas have been victims of arbitrary arrest, unlawful detention and torture in custody to extract confessions or provide information about alleged terrorists.

Indigenous Jumma women have been extremely vulnerable to violence including rape and other sexual harassment and torture both at the hands of the security forces and illegal settlers. On 10 April 2006, a Jumma widow identified as Rupali Chakma, wife of late Dhan Kumar Chakma, was raped by an army officer, Subedar Kobad of Dwi-Tila army camp in Baghahat in Rangmati district. The victim was returning home from Baghahat after drawing government allowances and the

vehicle in which she was traveling was stopped by the security personnel. Subedar Kobad forcibly took her off to the Dwi-Tila camp and raped her. Though the victim was admitted in Rangamati Hospital for treatment, no arrest was made.

Whenever indigenous Jumma peoples sought to protest against rape and other sexual harassment of their women, the security forces and the illegal settlers retaliated with violence and mayhem. On 23 March 2006, illegal plain settlers launched violent attacks on Jummas at Jouta Khamar village under Ghagra union of Kaukhali upazila in Rangamati district. At around 9:30 pm, an illegal plain settler identified as Md. Rafique, s/o Abdul Salam, tried to rape Ms. Rajeshwari Chakma, w/o late Dhenga Chakma. Md. Rafique was driven away by the Jumma villagers who rushed to the spot hearing shouts for help from the victim. But Md Rafique returned with more settlers and attacked the Jumma villagers. In the attack, 8 Jumma villagers were reportedly injured, and many houses were looted and their properties destroyed.

Indigenous Jumma children have been victims of torture, rape and other sexual abuses at the hands of the security forces and the illegal plain settlers. On 23 January 2005, a 9-year-old boy named Bandachya Chakma, son of Pagana Khulo Chakma of Dojar area was sexually abused by an army personnel. The victim and his friend had gone to the forest to collect forest products when the army personnel encountered them. The accused sent the victim's friend to buy him food, and sexually harassed the minor boy. Later, the accused gave Taka 50 note to the victim to not to disclose the matter.

The CHTs Accord had provided for the withdrawal of temporary military camps. In 2004, the JSS stated that only 35 out of 500 camps had been

withdrawn. Since then government has established more new camps at Milachari under Bandarban district and at Ghagra in Rangamati district.

One of the key provisions of the CHTs Accord i.e. the demilitarisation has not been implemented at all.

### **c. Ethnic cleansing through implantation of the illegal plain settlers**

The CHTs Accord did not help to resolve the illegal settlers' issue. Tens of thousands of illegal plain settlers continue to pour in with the support of the government. 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 of Rangamati, Bandarban and Khagrachari became double and rose to 50,000. The illegal plain settlers are kept in the cluster villages until they can forcibly occupy the lands of the indigenous Jumma peoples and permanently settle down. The government provides 86 kilogram of rice to per settler family per month, in addition to other amenities. However, no such assistance is provided to the internally displaced Jummas. Rather, in 2000 the task force on Internally Displaced Persons (IDPs) set up by the government of Bangladesh identified 38,156 plain settlers' families as IDPs. It is a travesty that those illegal settlers who in the first place displaced indigenous Jummas have also been identified as IDPs. The actual number of internally displaced Jummas is about 100,000 families.

About 43,000 Jumma refugees returned to CHTs from Tripura State of India after the peace accord was signed in 1997. About 40 villages of returnee refugees are still under the occupation of the illegal settlers. Over 3,000 families did not get their lands back in violations of the agreement signed with the Returnee Jumma Refugees Welfare

Association.

#### **d. The dead CHTs Accord Implementation Committee**

Clause 3 of Part A of the CHTs Accord provided for formation of an Implementation Committee to monitor the process of implementation of the Accord. The Implementation Committee constituted of a member to be nominated by the Prime Minister as Convenor, the Chairman of the Task Force formed within the purview of the Accord and the President of the Parbatya Chattagram Jana Samhati Samiti.

The CHTs Accord Implementation Committee is as dead as dodo.

#### **e. The CHTs Illegal Settlers' Affairs Ministry?**

The CHTs Affairs Ministry set up pursuant to the CHTs Accord has been turned into the Ministry for the Illegal Settlers. In November 1999, after instructions from the Prime Minister's Office, illegal plain settlers who displaced the indigenous Jumma peoples in the first place were included in the definition 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. On 21 December 2000, the CHTs Affairs Ministry 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. On 23 November 2005, a directive from the Prime Minister's Office (PMO) forced the Jumma NGOs to abandon a workshop on land rights issues hours after it was convened at Rangamati.

#### **f. The CHTs Illegal Settlers' Development Board!**

The CHTs Development Board was

set up essentially to carry out the implementation of the programmes for illegal settlers. Little has changed after the signing of the CHTs Accord.

Prime Minister Khaleda Zia appointed BNP Member of Parliament from Khagrachari, Wadud Buiyan as the Chairman of the CHTs Development Board on 11 February 2002 in violation of the CHTs Accord that provided for appointment of an indigenous person as the Chairperson. Under Buiyan's leadership, the CHTDB has been undertaking settler-oriented development programmes and bringing in thousands of illegal settlers and providing them free rations. The illegal settlers feel 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.

#### **g. The CHTs Regional Council: Dhaka's rubber stamp**

Little has been done to implement the Accord apart from appointing key JSS officials as members of the Regional Council. The tenure of the Regional Council under the Accord is five years. However, though the JSS assumed charge in May 1999, no election has yet been held to the Regional Council so far. No election to the three Hill District Councils has also been held since 1989.

While the JSS rightly opposes elections to the Regional Council and Hill District Councils because of the inclusion of the illegal settlers into electoral rolls, the issue has increasingly become an excuse to cling on to power in the Regional Council. After all, the illegal plain settlers have been participating in the local government

and municipal elections.

The District Councils do not give a hoot to the CHTs Regional Council. JSS President Santu Larma who also serves as the Chairman of the Regional Council rightly makes regular complaints about the non-implementation of the Accord. However, it is difficult to make distinction as to whether complaints were being made by him as signatory to the Accord on behalf of the JSS or as the Chairman of the Regional Council. The Regional Council remained the most ignored local government institution in the country.

The continuation of the JSS in the Regional Council is the only sign that the CHTs Accord is on. But it only helps the government of Bangladesh as did the surrender of the JSS.

#### **Response of the government of Bangladesh**

AITPN report was circulated at the 5th session of the Permanent Forum in May 2006. Many indigenous Jumma representatives also made oral interventions.

The representative of Bangladesh made an oral intervention on 23 May 2006. The representative while protesting against the report and oral interventions stated, "We have noted the contents of some statements as well as publications made available in the Forum. It is a matter of regret that most of those are concocted. Many are motivated by a desire to grab the sympathy of the international community. Tribal representatives often present wrongdoing against them as attempts of victimization. But they have often been found, upon investigation, as regular criminal activities, which are no different from other peoples'. It would be our hope that the distinguished members of the Forum and the fellow delegates would appreciate the sincere efforts by the ..... continued in page 17

## The proposed Saami Convention: A test for the Nordic commitment on rights

Mattias Arhen, Human Rights Coordinator, Saami Council



**T**he Saami people are the indigenous peoples of the northern parts of Norway, Finland and Sweden, and the Kola

Peninsula of the Russian Federation. Like other indigenous peoples around the globe, the Saami people have been struggling for the recognition of their rights since colonization of their land and territories. In addition, having had their traditional areas divided by national borders drawn by others, the Saami people have been struggling to remove or at least mitigate the problems these borders create for the fellowship of the Saami people.

In 1986, the Saami Council proposed that the four countries in which the Saami population reside, together with the Saami people, should elaborate a "Saami Convention" both to underline the Saami people's right as an indigenous people as well as to address the problems that national borders cause for them. In February 1995, the Nordic Council decided to commence the work with a Nordic Saami Convention. In November 2001, the governments of Finland, Norway and Sweden and the Saami parliaments in these three countries, decided that an Expert Group should be appointed with the task to draft a Saami Convention. The members of the Expert Group were appointed in November 2002. The Expert Group commenced its work in January 2003.

From the outset, there was a clear

understanding among all relevant parties that the Saami Convention would be elaborated in complete and equal partnership between the four parties involved; the Finnish, Norwegian, Swedish and the Saami people. Consequently, it was decided that the Expert Group should consist of one member appointed by each of the governments and one member appointed by each of the Saami parliaments. The Expert Group among others consisted of Professor Carsten Smith, former Chief Judge of the Norwegian Supreme Court (Chair of the Expert group), Mr. Hans Danelius, former Supreme Court Judge in Sweden and former judge on the International Court of Justice as well as Chief Lawyer for the Swedish Ministry of Foreign Affairs and Professor Martin Scheinin, former member of the UN Human Rights Committee and presently the UN's Special Rapporteur on Human Rights and Terrorism.

The Expert Group spent a little bit less than three years negotiating the Convention. In November 2005, it presented a unanimous proposal for a Saami Convention to the three governments and the three Saami parliaments.

### Salient features of the Saami Convention

As common in international instruments, the Saami Convention consists of one preambular and one operative part. What probably renders the Saami Convention unique, however, is that the preambular part is divided into two wherein the governments and the Saami parliaments separately outline

the foundation for the Saami Convention. The preambular section underscores that the Saami Convention rests on a general understanding that the Saami people have the right to self-determination and rights to its traditional lands, waters and natural resources. Also, the preambular part underlines that the fact that the Saami people have throughout history suffered injustices and have not been treated as an equal people shall be taken into consideration when determining future status of the Saami people.

In operative part, Article 1 of the Saami Convention spells out the objectives of the Convention: (i) to underline the Saami people's human rights and (ii), to the largest extent possible remove or mitigate the problems caused to the Saami people by the fact that our traditional territory is today divided by national borders.

Article 3 stipulates that the Saami people - as a people - has the right to self-determination. The Article essentially merges paras. 1 and 2 of the common Article 1 of the 1966 Covenants, and thus also includes the resource dimension of the right of self-determination. Interestingly, the Expert Group agreed on the paramount Article 3 in the Convention without much disagreement or debate. An entire chapter of the Convention (Articles 14-22) is devoted to how the right to self-determination shall be implemented in a Saami context, given that the entire Saami area today have a mixed population. The Saami people today share their territory with the colonizing population. The Chapter therefore introduces a sliding scale, where the Saami people have complete decision-

making authority on matters that only concerns the Saami or, that even though they also have implications on the non-Saami population, are of significant importance to the Saami people. On matters of importance to the Saami, but that also concerns the non-Saami populations, the Convention proposes a joint-decision making between the two peoples through negotiation mechanisms. On matters that affect the Saami, but that are not of that importance to them, the Saami should be consulted before any decision-making. The Saami people shall also be allowed to be represented in public councils or committees that deal with Saami issues. The Convention further stipulates that the Saami parliaments shall represent the Saami people in international affairs. In other words, the Saami Convention underscores that the Saami people is entitled also to the external aspect of self-determination. Intrinsicly linked to the right to self-determination, Article 9 stipulates that the states shall duly recognize the Saami people's customary legal thinking and norms.

In the standard setting processes on the rights of indigenous peoples at the United Nations, the right to self-determination and rights over land and resources are the most contentious issues. Unlike the right to self-determination, the Expert Group too, was really struggling to agree on how the Saami Convention should address these matters. The final outcome, arrived at after lengthy debate, is contained in Chapter IV (Articles 34-40). Generally speaking, the land and resource rights chapter was drawn from the corresponding articles in the ILO Convention No. 169 on Indigenous and Tribal Peoples. Article 34 stipulates that the Saami people have the right to own areas they occupy solely or predominantly and the right to continued usage of areas they presently share with the non-Saami population.

The article further underlines that the evaluation of whether the Saami people have traditionally utilized an area must be made taking into consideration that the Saami traditional livelihoods such as reindeer husbandry leave little permanent traces in nature. Similar to Article 27 of the Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee, the Convention includes an absolute prohibition of activities in the Saami areas that would render it impossible or make it considerably more difficult for the Saami people to pursue their traditional livelihoods. The Saami Convention does not take a final stand on what rights the Saami people have to sub-surface resources such as oil, gas and minerals, but highlights that such rights must be respected when existing. In a similar manner, the Convention stresses that the Saami people might indeed be entitled to restitution of lands and waters lost during the colonization of the Saami traditional areas.

Articles 35 and 47 oblige the state parties to provide financial assistance to the Saami people and individuals, rendering it possible for them to have cases of great importance tried before courts of law.

Article 45 establishes a committee with the mandate to oversee the implementation of the Convention. The Saami Convention committee is not a true treaty body, in the meaning of the institutions tasked to monitor state compliance with the major UN human rights treaties. Still, individuals can report alleged violations of the Saami Convention to the committee, and expect a response. Further, pursuant to Article 46, the state parties are, when possible, obliged to implement the provisions in the Convention into national legislation.

#### Limits of international law :

The negotiations in the Expert

Group were carried out in good spirit with a genuine interest from all parties to reach a fair and balanced text which can be also implemented by the countries concerned. Generally speaking, good arguments were decisive, international legal standards were the guiding light, and the process was never allowed to be politicised. The Saami members of the Expert Group were treated as equal partners, and their arguments carried as much weight as any of the government appointees. Still, the work with elaborating the Saami Convention was a negotiating process and the outcome not perfect from a Saami perspective.

The Saami Convention marks a new partnership between the Saami people on one side and the Finnish, Norwegian and Swedish peoples on the other. Hence, it would have been natural that the Saami people had been a party to the Convention. This was also the aspiration of the Expert Group. However, a legal opinion commissioned by the expert group concluded that making the Saami people a party to the Convention would likely deprive it of the status as a legally binding document under international law. Faced with this imperfection in international law, the Expert Group opted for a solution according to which only the states are formal parties to the Saami Convention, but where the Convention text stipulates that the entering into force of, and any amendment to, the Convention requires the approval not only of the three states, but also of the Saami parliaments. It is thus fair to say that the Saami Convention is a modern treaty between the Finnish, Norwegian and Swedish state-forming peoples on one hand and the Saami people, on the other.

Without doubt, the biggest shortcoming of the Saami Convention is that the Convention does not apply to the parts of the Saami people's traditional areas that are today situated

within the Russian Federation. It was deemed that at this stage, it would not be possible to agree on a strong and effective Convention if the negotiations should also include the Russian Federation. The Expert Group expressed, however, that it expects the Nordic countries, as soon as the Saami Convention has entered into force, to initiate discussions with the Russian Federation on how the spirit and the provisions of the Saami Convention can become reality also for the Saami population residing within Russia. The end goal is that one day, the Russian Federation shall be a party to the Saami Convention. Until then, it is worth noting that the individual rights in the Convention - such as on education and health and social services - do apply also to Saami persons that are citizens of the Russian Federation, if they are residing in Finland, Norway or Sweden.

In conclusion, the Saami Convention stands out as a unique international instrument and project. Even though the Convention is not perfect, the mere fact that the colonized Saami people and the colonizing peoples can - in the 21st Century - agree on a new basis for their future relationship, should serve as an inspiration for other countries in which indigenous peoples reside.

### Test for Nordic commitments on rights

Following the presentation of the draft Saami Convention in November 2005, it was decided that the Convention text should be sent to relevant national, regional, local and Saami institutions for comments. In July 2006, the hearing period has just ended. The comments submitted are about to be compiled. Early indications suggest, as could be expected, mixed responses. Many comments have been positive, referring to the Saami Convention text as balanced and well drafted, and calling for a speedy

adoption of the Convention by the states and the Saami parties. Other responses, particularly from municipal institutions, representing the non-Saami population in the Saami areas, are negative, calling on the state parties not to adopt the Saami Convention. These are bodies that are normally negative towards respect for the Saami people's human rights. It appears that generally speaking, the responses have been most positive in Norway, which was expected. Interestingly, and more surprisingly, early indications suggest that the responses have been more positive in Finland, compared to Sweden.

Presumably, a political (rather than an expert) group, consisting of representatives of the three governments and the three Saami parliaments will be established in the autumn 2006 with the aim to agree on an adoption and ratification of the Saami Convention. It is not easy to foresee how these discussions will develop. Potentially, the governments and the Saami parliaments could agree fairly easily to adopt the Saami Convention with no or minor amendments to the Expert Group text. The adoption by the UN Human Rights Council of the Draft UN Declaration on the Rights of Indigenous Peoples suggests such a development, since the UN Declaration contains many provisions that are similar to, and sometimes more far reaching, than the corresponding provisions in the Saami Convention. However, as in most countries with indigenous populations, the Saami issues have a tendency to be politicized. As indicated by the hearing responses, certainly large segments of the non-Saami population in the Saami areas will try to convince the states not to adopt the Saami Convention. Such pressure, has so far, for instance, prevented Finland and Sweden from ratifying the ILO Convention No. 169. Yet, as pointed out above, the Saami Convention has been drafted by some of

the finest experts on international law in Finland, Norway and Sweden based on international law.

However the question to Finland, Norway and Sweden remains: will they allow the Saami issues to be continuously politicized or do away with the principle of non-discrimination, respect for human rights and the rule of law while formulating policies and practices to deal with the Saamis? ■

*continued from page 14*

Government and reject the propaganda. My delegation deplores the actions of those individuals who take it as a mission to tarnish the positive image of their own country for short term gains, which are often personal in nature.”

### AITPN's reply to Bangladesh

The statement of the government of Bangladesh has failed to respond to any of the allegations made in the report of AITPN or oral interventions of the indigenous Jumma representatives. Apart from specific human rights violations mentioned in AITPN's report, the representative of Bangladesh also failed to respond to the threat issued by the Parliamentary Standing Committee on the CHT Affairs Ministry on 31 August 2005 to take legal action against indigenous activists from the CHTs - Mangal Kumar Chakma and Mrinal Kanti Tripura of the PCJSS, Albert Mankin and Ina Hume for demanding implementation of the provisions of the CHTs Accord at the 4th session of the Permanent Forum.

It is a fact that Permanent Mission of Bangladesh in New York has sent *note verbale* to Dhaka in such a manner that the Parliamentary Standing Committee on the CHT Affairs Ministry felt it necessary to issue such a threat to the indigenous representatives - an unacceptable action in any society claiming to be democratic. The intervention reflected the diplomatic unease of being reduced to spooks. ■

## Out in Africa: Methods of extinguishing Bushmen's rights

Since time immemorial, Bushmen, who are also known as Basarwas in Botswana, lived in the area which came to be known as the Central Kalahari Game Reserve. Their rights were not extinguished by the colonial British, who rather recognised the exclusive rights of particular bands to particular territories under a system of traditional land usage. When Botswana was declared independent in 1965, these rights accorded to the Basarwas by the colonial British were not extinguished either. Rather, the constitution of Botswana, in particular Article 14(3), accorded the Basarwas a right to reside in the Central Kalahari Game Reserve.

Today, these rights of the Basarwas are being extinguished by the Botswana government. First, in February 2002, the government of Botswana displaced the Basarwas under the National Parks and Game Reserve Regulation on frivolous grounds such as protection of the wildlife

population in the Reserve; the prohibitive cost of the provision of basic services to the settlements and its desire to introduce the Basarwas to the mainstream of Botswana society. Second, when the Basarwas sought to exercise the right accorded under Section 14(3) of the Constitution, the government came up with disingenuous plan to repeal the same. A mockery of democracy, justice and rule of law!

Basarwas sought a negotiated solution for a Management Plan for the Reserve. These negotiations were reportedly close to producing an agreement under which the settlements inside the Reserve would have had their own "community use zones" to continue to hunt and gather in these zones and launch projects to generate much needed revenue. However, the Government produced another alternate management plan without any consultation with the Basarwas and displaced them. The

alternate plan absolutely prohibits any form of hunting and cultivation of any crops and bans all domestic livestock. The government unilaterally withdrew basic services. The aim was to make living conditions of the Basarwas untenable.

While examining the 15th and 16th periodic reports of Botswana, the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee) in its Concluding Observations of 4 April 2006 expressed concern at "the discrepancy between the information provided by the State party that residents of the Central Kalahari Game Reserve have been consulted and have agreed to their relocation outside the Reserve, and persistent allegations that residents were forcibly removed, through, in particular, such measures as the termination of basic and essential services inside the Reserve, the dismantling of existing infrastructures, the confiscation of livestock, harassment and ill-treatment of some residents by police and wildlife officers, as well as the prohibition of hunting and restrictions on freedom of movement inside the Reserve".

As negotiation failed and government made conditions of the Basarwas untenable, the Bushmen had no other option but to file a case in April 2002. The world's most impoverished populations were forced to seek legal recourse which has so far turned out to be the longest and most expensive litigation in Botswana's legal history. The difficulties experienced by poor people, many of whom belong to San/Basarwa groups and other non-Tswana tribes, in accessing common law courts, particularly high fees, the



absence of legal aid in most cases, as well as difficulties in accessing adequate interpretation services in Botswana has been confirmed by none other than the CERD Committee.

The petition of the Basarwas was first rejected on technical grounds. The Bushmen appealed and won the right to have the case heard, and it began in July 2004 in Botswana's High Court. At least 10% of the original 243 applicants have died in government resettlement camps since the case was filed. 135 more Bushmen have asked to be added to the original list of 243 applicants in 2006.

In April 2006, the CERD Committee recommended to the Botswana government that it resume negotiations with the residents of the Reserve, including those who have been relocated with a view to finding a

solution acceptable to all. Emphasising a rights-based approach, the CERD Committee urged Botswana to (a) pay particular attention to the close cultural ties that bind the San/Basarwa to their ancestral land; (b) protect the economic activities of the San/Basarwa that are an essential element of their culture, such as hunting and gathering practices, whether conducted by traditional or modern means; (c) study all possible alternatives to relocation; and (d) seek the prior free and informed consent of the persons and groups concerned.

The CERD Committee's recommendation of resuming dialogue with the Bushmen was not implemented. Final arguments in the High Court are slated for the last week of August 2006.

Earlier, in an attempt to nullify the

impending judgment, Botswana decided to repeal section 14 (3) of the Constitution on the obnoxious ground that there was no point in maintaining this provision since the residents of the Reserve had been persuaded to be relocated. The CERD Committee held that such an action would prejudice the results of the on-going court case and urged Botswana to refrain.

The Republic of Botswana has been considered a progressive and stable democratic country in Africa. Its reputation faces a litmus test. If Botswana repeals Section 14(3) or deprives the rights of the Basarwas, it would be nothing short of the tyranny of the majority in the name of democracy and rule of law. The denial of rights to the Basarwas will be a sad case for Africa as a whole. ■

## Canada's search for the Rosetta Stone: Membership of the First Nations' Women

“The impact of colonization and assimilation strategies aided in altering First Nations traditional values and social structures, often replacing or enforcing the colonizers cultural values on First Nations societies. First Nations women's roles and responsibilities in the decision making process throughout North American societies were strategically targeted in the goal of assimilation and loss of culture.” - the Assembly of the First Nations in its submission to the UN Committee on Economic, Social and Cultural Rights in May 2006.

In its latest examination of the periodic report of Canada, the UN Committee on Economic, Social and Cultural Rights expressed concerns that "the disparities still persist between Aboriginal peoples and the rest of the Canadian population in the enjoyment

of Covenant rights, as well as the discrimination still experienced by Aboriginal women in matters of matrimonial property". The Committee held that the long-standing issues of discrimination against First Nations women and their children, in matters relating to Indian status, band membership, and matrimonial real property on reserve lands had a negative impact on the enjoyment of economic, social and cultural rights of some First Nations women and their children under the Covenant.

The ESCR Committee recommended that Canada, in consultation with First Nations including Aboriginal women's groups, adopt measures to combat discrimination against First Nations women and their children in matters relating to Indian status, band

membership and matrimonial property. In particular, the Committee urged to repeal section 67 of the Canadian Human Rights Act (CHRA) which prevents First Nations people from filing complaints of discrimination before a human rights commission or tribunal. The ECSR Committee also urged the State party to amend the Indian Act of Canada to remove any residual discrimination against First Nations women and their children.

The submission of the Assembly of the First Nations to the ESCR Committee devoted 11 out of 43 pages on "Article 3 Equal Rights of Men and Women".

On the surface, the dispute relates to Section 67 of the CHRA which provides that the CHRA does "not affect any provision of the Indian Act or any provision made under or pursuant to

that Act." In other words, section 67 of the CHRA effectively excludes members of First Nations communities who fit within the definition of "Indian", as defined in the federal Indian Act and who live or work on an Indian reserve or Indian Act community, from filing complaints with the Canadian Human Rights Commission in respect of any action arising from or pursuant to the Indian Act.

The Canadian Human Rights Commission in its report, *"A Matter of Rights - Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act"* of 26 October 2005 recommended an immediate repeal of section 67 of the CHRA and develop an "interpretive provision" to guide the Commission and Tribunal in adjudicating complaints against First Nations governments, agencies and institutions through consultation with

First Nations over an 18-30 month period.

At the heart of the dispute is membership to the first nations. Since the UN Human Rights Committee gave its opinion on *Sandra Lovelace v. Canada* case in 1977, Canada and the First Nations have been struggling to strike a balance to address this volatile issue.

Take Canada's vote against the Draft Declaration at the UN Human Rights Council in June 2006 and the recognition of the rights of indigenous peoples to "determine their own identity or membership in accordance with their customs and traditions" under Article 33 of the Draft Declaration, striking a balance between individual and collective rights which have direct implications on the identity and membership to First Nations is akin to searching the Rossetta Stone. For Canada, it is more difficult than saying "no" at the Human Rights Council. ■

Yet, those modern States which were built over the indigenous peoples' land and territories have been the most vociferous opponents of the Draft Declaration. It was, therefore, not surprising but saddening when the representative of Mauritius expressed the fear at the Human Rights Council that "some self-designated indigenous groups might threaten the sovereignty of a State by following a wrong interpretation of the declaration." The descendants of the settlers speak!

From 1996 to 2005, the WGDD did not adopt a single article. Indigenous peoples had their own share of blame. Many held on to the position that the Draft adopted by the Sub-Commission should not be changed. In this context, the adoption of the Chairman's proposal by the Human Rights Council is nothing short of a miracle.

### The best and new elements of the Declaration

From denial of entry to the League of Nations to the adoption of the Draft Declaration to exclusion from the "WE THE PEOPLES OF THE UNITED NATIONS" of the Charter of the United Nations, indigenous peoples had to consistently overcome exclusion. International human rights instruments failed to include indigenous peoples. Critical indigenous rights are not found in normative legal framework.

The Draft Declaration as adopted by the Human Rights Council contains many new elements specific to indigenous peoples. It recognises the rights of indigenous peoples, as a collective and as individuals (Article 1). It contains strong language on the right of self-determination (Article 3) which makes them equal to other peoples. Although ILO Convention No 169 has already done away with the assimilation provided under ILO Convention No. 107, the Draft Declaration reiterates the rights of indigenous peoples and

## A UN Draft Declaration on the Rights of Indigenous Peoples: Right and wrong sides of history

On 29 June 2006, the newly established United Nations Human Rights Council through its resolution 2006/2 adopted the Draft United Nations Declaration on the Rights of Indigenous Peoples and recommended to the General Assembly for proclamation of the same. At the end of 11th session of the Working Group on the Draft Declaration on the Rights of Indigenous Peoples (WGDD) held from 5-16 December 2005 and from 30 January to 3 February 2006, Chairman/Rapporteur of the Working Group, Luis-Enrique Chavez forwarded his proposal on the Draft Declaration to be "considered as final compromised text".

### A historic Declaration

The process of the adoption of the Draft Declaration has not been without controversies. Very few other standard setting processes evoked such controversies including the walkout by indigenous representatives from WGDD in 1996. The standard setting process of the Draft Declaration on the Rights of Indigenous was also unique - indigenous peoples representatives have been virtually given equal say in the adoption of the Declaration. The exclusion of the indigenous peoples from the United Nations processes and enduring affects of colonisation, which among others resulted into the extinction of many indigenous peoples, necessitated such a unique standard setting process.

individuals not to be subjected to forced assimilation or destruction of their culture (Article 8). For the first time, the concept of free, prior and informed consent, which is being urged as central element for undertaking developmental projects, finds a place in a UN Declaration (Article 10). The recognition of the right to traditional medicines and the right to maintain their health practices will enhance indigenous peoples rights under the intellectual property regime and the Convention on the Bio-logical Diversity (Article 24). Though Article 17 of the Universal Declaration on Human Rights recognised the right to property International Covenant on Economic, Social and Cultural Rights failed to make any reference to the most fundamental element for exercising the ESCR i.e. the right to land. The Draft Declaration recognises the land rights (Article 25) as well as the right to the lands, territories and resources (Article 26) of indigenous peoples. Though many national constitutions and courts recognise customary laws, international human rights law did not explicitly recognise these rights. The Draft Declaration gives customary laws of indigenous peoples a place under the sun of international human rights law (Article 34). Similarly, the Draft Declaration recognises the right to the recognition, observance and enforcement of Treaties, Agreements and Other Constructive Arrangements concluded with States or their successors and to have States honour and respect such Treaties, Agreements and other Constructive Arrangements (Article 37).

### Analysis of the voting

As the Mexican delegation stated, the adoption of the Declaration gives "a clear signal to indigenous peoples throughout the world that Human Rights Council was working to promote and protect their human rights". Many

countries such as Guatemala, Switzerland, Mexico, Brazil etc were vocal to support the process of making history. Many remained silent. But a few put their own caveats if they have any meaning under international law while supporting the adoption of the Draft Declaration.

### Canada and Russia: On the wrong side of history

Canada and Russia are the only two members of Human Rights Council which voted against the resolution 2006/2 for adoption of the Draft Declaration. The statement of the Canadian representatives for opposing the adoption of the Draft Declaration reflected typical Canadian position on standard setting on indigenous peoples rights for the last two decades - probate and reprobate at the same time. Canada's sympathetic private position often failed to translate into a public position on the floor. With none of its compatriots - the United States, Australia and New Zealand sitting in the Human Rights Council, Canada was expected to take such a negative stand. The election of the conservative government of Prime Minister Stephen Harper provided an excuse. But Canada was destined to be on the wrong side of the history irrespective of whether there

is a conservative government in Ottawa or not. It has too long been a poodle of the US.

As for Russia, when was the last time that they were on the right side of rights?

### Harking back at history: India

While explaining the vote in favour, the representative of India expressed concern that the text did not contain a definition of "indigenous". "The entire population of India was considered to be indigenous" - thundered the representative. "With regards to the right to self-determination, this was understood to apply only to peoples under foreign domination, and not to a nation of indigenous persons". India still suffers from Columbus syndrome on the definition of indigenous peoples. Will India, a signatory to ILO Convention No 107, explain what does "indigenous" mean under the ILO Convention? Let us not explain other national laws.

### Living on its Ivory Tower: Philippines

Philippines government lived long on its only laurel - the Indigenous Peoples Rights Act of 1997. However, the IPRA has fallen because of the lack of implementation. Philippines has always been a case of being only

## [Historic vote: 30 in favour, 2 against and 12 abstentions]

- In favour** : Azerbaijan, Brazil, Cameroon, China, Cuba, Czech Republic, Ecuador, Finland, France, Germany, Guatemala, India, Indonesia, Japan, Malaysia, Mauritius, Mexico, Netherlands, Pakistan, Peru, Poland, Republic of Korea, Romania, Saudi Arabia, South Africa, Sri Lanka, Switzerland, United Kingdom of Great Britain and Northern Ireland, Uruguay, Zambia
- Against** : Canada, Russian Federation
- Abstaining** : Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, the Philippines, Senegal, Tunisia, Ukraine]

spectacular on paper. On the D-Day, it failed again - abstained from voting for putting the Declaration to vote! So much commitment!

### End of innovation: Japan

As far as the memory goes, Japan always insisted that it did not recognise collective rights. How could they miss the last opportunity to reiterate the same while the Draft Declaration was being adopted?

### Half asleep: Argentina

After over two decades of negotiation of the Draft Declaration - 11 years at the WGDD and 11 years at the Sub-Commission, Argentina still felt, "the lack of time to deal with certain provisions of the declaration, which were of particular importance, namely

the process of self-determination and territorial integrity". Was Argentina sleeping?

### And finally .....crocodile tears from China and the UK

While voting in favour of the draft resolution, China regretted that this instrument would have to be adopted by voting. Having acted as the poodle of the United States, the representative of the United Kingdom shed crocodile tears and "regretted that the declaration had had to come to a vote". Diplomacy!

### Threat:

The Draft Declaration is all set to be proclaimed by the UN General Assembly. But, Argentina has already threatened to raise issues which it could not address in the last two decades. ■

root cause of their poverty. Generalisation is another name of assimilation!

In 2002, the Permanent Forum on Indigenous Issues was established. Effectively, indigenous peoples and their protagonist at the United Nations, the Permanent Forum on Indigenous Issues missed the MDG bus. Since its third session in May 2004, the Permanent Forum however has been trying to catch the MDG bus that it actually missed. The Permanent Forum is still far from catching the missed bus but it has already given up!

At its 4th session in May 2005, the Permanent Forum spent one full week to discuss two goals of the MDGs: Goal 1: eradicate extreme poverty and hunger; and Goal 2: achieve universal primary education. Another week was spent at the 5th session on "Special theme: the Millennium Development Goals and indigenous peoples: redefining the Goals". Intersperse these discussions to redefine the MDGs - that can easily be construed as opening the MDGs for further negotiations - with closed door meetings of the members of the Permanent Forum and mundane dialogue with the UN agencies, the sessions of the PFII become useless and delusional if not perverse.

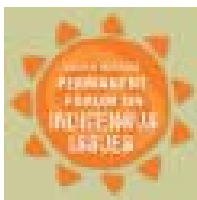
At the first week of the 5th session, majority indigenous representatives were at lost, as the Permanent Forum dragged on to discuss the MDGs only to conclude that "the Permanent Forum on Indigenous Issues appreciates that it may not be possible to redefine the Goals". The Forum urged for the redesigning of approaches to the implementation of the Goals so as to include the perspectives, concerns, experiences and world views of indigenous peoples. Well said, but means nothing!

### Cacophony and the UN mandarins:

Part of the mundane discussion relates to the mandate of the Permanent Forum to coordinate with UN agencies.

## Catching the missed MDG Bus: Permanent Forum or Perfunctory Forum?

### How important are the Millennium Development Goals (MDGs)?



Since the Millennium Session of the UN General Assembly in September 2000, the MDGs have come to shape programmes of governments and donors of the world. Many rights, enforceable by definition, became Goals, a set of targets. The US dollars - "less than one dollar a day" to be precise - became the yardsticks for measuring hunger and poverty. The adoption of the MDGs may well be construed as the final declaration of the victory of the *laissez-faire* economics even Adam Smith would not have foreseen!

When the Member States of the United Nations adopted the MDGs in September 2000, the Commission on

Human Rights was considering whether to establish a UN body to deal with indigenous peoples. The MDGs failed to make any specific reference to indigenous peoples. Undoubtedly, indigenous peoples are on the lowest rung of the ladder of the society. They are also poor because of their origin, descent and discrimination they face. The 2005 report of the UN on the MDGs stated: "The lowest levels of attendance are found among indigenous peoples and other minority groups. Addressing these disparities and reaching the most disadvantaged will be the greatest challenge in achieving universal primary education". Is this something new? It has been universally known. Yet, the MDGs much like the Charter of the United Nations or the Universal Declaration on Human Rights and subsequent international human rights standards failed to refer to indigenous peoples or

After five years, Permanent Forum is yet to decide whether it should hold its discussion as one of the UN specialised agencies without requisite secretariat assistance and funds, or as a political body, similar to the functional commissions, without any mandate to act as such. The Permanent Forum has also been desperate to be different from its competitor, the UN Working Group on Indigenous Peoples.

Worse, the much-vaunted debate with the UN agencies that the Permanent Forum highlights as one of the indicators of its effectiveness is actually not highlighted in the final reports of various sessions. These UN specialised agencies are uniformly inaccessible to indigenous peoples including members of the Forum at national level across the world. Yet, holier than the cow attitude of many UN agencies is omnipresent. Inter-Agency Task Force of the Permanent Forum has become a forum to set self-promotion agenda of the UN agencies. Even the World Bank has found a UN forum to seek and claim legitimacy.

It is clear that critical indigenous

issues have been lost in the semantics of the UN. In more ways than one, it appears to have been held hostage to a cacophony of self-promotion agenda of the UN agencies.

#### A "Perfunctory Forum"?

The Draft Decision IV of the 5th session of the Permanent Forum on the "Provisional agenda and documentation for the sixth session" that relates to the Millennium Development Goals with the mandated areas of the Permanent Forum may finally bring the PFII to the earth. With the abolition of the WGIP, the Permanent Forum should take cognizance of its new role as a political body.

Asian Indigenous and Tribal Peoples Network consistently highlighted organisation of work and time management as key to improving the efficacy of the Forum. It is more important considering that the secretariat of the Forum does not have adequate staff and it appears to be lost at the UN headquarters in New York.

The experiences of now-defunct Commission on Human Rights provide some guidance. Time management

must uniformly apply to all - dignitaries, special invitees, members of the Permanent Forum and other observers. This has not been followed even when the debates have been absolutely mundane. Moreover, why should the Permanent Forum members spend time allocated for the plenary for their closed door meetings? Indigenous representatives vehemently protested whenever the government delegates sought time for their internal negotiations at the Working Group on the Draft Declaration. It is not a practice followed by the Sub-Commission on Human Rights. Nor is it a practice followed by the Bureau of the now defunct Commission on Human Rights or newly established Human Rights Council.

Are the Permanent Forum members too busy or lazy to hold closed door meetings at some other times so as to not take away time allotted for all? If indigenous peoples continue to be denied the space by none other than the members of the Permanent Forum, the Permanent Forum runs the risk of being reduced to "Perfunctory Forum". ■

## INDIGENOUS WORLD

### US: Under CERD's Early Warning

In its 68th session, the UN CERD Committee issued early warning to the United States under its Urgent Action procedure after considering credible information received by the Committee alleging that the Western Shoshone indigenous peoples are being denied their traditional rights to land, and that measures taken and even accelerated lately by the United States in relation to the status, use and occupation of these lands may cumulatively lead to irreparable harm to these communities. The CERD Committee urged the US to inform

about (a) reported legislative efforts to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers; (b) information according to which destructive activities are conducted and/or planned on areas of spiritual and cultural significance to the Western Shoshone peoples, who are denied access to, and use of, such areas, in particular the reinvigorated federal efforts to open a nuclear waste repository at the Yucca Mountain; the alleged use of explosives and open pit gold mining activities on Mont Tenabo and Horse Canyon; and the alleged issuance of geothermal energy leases at,

or near, hot springs, and the processing of further applications to that end; (c) the reported resumption of underground nuclear testing on Western Shoshone ancestral lands; (d) the conduct and / or planning of all such activities without consultation with and despite protests of the Western Shoshone peoples; (e) the reported intimidation and harassment of Western Shoshone people by the State party's authorities, through the imposition of grazing fees, trespass and collection notices, impounding of horse and livestock, restrictions on hunting, fishing and gathering, as well as arrests, which gravely disturb the

enjoyment of their ancestral lands; and (f) the difficulties encountered by Western Shoshone peoples in appropriately challenging all such actions before national courts and in obtaining adjudication on the merits of their claims, due in particular to domestic technicalities.

Despite reminders, the US failed to submit its fourth and fifth periodic reports to clarify the situations.

The CERD Committee stated that past and new actions taken by the State party on Western Shoshone ancestral lands lead to a situation where, today, the obligations of the US under the Convention are not respected, in particular the obligation to guarantee the right of everyone to equality before the law in the enjoyment of civil, political, economic, social and cultural rights, without discrimination based on race, colour, or national or ethnic origin.

### Australia: at it again

In January 2006, 43 Papuan refugees managed to sail to Australia in boats with tales of human rights violations. After considering the applications on individual basis, Australia, which is infamous for risking the plight of the refugees and asylum seekers, granted temporary asylum to 42 Papuans which will allow them to stay in the country for three years. On 23 March 2006, Australian Immigration Minister Amanda Vanstone informed that a decision has been pending on the 43rd asylum seeker.

Indonesia reacted angrily and recalled its Ambassador to Canberra for clarifications on the issue. It absurdly urged that that the grant of refugee status will mean Australia's support to the separatist movement in Papua. Australia on its part decided to trim up already restrictive refugee

determination process! No safe haven around.

### Mexico: Indigenous children face discrimination

The UN Committee on the Rights of the Child in its concluding observations (CRC/C/MEX/CO/3) expressed concern about indigenous children in Mexico. Indigenous children, especially those of the indigenous migrant workers, in particular have very limited access to education and health and suffer from disproportionately high malnutrition rate, and infant and maternal mortality rates. The Committee expressed concerns about the disproportionately high number of working children among indigenous peoples. The Committee recommended that Mexico provide indigenous communities with sufficient information, in their own language as well as in a child friendly format, regarding birth registration procedures, child labour, education and health, HIV/AIDS, child abuse and neglect, including corporal punishment, and on themes covered by the Optional Protocols to the Convention. However, when there is little disaggregation of data, it can be of little help

### Racism: Alive and kicking in Bangladesh

Mohammad Humayun Kabir, the Deputy Commissioner of the Khagrachari Hill district of Bangladesh in his book, "Khagrachari 2001-2005", described the indigenous peoples of the CHT as "outsiders", "anti-Bengali people", "wild and uncivilized tribes" and purposefully distributed it to various Ministers, representatives of diplomatic missions, government officials and offices of donor agencies in Bangladesh. It is racism of the highest order. If the head of the District holds such racist views, what about the illiterate plain

settlers and security forces? Strangely, the government of Bangladesh failed to take any action against the errant Commissioner despite the protest from the Jana Samhati Samiti.

### Bangladesh: Phulbari Coal Project displaces indigenous peoples

The proposed open pit coal mine plant of Asia Energy Corporation (AEC) at Phulbari in Dinajpur district of Bangladesh will displace around 4,70,000 people of Phulbari, Nababganj, Birampur and Parbatipur upzilas, including 50,000 indigenous peoples. It will also adversely affect the environment.

AEC is presently waiting for the approval of the government of Bangladesh to start the mining operations at the cost of US\$1.6 billion to extract around 15 million tones of coal per year for 30 years.

On 30 April 2006, thousands of indigenous peoples protested against the proposed plan. Due to extraction of coal in open pit method, the affected areas will lose natural vegetation and the water level might fall with devastating effects on agriculture. AEC has recently awarded a contract of a \$50 million water management programme to a Bangladeshi company, Falgu Sandhani, signalling its readiness to start full operation from 2008.

### Malaysia: Conversion by inducements

Kelantan is the only province in Malaysia ruled by the Islamic fundamentalists. The "Orang Aslis", first peoples, who traditionally do not follow mainstream Muslim religion, have been target of proselytization by the Islamists. Preachers who marry Orang Asli women will receive a lump sum of 10,000 ringgit (2,707 dollars) as well as free accommodation, a four-

wheel drive vehicle and a monthly allowance of 1,000 ringgit. More than 12,000 Orang Asli reside in Kelantan and 2,902 have already converted to Islam. But the provincial government is unhappy and wants to complete the process of conversion by inducements.

### **India: EC experience on reaching out to the tribal communities in India**

On 28 June 2006, the Delegation of the European Commission to India organised a thematic seminar focusing on its experience in reaching out to the tribal communities in India through various cooperation programmes and projects. "There is a gap between policy intent at macro-level and actual local level delivery and implementation in tribal development schemes and plans in different parts of the country. This is observed in terms of availability, access and utilization of social services, as well as in terms of access and control of natural resources that impact livelihoods of the tribal people, who are perhaps the most disadvantaged and marginalized section of the Indian society. In order for the development plans to be effective, it is essential that tribal communities should have their say in defining their development needs. At the same time their tribal identity should not be lost in the process of development." - concluded the seminar. More than 300 participants attended the seminar inaugurated by the Head of Delegation, Ambassador Francisco Dâ Camara Gomes and Joint Secretary Mr. Farooqui, Department of Economic Affairs, Ministry of Finance.

### **Philippines: Defenders on the hit list**

On 8 June 2006, Rafael Markus Bangit, an indigenous leader was gunned down by the vigilantes associated with the military. Bangit was killed while he was in transit to Baguio from his home province, Kalinga. He was working with at the regional office of Cordillera Peoples Alliance in Baguio. He was the 682nd victim of political killing since 2001 and the 99th for 2006, according to the documentation of KARAPATAN (Philippine Alliance for the Advancement of People's Rights). More than 140 activists have been abducted and remain missing. In addition, 42 journalists have been killed since 2001 - five of them since January 2006, according to the National Union of Journalists in the Philippines.

Those who are still on military's hit list include Pastor Vergel Aniceto, Ignacio Pangket, Leonida Tundage, Geannette Galvez, Art malecdan in addition to those in the hitlist, namely Joan Carling, Windel Bolinget, Manny Lose, Julian Gayumba, Jose Cawiding and Xavier Akien. ■



## **ASIAN INDIGENOUS & TRIBAL PEOPLES NETWORK**

**A**sian 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).

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

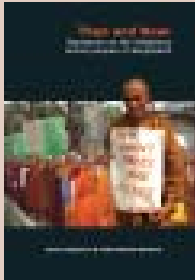
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# Latest Publications from AITPN

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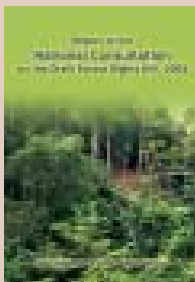
## Report of the National Consultation on draft National Tribal Policy (forthcoming!)

In 2004, the Ministry of Tribal Affairs of the government of India made public the first ever draft policy on the scheduled tribes, Draft National Tribal Policy. The Ministry of Tribal Affairs organised a series of consultations to elicit views. Indigenous and tribal peoples' organisations also organised their own consultations and submitted specific recommendations. The revised draft has recently been released (5 July 2006) for submission of comments/recommendations. Asian Indigenous and Tribal Peoples Network is scheduled to hold a National Consultation on the revised Draft National Tribal Policy to provide specific comments from indigenous and tribal representatives of the country.



## Then and Now: Repression on indigenous Jumma Peoples, May 2006

*Then and Now*, presented at the 5th session of the Permanent Forum on Indigenous Issues in May 2006, chronicles the repression on the indigenous Jumma peoples in the Chittagong Hill Tracts of Bangladesh since the signing of the Peace Accord in December 1997. It examines recent attacks on indigenous Jumma peoples at Maischari on 3 April 2006, repression against resistance, human rights violations, violence against Jumma women and Jumma children, and the failure of the CHTs Peace Accord, in particular, the failure to demilitarize the CHTs, continued implantation of illegal plain settlers, failure to rehabilitate returnee Jumma refugees and IDPs, failure of the CHTs Land Commission and the failure of the administrative mechanisms for implementation of the CHTs Accord.



## Report of the National Consultation on draft Forest Rights Bill, August 2005

In order to address historical injustices against tribal peoples, in early 2005, the government of India presented Draft Scheduled Tribes (Recognition of Forest Rights) Bill, 2005. Asian Indigenous and Tribal Peoples Network organized a National Consultation on the Draft Forest Rights Bill, 2005 on 7-8 August 2005 in New Delhi. This report contains the Declaration of the National Consultation on the Draft Forest Rights Bill, 2005, proceedings of the National Consultation on the Draft Forest Rights Bill, 2005, Background Note I: In defense of the Draft Forest Rights bill: De -constructing urban view of the jungle, Background Note II: Further strengthening the fine balance between rights and responsibility and Background Note III: an assessment of the implementation of international commitments on traditional forest-related knowledge in India.

