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CONTENTS

EDITORIAL

- 1 NIIPs: NIs of a Lesser God

REPORT

- 2 Nepal: National Seminar on the Role of National Institutions on Indigenous Peoples
- 4 Key elements of the proposed model law on the National Commission for the Adivasi Janjatis

UN

- 7 Draft Declaration faces litmus test at UNGA: There is a way out for the African Group
- 10 Permanent Forum: Manufacturing recommendations

ASIA

- 13 Indonesia: Piecemeal approaches to systemic and institutionalised discrimination
- 18 FATA: The dark region of Pakistan
- 20 Malaysia: Sabah and Sarawak High Court reaffirms native customary rights of indigenous peoples
- 21 Indigenous defenders at risk
- 24 Snippets



Asian Indigenous & Tribal Peoples Network
P.O. Box 9627, Janakpuri, New Delhi - 58, India
E-Mail: aitpn@aitpn.org Website: www.aitpn.org

EDITORIAL

NIIPs: NIs of a Lesser God

Asian Indigenous and Tribal Peoples Network (AITPN), having used mechanisms of the National Human Rights Institutions of India, is aware of the critical role the National Institutions play in the protection and promotion of human rights and fundamental freedoms. AITPN under its programme on the National Institutions on Indigenous Peoples (NIIPs) in Asia conducted the *National Seminar on Transition in Nepal and the Role of National Institutions on Indigenous Peoples* in Kathmandu on 1-2 May 2007.

As the representative of the Office of the High Commissioner for Human Rights, Ms Lena Sundh summarized the mood of the seminar, "the experts (two Sub-Commission experts who visited Nepal in May 2007) suggested that it would be useful for leaders of indigenous peoples to look beyond the upcoming electoral process and consider more broadly possible strategies to ensure that the rights of indigenous peoples - not only civil and political rights - recognized and respected in the future Nepal. One such strategy is a national institution on indigenous peoples, which you are discussing here". Because of the failure of the National Foundation for Development of Nationalities of Nepal, the National Seminar came up with a model law for the establishment of a "National Commission for the Adivasi Janjatis"

Since the United Nations adopted the Paris Principles on National Human Rights Institutions (NHRIs) in 1991, a large number of national institutions, more popularly known as National Human Rights Commissions, have been established across the world. International Coordination Committee of the NHRIs, regional organizations like the Asia Pacific Forum of NHRIs or Sub-regional organization of the NHRIs like ASEAN-Four indicate the number of such institutions created for increased cooperation for protection and promotion of human rights and fundamental freedoms.

Though there is less awareness, many governments have created National Institutions on Indigenous Peoples (NIIPs) like the National Commission for Scheduled Tribes of India and National Commission for Indigenous

Peoples of the Philippines. Other sectoral national institutions on women and children or the Dalits have also been established by the governments.

These sectoral institutions suffer from a number of shortcomings.

First, there are no internationally accepted guidelines for the establishment of National Institutions on Indigenous Peoples or other sectoral institutions. Therefore, governments like Nepal created semi-academic institution like the National Foundation for Development of Indigenous Nationalities. Most governments also prefer to create government department like the Bureau of Indian Affairs of the United States and the Committee for Ethnic

The sectoral National Institutions on indigenous peoples, Dalits, women etc have so far been ignored by the OHCHR, International Coordination Committee and regional bodies of the NHRIs, and even by the UN bodies created to address these sectors.

Minorities and Mountainous Areas of Vietnam. Some governments like Bangladesh created separate Ministries like the Chittagong Hill Tracts Affairs Ministry - a Ministry for a particular region where both indigenous and non-indigenous people live.

Second, the National Institutions on Indigenous Peoples in particular have been subsumed by the National Human Rights Institutions. For example, the Aboriginal and Torres Island Commission functions under the Human Rights

and Equal Opportunities Commission of Australia.

Third, because of the lack of awareness, organisations like the International Coordinating Committee, Asia Pacific Forum of National Human Rights Institutions or ASEAN-Four completely overlooked/excluded sectoral national institutions such as National Institutions on IPs, National Institutions on the Dalits (National Commission for Scheduled Castes of India or National Commission for Dalits of Nepal) or National Commissions for Women. Consequently, these sectoral national institutions which have a critical role to play for protection of human rights and fundamental freedoms of the most vulnerable groups have been denied the opportunity to learn from best practices or increase their capacity.

Fourth, the Office of the United Nations High Commissioner for Human Rights also only focused on the NHRIs and not on the sectoral NHRIs. In many areas, these sectoral institutions are critical and as important as the NHRIs. For example, while the National Human

Nepal: National Seminar on the Role of National Institutions on Indigenous Peoples

On 2-3 May 2007, Asian Indigenous Tribal People's Network (AITPN) in cooperation with Kirat Welfare Society (KWS) organised a "National Seminar on Transition in Nepal and the Role of National Institutions on Indigenous Peoples" in Kathmandu, Nepal. About 70 indigenous representatives participated in the National Seminar which, among others, addressed the present status of the indigenous peoples in Nepal, indigenous peoples' perspectives on the interim constitution and the issue of federalism, status of indigenous women in Nepal, the Role of National Institutions on Indigenous Peoples and ratification of the ILO Convention No. 169 and its relevance in Nepal.

In the post-conflict phase, each and every community is yearning for peace but at the same time also wants higher stakes in governance. This is a critical period for the indigenous peoples of Nepal who need legal mechanisms to end injustice, oppression and discrimination and for protection of their rights, including political, economic and social, or else be doomed to suffer till arrival of another wave of reforms in the country.

Those who graced the National Seminar were H.E. Ms Lena Sundh, Representative of the Office of the High Commissioner for Human Rights to Nepal; Dr. Jagadish Chandra Pokhrel, Vice Chairman of National Planning Commission of Nepal; Dr Chaitanya Subba, Member, National Planning Commission of Nepal; Mr Bijay Subba, Member of Parliament, Communist Party of

Nepal-UML; Mr. Mitharam Biswakarma, Member of Parliament, Nepali Congress; Ms Sarina Gurung, Information Officer, National Foundation for Development of Indigenous Nationalities (NFDIN); Mr. Parshuram Tamang, Member, UNPFII, Mr Chandra Kulung, General Secretary, Kirat Welfare Society; Dr Sukendu Debbarma, President, Asia Indigenous Peoples Pact; Mr. Dinesh Ghale, Vice Chairperson, Lawyers' Association for



Human Rights of Nepalese Indigenous Peoples; Ms. Lucky Sherpa, President of Himalayan Indigenous Women Network; Dr Om Gurung, Advisor, Nepal Federation of Indigenous Nationalities (NEFIN); Mr. Satish Budhamagar, Chairperson, Magarat Mukti Morcha, among others.

Speaking at the seminar, Ms Lena Sundh, Representative of the OHCHR in Nepal stated that the indigenous peoples "are among the poorest of this country's (Nepal) poor". She urged the indigenous lead-

ers to look beyond the upcoming electoral process and consider more broadly possible strategies to ensure that all the rights of the indigenous peoples are recognized and respected in future. Establishing a "national institution on indigenous peoples" should be one such goal, she said. She enlightened the participants about the Paris Principles but warned that "No single model of national institutions can, or should, be recommended as the appropriate mechanism for all countries." National institutions must be developed taking into account "local cultural and legal traditions as well as existing institutions" while benefiting from the experiences of other nations' institutions, she suggested.

Dr. Jagadish Chandra Pokhrel, Vice Chairman of National Planning Commission of Nepal empathically stated that all the political parties must show "firm commitment" to protect the rights of the indigenous peoples in "their agenda as expressed in eight party minimum common agenda". These commitments need to be operationalized and demonstrated with "some results in practice". Dr Pokhrel stated that Nepal cherishes its diversity in "culture, language, and so many other aspects of human life" but expressed regret that "It took us lot of

effort in this country to identify some of the almost extinct indigenous peoples and come up with immediate action” so that language, culture etc of the threatened indigenous peoples can be protected. “We must know clearly what we want to protect”, he said, adding that he was optimistic that “recommendations” of the seminar will be “really helpful for us to come up with national policies and programmes”.

Dr Om Gurung, Advisor to NEFIN, spoke on the “Perception of Indigenous Nationalities of Nepal Towards the Interim Constitution of Nepal-2063 and the Issue of Federal Democratic Republican State raised by the Nationalities”. According to him, there are several shortcomings in the interim constitution of Nepal. He stated that major issues like “right to self-determination, restructuring the state based on ethnic, territorial self-rule and proportionate representation based on ethnic population in the constituent assembly” have not been included in the interim constitution. The indigenous peoples are “highly marginalized” and have “very low and somewhere about to none” representation in services such as Executive, Judiciary, Education, Health, Civil Services and Army Services. The indigenous peoples have been “isolated from the national political life and mainstream of development” due to discriminatory policies of the government. Lack of decentralization of power “does not provide any opportunity and place” to the indigenous peoples to participate in state affairs. So, “restructuring of the state” is necessary, Dr Gurung asserted. He recommended “a federal state based on ethnicity, language and geographical area” instead of “a federal state based only on geographical areas”.

Mr. Dinesh Ghale, Vice Chairperson of Lawyers’ Association

for Human Rights of Nepalese Indigenous Peoples was of the opinion that the “conventional approach” was still practiced in the judiciary in Nepal and even the People’s Movements (both first and second) have not tried to make the judiciary “inclusive”. According to figures provided by him, Brahmin/Chetry represented 85% in Supreme Court, 79% in Appellate Court and 86% in District Courts while Indigenous peoples (except Newar) represented only 1.1% in Appellate Court, 1.3 in District Courts but none in the Supreme Court. Newar indigenous peoples represented 15% in the Supreme Court, 14% in Appellate Court and 9.7% in District Courts. He also stated that there were only 1,578 Advocates and 1,683 Pleaders belonging to indigenous peoples (including Newar) who have received license from Nepal Lawyers’ Council.

Ms. Lucky Sherpa, President of Himalayan Indigenous Women Network, in her paper, “Indigenous Women of Nepal-Issues and Challenges” stated that the indigenous women of Nepal have not received attention either from the government of Nepal or from the civil society groups, including the women’s movement in Nepal. She regretted that despite constituting 37.5 percent of the total female population of Nepal, overall participation of indigenous women in political parties, in decision making bodies including the National Foundation for Development of Indigenous Nationalities (NFDIN) and even in indigenous peoples organisations is meager and negligible. The “NFDIN Constitution contains discriminatory clauses for indigenous women and the member organizations of NEFIN while proposing the names of indigenous representatives of NFDIN have nominated men.” She also highlighted

the discrimination faced by the indigenous women, “The services and facilities granted to women are only within the access of women who belong to so called high caste, have close relationship with people in power and have party affiliation and monetary power. With a few exceptions most indigenous women are deprived of such facilities. Indigenous women’s participation in local elections, professional and administrative jobs, cabinet, parliament, judiciary etc is very low. Most of the women, who have been able to get in, belong to Bahun-Chhetri groups (with some exceptions of Newar women, who are IPs). The result of such an imbalanced representation of the dominant caste Bahun-Chhetri in various decision making bodies have made adverse impact on their (IP women) identity, language, religion and culture.” She further lamented that “Innumerable programmes related to women development and gender equality are being implemented in the country. But they do not involve women from *adivasi janajatis* (indigenous nationalities). The women’s movement is limited to the castes/communities who dominate the state affairs, so called high caste and the elite and to places where modern facilities are available Indigenous women do not have control and access on the local resources and means.”

Ms. Sarina Gurung, representative of National Foundation for Development of Indigenous Nationalities (NFDIN) of Nepal spoke about both the major achievements and shortfalls of the NFDIN. She identified several constraints including low budgetary allocation (only 3.3 crore), lack of proper infrastructure including absence of its own building, problem of implementation of the programmes which “are not matched” as per the Act and Regulations of NFDIN, failure to

appoint Vice Chairperson and Member-Secretary since past 11 months, etc.

Analysing the performance of the NFDIN, Mr Chandra Kulung, General Secretary, Kirat Welfare Society stated that NFDIN was an absolute failure. He pointed out that NFDIN's failure was a result of lack of the essential components of good governance such as accountability, transparency, democratic practices, rule of law, decentralization of powers and prevalence of rampant corruption. He regretted that the indigenous representatives in the Governing Council of the NFDIN were excluded from having meaningful participation in the foundation. He rued, "The members of the governing council were not provided opportunities for serious discussion for over all development of the indigenous nationalities to bring them in mainstream development process." Mr. Kulung also charged the NFDIN of functioning in a secretive and suspicious manner due to preponderance of influence of the Line Minister i.e. the

Minister of Local Development. He says, "In almost all instances, only the Chairman and Member Secretary of the Executive Committee of NFDIN were involved in decision making process keeping aside the other members of Executive Committee nominated by NEFIN and the Governing Council. Annual Report of NFDIN is not made publicly available. After entering into some sort of mutual understanding with some clever members of the Governing Council, the Executive Officers of NFDIN impose their decision upon the other members who are usually the unsuspecting indigenous peoples' representatives." He further charged that the NFDIN was being run in an undemocratic manner. At the behest of some of the larger indigenous groups, NFDIN has not yet given separate recognition to more than 20 comparatively smaller indigenous groups and they are continued to be recognized within the larger groups.

Dr Sukendu Debbarma,
President, Asia Indigenous Peoples

Pact, expressed the view that the indigenous peoples are what they are today "because we have not been able to make space for ourselves". However, the States have now understood the very uniqueness of the indigenous peoples, he said. A democratic country cannot do away with discrimination against indigenous peoples because "Neglected indigenous peoples would mean that a section of the citizens of that particular country are being neglected". Several countries in the region have established National Institutions on indigenous peoples such as Scheduled Tribes and Scheduled Castes Commission of 1989 of India, Indigenous Peoples Rights Act (IPRA) of Philippines, 1997, National Foundation for Indigenous Peoples of Nepal, 2002, and Aboriginal and Torres Strait Islanders Commission of Australia. Establishing institutions for the indigenous peoples is not enough. Therefore, the indigenous civil society must take pro-active role to make these institutions "very very viable". ■

Key elements of the proposed model law on the National Commission for the Adivasi Janjatis

The "National Seminar on Transition in Nepal and the Role of National Institutions on Indigenous Peoples" held in Kathmandu, Nepal from 2-3 May 2007 unanimously adopted a Model law on the possible establishment of a National Commission on the Adivasi Janjatis (Indigenous Peoples). The model law with the nomenclature of "National Commission on the Adivasi Janjatis Act of 2007" would extend to the whole of Nepal.

Prior to the drafting of the said model law, AITPN carried out an extensive study on the National

Foundation for Development of Indigenous Nationalities (NFDIN) Act of 2002. AITPN found the NFDIN Act wanting in many respects. The NFDIN Act does not conform to any of the bare minimum standards set by the Paris Principles on National Human Rights Institutions. The objectives of the NFDIN Act as provided in Sections 5 and 6 only provides for promotion and preservation of the economic, social and cultural development of the indigenous peoples without any provision for safeguarding their rights and therefore, there is absolute lack of rights based

approaches in the whole law. The NFDIN does not have the mandate to intervene against incidents of violations of the rights of indigenous peoples or intervene against the failure to provide basic services or provide expertise in the formulation of policies and programmes of the governments relating to indigenous peoples. In a nutshell it can be concluded that the Government of Nepal enacted this law primarily to stymie the struggle of the indigenous peoples for a rightful place in Nepal's socio-political arena and co-opt the indigenous leaders in through the governing council (93) of

NFDIN. It does not have any rights perspectives.

The model law has 30 sections in 7 chapters. Some of the key provisions of the model are illustrated below.

1. Objectives and composition of the National Commission

This section enjoins upon the Government of Nepal to constitute an autonomous body by the name and title of "*National Commission on the Adivasi Janjatis*" to protect, promote and defend human rights, fundamental freedoms and other rights and interests of the indigenous peoples with due regard to their beliefs, customs, traditions and institutions. It lays down that the National Commission shall comprise of one Chief Commissioner and eight other Commissioners while the Secretary-General, who shall be an indigenous person having experiences on indigenous peoples' issues both at national and international levels, shall serve as the Chief Executive Officer of the National Commission.

It also significantly proposes that the members of the proposed National Commission i.e. the Chief Commissioner and the Commissioners must be indigenous persons having work experience of at least 7 years in indigenous peoples' issues. It also requires that the composition of the Commissioners shall reflect the diversity of the indigenous peoples including equal representation from three different regions respectively mountain region, hill region and Terai region while sub-section 3 lays down 50% representation of indigenous women.

2. Mandate: Powers and functions of the National Commission

The effectiveness and independence of an autonomous body is judged by the extent of the powers and functions it is mandated to exercise. The

relevant sections require the Government of Nepal to inform and consult the National Commission on all major policy matters affecting indigenous peoples.

The seminar recommended that that the proposed Commission shall have the mandate to:

(a) Serve as the primary government agency through which indigenous peoples can seek government assistance and as the medium, through which such assistance may be extended;

“The experts (two Sub-Commission experts who visited Nepal in May 2007) suggested that it would be useful for leaders of indigenous peoples to look beyond the upcoming electoral process and consider more broadly possible strategies to ensure that the rights of indigenous peoples - not only civil and political rights - recognized and respected in the future Nepal. One such strategy is a national institution on indigenous peoples, which you are discussing here”.

(b) monitor, review, and assess the conditions of indigenous peoples including existing laws and policies pertinent thereto and to propose relevant laws and policies to ensure their role in national development;

(c) coordinate, formulate and implement policies, plans, programs and projects of the government of Nepal for the economic, social and cultural development of the indigenous peoples and monitoring the implementation thereof;

(d) request and engage the serv-

ices and support of experts from other agencies of government or employ private experts and consultants as may be required in the pursuit of its objectives;

(e) inquire into specific complaints, on receipt of complaints or suo motu, with respect to the violations of the rights and safeguards of the indigenous peoples;

(f) receive complaints and/or take suo motu action and inquire into non-implementation of the services provided by the government and compel action from appropriate agency.

(g) participate and advise on the planning process of socio-economic development of the indigenous peoples and to evaluate the progress of their development;

(h) study and make recommendations for sustainable development of indigenous peoples;

(i) discharge such other functions in relation to the protection, welfare and development and advancement of the indigenous peoples;

(j) discharge such other functions in relation to the protection, welfare and development and advancement of the indigenous peoples as the case may be, subject to the provisions of any law made by Parliament;

(k) convene periodic conventions or assemblies of indigenous peoples to review, assess as well as propose policies or plans;

(l) update the scheduled list of indigenous peoples through identification and recognition of the unidentified and unrecognized ones;

(m) recognize, promote and protect traditional wisdom and knowledge of the indigenous peoples and prevent transfer of such knowledge and wisdom to non-indigenous peoples/areas without benefit sharing and ensuring full respect for the right to free, prior and informed consent;

(n) act as the regulating agency

for implementation of programmes or projects by non-governmental organizations and the private sector; and

(o) promulgate the necessary rules and regulations for the implementation of this Act.

3. Powers of the National Commission relating to inquiries into violations of rights of the indigenous peoples

The Commission should have the authority/ powers to inquire into specific complaints, on receipt of complaints or *suo motu*, with respect to the violations of the rights of the indigenous peoples and their safeguards remain indispensable for the fulfillment of the objectives which an autonomous body envisages. It is therefore required that while inquiring into any violation of rights or their safeguards, the National Commission should have adequate powers. The relevant provision of the proposed law provides that the National Commission shall have all the powers of a civil or criminal court whichever applicable in respect of the following matters, namely - (a) to summon and enforce attendance of any person from any part of Nepal and examine him on oath; (b) to require the discovery and production of any documents; (c) to receive evidence on affidavits; (d) to requisition any public record or copy thereof from any court or office; (e) to issue commissions for the examination of witnesses and documents; (f) any other matter which may be prescribed by the parliament; (g) to require any person, subject to any privilege, to furnish all information on such points or matters that the National Commission deems fit and proper; (h) to enter any building or place where the National Commission has reason to believe that any document relating to the subject matter of the inquiry may be found,

and may seize any such document or take extracts or copies there from as provided under law.

Further upon completion of an inquiry held under this Act, the National Commission should be empowered to - (1) recommend to the Government of Nepal or the concerned authority the initiation of proceedings for prosecution or such other action as the National Commission may deem fit against the person responsible for violation of rights of the indigenous people; (2) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary; and (3) recommend to the Government of Nepal or the concerned authority for the grant of such immediate interim relief to the victim or the members of his/her family as the Commission may consider necessary.

4. Submission of annual and special reports

The Commission shall submit its annual reports highlighting the conditions of the indigenous peoples in Nepal and the same should be placed before the Parliament. Depending upon the urgency of the situation, the National Commission should also be mandated to submit special reports on any matter and urge the Government for prompt actions. The Government of Nepal must submit a memorandum of action taken or proposed to be taken on the recommendations contained in the annual and special reports of the National Commission.

5. Departments of the National Commission

It is felt that for its smooth and effective functioning, the National Commission should have several offices or departments which shall be headed by indigenous persons and be responsible for the implementation of various policies and programmes. The

key departments recommended are: (a) Policy, Planning and Research and Advocacy office; (b) Education and Culture Office; (c) Office on Socio-Economic Services and Special Concerns; (d) Women Rights Cell; (e) Youth and Child Rights Cell; (f) Office of Empowerment and Human Rights; (g) Administrative Office; (h) Legal Affairs Office; and (i) Other Offices.

6. Participation of the indigenous peoples in decision making process of the National Commission

Indigenous peoples must have participation in decision making. The National Commission is compulsorily required to inform and consult the Consultative Advisory Committee consisting of one representative from each of the indigenous communities on matters relating to the problems, aspirations and interests of the indigenous peoples. The Advisory Council of the NFDIN should serve as the first Consultative Advisory Committee.

7. Autonomy over resources

The autonomy over resources also, to a large extent, determines independence of any institution. If the procedures for approval or sanction of resources - finance and staff - are arbitrary or dependent upon the whims and fancies of the Government / a particular ministry of the Government, it becomes meaningless. With the prime objective of ensuring independence and impartiality of the National Commission, the model law recommended that the Government of Nepal shall after due appropriation made by Parliament by law in this behalf, pay to the National Commission by way of grants such sums of money as the Commission may present in a budget to the Government annually. ■

Draft Declaration faces litmus test at UNGA: There is a way out for the African Group

In September 2007, the United Nations General Assembly is slated to vote for adoption of the Draft Declaration on the Rights of Indigenous Peoples. H.E. Ambassador Hilario Davide of the Philippines, the Facilitator appointed by the President of the UNGA for adoption of the Draft United Nations Declaration on the Rights of Indigenous Peoples urged for the middle path. But, the UN standard setting processes have been infamous for finding the lowest common denominators.

On 29 June 2007, at the plenary of the UNGA, Ambassador John McNee, Permanent Representative of Canada to the United Nations called for re-opening of the Draft Declaration.

The positions of Australia, Canada, New Zealand and the United States, especially on issues like lands and resources; free, prior and informed consent; self-government or autonomy; intellectual property; military issues: and the balance between the rights and obligations of indigenous peoples, member States and third parties are well known. Ambassador John McNee just reiterated the same.

Yet, what has caught indigenous peoples virtually unaware is the opposition by the African Group. In the last one year since the General Assembly deferred the consideration of action on the Draft Declaration on the Rights of Indigenous Peoples to allow time for further consultations on 20 December 2006, the African Group has been up ante. It is as if indigenous issues are so crucial and critical that they touch upon the existence of member States from the African Group that members

of the African Union have to be more vocal than Australia, Canada, New Zealand and the United States. New Zealand, whose existence depends on the treaties like The Treaty of Waitangi, has been less vocal than the African Group.

I. Analysis of the African onslaught on the Draft Declaration

After having tasted blood at the UNGA in December 2006, the African Union in a decision on the United Nations Declaration on the Rights of Indigenous Peoples (DOC. ASSEMBLY/AU/9 (VIII) ADD.6) on 30 January 2007 affirmed “to maintain a united position in the negotiations on amending the Declaration” and decided to re-draft five cardinal issues of the Draft Declaration: definition of indigenous peoples; right of self-determination; ownership of land and resources; establishment of distinct political and economic institutions; and national and territorial integrity.

On 8 May 2007, the African Group at the UNGA submitted 30 amendments to the Draft Declaration littered with reference to “provisions of national laws”, “where appropriate”, “where applicable” etc. The proposals are incongruous and effectively negate the Draft Declaration.

a. Denial of distinctiveness of indigenous peoples

At the heart of the African group’s proposals lies the denial of the specificities or distinctiveness of indigenous peoples, and therefore, the proposals to treat them as “equal” with other peoples and citizens. Therefore, the proposals suggest inclusion of new texts such as “on equal basis with other citi-

zens” freely to determine their relationships with state in a spirit of coexistence, mutual benefit and full respect (Preambular Para 13) participate in the political affairs of the State; to pursue their economic, social and cultural development “on an equal basis with others” (Article 3); indigenous peoples right to exercise their “rights granted to all citizens and from assuming the corresponding duties” (Article 5 bis) and indigenous peoples’ right “on equal basis with other citizens” to have access to and prompt decision through just, fair procedures for the resolution of conflicts and disputes with States or other parties (Article 40).

All these amendments deny the specificities of the indigenous world. The African Group obviously failed to see the distinction between racism and racial discrimination – a case that may arise in the event of denial of rights to indigenous peoples at par with other citizens, and positive discrimination or affirmative action which the Draft Declaration is all about. If equality among citizens and peoples alone was sufficient, there would not have been any need for the Draft Declaration on the Rights of Indigenous Peoples or the United Nations Declaration on specific groups whether women, children, minorities, victims of enforced disappearances etc.

Though legally sanctioned administrative measures have been taken to assimilate indigenous peoples, the proposals of the African Group eliminate any effective assimilation by “legislative, administrative or other measures” [Article 8(D)].

b. Is Waitangi in Africa?

With regard to the treaties, the African Group referred to “applicable existing” treaties, agreements and other constructive arrangements with States (Preambular para 14 and Article 37). It is as if treaties could be signed in future by the indigenous peoples

without the consent of the State! A treaty is always signed on mutual consent.

c. Upholding the supremacy of national law

Out of 30 proposals, 11 proposals pertain to inclusion of references to national law, in accordance with the national laws, applicable law [PP 3, Article 4, Article 5, Article 8, Article 9, Article 19, Article 20, Article 26(1), 26(2), Article 28, Article 39].

In fact, a particular para stating that the entire Draft Declaration is subject to national law would have looked less crude than reference to national law in 11 paragraphs.

d. Definition of “indigenous peoples”

In an attempt to define indigenous peoples, the African Group inserted a new preambular paragraph reiterating the prerogative of the State to “define who constitutes indigenous people in their respective countries or regions taking into account its national or regional peculiarities”.

The fact that the United Nations failed to reach consensus on the definition of terrorism has not served as a lesson. The UN Committee on the Elimination of Racial Discrimination made numerous Concluding Observations on the indigenous peoples of Africa.

e. Self-determination, sovereignty and territorial integrity

The proposal to delete any reference to the right of self-determination (Article 3) had to come from the former colonies. Even the United States did not propose deletion of the right of self-determination. Obviously, the African Group seeks to violate the principles of equality and non-discrimination and prohibition of racial discrimination in the application of international human rights standards.

In the Preambular Paragraph 13 and Article 46(3), the African Group

suggested insertion of “territorial integrity, sovereignty”. This is despite the fact that Article 46(1) clearly and unequivocally states that “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations”.

The dismemberment of a member State of the United Nations is a violation of the Charter of the United Nations and the territorial integrity is an integral part of the Charter of the United Nations. It is preposterous to

The concerns now being raised by the African Group at the UNGA were repeatedly raised by the Asia Group during the drafting of the Declaration at the Commission on Human Rights.

suggest that the Bushmen in Kalahari, the Sans in South Africa, the Pygmies in Rwanda or the Masais in Kenya in any way pose a threat to territorial integrity or sovereignty of any member State of the African Union. These fears are as baseless as the African Group’s insistence on “existing treaties” as if any treaty in future can ever be signed without the consent of the State parties.

II. Dead of the moral voice: Explaining the African Group’s position on the Draft Declaration

Political instability, hunger and a series of war crimes in Africa necessitated interventions by the United Nations bodies. In the post 1990s, most country resolutions at the UN Commission on Human Rights focused on the African countries with the exception of countries like North Korea, Afghanistan and former Yugoslavia.

None complained against the res-

olutions at the Commission on Human Rights. The complaint has always been against inability to condemn the human rights violators.

Yet, many of the African countries developed victim-hood syndrome and considered the United Nations instruments and the use of UN mechanisms in general as “interference by the West”. As African countries developed a unified position, their intention became increasingly clear – how to destroy the UN human rights mechanisms. In the negotiations at the newly established Human Rights Council, African Group has been the most vocal about the Code of Conduct for the Special Procedures (Special Rapporteurs/Special Representatives/Working Groups).

The role of leadership of the African Union has been quite open and the proposal to expand of the UN Security Council enhanced the rat race of leadership. Nigeria and South Africa have been slogging it out. In its attempt to consolidate its position as the leader of African Union, South Africa, which in the initial post-Apartheid period supported the Draft Declaration, became the most negative country.

Today, South Africa takes the most negative position from opposing the UN resolutions for appropriate actions against the continued illegal detention of the Burmese Nobel Laureate Aung San Suu Kyi to prevention of the genocide in Darfur.

Undoubtedly, Nelson Mandela remains the greatest moral voice on the Mother Earth. But, his voice is mostly ignored by the Foreign Office in Pretoria.

In a nutshell, the moral voice in Africa has already died.

III: Been there, done that

Many of the concerns being raised by the African Group such as

supremacy of national laws over a UN declaration, sovereignty, territorial integrity, right of self-determination, definition of indigenous peoples, land rights, enforcement of treaties etc have been repeatedly raised by the member States from Asia during the drafting of the Declaration by the Working Group on the Draft Declaration of the UN Commission on Human Rights.

During drafting of the Draft Declaration, many of these critical issues including the proposed “prerogative to define who constitutes indigenous people in their respective countries” were set aside for consensus. Many Asian States also moved away from the position of opposing the Draft Declaration. It does not imply that many of the Asian States do not share the same concerns today.

While supporting the adoption of the Draft Declaration at the United Nations Human Rights Council on 29 June 2006, the distinguished representative of India stated that “The entire population of India is considered indigenous.... With regard to the right to self-determination, this is understood to apply only to peoples under foreign domination and not to a nation of indigenous persons”.

Asian Indigenous and Tribal Peoples Network (AITPN) does not agree with the statement of the distinguished representative of India at the Human Rights Council. But AITPN does appreciate the decision of India to vote in favour of the Draft Declaration after having recorded its reservation.

IV: There is a way out: Record reservations orally but support the adoption of the Draft Declaration as adopted by the Human Rights Council

A United Nations Declaration is only morally binding upon the States. Yet, a few States record their reserva-

tion while adopting a Declaration but do not propose changes to the text of the Draft Declaration.

During the adoption of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, popularly known as “UN Declaration on the Human Rights Defenders” by the General Assembly, a few States recorded their reservations without formally placing amendments but supported the adoption of the Human Rights Defenders’ Declaration.

In its appeal to the member States of the UN, AITPN stated that the concerns expressed by the African Group or any other country for that matter can be addressed by (1) recording the reservations individually or collectively; (2) withdrawing the amendments proposed by the African Group on 8 May 2007; and (3) supporting the relevant resolution for unanimous adoption of the Draft Declaration as adopted by the UN Human Rights Council on 29 June 2006.

If the amendments proposed by the African Group were to be adopted, the very purpose of having a United Nations Declaration on the Rights of Indigenous Peoples would be defeated. Nothing could be more unfortunate than the African Group colluding with Australia, Canada, New Zealand and the United States to undermine the Draft United Nations Declaration on the Rights of Indigenous Peoples. Indigenous peoples have been the symbol of atrocities perpetrated by the colonisers; and today, they are once being victimised by the very region, Africa where the outrage against colonisation is still fresh and more strongly felt than the other continents. ■

Editorial ... Contd. from pg 1

Rights Commission of India is barred from directly investigating the human rights violations by the armed forces under section 19 of the Human Rights Protection Act of 1993, the National Commission for the Scheduled Tribes (NCST) is vested with powers of a civil court having authority to “summon and enforce attendance of any person and examine on oath”. What is more important is the fact that while the NHRC of India was created by a parliamentary Act, the NCST has been created through an amendment of the Constitution.

Fifth, even United Nations bodies like the Permanent Forum on Indigenous Issues have completely ignored the National Institutions on Indigenous Peoples. Not a single recommendation out of 922 recommendations made by PFII between 2002-2006 made any reference to NIIPs.

Human rights are implemented at national level, and despite their shortcomings, National Institutions do play a critical role for implementation and realization of rights. Strengthening the National Institutions on Indigenous Peoples (NIIPs) or other sectoral national institutions requires attention of the United Nations expert bodies like the Permanent Forum on Indigenous Issues, United Nations agencies like Office of the High Commissioner for Human Rights (OHCHR), International Coordination Committee of the NHRIs or the Asia Pacific Forum of National Institutions or ASEAN-Four of the NHRIs. The inclusion of the NIIPs or other sectoral national institutions can only enrich the National Institutions to strengthen the efforts for protection and promotion of human rights and fundamental freedoms of the most vulnerable groups.

There is a need for an inclusive approach. ■

Permanent Forum: Manufacturing recommendations

With 922 recommendations to various United Nations bodies and governments in the first five years (2002-2006) with two weeks sitting in each annual session, the Permanent Forum on Indigenous Issues (PFII) should be in the Guinness Book of World Record among the UN agencies. The voluminous recommendations which are insane even by the UN standards should ideally be the yardsticks for its effectiveness but in reality something is rotten out there. The Forum members and the Secretariat contributed to its ineffectiveness.

The sixth session of the PFII held in New York from 14 to 25 May 2007 was an exposure to consistent and systematic erosion of standards. There are a few who managed to sing after the so-called successful sixth session - obviously the yardsticks for measuring success are different. After all, at the 6th session, majority of the representatives of the decision makers in the United Nations i.e. representatives of the governments were rarely sighted while junior representatives of the UN agencies whose Country Representatives get cold when the Foreign Offices sneeze in the capitals thronged the Permanent Forum.

The Permanent Forum at its sixth year faces the same problems the Working Group on Indigenous Populations (WGIP) of the Sub-Commission on Human Rights faced in its twilight years before it was shut down with the burial of the Commission on Human Rights. There is a need for some soul searching when an institution like Permanent Forum faces the same problems at the very tender age.

The ECOSOC resolution decided that five years after the establishment of the Permanent Forum, “an evaluation of the functioning of the Permanent Forum, including the method for selection of its members, shall be carried out by the Council in the light of the experience gained”.

AITPN shares some preliminary observations for provoking thoughts.

A. Governments attend only serious meetings

United Nations bodies dealing with indigenous issues often suffer from prejudices. Whether WGIP or the Permanent Forum, many consider them as forum for “cultural expositions” rather than forums for serious discussions on rights. The annual meetings of these bodies are most likely to be construed as “ritualistic” even though all UN bodies meet regularly. Indigenous peoples often add to the prejudices with prolong public expression of religious identities – even sometimes with hymns of Buddhism being read out and representatives of the Burmese junta sitting right across.

No government wants to be condemned or exposed for human rights violations. Therefore, attendance of the governmental representatives can be considered as yardstick for measuring effectiveness. If anyone requires a historical precedent, in the old days of the United Nations Commission on Human Rights, junior diplomats in Geneva were made to sit through the late evening sessions (9 pm to 12 pm) to listen to the interventions of the NGOs.

The opening session of the Permanent Forum in 2002 was attended only by 29 governments. As

there could not have been any serious discussion in the absence of agenda and rules of procedures, majority diplomats just wanted to attend the celebration party at the inaugural session.

The second session in May 2003 saw increased participation of 57 governments followed by 71 governments in the third session - the highest number of governments ever attended the UN Permanent Forum. Since then number of diplomats have been decreasing with 66 governments at the 4th session and 52 governments at the 5th session. There were less number of government representatives at the 6th sessions. Asian diplomats were as rare as the Pandas at the 6th session. In addition, there is a difference between registration for participation and actual participation in the proceedings.

The question remains how many governments spoke? The lack of interest on the Permanent Forum could not have been conspicuous.

B. Governments do reply to serious charges

Aren't the indigenous issues the thorniest in the United Nations? The definition of indigenous peoples, the right of self-determination, ownership of land and resources, third party rights etc are issues one can discuss till the cows come home and yet find no solution. That these issues are the thorniest is reflected from the ongoing attempts at the General Assembly to re-open the text of the Draft Declaration on the Rights of Indigenous Peoples adopted by the Human Rights Council.

Yet, as stated above, more governments are increasingly not attending the Forum and many of those registered only come for a look. In the six sessions, only two governments exercised the right to reply. Chile exercised the rights of reply in the first session in 2002 while

Indonesia exercised its right of reply in the second session in 2003.

Does that mean reduction of human rights violations against indigenous peoples or increased understanding between the indigenous peoples and governments? Unfortunately, neither is the case.

C. Activists turned diplomats have weakened the Forum

The United Nations Economic and Social Council Resolution 2000/22 on the establishment of the Permanent Forum on Indigenous Issues provided for appointment of eight indigenous experts by “the President of the Council following formal consultation with the Bureau and the regional groups through their coordinators, on the basis of broad consultations with indigenous organizations, taking into account the diversity and geographical distribution of the indigenous people of the world as well as the principles of transparency, representativity and equal opportunity for all indigenous people, including internal processes, when appropriate, and local indigenous consultation processes”. This has been a unique experience with members appointed by the governments and indigenous peoples exercising the same powers and functions.

Indigenous peoples’ nominated membership has been touted as the most effective mechanism for giving voices to the indigenous peoples – the voiceless of the earth.

Yet, over the years, the performance of the indigenous experts has been, frankly speaking, less than satisfactory. In a setting where consensus is the rule for decision making, indigenous experts do have to take government appointed experts into account for decision making and vice-versa. Therefore, it requires

making compromises in the processes of decision making. But it does not foreclose the right to freedom of expression – the discretion as an expert to speak the truth during interventions on the relevant agenda items.

Unfortunately, indigenous activists who have been appointed as “experts” of the Forum have turned into “diplomats”. They are more at ease with diplomatese or maintaining social niceties with government or UN officials rather than raising critical indigenous issues. The fact that not a single government exercised the right of reply against any “indigenous expert” in the last six sessions is a record of sort in the history of the United Nations.

Out of two rights of reply exercised, Indonesia exercised its right of reply against AITPN while Chile responded to a statement from an indigenous organisation. That speaks for indigenous experts who have become the engines of manufacturing recommendations.

D. Following the tradition of oral history at our own perils

The importance of oral history to indigenous peoples across the world cannot be undermined. In fact, as for the indigenous Chakmas in South Asia, its history is only found in Ghenghuli – the Chakma folksong. In the Mobo judgement, oral history has been recognised for determining land rights of the indigenous peoples.

However, the history of the United Nations is all about the use of millions of reams of paper. It is about putting on record.

But, most Permanent Forum members have been defying history at the UN. While government experts of the Forum with the exception of a few often maintain studied silence, indigenous experts have been following the distorted oral tradition.

They make ex-tempo interventions even on the agenda items of the annual session which have been known since its establishment. This is despite the fact that irrespective of however brilliant one might be, it is not always possible to deliver ex-tempo speeches with the same clear, concise, accurate and incisive contents or with sufficient illumination, context, insight and analysis. Not surprisingly, even, discussion on the human rights issues which should evoke sharp reactions from the governments has become quite boring at the Forum!

When oral interventions from written text are seldom made on the agenda items, one cannot expect the written statements on the Interactive Dialogue with the UN agencies. The interactive dialogue – which is often highlighted by the Permanent Forum as one of its effectiveness - is indeed an useless exercise that institutionalises the oral tradition in the UN to the detriment of the indigenous peoples. The sessional reports of the Forum make little or no reference to the Interactive Dialogue.

The Annual Reports of the Permanent Forum are repetitive of sentences like “At the same meeting, statements were made by the observers for the following States and organizations.....”. “At the 4th meeting, on 14 May, statements were made by the representatives of the United Nations Human Settlements Programme and the World Bank. In the interactive discussion that followed, statements were made by the following members of the Forum: Ida Nicolaisen, Zinaida Strogalschikova, Ayitegau Kouevi, Yuji Iwasawa, Antonio Jacanamijoy, Willie Littlechild, Parshuram Tamang, Mililani Trask and Njuma Ekundanayo. Statements in that connection were also made by the

representatives of UNITAR, UNDP, ILO and the World Bank.”

The Secretariat of the Permanent Forum is brilliant at noting the list of speakers without recording the essence of the interventions made. There is nothing to be happy about unless somebody wants to go back to the community, show that an intervention has been made at the United Nations in New York and feel proud. That might be a historical record for newcomers, but it is an absolute nonsense when the names of the speakers are repeated in each and every agenda item!

The statements such as the one reported by the Working Group on Indigenous Populations in its last session (E/CN.4/Sub.2/2005/26) reproduced below is more useful than reading the names of the speakers again and again as practiced by the Permanent Forum:

“A number of indigenous participants raised the issue of militarization of ancestral lands as a cause of conflict, sometimes in connection with the exploitation of natural resources on these lands, as in the case of the Chittagong Hill Tracts of Bangladesh. Additionally conflicts might arise over the issue of multinational companies’ direct exploitation of natural resources on traditional lands, as in the case of foreign mining companies in the Philippines and other countries.

A positive development reported in India was in regard to the Adivasi peoples of Assam. The Government of India had invited the United Liberation Front of Assam (ULEA) to discuss solutions to the conflict, including the core issue of the sovereignty of Assam.”

One does not have to be a fan of the WGIP. But it is clear that 34 page report of the 23rd session of the WGIP is more informative than 45 page report of the 4th session of the Permanent Forum. The report of the

4th session of the Permanent Forum contains from page 8 to 22 recommendations made by the Permanent Forum to the ECOSOC and from page 23 to page 41 the order of the speakers and from page 42 to page 44 the list of speakers. To be more precise, the recommendations are repetitive each year.

The Secretariat of the PFII has failed to learn the basics of the writing the reports or capturing the essence of the statements made like the Secretariat of the WGIP! The “UN God” has been quite stingy with the Secretariat of the Permanent Forum.

The recommendations adopted by the PFII in the last six years on a specific issue should be collated and redrafted into Standing Recommendations which can be revised from time to time as done the Treaty Bodies for the General Comments.

E. Visit the Statue of Liberty: Gift from the Forum members

Despite repeated interventions from organisations like Asian Indigenous and Tribal Peoples Network, the Permanent Forum suffers from gross inefficiencies with regard to time management, dealing with speakers list and endless closed door meetings of the members of the Forum for negotiation. Sometimes there were six closed door sessions – implying three days of forced holidaying in New York. Participants are forced to go for window shopping in the Manhattan, visiting Metropolitan Museum of Art, hang around the corridors of the UN endlessly or visit The Statue of Liberty. Each year, dozens of speakers are simply denied the right to speak and

the Chair happily moves on to the next item. Since the Forum follows the tradition of oral history, possibly interventions do not matter.

The members of the Forum have failed to learn from the best practices of the Commission on Human Rights on time management. The Chairs and the Secretariat often sought to manage time by giving preference to joint statements while the representatives of the UN agencies and guest speakers continue to enjoy the *largesse*. Lack of rule of procedures to deal with those addressing High Level Segments or subsuming individual cases under the joint statements have been the hallmark of the Permanent Forum. More sadly, each year the Permanent Forum members mostly negotiate on the same resolutions.

Permanent Forum has become equally, if not more, ineffective like the WGIP. It is not because the Forum is overshadowed by the high profile bodies at the UN headquarters in New York like the United Nations Security Council and the Office of the Secretary General. There has been plain dearth of leadership and innovation or simply the lack of realization as to what is the mandate of each member.

At the end of the day, the effectiveness of the Forum could be measured by the willingness of the stakeholders to relate to the Forum. It has become a Forum of the experts, for the experts and by the experts. Many so-called experts of the Forum might be committed activists and well-known leaders within their own communities or within their own nation but the knowledge of many on indigenous issues remain limited and it had direct bearings on the deliberations. Many experts are simply caught in the UN semantics; they are more diplomatic than the diplomats to the point that even the

World Bank might appear to have been reformed as a member of the Inter-Agency Task Force of the PFII. As for the Secretariat, the lack of experiences and resources has become the excuse for perpetuation of inefficiency. Sadly, it had to happen to indigenous peoples who always have to be doubly better than the rest to be equal.

There are still some ways out. While AITPN will be making concrete recommendations later on, it makes one particular particular recommendation in the meanwhile for consideration by the members of the Permanent Forum:

Reorganize recommendations as "Standing Recommendations":

It is shameful that the Permanent Forum is shown having adopted 922 recommendations some of which are basically repetition of the same recommendations except some additions or deletions like "is, was, are, were, and, or etc".

The recommendations adopted in the last six years on a specific thematic issue should be collated and redrafted into Standing Recommendations of the Permanent Forum. These Standing Recommendations can be revised by the Forum if issues or circumstances so demand. The United Nations Treaty Bodies also revise their General Comments.

As Permanent Forum negotiates on the same recommendation each year, there is no need to re-negotiate virtually on the same texts. There is no need to refer the same recommendations each year and collating them in the form of Standing Recommendations instead of mentioning them in annual report shall provide tremendous scope for inclusion of the essence of the statements made in the report to the ECOSOC. ■

Indonesia: Piecemeal approaches to systemic and institutionalised discrimination

"When the Soeharto regime was overthrown, an opportunity arose for the review of the 1945 Constitution and the adoption of a new Constitution to meet the aspirations of the people for a democratic country under the rule of law, as happened in the Philippines in 1987. Unfortunately, this did not happen. The piecemeal amendments to the Constitution since 1998, and moreover some of these amendments yet to be implemented, are not satisfactory." –Dato Param Cumaraswamy, UN Special Rapporteur on Independence of Judges and Lawyers in his Indonesian mission report to the 59th session of the United Nations Commission on Human Rights in March-April 2003.

Reform in Indonesia has been all about piecemeal amendments to the Constitution of 1945 and various laws. The Initial to Third Periodic Reports (CERD/C/IDN/3 of 4 April 2006) under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) only informs about the positive administrative measures taken so far, and not about the counter-measures taken to nullify many of these positive measures. The message of the periodic reports can be summarised in one sentence: since discrimination is prohibited under Law No. 39 of 1999 concerning human rights, there are no violations of the provisions of ICERD in Indonesia.

For many nations, it has taken generations of sustained campaigning, affirmative actions and enforcement of the anti-discrimination laws to combat

all forms of discrimination. Indonesia claims to have achieved the same with one piece of legislation. Nothing could be far from the truth in a country where majority Javanese Muslims are often engaged in conflicts with pre-dominantly Christian indigenous peoples in the outlying Islands, and the government led by majority Javanese Muslims often

The State sponsored population transfer programme of the settlers mainly from Java, Bali and Madura which had major "negative and irreversible impact" on the indigenous peoples inhabiting the outlying islands.

protects the interest of the majority.

In its shadow report, Asian Indigenous and Tribal Peoples Network highlighted the following key facets of racism and discrimination in Indonesia:

1.1 Racism and racial discrimination in Indonesia can only be rightly understood from a series of violent conflicts that took place in Aceh, Papua, the Maluku, Central Sulawesi, and Central and West Kalimantan after the fall of Soeharto. The extent of the violence was such that by August 2004 there were 1.3 million internally displaced persons spread throughout the Archipelago. The descriptions of these conflicts as separatists, uncivil, inter-religious i.e. between the Muslims and the

Christians or conflict over mere land and natural resources are simplistic and misleading. These conflicts have racial dimensions and they took place between the transmigrasis, the settlers from Java, Bali and Madura who were implanted in the outlying Islands inhabited by indigenous peoples. The transmigrasis mainly follow Islam while the indigenous peoples are predominantly Christians. Many indigenous peoples like the Papuans ethnically belong to the Melanesian stock and are therefore different from the transmigrasis. An estimated 3.6 million people were planted on the lands of indigenous peoples upto 1990 which according to the Operations Evaluation Department of the World Bank had a “major negative and irreversible impact on indigenous peoples”. Yet, the periodic reports do not mention a single word about its population transfer programme.

2.1 The 1945 Constitution of Indonesia recognized the indigenous peoples. Clause 3 of Article 28I provides that “The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations.” However, through Presidential Instruction No. 26 of 1998, the government banned the use of the terms “indigenous” and “non-indigenous” in all official documents. In its periodic reports, Indonesian government had the audacity to describe this racist Instruction as a reflection of its “further commitment to eradicating and preventing the occurrence of any form of discrimination in Indonesian society... grant the equal treatment and services for all the people of Indonesia; as well as reviews and adjusts all laws and regulations, programs, policies and the implementation of programs”. This Presidential Instruction denies the cultural identities of indigenous

peoples, violates their cultural rights and negates the principles for affirmative action as provided under the ICERD.

2.2 A number of Acts such as the Forestry Acts (Act No. 5 of 1967 and

destroy indigenous peoples’ means of survival – dependence on nature as rightly recognized by the Indonesian government. It will change their way of life, modes of production and indigenous peoples evicted from their

In one hand, Law No 39/1999 concerning human rights recognises indigenous peoples. On the other, Presidential Instruction No. 26/1998 bans the use of the terms "indigenous" and "non-indigenous". Similarly, Law No 45/1999 instructed to divide Papua into three provinces but the Papua Special Autonomy Law No. 21/2001 prohibited the division of Papua without the consent of the Papuans. Taking advantage of the ambiguity, Papua has been divided into two provinces.

Act No. 41 of 1999), Law No. 11 of 1967 on the Principles of Mining, Act No. 5 of 1990 concerning the Conservation of Biological Resources and the Ecosystem and Presidential Regulation No. 36 of 2005 on Land Procurement for Development for Public Purposes deny the *ulayat*, customary rights, of indigenous peoples recognized under Article 3 and Article 5 of the Basic Agrarian Law (BAL) No. 5 of 1960.

2.3 In its Periodic Reports (para 64), Indonesia states that “in reality, ensuring the survival of the indigenous people is proven to be a daunting task. The indigenous people live dependent on nature, not by social contract”. What the periodic reports fail to mention is that “ensuring the survival of the indigenous peoples is proven to be a daunting task” because of the policies and programmes adopted by the government of Indonesia. For example, the proposed Kalimantan Border Oil Palm Mega-project requires 1.8 million hectares of land at the heart of Borneo. This project will not only destroy three national parks of Betung Kerihun (800,000 hectares), Kayan Mentarang (1,360,000 hectares), and Danau Sentarum (132,000) but will also

lands will be reduced to labourers in the plantations. The lands of indigenous peoples are already being grabbed by force, fraudulent means and inducements. Under the law, the quantum of compensation is determined by the government and indigenous peoples do not have the right to free, prior and informed consent.

3.1 In Papua, which was annexed through rigged Act of Free Choice of 1969, there have been reports of consistent and systematic violations of human rights and fundamental freedoms against indigenous Papuans of the Melanesian ethnic origin by the security forces mainly belonging to the Javanese Muslims. The fall of Soeharto’s dictatorship changed little.

3.2 There are many prisoners of conscience in Papua who were arrested for merely raising the Papuan Morning Star flag. On 26 May 2006, an Indonesian court sentenced Mr Filep Karma to fifteen years in prison on charges of treason and expressing hostility towards the state for taking part in a flag-raising ceremony on 1 December 2004. Another student, Yusak Package received a ten-year sentence for the same offence. On 9 and 11 July 2007, leading leaders of

the Papuans belonging to the Papuan Presidium Council and Papuan Dewan Adat were interrogated for hours together in Jayapura for raising the Morning Star flag during the opening ceremony, of the Papuan Tribal Congress. Earlier on 1 July 2007, the Indonesian military reportedly started shooting in villages in Bolakme when the flag was raised.

3.3 Many Papuan leaders espousing the right of self-determination of Papua were systematically eliminated. Mr Theys Eluays, leader of the Papuan Presidium Council, was murdered while being driven home from a dinner at the Kopassus Special Forces' headquarters in the provincial capital Jayapura on 10 November 2001. He went to hold talks with the army. On 21 April 2003, a military court in the port city of Surabaya convicted four army personnel belonging to Indonesia's notorious Kopassus, Indonesian Special Forces Command, for "mal-treatment", and not for murder of Theys Eluay.

3.4 Many Papuans have been facing intimidation and harassment for meeting the UN Special Representative of the UN Secretary General on Human Rights Defenders during her visit to Indonesia in June 2007. This includes attempt at the lives of Frederika Korain and Priest Perinus Kogoya of Peace and Justice Commission for the Diocese of Jayapura and intimidation of Mr Yan Christian Warinussy, Executive Director of the Institute of Research, Analysis and Development for Legal Aid and Mr. Albert Rumbekwan, head of the Komisi Nasional Hak Asasi Manusia (National Human Rights Commission, Komnas HAM), Papua Province.

3.5 The Papua Special Autonomy Law No. 21/2001 provided a window of opportunity to resolve the historic problems but the authorities in Jakarta have squandered it. In violation of

Article 76 of Law No. 21 of 2001 (Papuan Special Autonomy Law) which stipulates that the creation of new provinces in Papua must have the approval of the Papua People's Council (Majelis Rakyat Papua) and the Provincial Legislative Council, the government went ahead and divided Papua into two provinces after then President Megawati Sukarnoputri passed Presidential Decree No.1 of 2003. The Presidential Decree No. 1 of 2003 called for the speedy implementation of Law No. 45/1999 which authorized to divide the West Papua into Papua, Central Irian Jaya and West Irian Jaya. While the creation of Central Irian Jaya was abandoned due to violent protest, Indonesia's Constitutional Court in a judgement in November 2004 sanctified the partition of Papua into two provinces as a political fait accompli.

3.6 The present administration of President Susilo Bambang Yudhoyono also does not have any political will to resolve the Papua problems. Instead of implementing the Papua Special Autonomy Law, on 16 May 2007 President Yudhoyono signed the Presidential Decree No. 5/2007 regarding the Speeding of the Development of the Province of Papua and the Province of West Papua. This Decree instructs 11 ministers, 2 governors and all regents in Papua to: [1] maintain the food security and poverty reduction, [2] improve the quality of education services, [3] improve the quality of health services, [4] improve basic infrastructure to improve the accessibility of the isolated and remote areas as well as the border area, and [5] take affirmative action for development of the indigenous Papuans. Though access to basic services remains a priority for the Papuans, this is an attempt to reduce the Papua political conflict into an economic one.

3.7 The PT Freeport Indonesia owned by the United States based global mining giant Freeport-McMoRan Copper & Gold Inc in Jayapura, Papua has been responsible for destruction of environment and livelihood of the indigenous peoples. *The New York Times* reported on 27 December 2007 that 160 people had been killed by the military between 1975 and 1997 in the mine area and its surroundings. *The New York Times* further reported that its requests to "visit the mine and its surrounding area, which requires special permission for journalists were turned down".

3.8 Since 1977 violations of human rights have been systematically and consciously carried out by the Indonesian military and police with the support of PT Freeport Indonesia. After a series of riots in March 1996 against the Freeport mine in which the mine was forced to shut down for three days, Freeport hired Indonesian army for its protection. The company documents obtained by *The New York Times* showed that "from 1998 through 2004, Freeport gave military and police generals, colonels, majors and captains, and military units, nearly \$20 million. Individual commanders received tens of thousands of dollars, in one case up to \$150,000.... Freeport spent \$35 million on military infrastructure -barracks, headquarters, mess halls, roads - and it also gave the commanders 70 Land Rovers and Land Cruisers, which were replaced every few years. Everybody got something, even the Navy and Air Force."

3.9 Freeport failed to benefit indigenous Papuans. It reportedly provided Indonesia with \$33 billion in direct and indirect benefits from 1992 to 2004. In 2005, the company's annual report stated that it extracted metals worth US\$3.5bn and paid \$1.2bn in taxes and royalties to the

government in Jakarta. However, Papuans suffered further pauperization. Papua is at the lowest rank in Human Development Index (HDI) amongst Indonesia's 32 provinces with 35% of the total population living below the poverty line.

3.10 The Freeport mining has destroyed the environment and livelihood of the indigenous Papuan peoples. According to The New York Times, approximately 300,000 tons of mine waste is being dumped into the Aghawaghon-Aijkwa river system daily which destroyed the ecosystem. According to the Freeport, it "will generate an estimated six billion tons of waste before it is through - more than twice as much earth as was excavated for the Panama Canal". At least 2.5 million hectares of land have been taken away from indigenous Papuans who were forced to surrender their ancestral lands in the form of concessions given to the company by the Indonesian Government.

4.1 While in its periodic reports (Para 28), Indonesia recognizes that "Indonesians usually practice Islam, Protestantism, Catholicism, Hinduism and Buddhism as well as other beliefs, including traditional indigenous religions", it fails to mention that non-formal or "traditional indigenous religions" such as the Naurus in Maluku; Kepercayaan in Kalimantan, Papua and Java; Kaharingan in Kalimantan; Sunda Wiwitan in West Java; and Tolotang in South Sulawesi are not recognised and classified as "other". About 0.2 per cent of the 241 million population of Indonesia were classified as 'other' by the Central Bureau of Statistics as per its national decadal census in 2000. They face harassment and difficulties in the form of long delays and they have to pay bribes, euphemistically called 'extra' payment, when they apply for an identity card, Kartu Tanda Penduduk

(KTP).

5.1 Indonesia's National Human Rights Commission, Komnas HAM remained a toothless wonder despite its incorporation under the Law No 39 of 1999 concerning Human Rights. In reality, Law No. 26 of 2000 concerning Human Rights Courts governs the functions of the Komnas HAM. Under Article 19 of Law No. 26 of 2000, the Komnas HAM is authorised to inquire any alleged gross human rights violations without subpoena powers. Based on this inquiry of the Komnas HAM, the Attorney General takes the final decision under Article 21 whether to order further inquiries or not for eventual prosecution. Since the

The proposed Kalimantan Border Oil Palm Mega-project requires 18 million hectares of land at the heart of Borneo. It will destroy the rich bio-diversity and effectively reduce indigenous peoples into plantation labourers.

Komnas HAM in the first place is legally constrained through denial of subpoena powers, inquiry cannot be effectively conducted by it to compel the Attorney General to order further inquiries. This is nothing but an effective procedural obstacle to provide impunity.

5.2 On 8 September 2005, a special Human Rights Court in Makassar acquitted two senior police officers who were found guilty by the National Human Rights Commission, Komnas HAM, for allowing the killing of three Papuan students and the torture of over 100 others in Abepura on 7 December 2000. The two accused police officers, Brigadier General Johny Wainal Usman and

Senior Commissioner Daud Sihombing were charged with command responsibility for the killings and torture. They faced a maximum penalty of life imprisonment if convicted. But Chief Prosecutor I Ketut Murtika recommended the minimum penalty of only 10 years, claiming the two accused had "served the nation" and "did not have malicious intentions". The court went a few steps further to exonerate both the accused officers and rule that they were not guilty of allowing their subordinates to torture and kill civilians during the raid.

6.1 Human rights courts of Indonesia established under Law No. 26 of 2000 have the notorious reputation of shielding the culprits. As stated above even two officials charged by the Attorney General for the killing of three Papuan students and the torture of about 100 others on 7 December 2000 at Abepura, West Papua were exonerated by the Human Rights Court. The US State Department's Country Report on Human Rights Practices (Indonesia 2006) stated "in recent years Komnas HAM's efforts to expose human rights violations and bring perpetrators to account were undermined by a number of court decisions regarding its jurisdiction or authority. In 2003 a Jakarta court refused to subpoena former and active military officers who had ignored Komnas HAM summonses to face questioning about 1998 riots, which claimed more than 1,200 lives."

Recommendations

AITPN made the following recommendations for consideration by the CERD Committee:

Recommend to:

- the State party (Indonesia), World Bank, Asian Development Bank, UN agencies and other

multilateral and bilateral financial institutions to undertake affirmative action programmes to remove the negative impacts with full and effective participation of indigenous peoples;

- repeal that Presidential Instruction No. 26 of 1998 banning the use of the terms “indigenous” and “non-indigenous” in all official documents;
- amend various laws relating to indigenous peoples in particular the Forestry Acts (Act No. 5 of 1967 and Act No. 41 of 1999), Law No. 11 of 1967 on the Principles of Mining, Act No. 5 of 1990 concerning the Conservation of Biological Resources and the Ecosystem and Presidential Regulation No. 36 of 2005 on Land Procurement for Development for Public Purposes to recognise the rights of the indigenous peoples;
- fully respect and implement the right of ownership, collective or individual, of the members of indigenous communities over the lands traditionally occupied by them in its practice concerning indigenous peoples. The State party should seek the prior informed consent of communities while taking away any land for the Kalimantan Palm Oil Project in full conformity with the general recommendation No. 23 of the ICERD;
- fully implement the Papua Special Autonomy Law No. 21/2001 in letter and spirit and initiate dialogue with the legitimate representatives of Papuan society on a wide range of issues including truth, justice and reconciliation, security arrangements, and division of the province.
- release all the prisoners of conscience including Mr Filep Karma

and Yusak Pakage who were sentenced to 15 years and 10 imprisonment respectively for raising the Papuan Morning Star flag and to immediately stop intimidation and harassment of the leaders of the Papuans belonging to the Papuan Presidium Council and Papuan Dewan Adat for raising of the Morning Star flag during the opening session of their Congress on 6 June 2007.

- order an inquiry into the allegations of harassment and intimidation of the human rights defenders of Papua for meeting the UN Special Representative on Human Rights Defenders in June 2006.
- take measures for ensuring independence and impartiality of judiciary including capacity building through technical cooperation programmes with the Office of the High Commission for Human Rights.
- (1) ensure full respect for human rights and fundamental freedoms of indigenous peoples in Papua, (2) institute a Commission of Inquiry to investigate linkages between the so-called protection money provided to TNI personnel by the Freeport and human rights violations on indigenous Papuans and take appropriate actions; (3) establish a “Permanent High Powered Committee” consisting of environmental scientists, representatives of the Papuans and representatives of the Komnas HAM to monitor the environmental effects on the populace and the nature; and (4) develop verifiable mechanisms to provide benefits of the Freeport revenues to indigenous Papuans.
- repeal of the Civil Registration Law of 2006 to give equal status and recognition and access to

assistance from the State party to all the religions including “traditional indigenous religions” such as the Naurus in Maluku; Kepercayaan in Kalimantan, Papua and Java; Kaharingan in Kalimantan; Sunda Wiwitan in West Java; and Tolotang in South Sulawesi.

- withdraw the bans imposed on different religions and sects including the ones imposed by the provincial and regency governments.
- withdraw the Joint Ministerial Decree No. 1/2006
- take appropriate actions against the officials who remain mute witness or encourage criminal acts against religious minorities and implement the recommendations of the Komnas HAM.
- amend the Law No 39 of 1999 concerning Human Rights and Law No. 26 of 2000 concerning Human Rights Courts to (1) provide the powers of a court to the National Human Rights Commission, Komnas HAM among others for (a) summoning and enforcing the attendance of witnesses and examining them on oath; (b) discovery and production of any document; (c) receiving evidence on affidavits; (d) requisitioning any public record or copy thereof from any court or office; (e) issuing commissions for the examination of witnesses or documents; (f) any other matter which may be prescribed; and (2) empower the Komnas to file cases directly and independently before the judiciary.
- establish a National Commission on Indigenous Peoples in conformity with the Paris Principles on National Human Rights Institutions.
- develop national anti-discrimination law. ■

FATA: The dark region of Pakistan

In the post September 11th period, the provinces bordering Afghanistan, known as the Federally Administered Tribal Areas (FATA) usually brings the images of the gun-totting Al-Qaeda terrorists but beyond these images lie the jackboot justice introduced by the colonial British and perfected by the Pakistani authorities under the draconian Frontier Crime Regulation (FCR) of 1901. The systematic denial of the legal and judicial reforms in the Federally Administered Tribal Areas (FATA) indeed institutionalised Taleban style of justice in the FATA region and the absence of the edifice of the State structure or governance created the necessary conditions in which Pakistan has to engage in war.

Political Agent: The judge and the jury

The executive authority of the President of Pakistan has been extended to the FATA. It is the President of Pakistan who effectively rules this tribal region directly. And, the step motherly treatment of the Federation towards this tribal region has kept the region away from development. Under Article 247 (3) of the Constitution of 1973, no act of Parliament is applicable to the FATA or any part thereof unless the President of Pakistan so directs. The Governor of North West Frontier Province acts as the “agent” to the President of Pakistan.

Yet, it is the Political Agent or, in his absence, the Assistant Political Agent posted in each Agency of the FATA who is the real boss on the ground. He is both the judge and the jury.

Under the draconian Frontier Crime Regulation (FCR) of 1901, the Political Agent or his deputy, the Assistant Political Agent, enjoys unbridled powers – both executive and judi-

cial. There is no regulatory mechanism to check misuse of powers by the Political Agent which often resulted in serious human rights violations. Under the FCR, suspects are tried by the tribal jirga or council which submits its recommendations regarding conviction or acquittal to the Political Agent. The Political Agent makes a decision regarding conviction or acquittal but is not bound by the jirga’s recommendations.¹ The orders of the Political Agent cannot be challenged before the higher courts. In effect, there is virtually no separation of the judiciary from the executive in the FATA.

While the Constitution has virtually put the entire populace of the FATA region at the mercy of the President of Pakistan for any reform and development in the region, the Political Agent has been ruling the tribal region with absolute authority with the help of black laws and he is beyond the reach of the law.

On 29 June 2007, the Peshawar High Court ordered the Kurram Agency administration to immediately release 11 tribal maliks (elders) including Malik Janan, Malik Zahoor, Malik Mazda Jan who were arrested on the order of Assistant Political Agent of Lower Kurram, Dost Mohammad on 17 February 2007 under the FCR and threatened the administration to initiate contempt of court proceedings if it failed to release the tribal maliks. Earlier in May 2007, the High Court had directed the Kurram Agency administration but the authorities failed to release the detainees.²

The Frontier Crimes Regulations: The source of all ills

The Frontier Crimes Regulations of 1901 (FCR) has been certified as “draconian”, “black laws”, “illegal”, “unconstitutional” and “un-Islamic” by the people and the courts. The FCR

was enacted by the British colonialists as an instrument of subjugation of the local people and to check any rebellion by the tribals. In 1979, the Balochistan High Court (the Shariat bench) held that the FCR was discriminatory and un-Islamic. On 29 July 2002, the Lahore High Court ruled that the Frontier Crimes Regulation was no more in existence following the Balochistan High Court’s judgment of 1979 and hence, detention under the FCR was “illegal”. In the same order, the Lahore High Court directed the release of Qimat Gul of the FATA who had been detained for about two-and-a-half years without any right to defend. The Political Agent of Bajaur Agency had implicated him under the FCR and had detained him when he protested against forcibly grabbing of his land by some influential persons in the village.³

The FATA is divided into two administrative categories: “protected” areas which are under direct control of the government and the “non-protected” areas which are administered indirectly through the local tribes.⁴ The FCR empowers the authorities to arrest and detain any one without specifying the charges. The accused cannot get bail in such cases.⁵ Contrary to all civilized laws and jurisprudence, the FCR provides for collective punishment to the family members or blood relatives instead of punishing only the guilty. Family members or blood relatives are handed a jail term for no crime of their own. Innocent men, women and children become victims of this black law. Children as young as two years old have been convicted under it.⁶ In “non-protected” areas, the tribe has been vested with the responsibility of implementing the jirga decisions. The jirga often mete out punishment to an offender with a heavy fine. More serious measures of punishment involve expelling an individual or a family from the area, and confiscating, destroying or

setting fire to homes and property.⁷

Article 13 (a) of the Constitution of Pakistan states that no person “shall be prosecuted or punished for the same offence more than once”. But under the Frontier Crimes Regulation, tribal prisoners had to serve two or more sentences for the same crime. Most tribal prisoners complained that they remained in jails even after serving their jail terms because they were unable to furnish huge amount of bail to Political Agents. In April 2007, while hearing a jail writ petition (JPW) by a tribal prisoner Rahimullah, a division bench of Peshawar High Court consisting of Chief Justice Tariq Pervaz Khan and Justice Qaim Jan Khan directed the Federally Administered Tribal Areas (FATA) Security Secretary to check the “unbridled” powers of political authorities and the human rights violations carried out by them. The Assistant Political Agent (APA) had sentenced Rahimullah under section 40 of FCR on 15 December 2003 but before the completion of Rahimullah’s first jail term, the APA passed another order on 14 January 2005 against him in the same crime. Again on 25 May 2006, the APA convicted Rahimullah for another three years in the same crime.⁸

Constitutional blockade to access to justice and reforms

The Government of FATA has officially admitted the miscarriage of justice by the jirga system of administration of justice. The FATA Government webpage has been candid when it states, “Although the jirga mechanism enjoys widespread favour, corruption has begun to enter the system. It is reported that the poor and more vulnerable segments of society cannot afford to convene a jirga. There are a number of requirements for a jirga to be held, including hospitality, which is increasingly beyond the reach of most

ordinary people. There is also the grievance, now voiced more frequently, that in most cases jirga decisions favours the richer or more influential party.”⁹

Yet, there has been no attempt to provide access to the rule of law to the people of the FATA. The Constitution itself provides the biggest hurdle to the access of justice as Article 247(7) states “Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Majlis-e-Shoora (Parliament) by law otherwise provides.”

On the other hand, no legislation passed by the Parliament is applicable to the FATA region without the assent of the President under Article 247 (3) of the Constitution.

In the view of Article 247(3) of the Constitution, the FATA region has been excluded from all legal reforms that Pakistan has witnessed since 1947. During these six decades, Pakistan has enacted tens of laws relating to administration, social, economic, political and judicial reforms to cope with the changing social needs but these reforms have been effectively denied to the people of FATA due to the bar provided in Article 247(3).

Lack of economic development and basic services

The people of the FATA have little livelihood opportunities. Only 7 per cent of the total geographic area of the region is under cultivation while more than 82 per cent of the land is not suited for cultivation.¹⁰ Most households are engaged in primary-level economic activities such as subsistence agriculture and livestock rearing, or small-scale business conducted locally.¹¹

Level of poverty in the FATA is comparatively higher than the rest of Pakistan. The FATA region is also at the lowest rank in literacy rate and

availability of medical and health services. According to a comparative chart on these socio economic indicators, only 17.42% of the FATA population is literate compared to Pakistan’s national literacy rate of 43.92% and North West Frontier Province (NWFP)’s 35.41%. The female literacy rate in the FATA is only 3% compared to Pakistan’s national rate of 32.02% and 18.82% of NWFP. The people of FATA region have been denied access to adequate healthcare services. The number of doctors is limited and there is huge difference in the population per doctor in the FATA and in other parts of Pakistan. The doctor-population ratio in the FATA is 6 times more than the Pakistan’s national ration of 1,226 persons.¹² ■

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Malaysia: Sabah and Sarawak High Court reaffirms native customary rights of indigenous peoples

The judiciary in Malaysia have been attempting to set the standards on the rights of indigenous peoples. On 9 July 2007, Justice Datuk Ian H.C. Chin of the High Court of Sabah and Sarawak issued a series of directions/orders in favor of Rambilin Binti Ambit, a Dusun indigenous woman of Kampung Gailun Salimpodon in the District of Pitas in Sabah province of Malaysia, in a civil suit and two related judicial reviews. By all yardsticks, the ruling is far-reaching and is expected to set a landmark authority over court cases involving claims to Native Customary Right in Sabah.

The facts of the case were as follows: -

In 1982, Rambilin Binti Ambit bought two plots of land measuring a total of 15 acres at her village at Kampung Gailun Salimpodon in the District of Pitas in Sabah. She bought the plots of land from Sharif Osman bin Sharif Murah ("Osman") for RM12,500 and Sharif Endun bin Sharif Ading ("Endun") for RM2,000. Upon their entering into the land in 1982, Rambilin and her husband cleared the land, built a house as well as erected a boundary fence. They had developed the land by planting coconut and fruit trees and laid water pipes. However, Rambilin did not stay on the land continuously as she had to live wherever her husband, then working in the Agriculture Department, was posted, which at the relevant time was Kudat.

While Rambilin was away, Ruddy Awah, in connivance with Magudar Bin Ambit, brother of Rambilin, one of the land sellers

Endun, the office of the Assistant Collector of Land Revenue ("ACLR") and the office of the Registrar of Titles of Pitas District entered into Rambilin's 15 acres land and took possession of the same. On April 2000, Rambilin commenced a Suit being No.K22-71 of 2000 in the High Court of Sabah and Sarawak against Ruddy seeking for, inter alia, possession of the said Land and damages on ground of trespass by Ruddy. Meanwhile, in November 2001, the office of the Assistant Collector of Land Revenue (ACLR) and the office of the Registrar of Titles of Pitas District issued the titles to the land namely NT233105729 and NT233105710 to Ruddy. In 2002, Rambilin filed two applications for leave to apply judicial review. The first was Judicial Review No.JR-K25-02 of 2002 while the second was Judicial Review No.K24-240 of 2002 and Rambilin was granted leave in both.

Issues involved in the suit No.K22-71 of 2000

While hearing the petition, the High Court framed the following issues:

1. Did Rambilin acquire any rights by purchase?
2. Was Rambilin in possession of the land?
3. Whether an action in trespass is maintainable?
4. Whether Ruddy committed trespass?

In his judgement of 9 July 2007, Justice Datuk Ian H.C. Chin of the High Court of Sabah and Sarawak, Malaysia passed the following orders-

In Rambilin's suit claim against Ruddy

1. It is declared that Rambilin is entitled to possession and/or to recover possession of the land;
2. It is ordered that Ruddy whether by himself or his servants or agents do forthwith vacate the land, and forthwith deliver possession of the land to Rambilin;
3. It is ordered that Ruddy whether by himself or his servants or agents or otherwise howsoever from being or remaining on or entering or using the land upon and subsequent to the delivery of possession of the land to Rambilin;
4. It is also ordered that Ruddy pay Rambilin mesne profit at the rate of RM500.00 per month from the 31st of December 1996 until possession of the land is delivered up to Rambilin;
5. It is also ordered that Ruddy pay to Rambilin special damages of RM66,500.00 and statutory interest of 8% per annum thereon from 31st of December 1996 until the date of Judgment;
6. Interest of 8% per annum on the adjudged sums under Prayers (4) and (6) from the date of Judgment to the date of full payment.

As for exemplary and aggravated damages which award is justified by the fraudulent scheme of Ruddy in dispossessing Rambilin, a sum of RM10,000 should be sufficient as Ruddy had been ordered to pay mense profit. Ruddy is therefore also to pay RM10,000 to Rambilin as exemplary and aggravated damages. Costs to Rambilin.

Issues involved in the Judicial Reviews

1. Judicial Review No. JR-K25-02 of 2002 for an order of mandamus to direct the ACLR to deliver a decision in respect of Rambilin's application for native customary rights for which a land enquiry, No. 3/2000, was conducted and
2. Judicial Review No. K24-240 of 2002 for an order of certiorari directed against the Director to quash his decision to issue a title to the land to Ruddy before a decision in land enquiry no. 3/2000 was delivered.

The orders made in the judicial review actions are-

1. The ACLR shall within 90 days hereof deliver his decision in land enquiry no. LE 3/2000 in respect of land application nos, 89230296 and 96230318;
2. It is declared that the alienation of the land by Native Title No. 233105729 and Native Title No. 233105710 is unlawful, null and void;
3. The decision of the Director to alienate the land constituted by Native Title No. 233105729 and Native Title No. 233105710 is hereby quashed;
4. The decision of the ACLR and Registrar of Titles to register Native Title No. 233105729 and Native Title No. 233105710 is quashed;
5. The Director, the ACLR and the Registrar of Titles and all officers acting under them shall be prohibited from further processing land application no. 96230318, land application no. 97230158 and land application no. 9620350 until after the final determination of land enquiry no. LE 3/2000 and Rambilin's land application no. 89230296; and
6. Cost to Rambilin. ■

Indigenous defenders at risk

Indigenous rights defenders continue to be targeted across Asia. In the last issue of *Indigenous Rights Quarterly*, AITPN has extensively covered the precarious situations of the indigenous human rights defenders. AITPN can only express aghast that the indigenous rights defenders of West Papua in Indonesia have been constantly prowled by the intelligence agencies for meeting the United Nations Secretary General's Special Representative on Human

oppose the establishment of an Eco Park that would displace the indigenous peoples, was tortured to death in the custody of the army at the Kakraid army camp in Tangail district of Bangladesh on 18 March 2007. The army has however denied torturing and killing the Garo leader.

Following national and international outcry, the government set up a inquiry headed by Special Court Judge Rofiuddin Ahmed. But the conspiracy is so deep that despite



Rights Defenders, Ms Hina Jilani during her visit to Indonesia in June 2006. If one is not safe for meeting the UN officials, none can be safe. Not surprisingly, indigenous rights defenders continue to be arbitrarily arrested, detained and denied legal representation in Bangladesh.

a. Update on the extrajudicial killing of Cholesh Ritchil in Bangladesh

In the last *Indigenous Rights Quarterly*, the extrajudicial killing of Cholesh Ritchil, an indigenous Garo leader in Bangladesh was brought into limelight. Mr Ritchil, who was one of the prominent indigenous leaders to

tell-tale signs of torture, two autopsies conducted on Cholesh's body claimed that "Cholesh died from heart failure". Judge Rofiuddin Ahmed committee heard many witnesses. Numerous pictures taken of the tortured body of the deceased were also submitted before the judge.

All the witnesses including Cholesh's friends Protap Jambil, Tuhin Hadima, and Piren Simsang who were also arrested along with Cholesh and tortured in custody, stated before the judicial committee that Cholesh Ritchil was subjected to third degree torture which caused his death. Many witnesses including the wife of Cholesh Ritchil, Sandhya Simsang

revealed the conspiracy to eliminate Cholesh hatched by Chairman Zakir Hussain and the officials of the Forest Department. Sandhya Simsang stated that Cholesh was in conflict with Chairman Zakir Hussain as Cholesh had contested against him for the post of Chairman in 1992. In 1995, Zakir Hussain allegedly sent his men to kill Cholesh. Cholesh also earned the ire of the officials of the Forest Department for leading the protest by the indigenous Garo peoples against the Eco Park. Many false cases were filed against him by the Forest Department personnel.

While deposing before the judicial committee on 13 June 2007, eyewitness and torture victim, Protap Jambil (38), Son of Robindra Marak of Beribaid village under Madhupur Police Station in Tangail district stated that he, Cholesh, Tuhin and Piren were arrested by the army in civil dress from Kalibari bus station in Muktagacha Upazila when they were returning in a private car after attending a marriage ceremony in Mymensingh. They were blindfolded and taken to Kakraid army camp. There Major Toufique ordered his men to beat up Cholesh and others. Their hands and legs were tied and brutally tortured while asking the question “Where are your arms?” Protap Jambil further narrated the horrible tale of torture by the army - “Then the Habildar Sahadat was ordered to bring hot water, Chili powder, salt, blades and pliers. Habildar Sahadat and warrant officer Zaman continued to torture Cholesh. Habildar Sahadat opened the zippers of the pants of Cholesh and grabbed the penis and testicles of Cholesh and asked ‘Cholesh where are your arms?’ Cholesh replied ‘I do not have any other arms but a licensed gun’. But they continued to torture us. They poured hot water on our bodies and

put the same question.” At about 4:00 pm, the army brought a journalist identified as Abdur Rob who took their photographs after untying their hands and legs. After being photographed, they were tortured again. “Then they poured boiling hot water mixed with chili powder, salt in our noses. My belly became swollen and got painful. I vomited blood for four times, Cholesh vomited blood two times. Then they untied our hands and legs. Cholesh was severely trembling. He tried to get up, but could not, at about 7:00/7:30 P.M Cholesh passed mucus through his mouth. I cried out “Cholesh is

Then the Habildar Sahadat was ordered to bring hot water, Chili powder, salt, blades and pliers. Habildar Sahadat and warrant officer Zaman continued to torture Cholesh. Habildar Sahadat opened the zippers of the pants of Cholesh and grabbed the penis and testicles of Cholesh and asked 'Cholesh where are your arms?'

dying’.” At about 7-30 pm, Cholesh died. After the death of Cholesh, Protap said he was taken to Madhupur hospital where he was given an injection and later in the night released near Beribaid Bairagee bazaar.

Another eyewitness and torture victim, Piren Simsang, S/o Lampa Chiran of Beribaid village also confirmed brutal torture by the army. He told the judge: “They (the army personnel) beat Cholesh first, then Protap, Tuhin and me. They brought pliers, needles, and blade. They cut the body of Cholesh with blades. They sprayed chili powder, salt into the wounds. They then beat up Cholesh

severely. Then in the evening at about 6:00 pm they released Tuhin (Tuhin Hadima) and me.” Tuhin Hadima (26), who was arrested and tortured by the army, also corroborated the evidence of torture before the judge.

Joyon Bajee (56), S/o Boben Drong of Beribaid village told the judge that when they were giving a customary bath to the dead body of Cholesh Ritchil, he “turned the dead body up side down. I caught testicles and found that the testicles were smashed. His hands and legs were broken.”

It is evident from the statements of the witnesses that Cholesh Ritchil was tortured to death in the custody of the Bangladesh army.

b. Illegal arrest and detention of Milton Chakma in Bangladesh

Another indigenous rights activist, Milton Chakma was illegally arrested by the Bangladesh army from Chengi Bridge in Khagrachari in Chittagong Hill Tracts (CHTs) on the morning of 29 May 2007. Mr Chakma, Assistant Coordinator of the Hill Watch Human Rights Forum, an indigenous Jumma peoples organization, was arrested when he was taking his wife Ms Sumana Chakma for medical treatment in Chittagong. Mr Chakma is also associated with a Jumma political organization, United Peoples Democratic Front (UPDF).

According to Ms Sumana Chakma, who is the Finance Secretary of the Hill Women’s Federation, Milton Chakma was picked up by a group of Bangladesh army personnel after they confirmed his name. No arrest memo was issued or reason given at the time of his arrest.

The army refused to provide information regarding the whereabouts of Mr Chakma. In the afternoon of 29 May 2007, Ms

Sumana Chakma and her mother-in-law, Ms Ananta Probha Chakma contacted Khagrachari zone army headquarters to seek information about the whereabouts of Mr Chakma but the army authorities simply refused to provide information by stating that the offices had been closed for the day at 2 pm. When they contacted again the next morning, the zone commander told them that Mr Milton Chakma was picked up by army personnel from Mahalchhari zone. But when Mr Chakma's family members went to Mahalchhari zone office, the army officers denied having arrested him.

Mr Chakma was shown arrested on the basis of a First Information Report (FIR) filed by Md. Shahidul Islam, Sergeant (No. 3998686) of 24 Bengal Regiment. In the army records, he has been shown arrested on 31 May 2007, although the Bangladesh army had picked him up on 29 May 2006 from Chengi Bridge area.

Mr Chakma has also been implicated in a false case which is related to the death of an army officer in Ghilachari under Rangamati district in December 2006. As per official records, this alleged murder case (No. GR 304/06) was originally filed on 27 December 2006 at 10:35 pm under Sections 302 and 304 of the Bangladesh Penal Code. But, in the FIR filed on 27 December 2006, Mr Chakma's name was not mentioned. Therefore, his arrest for the alleged murder is an afterthought to falsely prosecute him.

On 31 May 2006, Mr Chakma was produced before the court in Rangamati, which sent him to 7-day remand for interrogation from 6 June 2006 to 12 June 2006. On 12 June 2007, he was brought in an army vehicle in secret manner so that his lawyer Advocate Dulal Kanti Dey could not appeal for bail. He is still

under detention.

Many members of the Jana Samhati Samiti were also arrested under the emergency rules.

c. Illegal arrest and detention of Santoshito Chakma alias Bakul in Bangladesh

On 3 June 2007, indigenous peoples human rights defender, Santoshito Chakma alias Bakul (52 years), who also serves as the General Secretary of the Chittagong Hill Tracts Jumma Refugee Welfare Association was arrested by the Bangladesh Police from the Chengi Square in Khagrachari town. His arrest was totally illegal and politically motivated. Mr Chakma was arrested when he was returning home after attending a meeting of the Task Force on rehabilitation of the returnee Jumma refugees at the Circuit House. The police did not give any reason for his arrest.

As a leader of the Jumma refugees, Mr. Chakma has been highly critical of the previous Bangladesh Nationalist Party-led four-party coalition government for the lack of progress in the rehabilitation of the returnee Jumma refugees following their return from India. Under his leadership, Chittagong Hill Tracts Jumma Refugee Welfare Association launched various democratic programmes such as mass rally, road blockade and hartals (strikes) to draw the attention of the government of Bangladesh towards the pitiful conditions of the refugees. The Chittagong Hill Tracts Jumma Refugee Welfare Association had signed a 16-Point Agreement with the government of Bangladesh.

d. Papua: Defenders are at risks for meeting UN Special Representative

Human rights defenders regularly

face threats and intimidation in Papua in Indonesia. This has been confirmed by Ms Hina Jilani, UN Secretary-General's Special Representative on the situation of human rights defenders. Even those who met her faced threats from the intelligence agencies and Indonesian Armed Forces, the TNI

Case 1: Attempt at the lives of Frederika Korain and Priest Perinus Kogoya of Peace and Justice Commission for the Diocese of Jayapura (SKP Jayapura)

On 8 June 2007, Mr Frederika Korain and Priest Perinus Kogoya of Peace and Justice Commission for the Diocese of Jayapura (SKP Jayapura) were returning to their home in Jayapura, West Papua after attending a public hearing with Ms. Hina Jilani in Jakarta on the previous day. While passing through Post 7, Sentani in Ifar (after a drive of 5-10 minutes from the airport), their SKP car was intentionally rammed by a blue Kijang car with police license plate number DS 1693 AE. The ramming damaged their car although they remain unhurt. When the SKP driver tried to stop the blue Kijang car, two men got out of it and identified themselves as intelligence commanders for the military regional command of Trikora (Komandan Intel Kodam XVII Trikora). One of them identified his name as FX. Subangun. He also had the audacity to give his cell phone number which is 0811484860. The police looked on all these but did not intervene.

Case 2: Surveillance over Mr Yan Christian Warinussy

Mr Yan Christian Warinussy, Executive Director of the Institute of Research, Analysis and Development for Legal Aid (LP3BH), Manokwari reported that he has been under surveillance both at his home and

office following his meeting with Ms. Hina Jilani in Jayapura. At about 8 p.m. on 9 June 2007, Mr. Warinussy noticed a black Kijang Innova car with tinted windows parked in front of his house for about 20 minutes. At 11 pm, the car returned back to in front of his house on that night. At around 7 p.m. on 11 June 2007, two Kijang cars were again found parked in front of his office on Gunung Salju street for about 30 minutes. Again on 16 June 2007, at around 8 pm, Mr. Warinussy and the two PBI activists whose protection Mr. Warinussy had requested spotted a metallic-coloured Kijang diesel car with police license plate number DD 546 PD parked in front of his house for 20 minutes. The car left but again passed by twice that night without stopping. Again on 18 June 2007, at 11pm, that same car was parked in front of his office. That car reportedly belongs to the Manokwari Telkomsel telephone company and is reportedly often borrowed by a member of the Indonesian Navy named Hery, who is believed to be working as an intelligence officer for the Armed Forces Strategic Intelligence Agency (BAIS) in Manokwari.

Case 3: Intimidation of Mr. Albert Rumbekwan, the head of the National Human Rights Commission (Komnas Ham), Papua Province

On 11 June 2007, Mr Albert Rumbekwan received a text message from cell phone number 81344034383 that said “You who are reporting about the human rights situation in Papua are trying to destroy the people. You want evidence of people being killed, I will kill your tribe, your family and your children will become only bones to show that there is only a zone of peace in Papua.”

Level of impunity is such that intelligence commander who threatened the Papuan human rights defenders gave his name as FX Subangun and his cell phone number as 0811484860. If such intimidation can happen for meeting UN Special Representative, one can imagine the actual situation.

On 14 June 2007, Mr. Albert Rumbekwan received five more text messages from the same number, again containing death threats. At around 8 a.m. on the same day, unidentified persons parked three cars some 20 meters from his office. The cars were a black Avanza, a Kijang LZ and a white Kijang Kapsul. The occupants of the cars shouted at Mr. Albert Rumbekwan to come outside and see them. As he ignored them, they waited there and observed his movements until around 4 p.m. but he received a call from the same cell phone asking him to meet the caller at Swissbell Hotel at 7 pm that night. These persons followed him when Mr. Albert Rumbekwan left for home in his official car. On the night of 17 June 2007, he found a car parked in front of his house for about two and a half hours.

The Commission for Disappeared Persons and Victims of Violence (KontraS) complained in writing to the Chief of Police for the Province of Papua (Kapolda Papua), Regional Military Commander of Trikora, chief of National Police (Kapolri), Foreign Affairs Minister of Indonesia, and the Head of Komnas HAM in Jakarta against the three abovesaid persons. But no action has yet been taken to investigate these serious threats and intimidation to human rights defenders. ■

Snippets

Arunachal Pradesh: Signs of hope

In June 2007, the provincial government of the Indian state of Arunachal Pradesh headed by Chief Minister Dorjee Khandu formed a high powered committee to find out an amicable solution to the vexed Chakma-Hajong issue. The high powered committee is reportedly headed by Speaker of the Arunachal Pradesh Legislative Assembly, Setong Sena and includes, among others, Health and Family Welfare Minister C.C. Singpho as member.

Both the All Arunachal Pradesh Students’ Union (AAPSU) and the Committee for Citizenship Rights of the Chakmas and Hajongs of Arunachal Pradesh (CCRCAP) have welcomed the constitution of the high powered committee.

The Chakmas and Hajongs whose total population is estimated to be 65,000 persons migrated to India in 1964 from erstwhile East Pakistan (now Bangladesh) and were settled by the Government of India in Arunachal Pradesh (previously known as North Eastern Frontier Agency) under a “definite plan of rehabilitation.” In 1995, apprehending loss of lives and properties of Chakmas and Hajongs because of the failure of the State government of Arunachal Pradesh, the National Human Rights Commission of India approached the Supreme Court which, among others, directed that the State Government of Arunachal Pradesh shall ensure security and safety of the Chakmas and Hajongs and that the Deputy Commissioners of the three Chakma and Hajong inhabited districts of Changlang, Lohit and Papumpare shall immediately forward the citizenship applications of the Chakmas and Hajongs to the Central

Government. However, not a single out of more than 45,000 Chakma and Hajong applicants has been granted citizenship.

Despite specific guidelines from the Election Commission of India as to how to conduct the revision of electoral rolls in the Chakma and Hajong areas, the concerned electoral officers who are also employees of the State Government have been successful to frustrate the efforts of the Election Commission of India to enroll all eligible Chakma and Hajong voters in the electoral rolls. Consequently, the Election Commission of India suspended the publication of the electoral rolls of Changlang, Lohit and Papumpare districts.

AITPN hopes that the problems can be resolved by these indigenous communities through the High Powered Committee.

The Kalinga Nagar massacre inquiry - update

The much-hyped investigation by Justice A.S. Naidu Commission of Inquiry into the police firing at Kalinga Nagar in Jajpur district of Orissa in India in which 14 tribal people were killed, has come to naught.

On 9 April 2007, a Bench of the Supreme Court of India comprising of Justices Arijit Pasayat and D K Jain rejected the Orissa government's plea for allowing Justice AS Naidu Commission, a sitting Judge of the Orissa High Court, to continue its probe on the ground that it is headed by a sitting High Court judge. Earlier in November 2006, the Supreme Court had ruled that no sitting judge of High Court can head an inquiry commission. The apex court, however, allowed some inquiry commissions which were in the final stages of completion of probes to continue. The end of the Justice AS Naidu Commission of Inquiry was signaled by Justice AS Naidu in the statement issued on 5 May 2007 that "The Commission has ceased to exist without completing the inquiry process in view of the Supreme Court's rejection of the state government's appeal (to continue its investigation)".

On 10 April 2007, Orissa Chief Minister Naveen Patnaik stated that a new commission headed by a retired judge would start the investigation into the Kalinga Nagar massacre from the point where Justice A.S. Naidu had left. But the state government of Orissa has failed to appoint a retired High Court judge to continue the judicial investigation until now. ■



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:

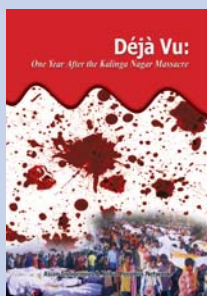
- ▶▶ by providing accurate and timely information to national human rights institutions, the United Nations and its specialised mechanisms, as appropriate;
- ▶▶ by conducting research, campaigning and lobbying on country situations or individual cases;
- ▶▶ by increasing the capacity of indigenous peoples 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

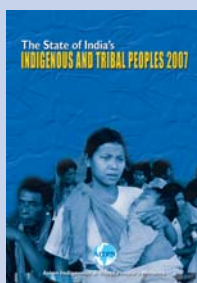
P.O. Box 9627, Janakpuri, New Delhi-110058, India
E-Mail: aitpn@aitpn.org Website: www.aitpn.org

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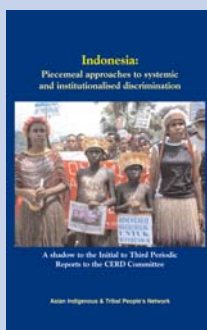
Déjà vu: One Year After the Kalinga Nagar Massacre, January 2007

This report examined the wider issues surrounding the Kalinga Nagar massacre like land alienation as a result of industrialisation, dispossession without rehabilitation and the denial of justice to the tribal peoples and government's apathy towards them. It also analysed the Rehabilitation and Resettlement Policy 2006 of the Orissa government which was enacted after the Kalinga Nagar massacre.



The State of India's Indigenous and Tribal Peoples 2007, March 2007

The State of India's Indigenous and Tribal Peoples 2007 also reported on the violations of civil and political rights in particular by the security forces and the armed opposition groups, atrocities by the non-tribals and an analysis of the non-implementation of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act; violence against indigenous women; land rights and land alienation; status of indigenous Internally Displaced Persons; repression under forest laws and denial of access to minor forest produce; non-implementation of the affirmative action programmes; status of the Particularly Vulnerable Tribal Groups and the Denotified Tribes; and the state of the right to food, health and education of the indigenous/tribal peoples of India.



Forthcoming! Indonesia: Piecemeal approaches to systemic and institutionalised discrimination

This is a shadow report to the Initial to Third Periodic Reports (CERD/C/IDN/3 of 4 April 2006) of the government of Indonesia submitted under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The message of the periodic reports can be summarised in one sentence: since discrimination is prohibited under Law No. 39 of 1999 concerning human rights, there are no violations of the provisions of ICERD. Indonesia stands exposed with this shadow report.

