

# Indigenous Peoples & National Human Rights Institutions in Asia

Good practices and challenges



EUROPEAN UNION

## **Indigenous Peoples & National Human Rights Institutions in Asia: Good practices and challenges**

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Editor: Julius Garcia Matibag

Writers:

Suzanah Masalin, Patricia Wattimena, Krishna Bhattachan, Ekachai Pinkaew, Mary Ann Bayang,  
Ningreichon Tungshang, Muktasree Chakma, Richard Gadit, Bernice See, Jade Tessier

Design and layout: Randy Evangelista

Photo credits:

Asia Indigenous Peoples Pact, Alyansi Masyarakat Adat Nusantara for Indonesia,  
Ekachai Pinkaew for Thailand, Jaringan Orang Asal SeMalaysia for Malaysia,  
Kapaeng Foundation and Maleya Foundation for Bangladesh,  
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Naga Peoples Movement for Human Rights for Northeast India

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108 Moo 5 Tamboon Sanpranate

Amphur Sansai, Chiang Mai 50210 THAILAND

Tel: 66 5338 0168 Fax: 66 5338 0752

Web: [www.aippnet.org](http://www.aippnet.org)

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Tel: +66(0) 53 492 422

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[www.aippprinting.com](http://www.aippprinting.com)



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# Acknowledgements

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# I. Executive summary

At its annual meeting held in October 2009, the International Coordinating Committee (ICC) of National Human Rights Institutions (NHRIs) urged for a greater focus by national human rights institutions on issues faced by indigenous peoples. It also urged the States to consider, in consultation and cooperation with indigenous peoples, the establishment of national institutions on the rights of indigenous peoples, mandated to promote and protect their rights in complete accordance with the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Article 42 of the UNDRIP calls on the United Nations (UN), its bodies and agencies to promote respect for and full application of the UNDRIP provisions and monitor its effectiveness. This means that States should take action to implement their international human rights commitments in national laws, policies and programs. According to the UN Commission on Human Rights resolution 1992/54 of 3 March 1992, the NHRIs' objective is "To promote respect for the enjoyment of human rights without any discrimination, as expressly set out in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination" (CERD).

NHRIs are a fundamental tool of national human rights protection system and play a key role in linking the international and domestic human rights systems. In the UN Handbook 1995, the term NHRI referred to "a body which is established by the government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights". To qualify as NHRI, an institution should comply with the principles relating to the status of national institutions, commonly known as the Paris Principles, which play a crucial role in promoting and monitoring the effective implementation of international human rights standards at the national level, a role which is increasingly recognized by the international community. They were recognized by the General Assembly resolution 48/134 endorsing the Paris Principles in 1993. The NHRIs are responsible for monitoring the States' duties to a) protect and promote indigenous peoples' rights, b) ensure that it meets its international and domestic human rights commitments, c) receive, investigate and resolve complaints relating to indigenous peoples' human rights violations and d) raise awareness and provide human rights education to all parts of the community.

To ensure effectiveness and credibility, the status and responsibilities of NHRIs should be consistent with the Paris Principles, which further provide that NHRIs should be independent, pluralistic and established wherever possible by the Constitution or by legislation.

The Paris Principles draw on a number of provisions that outline what NHRIs could do at the international level, such as encouraging States to ratify relevant treaties, promoting and protecting human rights at the national level; contributing to reporting procedures; and co-operating with international and regional bodies. Therefore, the Paris Principles provide guidelines concerning NHRIs' engagement with the international human rights system, as this is essential for the appropriate performance of the protective mandate of National Institutions.<sup>1</sup> According to the General Assembly resolution 60/251, NHRIs with an A status are invited to the Human Rights Council (HRC) to participate in the dialogue, comment and question the special procedures in their annual reports to the HRC. The HRC Resolution 6/36 also decided that the annual meeting of the expert mechanism should be open to the participation of NHRIs as observers. The Treaty Bodies receive information on States' party's implementation of treaty provisions from NHRIs as well. The CERD formalized the participation of NHRIs in its working methods and rules of procedure. NHRIs may also be consulted on draft General Comments. Some treaty bodies have already issued General Comments regarding indigenous peoples,<sup>2</sup> and NHRIs may recommend that a treaty body consider an issue where a General Comment is required.

Out of the seven institutions analysed in this study, six got an "A" status, while Bangladesh is the only NHRI that has been qualified as a "B" institution. In the most recent evaluation of the commission's status published in January 2014, it was "not fully in compliance with the Paris Principles."

### **1. Classification of NHRIs in the areas of study and its accessibility to indigenous peoples**

An "A" status attributed by the International Coordination Committee designates independent bodies, according to the provision 3 of the Paris Principles.<sup>3</sup> Targeted promotional activities highlighting the independence of the NHRI from the State can build help awareness among indigenous peoples<sup>4</sup>.

The NHRC Bangladesh is a statutory body constituted in 2009 under the provisions of the National Human Rights Commission Act, 2009 (NHRC Act). The NHRC Act in its preamble affirmed that the NHRC is being established to protect, promote and provide guarantees of human rights as enshrined in the Constitution of Bangladesh and under the international instruments ratified by Bangladesh.

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<sup>1</sup> Information note, NHRIs and the treaty bodies systems, OHCHR National Institutions and regional Mechanisms Section, 5 April 2011.

<sup>2</sup> Human Rights Committee, General Comment 23, Committee on the Elimination of Racial Discrimination, General Recommendation 23, Committee on the Rights of the Child, General Comment 11.

<sup>3</sup> Principles relating to the Status of National Institutions (The Paris Principles), Composition and guarantees of independence and pluralism, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>, accessed 3 February 2015.

<sup>4</sup> The United Nations Declaration on the Rights of Indigenous Peoples; A manual for National Human Rights Institutions, Asia Pacific Forum and UN OHCHR, 2013, p. 165.

<sup>5</sup> Principles relating to the Status of National Institutions (The Paris Principles), Composition and guarantees of independence and pluralism, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>, accessed 3 February 2015.

However, one of the leading principles of the Paris Principles is the independence of its members, which Bangladesh was infringing at least up to 15 July 2011<sup>6</sup> as the NHRC had no staff of its own; until this time it was staffed by secondees from other government offices.<sup>7</sup> The granting of an “A” status on other NHRCs by the International Coordination Committee on NHRIs is not a guarantee that their NHRI is independent. Nepal got its “A” status accreditation only in 2011, and the NHRC is challenged to continue monitoring the human rights situation in Nepal as well as the maintenance of its independence and effectiveness in the protection of human rights. Also in 2011, the NHRC identified seven priority issues, one focusing on collective rights of vulnerable groups, which can be found in the draft Strategic Plan for 2011-2015, article 8.7. During its review of the NHRC in the first session of 2013, the Sub-Committee on Accreditation (SCA) expressed concern over the selection process of the NHRC members and the current political environment: *“presented challenges that would likely hamper the selection and appointment of new members . . . to replace the existing members whose term[s] were set to expire in 2013”*. Nepal was therefore not only breaching the Paris Principles section on “Composition and guarantees of independence and pluralism”, but also SCA General Observations 1.7 on ‘Ensuring Pluralism’ and 1.8 on ‘Selection and appointment of the governing body.’<sup>8</sup> However, new Commissioners were not appointed prior to the expiration of the existing Commissioners’ terms on 15 September 2013. In Nepal up to now, there is a high risk of the appointment process being politicized in the current transition phase as the Commission is also part of the Truth and Reconciliation Commission and Commission of Inquiry into Disappeared Persons which are yet to be formed. Such practice is perceived to adversely affect the functional independence of NHRC Nepal. The government upon the recommendation of NHRC appoints the Secretary of the Commission. There is concern among different stakeholders about the functioning of individual personalities in the NHRC, and not as an institution. The UN Committee on Civil and Political Rights reviewed the case of Nepal in April 2014, and recommended that the State party should amend the National Human Rights Act 2068 (2012) to comply with the Paris Principles and the Supreme Court decision of 6 March 2013 so as to ensure its independent and effective functioning. It also advised to amend the procedures governing the appointment of Commissioners to ensure a fair, inclusive and transparent selection process, and that the recommendations issued by the NHRC are effectively implemented.<sup>9</sup>

Malaysia got its “A” status renewed by the ICC in 2010<sup>10</sup>. However, upon re-accreditation in 2008, issues with respect to its independence arose, particularly in relation to appointment and dismissal procedure in the NHRI Act 597. The Subcommittee on Accreditation (SCA) informed SUHAKAM that it had recommended to the ICC to demote SUHAKAM to B Status. Issues of SUHAKAMs independence, but also its efficiency, were also raised during the 2008 Universal Periodic Review of Malaysia. SUHAKAM itself submitted in its stakeholder report that Act 597 regulating the Commission was too restrictive.

<sup>6</sup> National Human Rights Commission of Bangladesh website, [http://www.nhrc.org.bd/About\\_NHRC.html](http://www.nhrc.org.bd/About_NHRC.html), accessed 3 February 2015.

<sup>7</sup> ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia 2010/2011.

<sup>8</sup> CSA November 2013 Final report, <http://www.irinnews.org/report/96579/nepal-government-hobbles-human-rightscommission>, accessed 18 July 2014.

<sup>9</sup> International Covenant on Civil and Political Rights, Concluding observations on the second periodic report of Nepal, 15 April 2014, CCPR/C/NPL/CO/2.

<sup>10</sup> ICC website, <http://nhri.ohchr.org/EN/Documents/Forms/AllItems.aspx>, accessed 3 March 2015.

In order not to lose its A status of the commission, the government amended the Act 597 in 2009. Two amendments were passed to bring it in line with the requirements of the Paris Principles on independence as they had evolved over time. The term of office for commissioners was extended to three years, renewable once. The appointment procedure of commissioners was revised: instead of the Prime Minister nominating Commissioners as in the 1999 Act, now a committee suggests candidates to the Prime Minister who nominates them<sup>11</sup>. However, the independence of the Commission is still doubtful. The members of the selection committee appointed by the Prime Minister in 2010 were not revealed until it was disclosed by an unnamed source to the media on 1 April 2010. The government only acknowledged the media report five days later, having come under heavy pressure from civil society to reveal the members of the selection committee. Concerning the appointment procedures, a difference can be highlighted between KOMNAS HAM and SUHAKAM: in SUHAKAM's case all commissioners are elected by the same committee, whereas in KOMNAS HAM's case they are elected by parliament, after a process of political negotiation, which means that KOMNAS HAM's composition is more diverse<sup>12</sup>.

After its establishment as the NHRI in 1993 in Indonesia, KOMNAS HAM's independence was doubted widely,<sup>13</sup> mostly on its lack of representativity. At the same time, there were also some positive comments on it, arguing that its work was "a step in the right direction for Indonesia,"<sup>14</sup> as KOMNAS HAM has positively accepted the recent civil society proposal of an additional criterion: the acknowledgement and acceptance of the universal values of human rights, as a key requirement for applicants. Several criteria for selection included administration, medical, psychology and fit and proper tests for all candidates in the House of Representatives. However, the 2012 selection process was delayed for more than three months, when the Commission III of the House of Representatives did not immediately proceed to conduct fit and proper test of the candidates after it had submitted the names of 60 candidates to the parliament on July 11, 2012. The term of the NHRI Commissioners (2007– 2012) was to end on August 31, 2012, so the President had to issue a Decree on 29 August 2012 extending the Standard Operating Procedure (SOP) until the House of Representatives had reviewed the candidates. The Commission III finally announced the 13 members of the NHRC on 22 October 2012.

In 2013, the Committee on Civil and Political Rights issued concluding observations on Indonesia,<sup>15</sup> and recommended the State party to take appropriate measures to address the concerns raised with regard to KOMNAS HAM, including the tenure of its members, and provision of adequate financial and human resources in line with the principles relating to the status of national institutions for the promotion and protection of human rights.

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11 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia 2014.

12 Promoting human rights: National Human Rights Commissions in Indonesia and Malaysia, Setiawan, Ken Marijtje Prahari, Leiden University, 12 December 2013, p. 181.

13 South Asia Human Rights Documentation Centre, NHRI in the Asia Pacific Region: Report of the alternate NGO Consultation on the second Asia-Pacific Regional Workshop on NHRI, New Delhi, SAHRCD, 1998, at 39-50.

14 «Indonesia's National Human Rights Commission: a step in the right direction?» Talwar Monika, *The Human Rights Briefs* (1997).

15 International Covenant on Civil and Political Rights, Concluding observations on the initial report of Indonesia, 21 August 2013, ICCPR/C/IND/CO/1/7

In the Philippines, the CHRP has also been subject to criticism by social movements and civil society organisations regarding its independence. The Congress refused to enact a proposed Charter of the Commission in 2009, which promoted independence and pluralism in its Section 12 of the proposal, “the nomination, selection and appointment process shall be transparent and shall ensure broad-based consultation with stakeholders.”<sup>16</sup> Thus there is still no defined and instituted procedure regarding selection and appointment process of the Commission. In 2010, the ICC President wrote to the Office of the President of the Philippines that “it will be important that the appointment procedures you adopt can be held up as international best practices” so that the next CHR Chairperson “can start on a firm foundation.”<sup>17</sup>

According to the CHRP 2012 report, although the Commission did not sign the charter, “it has taken further steps to fine tune its procedures in the investigation and monitoring of human rights violations and abuses. It revised, updated and published the CHR’s Omnibus Rules of Procedures and the Manual on Investigation and case Management Process; Draft Handbook for CHR Lawyers and Investigators on International Humanitarian Law; and a Protocol on Case Management of Children who are Abused, Exploited and Neglected. Currently, it has renewed attempt to re-file the Commission’s proposed Charter in Congress. This bill hopes to strengthen the Commission’s independence, elaborate its powers and reinforce a functional and organizational structure.”<sup>18</sup> However, the same report highlights the fact that “Despite wide-ranging positive developments such as the passage of major human rights law, the CHRP continues to grapple with serious human rights challenges like in the face of unabated human rights violations, particularly summary killings<sup>19</sup>”.

The nomination issue is still taken into account by the CHRP, as stated in an advisory on the selection and appointment of the members of the 5<sup>th</sup> Commission of the CHRP in December 2014. The chairperson<sup>20</sup> said that although the CHRP has maintained its status A in its reaccreditation in March 2012, the CHRP was commended by the SCA in advocating for and drafting a more comprehensive founding law that contains elements of the Paris Principles and further encouraged the CHRP to ensure that the bill addresses the issues on nomination, selection, and appointment, among others.

The National Human Rights Commission (NHRC) of Thailand was established under Section 199 and 200 of the Constitution as a mechanism to guarantee the respect for human rights. Despite the actual suspension of the Constitution, the NHRC is still in exercise. However, the chief of the National Council for Peace and Order (NCPO) assured that an interim constitution will be ready for royal endorsement and promulgation. Under Section 9 and 10 of the NHRC Act, members shall perform their duties with independence

16 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia 2013.

17 Website of the Commission on Human Rights of the Philippines, INTERNATIONAL CONCERN re: CHR CHAIRPERSON SELECTION, 7 July 2010, [http://www.chr.gov.ph/MAIN%20PAGES/news/PS\\_7July2010\\_ChairSel.htm](http://www.chr.gov.ph/MAIN%20PAGES/news/PS_7July2010_ChairSel.htm), accessed 3 March 2015.

18 Free Zone, Philippines: Divided leadership and lackluster performance, October 16, 2013, [https://renatomabung.wordpress.com/2013/10/16/philippines-dividedleadership-and-lacklustre-performance/#\\_ftn21](https://renatomabung.wordpress.com/2013/10/16/philippines-dividedleadership-and-lacklustre-performance/#_ftn21), accessed 3 February 2015.

19 Annual Accomplishment Report of the Commission on Human Rights of the Philippines, 2012, [http://www.chr.gov.ph/MAIN%20PAGES/about%20us/PDF/2012\\_chr\\_annual\\_report.pdf](http://www.chr.gov.ph/MAIN%20PAGES/about%20us/PDF/2012_chr_annual_report.pdf), accessed 3 March 2015.

20 ON THE SELECTION AND APPOINTMENT OF THE MEMBERS OF THE 5<sup>th</sup> COMMISSION OF THE COMMISSION ON HUMAN RIGHTS CHR A2014-008 12th day of December 2014. Accessed 3 February 2015.

and impartiality.<sup>21</sup> The 2012 concluding observations on Thailand<sup>22</sup> referred to the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993 about Thailand's plan of action,<sup>23</sup> noting that "(under) the State party's intention to collect and produce disaggregated data on the implementation of its National Human Rights Plan of Action, the Committee recommends that the State party also collect data on the enjoyment of economic, social and cultural rights by ethnic groups." The Committee on Civil and Political Rights also examined Thailand in 2005,<sup>24</sup> and stated that many of its recommendations to the relevant authorities have not been implemented. The Committee was also concerned about the lack of sufficient resources allocated to the Commission.

Article 5 of the Paris Principles states that a National Human Rights Institution should "not be subject to financial control which might affect its independence." In Bangladesh, according to section 25 (1) of the NHRC Act: "The Government shall allocate specific amount of money for the Commission in each fiscal year; and it shall not be necessary for the Commission to take prior approval from the Government to spend such allocated money for the approved and specified purpose." This article highlights the fact that the NHRC Act does not ensure an adequate budget and financial independence for the Commission, which limits the NHRC's ability to exercise autonomy over its budget. At present, the NHRC receives a discretionary budget from the Ministry of Law and it is not a specific item in the national budget approved by the Parliament. It is not subject to parliamentary scrutiny or approval and the NHRC does not have the opportunity to advocate publicly for the budget it considers necessary for its work. This limits its ability to control its budget and restricts its financial autonomy.<sup>25</sup>

In Thailand, the situation is similar, as the NHRC must obtain approval from the parliament regarding its budget.<sup>26</sup> In Malaysia, the Commission draws up its annual budgetary needs, and submits it to the treasury for approval. SUHAKAM acknowledges it receives adequate funds from the treasury and is in complete control of how its approved budget is to be spent. In 2012, the UN Committee on Civil and Political Rights observed this of the Philippines: "While noting the expansion of the Commission on Human Rights' (CHRP) responsibilities under various pieces of legislation, the Committee is concerned that this expansion has not been matched with an increase in resources and that the CHRP lacks full fiscal autonomy."<sup>27</sup>

Neither in the Philippines, nor in Malaysia or in Indonesia<sup>28</sup> is there any legal provision that ensures the disclosure of the human rights background of candidates, gender equality, civil

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21 National Human Rights Commission of Thailand, [http://www.nhrc.or.th/en/List\\_Of\\_Sub\\_Commissions.php](http://www.nhrc.or.th/en/List_Of_Sub_Commissions.php), accessed 18 July 2014.

22 Concluding observations on the first to third periodic reports of Thailand, adopted by the Committee at its eighty-first session (6–31 August 2012), CERD/C/THA/CO/1-3/17.

23 The Thai National Plan on Human Rights is only available in Thai at: <http://www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx>.

24 OHCHR, Concluding observations of the Human Rights Committee, 8 July 2005, CCPR/CO/84/THA/9

25 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia 2014.

26 Annual Expenditure Budget Act, BE 2556 (2013) (in Thai), [www.library.coj.go.th/managelaw/data/16-55-38.PDF](http://www.library.coj.go.th/managelaw/data/16-55-38.PDF) and [www.mua.go.th/~budget/doc/act-budget57.pdf](http://www.mua.go.th/~budget/doc/act-budget57.pdf) for Annual Expenditure Budget Act, BE 2557 (2014) (available in Thai only), accessed 3 February 2015.

27 Concluding observations on the fourth periodic report of the Philippines, adopted by the Committee at its 106<sup>th</sup> session (15 October - 2 November 2012), CCPR/C/PHL/CO/4/7, 13 November 2012.

28 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia 2013.

society participation, the representation of minority groups, and transparency in the whole process.<sup>29</sup> In both Nepal and Bangladesh, the study highlights the need for more indigenous peoples to be engaged in the Commission.

## 2. NHRIs and Indigenous Peoples

Also highlighted in the study is the need for a specific legislation to be included in the NHRIs components and addressed to indigenous peoples. The criterion of representativity is a key principle mentioned in the Paris Principles guidelines on “Composition and guarantees of independence and pluralism.” Moreover, Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR) provides that every citizen has the right, and shall be

given the opportunity to take part in the conduct of public affairs, either directly or through their freely elected representative.

In Nepal, although collective rights are referred to as “Promotion and protection of collective/group rights” in the NHRC 2011:9-10 strategic plan, article 8.7, the study puts forward the fact that the NHRC has difficulty in recognizing and accepting indigenous peoples’ collective rights, identifying indigenous peoples with “children, women, prisoners and migrant workers,” when specific groups would need specific legislations. Moreover, the NHRC Act’s use of the term “indigenous population” instead of indigenous peoples as per ILO Convention 169 and UNDRIP is reaffirming the non-compliance of the NHRC with the international instruments ratified by Nepal.

In Indonesia, the State’s lack of recognition of the existence of indigenous peoples incapacitates KOMNAS HAM to put forward their rights. While the revised Indonesian Constitution of 1945 recognises the existence of indigenous communities and their traditional rights as stipulated in article 18B (2), it does not recognise the terminology and definition of indigenous peoples as stipulated in international frameworks, like the UNDRIP.<sup>30</sup> In 2013, the Constitutional Court Decision No. 35/PUU-X/2012 on the judicial review of Law No. 41 Year 1999 on Forestry was passed, reviewing the Law categorizing Customary forest as a part of State Forest, and which had been used against indigenous peoples and their right to their customary forest. The Government is also in the process of adopting the RUU PPHMHA,<sup>31</sup> the Bill for Recognition and Protection of Indigenous People’s Rights as the House of Representatives’ Initiative Bill, which when adopted as a law will make Indonesia with the Philippines the only Asian countries with a specific law concerning indigenous peoples. KOMNAS HAM expressed its strong support to the Ruling and is urging the Government of Indonesia to implement it. Since Jokowi was elected President, the nine main Indonesian government agencies concerned with lands and forests have already declared their support for indigenous peoples’ rights. A Declaration instituting a National Programme for the Recognition and Protection of Customary Communities through REDD+ (Reduction of Emissions from Deforestation and Forest

29 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia 2013.

30 See the statement of the Government of Indonesia on the recommendation of the Human Rights Council’s Universal Periodic Review (UPR) A/HRC/21/7/Add.1, para. 6.3.

31 Alternative report on Indonesia, 52nd session, CESCR, April/May 2014, submitted by Aliansi Masyarakat Adat Nusantara, YMC, HUMA, Paradisea, and the Rainforest Foundation Norway fpp/files/news/2014/09/Declaration%20Text\_English.pdf, accessed 4 February 2015.

and Peat-land Degradation) was issued jointly on 1st September 2014 by the Coordinating Ministry of People's Welfare, Ministry of Internal Affairs, Ministry of Law and Human Rights, Ministry of Forestry, Ministry of the Environment, National Land Agency (BPN), the National Geospatial Information Agency, National Commission on Human Rights, and the national REDD+ Agency.

The announcement was welcomed by the national indigenous peoples' organisation, AMAN, which noted the need for legal reforms to secure their rights and efforts by indigenous peoples themselves to build their capacity to manage their lands and forests in line with local wisdom<sup>32</sup>.

Yet despite those progresses, the law N° 39/1999 which sets out general mandates as well as the objectives and principles of KOMNAS HAM is limiting the mandate of KOMNAS HAM to deal only with violations caused by State actors, excluding private actors' violations of human rights. Good practices regarding the promotion of indigenous peoples' rights by NHRIs are nevertheless to be noted. In 2007, the Nepali NHRC organized a workshop on indigenous peoples' rights and international treaties. The workshop included representatives of indigenous peoples' organizations, who urged the Government to ratify ILO Convention 169.<sup>33</sup> The NHRC of Bangladesh as well helped promote the ratification of the ILO Convention 169 by organizing a seminar focusing on the Convention and its relevance to the rights of indigenous peoples<sup>34</sup>.

The issue of a specific legislation is closely linked to the question of a devoted mechanism for indigenous peoples' rights. In Indonesia, AMAN proposed the issue of a National Commission on Indigenous Peoples but the Parliament is still reluctant to this proposal. In India, the statutory National Commission for Scheduled Castes and Scheduled Tribes came into being in 1992, after the Constitution 65th Amendment Act 1990. The Commission was later replaced by two separate Commissions, namely, the National Commission for Scheduled Castes (NCSC), and the National Commission for Scheduled Tribes (NCST) by constitutional amendments in 2003<sup>35</sup>. Thus, when the Indian NHRC was established in 1993, the National Commission for Scheduled Castes and Scheduled tribes was already functioning. It had already some of the main mandate of a national human rights institution according to the Paris principles. These are: intervening in courts where issues relating to human rights are pending; visits to prisons and detention centres; promoting human rights literacy; review of all existing laws that impede human rights; study of treaties and human rights standards and working to bring about their effective implementation in India; research in the field of human rights; encouraging NGOs; and finally, the open opportunity to undertake any other function for the protection of human rights in the country<sup>36</sup>. This is the reason why the only function left to the Indian NHRC is to handle complaints relating to violations of human rights. Because of its specific mandate limited by the other already

32 "Declaration National Programme for the Recognition and Protection of Customary Communities through REDD+ (Reduction of Emissions from Deforestation and Forest and Peat-land Degradation)", [http://www.forestpeoples.org/sites/fpp/files/news/2014/09/Declaration%20Text\\_English.pdf](http://www.forestpeoples.org/sites/fpp/files/news/2014/09/Declaration%20Text_English.pdf), accessed 4 February 2015.

33 The United Nations Declaration on the Rights of Indigenous Peoples; A manual for National Human Rights Institutions, Asia Pacific Forum and UN OHCHR, 2013, p. 75.

34 Ibid, p. 75.

35 National Commission for Scheduled Tribes website, <http://www.ncst.nic.in/index.asp?langid=1>, accessed 3 March 2015.

36 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia 2013.

functioning commissions, the role and scope of the Indian NHRC are still limited to cover civil and political rights, mostly individual cases and those relating to custodial deaths, illegal detention, torture and encounters.

In Thailand, the NHRC put in place a NHRC Sub-Commission on the Status of Stateless Persons, Displaced Thais, Asylum Seekers and Indigenous Peoples. However, study reveals that the Sub-Commission mostly deals with the issue of statelessness which is one of the areas of concern with regards indigenous peoples. There is still a need for a mechanism focusing only on indigenous peoples as they are not only subject to the problem of statelessness, but also face the issue of land titling. In Malaysia, SUHAKAM does not yet have any designated mechanism for indigenous peoples or for human rights defenders, which would be responsible for receiving and investigating complaints on human rights violations.<sup>37</sup> However, the Commission creates ad hoc focal points to handle cases of human rights violations when the need arises. In response to an OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples, SUHAKAM in Malaysia indicated having translated the Declaration into the national language to raise public awareness on the rights of indigenous peoples.<sup>38</sup>

In terms of good practices, the South East Asia National Human Rights Institutions Forum (SEANF) recently published a paper on *Good Practices in Promoting and Protecting the Rights of Indigenous Peoples in Malaysia*<sup>39</sup>. It cites the UNDRIP, article 34, which provides the right of indigenous peoples to be able to, inter alia, maintain their juridical systems and customs. The Orang Asal utilise their unique traditional customs or Adat to govern their daily lives. They include customary laws that govern their social system as well as their lands, territories and resources, among others. In Malaysia, Native Courts are one of the legal instruments available to conserve the Adat and way of life of the natives in Sabah and Sarawak and are recognised by the Federal Constitution of Malaysia.<sup>40</sup> The paper also published a report regarding the Philippine NHRI's contribution in enhancing human rights in the country's education system.<sup>41</sup> It refers to the Convention on the Rights of the Child and promotes "friendship among all people, ethnic, national and religious groups and persons of indigenous origin."

In the Philippines, specific projects focused on indigenous peoples were developed within the NHRC, such as the *Metagora* under the European Initiative for Democracy and Human Rights. Nonetheless, the study outlines the fact that those efforts were only punctual and thereafter terminated, and that there would have been no project if there were no funders with these specific objectives. The discontinuity of specific efforts like these projects can be attributed to the CHRP's lack of specific and adequate program for the indigenous peoples. Moreover, the CHRP being a decentralized body, has twenty-three regional offices, which has been questioned, as there is no institutionalization of leadership functions, where

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37 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia 2013.

38 The United Nations Declaration on the Rights of Indigenous Peoples; A manual for National Human Rights Institutions, Asia Pacific Forum and UN OHCHR, 2013.

39 South East Asia National Human Rights Institutions Forum (SEANF) *Project on Good Practices in Promoting and Protecting the Rights of Indigenous Peoples, Good Practices in Malaysia*, SUHAKAM.

40 cf. Federal Constitution of Malaysia (n. 11), Article 145(3), 161 (5), Ninth Schedule List IIA.

41 South East Asia National Human Rights Institutions Forum (SEANF), *HUMAN RIGHTS EDUCATION in BASIC SCHOOL EDUCATION OF THE PHILIPPINES*, ANA ELZY E. OFRENEO.

regional offices highly depend on the capacity, character and commitment of their regional heads.<sup>42</sup> There is no clear mechanism to exact accountability of the regional directors and to some extent, of Commissioners at the national level. Nevertheless, some positive developments can be noted in policy reforms. In 2013, President Aquino signed the Compensation for Martial Law Victims Act providing compensation, recognition and acceptance of the historical facts of grave human rights violations under the Martial Law, the Anti-Enforced or Involuntary Disappearance Act of 2012, which defines and penalizes enforced or involuntary disappearances. The Philippines also ratified the Rome Status. Moreover, the CHR has established a “Government Linkages Office” (GovLink) to specifically engage with governmental institutions to monitor more effectively the Philippines’ compliance with treaty obligations. Supported by UNDP and in partnership with the NGO PhilRights, GovLink has pursued a programme of activities aimed at ensuring that the State’s responsibilities according to the human rights’ treaties are understood by, and engaged with, relevant government and civil society organizations, which could then be properly monitored by the CHRP in accordance with its mandate. These activities have included the production of a handbook on how to engage with the Committee’s reporting process and responsibilities.<sup>43</sup> However, until today, President Aquino has not finalized nor signed the National Human Rights Action Plan (NHRAP), a highlight during the 1<sup>st</sup> and 2<sup>nd</sup> Philippine Universal Periodic Review Process (UPR) in 2008 and 2012 which is a framework that guides Government’s compliance with its international human rights obligations.<sup>44</sup>

### 3. Complaint Mechanisms on Indigenous Peoples’ Rights Violations

The Paris Principles state that “To emphasize on the role of NHRIs, the State party should ensure that recommendations of the National Human Rights Commission are given full and serious follow-up. It should also ensure that the Commission is endowed with sufficient resources to enable it effectively to discharge all of its mandated activities in accordance with the Principles relating to the status of national institutions for the promotion and protection of human rights”.

The NHRIs’ complaint-handling system also indicates how they function. In Nepal, the NHRC received more than 10,000 complaints but so far, only one referred to the violation of indigenous peoples’ rights, which is reaffirmed by the low number reported in AIPP’s project on indigenous peoples’ human rights defenders network in Asia. There were only four complaints deferred to the NHRI out of 25 registered complaints.<sup>45</sup> The study puts forward a few reasons which explain this low number. First, many indigenous people have no idea or awareness on the importance of complaints, much less about the NHRC and its complaint procedure. On the other hand, most of the indigenous leaders who know about complaint procedures have little or no faith in the NHRC, observing that it is still dominated by the dominant caste groups. The Khas Nepali language used in the complaint

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42 Minutes: CSOs/NGOs, Reflective Assessment on the Commission on Human Rights Philippines, UP Diliman, 14 November 2012

43 Asia Pacific Forum of National Human Rights Institutions, *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions* (2012), p 121.

44 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia 2013.

45 AIPP factsheet from the project on indigenous peoples’ human rights defenders network in Asia, data collected from January 2012 to June 2014.

form can still be an obstacle to many indigenous peoples who speak and write only in their own mother tongues. The current planned merger of the Ombudsman's Office and the NHRC can make things worse in terms of complaint handling. The NHRC and the Ombudsman monitored tasks in completely different ways, the former focusing on the task of verifying legal aspects and complaints related to human rights, including the application of the human-rights concept at the level of State policy implementation, while the Ombudsman merely monitors State agencies on the conduct of civil servants and the implementation of laws and regulations by government agencies.<sup>46</sup> Merging the two will complicate further the complaint-handling process and overload the only human rights organ. Thus in February 2015, the civil society representatives submitted a petition to the chairman of the Constitution Drafting Committee (CDC), opposing the planned merger.

The study reveals a similar situation in Bangladesh where indigenous peoples do not submit to the NHRC, opting to contact those within their own network to spread the news of their rights violations. The report from Bangladesh also revealed that apart from Kapaeeng, no other indigenous rights-based organizations have lodged any complaints with the NHRC.

On the other hand, SUHAKAM in Malaysia addressed some pressing human rights issues that are particularly prevalent in the country. After receiving many complaints on land grabs and eroding native customary land rights, the Commission conducted a nationwide Native Customary Land Rights Inquiry<sup>47</sup> starting in 2011 towards the middle of 2012. This experience helped elevate SUHAKAM's name internationally as it was referred to as an example of good practice by the UN Expert Mechanism on the Rights of Indigenous Peoples.<sup>48</sup> Helping indigenous peoples is one of SUHAKAM's core theme in its 2012-2016 Strategic plan, but although it received numerous complaints of human rights violations from the Orang Asal, most of the cases remained unresolved, thus, not much has changed on the ground. There appears to be no reports despite follow-up by the NHRI. However, in December 2013 the Government clarified during the Universal Periodic Review that "a task force comprising senior officials had been established to review and formulate the necessary strategy regarding the issue of indigenous peoples' land rights, pursuant to the national inquiry into the land rights of indigenous peoples in Malaysia undertaken by SUHAKAM."<sup>49</sup>

In May 2014, KOMNAS HAM also launched its first national inquiry into alleged human rights violations linked to land conflicts involving indigenous peoples. The Commission is basing its inquiry on around 140 formal complaints in seven regions – Sumatra, Java, Bali-Nusa, Sulawesi, Kalimantan, Maluku and Papua – in addition to a national hearing.

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46 Group fights CDC decision to merge NHRC, Ombudsman, THE NATION February 4, 2015 1:00 am, <http://nationmultimedia.com/politics/Group-fights-CDC-decision-to-merge-NHRC-Ombudsman-30253309.html>, accessed 5 february 2015.

47 Report of the National Inquiry into the Land Rights of Indigenous Peoples, SUHAKAM, 2013, <https://docs.google.com/file/d/0B2PpIT5XsFQfbE15V0YtdmdETIE/edit>, accessed 5 February 2015.

48 United Nations general Assembly, Human Rights Council, Eighteenth session, Report of the Expert Mechanism on the Rights of Indigenous Peoples Final report of the study on indigenous peoples and the right to participate in decision-making, 17 August 2011, A/HRC/18/42/78.

49 United Nations General Assembly, Human Rights Council, Twenty-fifth session, Report of the Working Group on the Universal Periodic Review, A/HRC/25/10 recommendation 131.

Each hearing involves witnesses, experts, local leaders and advocates from civil society organisations<sup>50</sup>, and aims to issue recommendations to President Joko Widodo<sup>51</sup>. The public hearings started in August 2014 in Palu on the island of Sulawesi<sup>52</sup>. Indonesia's National Human Rights Commission held the testimonial hearing of its National Inquiry for the Papua region in the Law and Human Rights Ministry Regional Office from 26<sup>th</sup> to 28<sup>th</sup> November 2014. The hearing investigated five cases including oil palm plantations' cases and complaints against logging companies. The testimonial hearing noted several findings where indigenous peoples' rights have been ignored, including the State unilaterally classifying and establishing forest status without taking into account the existence of indigenous peoples, resulting in a weakening of the link between Papuan indigenous people and their forests. Another finding was that local government has played a weak role in exerting control over development and has allowed disputes over land and natural resource management to break out. There are 14 points which the National Inquiry's testimonial hearing recommended for the Papua region<sup>53</sup>. Other parts of the Indonesian State have yet to deliver a comprehensive response to this decision, including supporting legislation which would clarify how such forest lands are to be managed.

In India, the website of the NHRC introduced an online complaints process in order to accommodate the increasing number of complaints. Based on the online NHRC statistics, by 1999-2000, the Commission received approximately 50,000 complaints. It also indicates that the NHRC took suo motu cognizance of 12 cases of alleged human rights violations reported by media in October 2014 and issued notices to the concerned authorities. In the 21<sup>st</sup> session of the Human Rights Council in 2012, the Universal Periodic Review recommended India to "(create a) special police and special courts for effective implementation of the Protection of Civil Rights Act and the Scheduled Caste and Scheduled Tribes Act, and the work of the National Commission for Schedule Castes."<sup>54</sup>

In Indonesia, 68% of the cases of violations reported to KOMNAS HAM in 2013 concerned land rights. However, those are the figures represented in the KOMNAS HAM data, when indigenous communities claim a higher number of cases on the ground. In India, the only role of the general NHRC is to handle complaints. The ICC-SCA in its re-accreditation review of the NHRC nevertheless expressed concern on the complaints-handling mechanism and highlighted this area for special attention in its next review of the Commission in 2016.

While acknowledging the limited mandate of NHRIs as recommendatory bodies, many indigenous leaders and organisations are frustrated that governments largely ignore these recommendations. In Bangladesh, the research shows that the biggest obstacle that the NHRC faced in its work to ensure human rights was its own weak implementation, which

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50 Thomson Reuters Foundation, Indonesia probes violations of indigenous rights in contested forests, 29 May 2014, <http://www.trust.org/item/20140529110927-5sw62>, accessed 3 March 2015.

51 Business and Human Rights Resource Centre, <http://business-humanrights.org/en/indonesia-human-rightscommission%E2%80%99s-first-national-inquiry-into-abuses-of-indigenous-peoples%E2%80%99-land-rights>, accessed 3 March 2015.

52 Indonesia to hear indigenous peoples' grievances on land disputes, August 22, 2014, <http://news.mongabay.com/2014/0822-lbell-indonesia-land-disputes.html>, accessed 3 March 2015.

53 Komnas HAM's National Inquiry into Indigenous Rights arrives in Papua, November 30, 2014, <https://awasmifee.potager.org/?p=1101>, accessed 3 March 2015.

54 United Nations General Assembly, Human Rights Council, Twenty-fifth session, Report of the Working Group on the Universal Periodic Review, A/HRC/21/10 recommendation 138.73.

can be explained by the fact that the only action taken by the NHRC consists of writing letters to the officials and of “fact-finding missions” which were qualified as “spot visits”<sup>55</sup> by experts on the NHRC Act 2009. Moreover, in the majority of cases it was found that despite repeated written communications from the NHRC, the responsible authorities accused of violating human rights failed to respond, even ignoring the NHRC’s concerns. However, the NHRC Act 2009 introduced a “mediator” process, which is enforceable by a fine if the parties do not respect the procedure. As stated in the Act, the next step possible for the NHRC is “to recommend to the Government to initiate proceeding for prosecution” and “to submit or cause to submit a petition before the High Court Division of the Supreme Court,” so that the NHRC does not have an independent authority further than a monetary fine. In Thailand, a similar mediation process exists in the NHRC Act. In case of noncompliance with the recommendations, the case then goes to the Prime Minister (section 30) or if he is not competent, to the National Assembly (section 31) for further proceeding. In case of non-compliance with the written agreement under paragraph one, Section 34 and 35 of the Act plan penalties, a person can be liable to imprisonment for a term not exceeding six months or to a fine not exceeding ten thousand Baht, or to both.

During a collation of factsheets on human rights violations done by AIPP’s partners,<sup>56</sup> out of 77 human rights violations documented, only 11 were deferred to the NHRC of Bangladesh, which is either a symptom of mistrust or of a lack of accessibility for indigenous peoples. Another reason for the lack of enforcement is the fact that the institution cannot deal with human rights violations already pending before the court, or with the issues being dealt with under the Ombudsman Act 1980, or any issue relating to matters which can be tried under the Administrative Tribunals Act 1980. It is the same situation in Malaysia, where SUHAKAM may not investigate complaints that are subject of proceedings pending in a court of law or which have been finally decided by any court. Investigations have to cease if the subject matter of a complaint is brought to court. Considering the length of a judgment, this situation prevents the NHRC to deal with most of the cases.

In the Philippines, two cases were cited in our report - the enforced disappearance of James Balao and the displacement of the indigenous peoples in Didipio. Despite the CHR resolutions in the two cases, “there is no effort from the State to surface James Balao,” and the company continues to mine the ancestral domains of the Didipio indigenous peoples. However, this statement has to be balanced. As a matter of fact, in 2011, the Chairperson of the Commission on Human Rights of the Philippines made a statement on their findings following the complaints of indigenous peoples concerning violations allegedly perpetrated by Oceana Gold, a foreign-owned mining company operating in the Philippines. The Commission then issued a resolution which recommended the Government to “consider the probable withdrawal of the Financial and Technical Assistance Agreement granted to the foreign company in view of the gross violations of human rights it has committed.” The Commission also “directed” its own regional office to “actively advocate(s) for the Human Rights of the affected community and to take every step possible to avoid the occurrence of

55 Comment from Sayeed Ahmed, expert on NHRC Act, presently working with Forum Asia.

56 AIPP factsheet from the project on indigenous peoples’ human rights defenders network in Asia, data collected from January 2012 to June 2014.

57 Commission on Human Rights of the Philippines, « Statement on the human rights situation in Barangay Dipidio, Kasibu, Nueva Vizcaya », 17 January 2011, [http://www.chr.gov.ph/MAIN%20PAGES/news/PS\\_17Jan2011\\_didipio.htm](http://www.chr.gov.ph/MAIN%20PAGES/news/PS_17Jan2011_didipio.htm), accessed August 2014.

further violence and oppression.”<sup>57</sup>

The NHRIs can also be put under pressure. This is an accepted fact by the CHRP whose investigators experienced harassments and physical threat in the conduct of their work.<sup>58</sup> In the Philippines, the CHR also allowed some cases of human rights violations committed by military elements to be exposed. For example, General Jovito Palparan, was accused and asked to confirm the contents of lists of victims of extrajudicial executions during his tours of duty in Mindoro (35 killings), Eastern Visayas (22 killings) and Central Luzon (75 killings), but he refused to confirm and even denied the accuracy of the said lists because he insisted he did not have any knowledge of these facts. Although he had been cleared of rights abuses by the military court through an internal, informal investigation in which no records were kept, a probe by the CHRP found that despite having no direct evidence indicating that Palparan was the mastermind of the tortures and killings, there was circumstantial evidence linking him to the killings.<sup>59</sup> The CHRP seizes the opportunities of military officials’ promotion to examine into the human rights complaints against them, as they have to clear their cases to get the new position. In a statement on the Violent Incident in Mamasapano on 27 January 2015, the CHRP Chairperson recalled that the principle of accountability must be emphasized.<sup>60</sup>

In India, a specific issue prevents the NHRC from taking into account the armed forces in its mandate. The Paris Principles state that national human rights institutions “shall be given as broad a mandate as possible being given”. This means that the NHRC mandate should not be restrictive, and its investigative powers must be broadened to include the armed forces. As it currently stands, section 19 of the Human Rights Act precludes the Commission from undertaking its own investigation into the armed forces.<sup>61</sup> This policy is particularly dramatic in northeast India<sup>62</sup> as it excludes the atrocities committed by the army and the paramilitary forces, which are the major actors in this region. This report refers to a 1997 case ruling on *NPMHR v. Union of India* in which the NHRC was also a party. The Supreme Court upheld the constitutionality of the AFSPA and the NHRC pled its helplessness under Section 19 of the Human Rights Act even in cases where the army and paramilitary had contravened it. In this case, the Commission was compromised by its own reluctance to interfere in politically sensitive matters. This is contrary to its obligation under the Paris Principles, under its section “Methods of operation,” which is to “freely consider any questions falling within its competence.”

In Thailand, despite a specific mechanism, the NHRC has difficulties tackling the violations against indigenous peoples. To cite, the nationality revocation of the 1,243 people in Mae Ai district in Chiang Mai province; the forced relocations of several hill tribe villages in the northern part following the War on Drugs policy from 2000-2002; and the refusal of the accessibility or deprivation of the fundamental human rights by the government officials against the non-Thai ethnic minorities. The latest case of human rights violation is the

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58 Comment from Sayeed Ahmed, expert on NHRC Act, presently working with Forum Asia.

59 ManilaMail.com, *FEATURES/MeloCommissionReport-3/Jan. 22, 2007*, INDEPENDENT COMMISSION to Address Media and Activist Killings, <http://www.manilamail.com/features/MeloCom3.htm>, accessed 5 February 2015.

60 CHRP website, Statement of Chairperson Loretta Ann P. Rosales on the Violent Incident in Mamasapano, 27 January 2015, [http://www.chr.gov.ph/MAIN%20PAGES/news/PR\\_27Jan2015\\_Mamasapano.htm](http://www.chr.gov.ph/MAIN%20PAGES/news/PR_27Jan2015_Mamasapano.htm), accessed 5 February 2015.

61 Protection of Human Rights Act 1993, section 19.

62 Northeast India is a region that is home to nearly 200 tribes.

enforced disappearance of “Billy,” a human rights defender of indigenous peoples’ land rights. Despite the international concern on a case of enforced disappearance following a complaint in September 2011 against the officers from Kaeng Krachan National Park for illegal burning and damaging their houses and barns, it had been almost five months and there was still no concrete action taken by the NHRCT.<sup>63</sup> According to a Thai lawyer, it is not possible for the NHRC to address the root of the problem, as it does not have any role of coercion.

However, in 2010, the Thai NHRC accepted a trans-boundary case against a Thai company operating in Cambodia for alleged human rights violations. In October 2014, on behalf of affected Cambodian and Thai communities, a coalition of NGOs filed a complaint against the Malaysian company Mega First before SUHAKAM. The complaint is aimed against Mega First’s construction of the Don Sahong Dam in the Mekong River in Lao PDR, located near the Lao-Cambodian border. The complaint focuses on the irreparable damage to the migratory fish population in the river across Lao PDR, Cambodia, Thailand and Viet Nam and the impact that this will have on the food security and culture of indigenous peoples. The petitioners claim that the developers failed to conduct an appropriate study on the project’s environmental effects and are proceeding with no consultation with the indigenous peoples in the affected countries. Don Sahong will be the first trans-boundary case for SUHAKAM if it decides to act on the complaint. Thus the NHRIs in Southeast Asia are beginning to play their role in trans-boundary human rights issues.<sup>64</sup>

The enabling laws have several limitations and deficiencies that prevent them from being efficient in protecting and defending indigenous peoples’ rights. In Nepal, an inadequate definition of “collective rights” prevents the NHRC from considering cases. In Bangladesh the limitation on full financial independence has been highlighted, and the deficiencies in the procedure for selection of members is present in Indonesia and Malaysia, due to delayed processes. India’s mandate is narrow and does not allow SUHAKAM to investigate major violations, whereas the government in Thailand does not implement the recommendations. According to an expert on NHRIs, the Philippines’ CHR members experience harassment, and are prevented from investigating allegations of human rights violations committed by the military and police.

On the other hand, some initiatives by the NHRIs met with success: the Native Customary Land Rights Inquiry in Malaysia in 2011 highlighted the land rights situation of indigenous peoples. KOMNAS HAM in Indonesia has been evolving positively regarding its selection process, taking into account the acknowledgement and acceptance of the universal values of human rights as a key requirement to be met by applicants. Bangladesh and Thailand have introduced monetary fines into their acts concerning the non-respect of their NHRIs’ recommendations. However, common among the NHRIs referred to in the study is the need to integrate more indigenous peoples into their institutions, to ensure “participatory” action

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63 Bangkok Post, Karen activist’s fate worries UN, 2 May 2014, <http://www.bangkokpost.com/print/407851/>, accessed 5 February 2015.

64 ‘When National Human Rights Institutions become international’, Krizna Gomez, 14 January 2015, IPHRD network, <http://www.iphrdefenders.net/country-updates/asean/921-when-national-human-rights-institutions-become-international>, accessed 3 March 2015.

and involvement.

NHRIs do not always have the power to adopt legally binding decisions, however they are still channels to empower indigenous peoples. They are institutional actors, and their recommendations can be further submitted to international mechanisms as a way to reinforce advocacy and pressure the lack of action from the governments. Even without the mandate to take action, they can make recommendations, and engaging with them for further awareness raising is still important. For instance, with the complaint currently binding before SUHAKAM, indigenous people in Cambodia may be empowered to demand trans-boundary accountability from a corporation.

In spite of the NHRIs' limitations, its increasing attention to indigenous peoples' rights is a positive step in the right direction. It is thereby important for indigenous peoples to engage with NHRIs and collaborate with other social movements and actors in demanding States, as part of their human rights obligations, to implement the recommendations of NHRIs and provide the necessary resource, political and legal environment for NHRIs to function independently and efficiently.

## II. Recommendations

### To the Governments:

- » Ensure that the commission and its members shall be independent, especially from government and non-state actors, such as corporations, and abide by the criteria of the mandate-holders under the Special Procedures of the United Nations (UN) and guided by Paris Principles;
- » Appoint as members of the Commission individuals with proven competence in the promotion and protection of human rights, and in particular, to include an expert on indigenous peoples rights as set out in the UNDRIP;
- » Provide for a transparent selection process that involves extensive and meaningful consultations with civil society, including indigenous peoples; To take concrete measures to make the Commission institutionally, functionally, financially independent;
- » Provide the Commission with as broad a mandate as possible, clearly set in a constitutional or legislative text, specifying its composition and its sphere of competence, and ensuring impartiality concerning official or military bodies ;
- » Provide the commission with adequate resources, and the authority to use these resources freely and independently, to properly fulfill its mandate;
- » To the extent possible, appoint indigenous peoples in the Commission;
- » Enforce the decisions/recommendations of the Commission relating to the respect, promotion and protection of the individual and collective rights of indigenous peoples;
- » Establish mechanisms that enable the Commission to make complaints-handling process more effective and accessible to indigenous peoples, especially those who live in remote areas.

**To the National Human Rights Commission (NHRC):**

- » Make recommendations on ensuring that laws and regulations conform to the fundamental principles of human rights, especially those stated in the UNDRIP regarding indigenous peoples;
- » Develop and execute special outreach programmes directed towards indigenous peoples;
- » Recommend the adoption of new legislations, the amendment of existing legislations and the adoption or amendment of administrative measures, whenever necessary;
- » Draw the attention of the Government to situations in any part of the country where human rights are violated, including violations against indigenous peoples' rights or those occurring in indigenous territories, and make proposals for initiatives to put an end to such situations;
- » Where necessary, to express an opinion on the positions and actions of the Government that impinge ;
- » Encourage the ratification of international instruments or accession to those instruments, including ILO Convention 169, and to ensure their implementation, including compliance with their commitments to the UNDRIP
- » Cooperate with the UN and any other organization in the UN system, regional institutions and national institutions of other countries that are competent in the areas of the protection and promotion of human rights of indigenous peoples;
- » Develop wider public awareness and knowledge of indigenous peoples' rights as provided for in the UNDRIP and undertake measures to combat all forms of discrimination against indigenous peoples;
- » Train the Commission staff to be able to respond sensitively to human rights issues or violations related to indigenous peoples
- » Strengthen cooperation with other national human rights institutions or national human rights bodies in the region, including those in ASEAN member-states, to work more effectively on violations of indigenous peoples' rights that involve cooperation across borders;
- » Cooperate with the regional human rights bodies such as ASEAN Intergovernmental Commission on Human Rights (AICHR) for cases of transnational indigenous peoples' rights violation which requires regional cooperation in dealing with the problem;
- » Establish and continue broad partnerships with indigenous peoples human rights defenders, their communities, and NGOs to launch community mobilizations;

- » Collaborate with NGOs, human rights defenders, and academic institutions that can initiate studies on indigenous peoples' rights violations in their countries;
- » Ensure their financial independence, transparency and accountability through a full public disclosure of their budgets and expenditure statements, including annual financial audits.

**To Indigenous Peoples:**

- » Document immediately any violations they are victims or witnesses to and send the information to the Commission
- » Actively monitor complaints filed and provide necessary responses to the Commission's queries with minimal delay;
- » Increase awareness, promotion and protection of their rights including the translation of the UNDRIP in their own language;
- » Indigenous organizations should give information to their constituencies/communities on the proper court/mechanism which could examine their complaint.

## **III. Country Studies**

### **A. Bangladesh**

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Contributor: Muktasree Chakma



## 1. Indigenous Peoples in Bangladesh

In 2013, Bangladesh had an estimated population of almost 157 million.<sup>1</sup> Although the majority of the population is Muslim, comprising 88 percent, and the Hindus are around 10 percent, there are several groups, or 1.2 percent, who have cultures, languages and religious beliefs that are distinct from the majority.<sup>2</sup> These minority groups generally fall into the category of indigenous peoples. The Bangladesh Bureau of Statistics (BBS), however, does not refer to them as “indigenous peoples,”<sup>3</sup> as the Bangladesh government strongly discourages the use of the term. Instead, it refers to indigenous peoples in Bangladesh as “small ethnic communities.”<sup>4</sup>

In 1991, the government declared that there were a total of 27 small ethnic communities.<sup>5</sup> In the last national population census in 2011, the BBS included a column identifying only the officially recognized 27 communities. The NHRC, community leaders and experts contended, however, that the figure was grossly inaccurate, suggesting that as many as 40 or more communities had been left out of the official list.<sup>6</sup>

In the book “Small Ethnic Groups of Bangladesh: A Mapping Exercise,” author Muhammad Rafi identified 73 indigenous groups while Philip Gain’s “Survival on the Fringe: Adivasis of Bangladesh” claimed that around 90 distinct groups are living across the country.

In 2001, the number of indigenous peoples in Bangladesh stood at 1,772,788, according to BBS, although indigenous peoples’ groups claimed that the figure was in fact much higher. 1,036,060 thereof live on the plains in the north-west, north-east and north-central border areas, south-central and south-eastern coastal areas -- mainly in Dinajpur, Rajshahi, greater Mymensingh, Patuakhali-Barguna-Cox’s Bazar, Sylhet and Moulvibazar Districts, and Jessore and Khulna Districts -- while 736,728 inhabit the Chittagong Hill Tracts in the south-east comprising the three districts of Bandarban, Khagrachari and Rangamati.<sup>7</sup>

In the 2011 national census, the total official number was reduced to 1,586,141, composed of 797,477 males and 788,664 females. Various organizations questioned this data, however, and they estimated the figure to be more than 3 million.<sup>8</sup>

Life for the indigenous peoples in Bangladesh has long been one of struggle. The situation over the past half century has in fact gotten worse for them, as documented in various human rights reports. Throughout history, they have had to struggle to protect their identity and way of life, and a major aspect thereof is securing the right to self-governance and administration.

1 <<http://data.worldbank.org/indicator/SP.POP.TOTL>>.

2 Bangladesh Bureau of Statistics <<http://www.bbs.gov.bd/Home.aspx>>.

3 Population Census 2011.

4 <<http://archive.thedailystar.net/newDesign/news-details.php?nid=195963>>.

5 <<http://www.southasianrights.org/wp-content/uploads/2009/10/final-BD-Minority-Report-2011.pdf>>.

6 <<http://www.aippnet.org/index.php/daily-sharing/400-over-40-ethnic-groups-not-individually-recognised-for-census>>, <<http://www.newagebd.com/detail.php?date=2012-08-09&nid=20048>>.

7 Bangladesh Census 2001 (Provisional).

8 <<http://newagebd.com/detail.php?date=2012-07-17&nid=17400#UxI43M7qKSp>>.

### 1.1. In Chittagong Hill Tracts

Chittagong Hill Tracts [CHT] is a contiguous area in southeastern Bangladesh that borders Myanmar and peopled dominantly by indigenous peoples collective called the Jumma. The indigenous peoples of Chittagong Hill Tracts have for a long time been the targets of massacres, arbitrary detention, torture and extrajudicial killings, notably during the years of armed conflict in 1970s to 1997. The signing of the Peace Accord between the government and the tribal representatives in December 1997 appeared to provide assurances that their civil and political rights, as well as their economic, social and cultural rights, would be respected.

Seventeen years after, however, the government has failed to implement it fully, including some of the most crucial provisions thereof. These include the rehabilitation of returned refugees and internally displaced families, the settlement of the lands confiscated from the indigenous peoples during the conflict, the withdrawal of non-permanent army camps from the area, and the transfer of power to the local administration.

Indigenous peoples are continuously being subjected to torture, abductions and attacks both by the Bengali settlers<sup>9</sup> and law enforcement personnel. In 2009 to 2010, seven indigenous persons were arbitrarily arrested, and four massive attacks against the communities, allegedly with the direct support of State forces, occurred where 511 homes were burned to ashes and 97 indigenous persons were injured.<sup>10</sup>

In 2011, the number of reported arbitrary arrests and detentions was 13 while 29 were subjected to torture. In the same year, four communal attacks took place.<sup>11</sup> In 2012, it was reported that 117 indigenous persons were subjected to torture.<sup>12</sup> In 2013, at least five communal attacks happened where at least 275 homes were destroyed and looted.<sup>13</sup> The area remains under heavy military control and surveillance, and tensions often arise between the indigenous peoples and Bengali settlers.<sup>14</sup> Land-related disputes remain to be a serious concern.

Indigenous women are largely marginalized in terms of socio-economic status and access to justice. The government's stated policy of eradicating racial discrimination has not led to the reserved seats being assigned to indigenous women in local government bodies and the national legislative body, resulting in their lack of participation in political affairs and institutions.

The most commonly reported forms of violence against indigenous women and girls are rape, gang rape, attempted rape, killing after rape, killing, physical assault, molestation, abduction, sexual harassment, and trafficking.<sup>15</sup>

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9 Bengali population who was politically moved from other parts of Bangladesh to Chittagong Hill Tracts.

10 Kapaeeng Human Rights Report 2009-2010, p. 12, Bangladesh.

11 Kapaeeng Human Rights Report 2011, p. 136.

12 Kapaeeng Human Rights Report 2012, p. 38.

13 <<http://www.dhakatribune.com/law-amp-rights/2014/feb/24/indigenous-populace-under-peril-violence#sthash.9vMFsYzZ.dpuf>>.

14 <<http://www.dhakatribune.com/law-amp-rights/2014/feb/26/pahari-bangalee-clash-leaves-10-injured>>.

15 Kapaeeng Human Rights Report 2012, p. 122, and 2013. Foundation, Bangladesh.

## 1.2. In Plain Lands

In north, northeast and central Bangladesh, several indigenous peoples, like the Hajong, Garos, and the Khasi, call these hilly and plain lands their homelands. During the colonial era, the British had forcibly removed indigenous peoples in the plain lands from their ancestral homes and lands, including forests, to maximize profits by using the areas in the production of goods for the international market. They were then sent away to be used as cheap labor for the expansion of colonies in the tea and indigo growing areas in Greater Bengal and in the north-east of Bangladesh. They have since resettled and became farmers or laborers.<sup>16</sup>

They are more vulnerable to rights violations as their population is generally spread out, resulting to a lack of community protection. In 2011 and 2012, 28 and 19 families, respectively, were subjected to attacks.<sup>17</sup> Four indigenous persons were killed while 39 were subjected to arbitrary arrest, detention and torture in 2011. On March 18, 2007, Cholesh Ritchil, an indigenous leader, was allegedly tortured to death in the Kalibari area of Mymensingh after he was taken into custody by State forces.<sup>18</sup>

In 2013, 13 indigenous women were victims of rape, gang rape, attempted rape, killing after rape, killing, physical assault, molestation, abduction, sexual harassment, or trafficking. From 2007 to 2012, 38 were victims of such crimes.<sup>19</sup>

Most of these cases do not see the light of day and often get lost among the backlog of suits.



16 Case study: Access to justice for indigenous peoples in Bangladesh, Raja Devashish Roy, Sara Hossain and dr. Meghna GuhaThakurta, UNDP/PRIP, 2007.

17 Kapaeng Human Rights Report 2011, p. 86.

18 <<http://www.blast.org.bd/issues/ativasi/295>>.

19 Kapaeng Human Rights Report 2012, p. 124.

## **2. Legal Framework**

Since Bangladesh's liberation in 1971, a number of laws were enacted by its government for the protection of indigenous peoples' rights in the country. These laws curiously referred to indigenous peoples as "tribal," "backward sections" and "small anthropological groups."

The Bangladesh Constitution has significant provisions that are applicable to indigenous peoples: Article 2(a) states that the State would ensure the equal treatment of religious groups other than Muslims in the country though the State religion is Islam; Article 23(a), a new amendment, refers to indigenous peoples as small ethnic groups, and adds that, "The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities;" Article 27 provides that all citizens are equal before law and are entitled to equal protection of the law; and Article 28 refers to the "Backward Section of Citizens," which is understood to include indigenous peoples. This 2011 amendment has been condemned by indigenous peoples throughout the country.

The national laws in the country mainly deal with the indigenous peoples' customary judicial systems, the regulation of indigenous societies, their social and cultural rights, and their right to the lands in indigenous inhabited areas. These laws include the Forest Act of 1927, National Human Rights Commission Act of 2009, Small Ethnic Groups Cultural Institution Act of 2010, Narcotics Substantive Control Act of 1990, Social Forestry Rules of 2004, Education Policy of 2010, Child Policy of 2010, and Women Policy of 2011.

Some of the above-stated laws (i.e., Forest Act of 1927, Narcotics Substantive Control Act of 1990 and Social Forestry Rules of 2004), which could be used to protect the indigenous peoples' right to lands and their traditional practices and cultures, are largely being used instead by State authorities in arresting and harassing them. Reports from indigenous inhabited areas allege that forest guards don't hesitate to kill indigenous people, including children, under the guise of protecting forest and reserved forest areas.

An example of abuses of existing laws is the acquisition of indigenous land, and this practice began in 1982. In 2013, under Section 20 of the Forest Act of 1927, the government acquired 8,454,242 acres of land in Rangamati and designated the same as a reserved forest area.

There are regional laws for indigenous peoples either in Chittagong Hill Tracts or in plain lands. In the former, these laws are the Frontier Police Regulation of 1881, Regulation of 1900, Regulation Act of 2003, Headman Manual of 1936, Bazar Fund Manual of 1937, Land Acquisition Regulation of 1958, Development Board Ordinance of 1976, Reserved Forest Fire Protection Rules of 1958, District Ordinance of 1984, Hill District Council Act of 1989, Regional Council Act of 1998, Land Dispute Resolution Commission Act of 2001, Land Khatian Ordinance of 1984, and Peace Accord of 1997. State institutions, including administrative and law enforcement agencies, however, have a tendency not to apply these laws, and instead give preference to the national laws, resulting to the constant failure to recognize and address the peculiar situations of indigenous peoples. In the plain lands,

existing laws are the East Bengal State Acquisition and Tenancy Act of 1950, Vested and Non-resident Property Administration Act of 1974, and Special Affairs Division. To some extent, the first two cited laws have been used in land-related cases involving indigenous peoples in plain lands.

### 3. International Human Rights Treaties

The Bangladesh government has ratified a number of international human rights instruments, including the International Labour Organization Convention (ILO) No. 107 (1957) that guarantees certain rights such as the right to land and self-governance and self-development for indigenous peoples. It has endorsed the Johannesburg Declaration on Sustainable Development, which recognizes the “vital role of indigenous peoples in sustainable development,” as well as the Economic and Social Council Resolution 2000/22 that establishes the United Nations Permanent Forum on Indigenous Issues with a mandate to advise and recommend the Economic and Social Council on economic and social Development, human rights, culture, education, health and environment.

The core international human rights treaties ratified or acceded to by the Bangladesh government are the following:

Treaty	Ratification / Accession(a)
International Convention on the Elimination of All Forms of Racial Discrimination	July 11, 1979 a
Convention on the Elimination of All Forms of Discrimination against Women	November 06, 1984 a
Convention on the Rights of the Child	August 03, 1990
International Covenant on Economic, Social and Cultural Rights	October 05, 1998 a
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	October 05, 1998 a
International Covenant on Civil and Political Rights	September 06, 2000 a
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	August 24, 2011
Convention on the Rights of Persons with Disabilities	November 30, 2007

The Bangladesh government receives funding from donor countries and international agencies for the implementation of these treaties, but it does not always comply insofar as indigenous peoples are concerned.

## **4. NHRI**

Established by the National Human Rights Commission Act of 2009, the Bangladesh National Human Rights Commission (NHRC) was formed as a national advocacy institution for human rights promotion and protection. It vowed to work for human rights, including the dignity, worth and freedom of every human being, as stated in the Bangladesh Constitution.

It started its work in June 2010 as a seven-member body. Despite having a status B accreditation from the ICC, NHRC officials claim that it is an independent, neutral and people-oriented organization.

### **4.1 Functions and Limitations**

The NHRC's functions relate to ensuring respect for human rights in Bangladesh. These functions are specified in Chapter III of the NHRC Act of 2009, which enables the NHRC to launch an inquiry, either *suo motu* or through a petition filed by an affected individual or a party on behalf of the affected individual against any person or public servant, the State or government agency or institution.

It may call for a report from the government regarding the alleged violation committed by State agents. It can also provide legal assistance or advice to the aggrieved person, and can summon the alleged perpetrators, appointing an arbitrator or mediator if necessary.

Following an investigation, the NHRC can then recommend for the alleged perpetrator from the State agency to act in accordance with the procedures stipulated by the NHRC. It is also vested with the power to review the safeguards provided by the Bangladesh Constitution and any other laws, and recommend necessary changes for effective implementation. It can examine draft bills and proposals for new legislation, and verify their adherence to international human rights standards or recommend necessary changes for compliance therewith.

NHRC staff can visit any jail or detention facility, and make recommendations for the improvement of these facilities. It is permitted to review factors relating to terrorism, and recommend the implementation of appropriate remedial procedures.

With the aim of raising public awareness on the human rights situation in the country, the NHRC can conduct research and work with educational and professional institutions to provide advice to the government on the ratification and implementation of international human rights instruments. It provides training to members of law enforcement agencies in order to improve their ability to protect human rights. Finally, if any person or authority to whom a recommendation was made fails to submit a report as directed, or in case of failure to act according to the NHRC directive, the NHRC can report this failure directly to the Bangladesh President.

One of its primary limitations is that the NHRC does not have any power to enforce its findings, as it can merely make recommendations for the promotion and protection of human rights. Additionally, the NHRC Act of 2009 provides that NHRC cannot deal with human rights issues that are pending before the court, issues that are being dealt with under the Ombudsman Act of 1980, or any issue relating to matters which can be heard under the Administrative Tribunals Act of 1980. However, and to complete the limitation stated in the article 12 of the NHRC Act, provision 19, “Procedure after inquiry” indicates under its section 6 that “The Commission shall have the right to intervene in any proceeding involving allegation of violation of human rights pending before any court in any legal proceeding”. The NHRC cannot also look into any human rights violation that happened before it was created.

#### 4.2. Accessibility

One can file a complaint with the NHRC through any mode, whether personally, or by post, e-mail, courier or fax. The complaints can be either written on a plain paper or on the form provided by the NHRC. The form is available on the NHRC website, [www.nhrc.org.bd](http://www.nhrc.org.bd). The NHRC has the option to submit any complaint regarding rights issues directly to its officials. Ordinarily, after a complaint is filed, the complainant receives a serial number, which can be used to find out the action taken by the NHRC thereon.

Presently, the NHRC has only one office in Dhaka, the capital city of Bangladesh. In an interview, the NHRC chairman, Mizanur Rahman, noted that:

According to NHRC legislation, we have a plan to establish NHRC offices at division and Upazila levels. But, till date, we have neither been provided with budgetary allocation nor the human resources. So, we couldn't set up any other NHRC offices in other parts of Bangladesh. We, however, want to at least establish four divisional offices in four divisions and I think CHT would be under the NHRC Chittagong branch.

#### 4.3. Integration

Since the NHRC was established in 2009, it has undertaken activities such as a seminar focusing on the 169 Convention to help promote its ratification at th time, for the promotion and protection of indigenous peoples' rights. It has also been cited in the media on several occasions making public comments on rights violations of indigenous peoples. It has dedicated, however, a great deal of time to promotional and awareness-raising activities, such as providing training, organizing seminars or conducting research.<sup>20</sup> Its five-year strategic plan includes a specific program aimed at improving the situation of indigenous peoples.

Mr. Rahman stated that the plan includes holding conferences and view-exchange programs between Bengali, indigenous peoples and the media, raising awareness on indigenous peoples' rights together with other human rights issues, and producing publications on indigenous peoples' rights, all of which have been labeled as mere

<sup>20</sup> NHRC Annual Report 2011, Bangladesh.

short-term programs by indigenous leaders and rights activists. Most of these activities have involved indigenous peoples' learning about their rights, but have mostly failed to target those who have been violating their rights. Mr. Rahman admitted that:

There is scope for criticism on NHRC's work on indigenous peoples as we are yet to start any long-term work such as policy making for such people. But then again, if you look into these short-term works' outcomes, then you will see that the results of such short-term projects ultimately will help us when we start to work for the indigenous peoples on a bigger scale.

He disclosed that the NHRC has nine permanent thematic committees, one of which is a three-member team specifically dedicated to Chittagong Hill Tracts:

Currently, Nirupa Dewan, an NHRC commissioner who is also an indigenous person, has been given the specific responsibility to prepare the ground for the NHRC to work together with CHT regional indigenous leaders, government officials and Bengali settlers who are allegedly often violating the rights of indigenous peoples. The NHRC has long-term plans to ensure indigenous peoples rights in Bangladesh.

These programs are yet to make significant or positive impacts on the situation of indigenous peoples. From the data provided by Kazi Arfan Ashik, private secretary to the NHRC Chairman, the NHRC received only 11 complaints in 2013 relating to indigenous peoples' rights violations, including five land-related issues and two cases of torture and murder. At the time the interview was conducted, only two land-related complaints from indigenous peoples were filed in 2014.

During the research, at least 20 allegations since the NHRC was created were filed by the indigenous rights organization Kapaeng Foundation, and one by individuals regarding the abduction of Kalpana Chakma. Apart from Kapaeng Foundation, no other indigenous rights organization has lodged a complaint with the NHRC. "As far as I know, we received complaints from one indigenous rights organization, that is, Kapaeng Foundation. We have also received a few complaints by individuals, mostly from the plain lands," the NHRC chairman said. Most of these complaints pertain to land grabbing through government acquisition and by law enforcement agencies or multinational companies, while a few allegations were about violence against women.

On several occasions, the NHRC chairman has expressed his interest in mediating the mistrust between the indigenous peoples in Chittagong Hill Tracts and the State security forces, particularly the armed forces, since most of the allegations of human rights violations are filed against the latter.<sup>21</sup> NHRC is largely limited, however, to writing letters to relevant government authorities. In the majority of cases, the responsible authorities accused of violating human rights fail to respond and ignore the concerns raised, despite repeated written communications from the NHRC.

21 <<http://www.dhakatribune.com/bangladesh/2013/aug/01/nhrc-ready-mediate-talks-between-army-and-indigenous>>.

The NHRC chairman and some members have also visited areas where violations have occurred, mostly when a comparatively large number of indigenous peoples were affected.<sup>22</sup> According to some, however, “systematic and institutional level fact-finding missions with clear guidelines and expertise is not evident.”<sup>23</sup> NHRC officials, however, insisted that:

After the visit of the chairman, the commission sends the fact-finding mission to the spot where the incidents have occurred. It is not true that the fact-finding missions do not work following the appropriate methodology. The commission works very sincerely. Several fact-finding missions have been conducted by the Commission.

Experts on the NHRC Act of 2009, Sayeed Ahmad and Nur Khan, who work for human rights organizations Forum Asia and Ain O Salish Kendra, respectively, pointed out that such fact-finding missions should be labeled as “spot visits” rather than being considered as a part of the investigation process.<sup>24</sup>

The NHRC 2012 Annual Report stated that the number of complaints lodged with the NHRC during that year rose sharply. It added that over the last few years, a growing proportion of these complaints were being disposed of. According to Ain O Salish Kendra, the number of complaints being made to the NHRC is increasing from year to year, from 76 in 2009, to 166 in 2010, 453 in 2011, and 635 in 2012. According to the NHRC, the increasing numbers of complaints is a positive development as it is indicative of the growing trust in the commission. In 2012, the NHRC took up 14 suo motu complaints, and has conducted investigations in nine of them.

Media reports suggested, however, that the NHRC and its secretary do not provide relevant information to the people.<sup>25</sup> NHRC officials explained that since they have no research section, it becomes a burden for the NHRC when one wants to get data to find out how many complaints have been filed on specific issues. The NHRC chairman said:

We have a lack of manpower. And this issue is very serious. When researchers or journalists or any other persons ask for specific issue-related information, we often take a long time to provide them the data. To find that data, our other employees, who are already engaged with other departments, have to work. If we had a department which only deals with data on how many allegations are being filed, and at which stage they are now, ensuring victim’s rights would be easier.

22 <<http://www.dhakatribune.com/law-amp-rights/2013/aug/19/impunity-behind-attacks-advocates-lead-ers>>.

23 Comment from Sayeed Ahmed, expert on NHRC Act and presently working with Forum Asia.

24 Interview of Nur Khan and Sayeed Ahmed of Ain O Salish Kendra and Forum Asia, respectively.

25 <<http://www.dhakatribune.com/bangladesh/2014/jun/26/%E2%80%98info-commission-does-not-provide-information%E2%80%99>>.

He also mentioned that despite the finance ministry being informed of the need for a research department, the ministry did not allocate any funds for the same. “This is sad. We are planning to hold a meeting with the Finance and Law ministries soon and we will reiterate the issue there again,” he disclosed.

#### **4.4. Analysis of Cases Handled by NHRC**

##### *The eviction of 21 Chak Families in Bandarban*



In April 2013, 21 Chak families were evicted from their homesteads at Badurjhiri, a village located in Alikhyongmouza in Bandarban district. They were forced to leave due to the continued harassment, violence, robberies, and land grabbing that they faced. Around 582 acres of land in the Badurjhiri have been occupied by land grabbers. On March 13, 2013, a group of about a dozen robbers attacked the villagers at around 9:00 p.m., looted valuables and threatened the villagers before leaving. The affected families took shelter in three villages in Headmanpara, Moddyampara, and Uporpara in Baisharimouza. Most of the affected families were Jum cultivators or those involved in traditional shifting cultivation agriculture.

On May 12, 2013, the Kapaeng Foundation lodged a complaint with the NHRC, requesting an on-site inquiry into the matter. The following day, the NHRC made a request to the Secretary of the Ministry of Chittagong Hill Tracts Affairs to conduct an investigation and to submit a report to the NHRC. The Ministry appointed deputy Alamgir Hossain to conduct the investigation. From May 29 to 31, Hossain conducted an inquiry on-site, and depositions were taken from the victims, as well as from the locals, traditional leaders, public representatives and the local administration. On June 11, 2013, a 32-page report was submitted to the NHRC.



The evidence gathered showed that indigenous Chak villagers were evicted from their ancestral lands, and the culprits were identified as influential Bengali land grabbers. The Ministry produced a list naming 14 individuals involved in stealing the lands. The report recommended the immediate arrest of the 14 individuals, as well as the return of the lands to the affected families and the implementation of measures to protect their safety.<sup>26</sup> When contacted, locals from the area confirmed that after the investigation, they are in a comparatively better position but they still feel the threat of eviction.

### *The abduction and disappearance of Kalpana Chakma*

Kalpana Chakma, an indigenous and women's rights activist, was abducted on June 12, 1996 from her home in New Lalyaghona, Baghaichari in Rangamati, a remote part of the Chittagong Hill Districts, the most heavily militarized part of Bangladesh. To this day, authorities failed to provide any information regarding her whereabouts 17 years since her abduction, which is alleged to have been committed by army personnel, mostly due to negligence in conducting a thorough and impartial investigation.

Kalpana was abducted several hours before the polling for the 7th national elections began. She had been campaigning for independent candidate Bijoy Ketan Chakma, then a senior presidium member of Pahari Gana Parishad, and supported by all peoples organizations. Kalpana's brother, Kalindi Kumar Chakma, later filed a first information report detailing his sister was abducted by Lieutenant Ferdous from the Kojochori Army camp in Rangamati and two members of the Village Defence Police --Nurul Haque and Salah Ahmed.<sup>27</sup> The police has already missed the submission deadline for their report twelve times.<sup>28</sup> The current investigating officer, Amena Begum, Rangamati Police Superintendent, offered little information on the status of the investigation when contacted by journalists regarding the case.<sup>29</sup>

Despite of the fact that the events happened in 1996, the NHRC is still trying to investigate the case, which is an example of good practice. The NHRC chairman also expressed frustration over the slow pace of investigations on cases of violence against women. According to a media report, Mr. Rahman said, "The law does not permit us to take action against anyone. Whenever we receive any allegations, we talk to the authorities concerned for actions. We are not even supposed to speak of the military forces although we receive allegations against some members of the armed forces in the CHT. We do not get responses from the defence ministry as quickly as we get from the home ministry."<sup>30</sup>

26 Kapaeeng Human Rights Report 2013.

27 <<http://www.onebillionrising.org/6281/rise4justice-blog-bangladesh-rising-kalpana-indigenous-activist-victim-militarization-impunity-muktasree-chakma-sathi/>>.

28 Excerpts from the interview of activists and lawyers engaged in monitoring the Kalpana Chakma case.

29 <<http://www.dhakatribune.com/weekend/2014/jun/19/eighteen-years-night#sthash.PSHHtes7.dpuf>>.

30 <<http://newagebd.net/20077/sexual-violence-in-chittagong-hill-tracts/#sthash.YXQjhty5.dpbs>>.

Indigenous woman leader Chanchana Chakma has sought assistance from the NHRC by filing a complaint therewith. It was filed after Mr. Rahman called on the indigenous leaders to file an application regarding the abduction. The NHRC chairman stated that they are monitoring the case due to its sensitive nature, but as far as the NHRC Act of 2009 is concerned, however, the NHRC cannot work on any human rights violation that took place before it was created.

#### **4.5. Gaps and Challenges**

A large gap was identified between the promotion and protection of indigenous peoples' rights, on the one hand, and the NHRC's work pursuant thereto, despite a noticeable level of mutual respect and cooperation between them. Partly due to the high number of human rights violations occurring in the other sectors of society (e.g. extrajudicial killings and violence against religious minorities, the sheer scale of overall rights violations in the country), the NHRC is unable to prioritize addressing the violations being committed against indigenous peoples. A lack of manpower further restricts its ability to pursue such cases. Indigenous leaders cited the lack of a designated official to specifically deal with violations against indigenous peoples as a major contributing factor.

Acknowledging the foregoing observations, the NHRC chairman added that there is a need for more indigenous people to be appointed or engaged with the NHRC. "This is a Bengali dominated institution, presently. Maybe we need to work on this matter too. I do believe that if there are some familiar faces, the indigenous victims will feel more connected and comfortable with this institution and the gap between them and us can be reduced," Mr. Rahman said. Moreover, indigenous peoples and organizations often do not monitor the progress of their complaints or keep appropriate documentation thereof. Poor or limited institutional and individual capacity, financial restraints and lack of awareness among indigenous people and organizations have also been observed.

The NHRC chairman pointed out that sometimes the indigenous people or organizations do not respond to their queries even after repeatedly being contacted. "They file the complaints, we inquire with the alleged violators. After the alleged violator replies to us, we again contact the complainant. This is our normal procedure. But we have observed that sometimes they don't respond regarding the alleged violator's explanation. In such cases, we have no other choice than to just close the file," Mr. Rahman disclosed.

## 5. Recommendations

The recommendations below focus on contributing more effectively in the promotion and protection of indigenous peoples' rights across the country.

### 5.1 Recommendations for the NHRC:

- 1) To maximize its powers under the NHRC Act of 2009;
- 2) To implement a more effective process in handling and addressing complaints, as the present model of fact-finding missions and sending written communications to the alleged perpetrators are not sufficient;
- 3) To make the State and its law enforcement agencies accountable in their failure to provide satisfactory and credible outcomes in human rights violations;
- 4) To hire officials coming from the indigenous community to specifically deal with indigenous peoples' issues;
- 5) To inform the Government of Bangladesh on a regular basis regarding the indigenous peoples' rights violations in the country;
- 6) To conduct independent investigations;
- 7) To establish a research or information section to accurately and efficiently monitor the number, nature and status of complaints filed;
- 8) To establish a more financial independence from the government finance department;
- 9) To have its own independent secretariat; and
- 10) To establish branch offices in areas with a high concentration of indigenous peoples to ensure them an accessibility to justice.

### **5.2 Recommendations for the Government of Bangladesh:**

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- 1) To take steps to accord the NHRC institutional, functional and financial independence;
- 2) To address inadequacies and loopholes in the NHRC Act 2009 through legislative amendments, in collaboration with indigenous representatives and organizations;
- 3) To put in place effective procedures through which the NHRC can launch disciplinary proceedings against State officials and officers who fail to cooperate in the investigations of rights violations;
- 4) To remove the provisions in existing laws which limit the NHRC's ability to investigate certain types of rights violations when allegedly committed by State security forces;
- 5) To provide the NHRC with sufficient budgetary support; and
- 6) To cooperate actively with the NHRC to improve the latter's system in handling complaints.

### **5.3 Recommendations for IPs and IP organizations:**

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- 1) To increase their awareness on their rights and to promote and protect them;
- 2) To actively monitor the complaints they have filed and to provide necessary responses to NHRC queries with minimal delay;
- 3) To improve the personal and organizational capacities through capacity-building, educational and training initiatives in order to better equip indigenous peoples' communities in promoting and protecting their rights, and in pursuing the perpetrators of rights violations.

## B. India

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Contributor: Ningreichon Tungshang



## 1. Indigenous Peoples in India

The Scheduled Tribes (STs) in India are generally considered as indigenous peoples. India has the largest indigenous population in the world at over 80 million, in over 700 distinct communities with distinct cultures, languages and traditions. The Indian government, however, does not officially recognize its STs as indigenous peoples, and instead considers all its citizens as indigenous to India.

STs as mentioned in Article 366 (25)<sup>1</sup> of the Indian constitution have de facto been treated as indigenous peoples in India<sup>2</sup> in the international, political and legal discourse. STs are such tribes or tribal communities or part of or groups within such tribes and tribal communities which have been declared as such by the President through a public notification.<sup>3</sup> They are clearly distinguished from the caste groups or other minority groups, and are accorded special status in the Indian Constitution. They are also entitled to various positive discriminative actions because they are considered as one of the weakest groups of people with a long history of deprivation and economic, social and political marginalization.

The STs are defined according to the following characteristics, which are well accepted and widely used in academic discourse, and for administrative purposes and policy making: primitive traits, geographical isolation, distinct culture, shy of contact with community at large, and economically backward. About 15 percent of the country's land area is inhabited by tribal communities comprising 702 tribes<sup>4</sup> spread across 31 states, and concentrated mainly in the north-central belt of India, also known as the tribal belt, and the North-Eastern region. There is no tribal population found in Punjab, Haryana, Delhi, Chandigarh, and Puducherry.

The Ministry of Tribal Affairs describes STs as the most underprivileged of the Indian society<sup>5</sup> and they continue to be the most marginalized, dispossessed and backward section with least access to health, social and development services. The Indian Vice President of India said in an international seminar that, "If there is any group of Indian people who have been shabbily treated, it is the 'adivasis' (tribals). They have been disgracefully treated, neglected for the last 6,000 years and they suffer from geographical and social exclusion, high poverty rates and lack of access to appropriate administrative and judicial mechanisms."<sup>6</sup>

Per the 2011 census, the population of STs is 104.28 million constituting 8.6 percent of the country's total population, with Lakshadweep having the highest population of STs at 94.8 percent. Their literacy rate is 47.1 percent compared to the national literacy rate of 64.84 percent. Key health indicators like infant mortality rate among the STs is as high as

1 Article 366 (25) defines scheduled tribes as "such tribes or tribal communities or part of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this constitution."

2 <<http://www.ifad.org/english/indigenous/pub/documents/tnotes/india.pdf>>.

3 <<http://indiankanoon.org/doc/768139/>>.

4 <<http://www.tribal.nic.in/Content/list%20of%20Scheduled%20Tribes%20in%20India.aspx>>.

5 <<http://tribal.nic.in/>>.

6 <[http://www.nchro.org/index.php?option=com\\_content&view=article&id=6919:tribal-literacy-rate-is-far-below--hamid-ansari&catid=5:dalitsatribals&Itemid=14](http://www.nchro.org/index.php?option=com_content&view=article&id=6919:tribal-literacy-rate-is-far-below--hamid-ansari&catid=5:dalitsatribals&Itemid=14)>.

62.1 percent while the mortality of children under five is 95.7 percent.<sup>7</sup> Among all social groups, the STs have the highest percentage of population below poverty line, at 47.3 percent in the rural area and 33.3 percent in the urban area.<sup>8</sup>

## 2. International Human Rights Instruments

Treaty	Ratification / Accession(a)
International Convention on the Elimination of All Forms of Racial Discrimination	December 03, 1968
International Covenant on Economic, Social and Cultural Rights	April 10, 1979 a
International Covenant on Civil and Political Rights	April 10, 1979 a
Convention on the Rights of the Child	December 11, 1992 a
Convention on the Elimination of All Forms of Discrimination against Women	July 09, 1993
Convention on the Rights of Persons with Disabilities	October 01, 2007

India voted for the adoption of the UNDRIP at the UN General Assembly on September 13, 2007. The Indian government also ratified the ILO Convention on Indigenous and Tribal Populations, 1957 (No.107) in 1958.

## 3. NHRI

In India, the NHRI is the National Human Rights Commission (NHRC) with each state establishing its one State Human Rights Commissions (SHRC). There are various governmental institutions, however, that function to promote and protect the rights of indigenous people. These are the National Commission for Women (NCW), the National Commission for Protection of Child Rights (NCPCR) and its State Commissions for Protection of Child Rights (SCPCR), the National Commission for Minorities (NCM), and the National Commission for Scheduled Tribes (NCST).

Except for the NCST, which has been created in the Constitution under the 89th Amendment Act, 2003, all other human rights institutions at the national level have been established through the following statutes: Protection of Human Rights Act of 1993, National Commission for Women Act of 1990, Commission for Protection of Child Rights Act of 2005, National Commission for Protection of Child Rights Rules of 2006, National Commission for Minorities Act of 1992, National Commission for Scheduled Tribes Rules of 2004, National Commission for Minorities Regulations of 1997, Rules of procedures of the National Commission for Scheduled Castes 2004.

<sup>7</sup> NFHS 2005-06.

<sup>8</sup> Planning Commission 2004-05, Government of India.

### 3.1. National Human Rights Commission

India's NHRC is the premier institution tasked to investigate human rights violations or the failure of the State to prevent such violations. It was established pursuant to the Protection of Human Rights Act of 1993, as a result of pressure at the international and domestic levels due to India's poor human rights record. An autonomous body, it consists of a chairperson and eight members. Under Section 3(3) of the Protection of Human Rights Act of 1993, the chairpersons of the NCM, NCW, NCST and National Commission for Scheduled Castes (NCSC) are ex officio members of the NHRC.

Currently, there are 23 SHRCs in the country, with six among them in Karnataka, Rajasthan, West Bengal, Madhya Pradesh, Odisha and Tamil Nadu with their respective acting chairpersons only, while the position of a chairperson is vacant in four SHRCs in Himachal Pradesh, Manipur, Jammu and Kashmir.<sup>9</sup> Most of these SHRCs do not have a full-fledged staff.

The functions<sup>10</sup> of the NHRC are the following:

- 1.) Handling of complaints relating to violations of human rights;
- 2.) Intervening in courts where issues relating to human rights are pending;
- 3.) Visits to prisons and detention centers;
- 4.) Promoting human rights literacy;
- 5.) Review of all existing laws that impede human rights;
- 6.) Study of treaties and human rights standards, and working to bring about their effective implementation in India;
- 7.) Research in the field of human rights, and encouraging the participation of non-governmental organizations; and
- 8.) Undertake any other function for the protection of human rights in the country.

The NHRC cannot inquire, however, into any matter after a year of occurrence of the violation even if the case is of serious nature. And despite having been in existence for more than 20 years, it is yet to firmly establish itself as an independent body that functions as a watchdog for human rights, and it is grappling with lack of transparency.

The selection of the chairperson and its members is made on the recommendations of a committee composed of the Prime Minister, Home Minister, Speaker and leader of the opposition in the House of the People, and Deputy Chairman and leader of the opposition in the Council of States. Only a former Chief Justice can be the NHRC chairman. This narrows the selection of the chairperson only to people from the judiciary, and they are not necessarily possessed with the expertise or commitment to human rights, consequently eliminating plurality of perspectives, vocations and diverse experiences from the civil society.<sup>11</sup>

9 <<http://nhrc.nic.in/> accessed on 8/7/2014>.

10 [ ANNI Report on the Performance and Establishment of National Human Rights Institutes in Asia 2013, p. 131.]

11 [ <<http://www.humanrightsinitiative.org/>>.]

According to the Asian Centre for Human Rights, the NHRC's composition does not reflect the plurality as required under the Paris Principles. Although the chairpersons of the NCM, NCW, NCST and NCSC are included as statutory members, they are already busy with their respective commissions, essentially resulting to a lack of effective representation in the NHRC from the minorities, women, STs, and SCs.<sup>12</sup> Delays in the appointments are also a concern, and the integrity of the appointed is not seriously considered as when there have been cases for initiation of impeachment.<sup>13</sup>

In December 2013, an Independent People's Tribunal (IPT) was organized in Delhi on the functioning of the NHRC. There was a strong case of corruption charges against the present NHRC chairperson before the Supreme Court of India, and yet he continues to hold office. It was also reflected that there is no transparency in the appointment process, indicating that appointments depend on the appointee's ties and connections with people in power. Opposition leaders of the Indian Parliament have stressed the need to appoint reputable persons from human rights background, and pointed out that in the current NHRC leadership, there was neither a woman nor a representative of the Northeast, nor a media person nor anybody associated with human rights organizations.<sup>14</sup>

The IPT revealed that the process of appointment [a] does not include publicising the vacancies; [b] does not maximize the candidates for positions from the groups that they are to represent; [c] has no broad consultation of the appointment committee in the application, screening, selection and appointment process; and [d] has no pre-determined objective and publicly known criteria for appointment. It further stressed that the appointment of a former police officer as an NHRC member paved way for many SHRCs in the country to appoint former police officials as their members. This affects the confidence of the public since most of the complaints filed with the NHRC and the SHRCs are against the police. The UN Special Rapporteur on Human Rights Defenders has also recommended current or former members of the police or military and security agencies should not be involved in investigation of human rights violations allegedly committed by State actors.<sup>15</sup>

Like any other institutions, the NHRC's role is still limited to covering civil and political rights, and the nature of the cases that it handles is mostly individual cases and relates to custodial deaths, illegal detention, torture and encounters. It has yet to deal with the issues being faced by the STs and the economic, social, political, environmental and cultural rights of the people. The non-binding nature of NHRC's recommendations is a limitation to its functions.<sup>16</sup> The composition, mandate, functions, and powers of NHRIs in India vary, and these differences affect their effectiveness as they are not allowed to pursue or look into complaints filed with another commission.

In the 2003-04 Annual Report of the Ministry of Home Affairs, India detailed that it faces intensive internal armed conflicts in Assam, Arunachal Pradesh, Jammu and

12 <<http://www.achrweb.org/theme/nhri.html>>

13 <<http://www.dnaindia.com/india/report-plea-for-removal-of-national-human-rights-commission-chief-kg-balakrishnan-a-serious-issue-supreme-court-1904897>>.

14 <<http://timesofindia.indiatimes.com/india/Two-NHRC-appointments-in-2013-violated-SC-norms/articleshow/39016055.cms>>.

15 <<http://www.ohchr.org/Documents/Issues/Defenders/A-HRC-19-55-Add1.pdf>, Para 152>.

16 <<http://infochangeindia.org/agenda/access-to-justice/multiplicity-of-human-rights-institutions.html>>.

Kashmir, Meghalaya, Manipur, Mizoram, Nagaland and Tripura. In addition, Indian states of Andhra Pradesh, Bihar, Chattisgarh, Orissa, West Bengal, Madhya Pradesh, Maharashtra, and parts of Uttar Pradesh are affected by the left wing Naxalites movement against inequity and social injustice. In most of these situations, State armed forces have been deployed and they are known



for their disrespect and violations of human rights. The NHRC, however, does not have any say and jurisdiction over these cases even when gross violations take place.

In a press note<sup>17</sup> sent by the Naga Peoples Movement for Human Rights (NPMHR) on March 10, 2013, it expressed that in the northeast of India, the NHRC and SHRC are not relevant, as their mandate excluded looking into the atrocities committed by the army and the paramilitary forces. Human rights issues in Northeast India mostly emanated from the violations reportedly perpetrated by the army and paramilitary forces, and these violations are shielded by the infamous Armed Forces (Special Powers) Act of 1958 (AFSPA) and by section 19 of the Human Rights Act, which allegedly directly contravenes and violates the right to life, though the Supreme Court upheld its constitutionality in the 1997 ruling in NPMHR v. Union of India.

NPMHR further stated that “unless a radical change in the laws, particularly bringing the acts of the army and paramilitary within the scope of NHRC, and the impunity enjoyed under AFSPA is changed as has been recommended by various non-State and State agencies including the Jeevan Reddy Committee,<sup>18</sup> the visit of the NHRC would remain a meaningless exercise for the people of Northeast India.”



17 <<http://www.humanrights.asia/news/forwarded-news/AHRC-FST-045-2013>>.

18 [A Committee set up by the central government in 2010 with the mandate to review the provisions of the Armed Forces Special Powers Act of 1958.]



### 3.2. Ministry of Tribal Affairs

Established in 1999 after dividing the Ministry of Social Justice and Empowerment (MoSJE), the Ministry of Tribal Affairs (MoTA) is the nodal Ministry for the overall policy, planning and coordination of programs for STs, particularly in providing a more focused approach on their integrated socio-economic development. Previously, the tribal affairs were handled by the Tribal Division, a part of the Ministry of Home Affairs, by the Ministry of Welfare from 1985 to 1998, and then by the MoSJE until 1999.<sup>19</sup>

MoTA's areas of activity include the following:

- 1.) Social security and social insurance to STs;
- 2.) Tribal Welfare (i.e., tribal welfare planning, project formulation, research, evaluation, statistics and training);
- 3.) Promotion and development of voluntary efforts on tribal welfare;
- 4.) Scheduled Tribes, including scholarship to students belonging to such tribes;
- 5.) Development of STs, and all matters including legislation relating to the rights of forest dwelling STs on forest lands;
- 6.) Scheduled Areas (SAs) and regulations framed by the Governors of States for SAs;
- 7.) Commission to report on the administration of SAs and the welfare of ST, and issuance of directions on the drawing up and execution of schemes essential for the welfare of the STs in any State;
- 8.) The NCST; and
- 9.) Implementation of the Protection of Civil Rights Act of 1955 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act of 1989, excluding the administration of criminal justice regarding offenses insofar as they relate to STs.<sup>20</sup>

<sup>19</sup> <<http://tribal.nic.in/index.aspx>>.

<sup>20</sup> <<http://tribal.nic.in/Content/Abouttheministry.aspx>>.

Under the MoTA, a special plan called Tribal Sub-Plan was initiated in the Fifth Five-Year Plan, where funds are earmarked specifically for the socio-economic development of the STs.

### **3.3. National Commission for Scheduled Tribes**

NCST was constituted in March 2004 after dividing the erstwhile National Commission for Scheduled Castes and Scheduled Tribes (NCSC/ST) into the NCSC and NCST. Its chairperson and vice chairperson have the rank of Union Cabinet Minister and Minister of State, respectively, while the members have the rank of a Secretary to the Government of India.

Under Clause 8(A) of Article 338A of the Indian Constitution for Investigation and Inquiry, NCST is vested with the powers of a civil court with the following authority:<sup>21</sup>

- 1.) Summon and enforce attendance of any person and examine on oath;
- 2.) Discovery and production of any documents;
- 3.) Receive evidence on affidavits;
- 4.) Requisitioning any public record or copy thereof from any court or office;
- 5.) Issue commissions for examination of witnesses and documents; and
- 6.) Any matter which the President, by rule, may determine.

It has numerous roles and responsibilities, viz.:<sup>22</sup>

- 1.) Investigate and monitor matters relating to the safeguards provided for the STs under the Constitution, other laws or government orders, and evaluate the working of such safeguards;
- 2.) Inquire into specific complaints relating to the rights and safeguards of the STs;
- 3.) Participate and advise in the planning process relating to the socio-economic development of the STs, and evaluate the progress of their development under the Union and any State;
- 4.) Submit report to the President annually, and at such other times as the NCST may deem fit, upon working of safeguards and measures required for the effective implementation of programmes and schemes relating to the welfare and socio-economic development of the STs;
- 5.) Discharge such other functions in relation to the STs as the President may, subject to the provisions of any law made by Parliament, specify; and
- 6.) Discharge other functions in relation to the protection, welfare, development and advancement of the STs.

The Indian Constitution does not provide for the establishment of State level commissions, but some States have enacted legislations for the creation of a joint commission for STs and SCs, and the Governor is the appointing authority therein.

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21 <<http://ncst.nic.in/index2.asp?slid=425&sublinkid=250&langid=1>>.

22 <<http://ncst.nic.in/index2.asp?slid=424&sublinkid=247&langid=1>>.

### 3.4. Committee on Welfare of Scheduled Castes and Scheduled Tribes

The Committee on the Welfare of Scheduled Castes and Scheduled Tribes consists of 30 members -- 20 have been elected from the Lok Sabha, the lower house of Parliament, and ten members of Rajya Sabha, the upper house of Parliament. The Speaker appoints the Committee from among the members elected thereto.

It has to consider the reports submitted by the NCSC and NCST, and needs to report on the action taken by the Government thereon. It examines the representation of SCs and STs in the Central Government Departments, Central Public Undertakings, Nationalized Banks, Statutory and Semi Government bodies, and reviews the working of welfare programs for SCs and STs in the Union Territories. The Committee can also examine the implementation by the State Governments of various programs for the welfare of SCs and STs that are partially or wholly funded by the Central Government.

It can appoint Sub-Committees or Study Groups to carry out detailed examinations on various related issues, and it receives complaints or representations from SCs and STs and from various SCs/STs Welfare Associations on their grievances pertaining to their welfare. The complaints or representations received are examined, and the cases determined to be genuine are referred to the authorities of the Central or State Governments for action or comments.<sup>23</sup>

## 4. Laws

The Indian Constitution guarantees the welfare and promotion of the social, economic and educational status of the STs. It has 209 articles and two special schedules known as Schedule V and Schedule VI<sup>24</sup> related to social, economic and political welfare that are applicable to the STs. The Indian government enacted several statutes to safeguard, protect and ensure the rights and privileges of the STs.

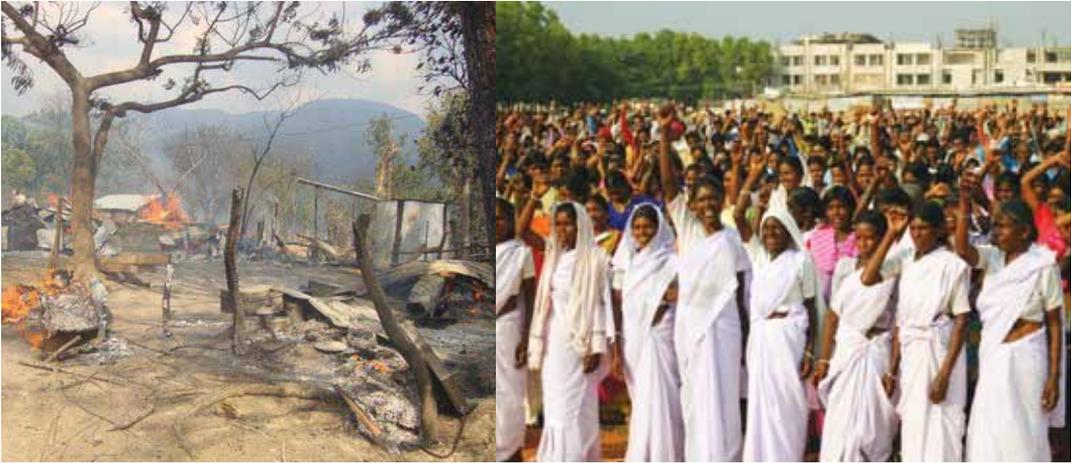
### ***Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of 1989 (Act No. 33 of 1989)***

The purpose of this law is to prevent the commission of offenses or atrocities against the members of the SCs and the STs, and contains provisions for special courts, criminal law, relief and compensation for the victims. It has provisions that establish special authorities for the implementation and monitoring of this law.<sup>25</sup>

23 <[http://164.100.47.132/LssNew/abstract/committee\\_on\\_the\\_welfare\\_of.htm](http://164.100.47.132/LssNew/abstract/committee_on_the_welfare_of.htm)>.

24 Adapted from India and the Rights of Indigenous Peoples: Constitutional, Legislative and Administrative Provisions Concerning Indigenous and Tribal Peoples in India and their Relation to International Law on Indigenous peoples, p.33-34.

25 <<http://socialjustice.nic.in/poa-act.php>>.



***Scheduled Tribes and other traditional forest dwellers  
(Recognition of forest rights) Act of 2006***

This Act, also called the Forest Rights Act, aims to recognize and vest the forest rights and occupation in forest land to the forest dwelling STs and other traditional forest dwellers who have been residing in such areas for generations but whose rights could not be recorded. The MoTA is the nodal Ministry while the tribal department at the State or Union Territory level is the nodal agency entrusted with the implementation of the Act. Rules thereof were issued in 2008 and amended in 2012 to strengthen the implementation of the law.<sup>26</sup>

***Panchayat (Extension to the Scheduled Areas) Act of 1996 (Act No. 40 of 1996)***

This is a law that is often described as a Constitution within the Constitution. It aims to promote people-centric governance, a departure from the colonial laws of governance that pervaded the Indian administration. The Act empowers the village as the governing unit for self-governance, especially with regard to natural resources, development and dispute resolution.



***Bonded Labour System (Abolition) Act of 1976 (Act No. 19 of 1976)***

The aim of this Act is to abolish the practice of bonded labour to prevent the economic and physical exploitation of the weaker sections, including STs, of society. It aims to free unilaterally all the bonded labourers from bondage with the simultaneous liquidation of their debts, and made the practice of bondage punishable by law.

<sup>26</sup> <<http://tribal.nic.in/Content/ForestRightActOtherLinks.aspx>>.

### ***Child Labour (Prohibition and Regulation) Act of 1986***

This Act prohibits the employment of children below 14 years old in hazardous occupations identified in the law. The list of hazardous occupations was expanded in 2006 and 2008. The largest number of child workers in all categories of work is found among the STs in the group 5-14 years old.

Despite these legal safeguards and targeted interventions to improve the lives of the STs, they remain to be the most vulnerable and exploited people in India. There are also various Acts and national policies that work against the STs, and these are increasingly used as instruments to dispossess the STs of their land and natural resources, as stated hereunder.

### ***Land Acquisition Act of 1894***

This Act was formulated during the British rule to allow the government to forcibly acquire land from private landholders for projects of public purpose. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013 replaced the Land Acquisition Act of 1894. It deals with the procedure to be adopted for land acquisition and grant of compensation, rehabilitation and resettlement to the affected persons due to land acquisition. The most important feature of the Act is that the developers need the consent of up to 80 percent of people whose land is acquired for private projects, and 70 percent of the landowners in the case of public-private partnership projects. It also provides for compensation as high as four times more than the existing practice in rural areas and two times in urban areas.<sup>27</sup>

### ***National Industrial Policy of 1991***

This policy pushed the economy to liberalization<sup>28</sup> and integrated the Indian economy into the world economy by removing restrictions on direct foreign investments and free domestic entrepreneurs from the restrictions under the Monopolies and Restrictive Practices Act. It abolished industrial licensing except for some specified industries. With the State yielding to the private enterprise, the social objectives of equity with growth and the protection of the interests of the STs are abandoned.

### ***National Mineral Policy of 2008***

This seeks to develop a sustainable framework for the optimum utilization of the country's natural mineral resources. India has a history, however, of mining projects displacing around 25.5 lakh<sup>29</sup> people from 1950 to 1991, and 52 percent thereof comes from the STs. More and more forest lands have been diverted to mining, resulting to the continued destruction of forests and taking of lands from the STs. From 1998 to 2005, 216 mining projects were granted forest clearance annually, as against 19 per year during 1980 to 1997.<sup>30</sup>

27 <<http://www.livelaw.in/land-acquisition-act-2013-comes-into-effect-from-today/>>.

28 <<http://www.preservearticles.com/2012013022068/short-notes-on-industrial-policy-1991.html>>.

29 A lakh is a unit in the South Asian numbering system equal to one hundred thousand.

30 <<http://infochangeindia.org/environment/analysis/indias-new-mineral-policy-will-usher-in-gloom-for-adv-asis.html>>.

## **5. Actual Cases**

### *The death of Korra Satya Rao in Vasapanda village, Andhra Pradesh*

The Secretary of the Andhra Pradesh Civil Liberties Committee filed a complaint with the NHRC in May 1994 alleging that police officers raided the Vasapanda village in Visakhapatnam district, Andhra Pradesh on 27 April 1994, rounding up a group of tribals and beat them up supposedly for providing food and shelter to the Naxalites. One the victims, Korra Satya Rao, sustained severe injuries to his head and shoulders, and died on 5 May 1994.

Investigations conducted by the Sub-Collector and Assistant Superintendent of Police confirmed the complicity of a Sub-Inspector and three police constables in the incident that led to the death of Rao. In its proceedings on February 17, 1995, the NHRC recommended that the police officers involved be prosecuted and that Rao's next of kin be compensated.

### *The killing of civilians in Ukhrul town, Manipur*

In a complaint on June 09, 1994, civilians were allegedly killed when they were caught in a cross-fire between elements of the Assam Rifles, a paramilitary unit of India's armed forces, and guerillas of the Nationalist Socialist Council of Nagaland (NSCN), a nationalist militant group. The complaint alleged that the Assam Rifles engaged in indiscriminate firing, that civilians had been killed, detained and subjected to acts of physical torture, and the Assam Rifles looted cash and valuables and destroyed properties. All this was supposedly in retaliation to the earlier killing of two Assam Rifles officers by NSCN guerillas.

The NHRC called for a report from the Ministry of Defence (MoD) on the matter. In its report on December 06, 1994, the Army Headquarters stated that NSCN insurgents had shot two Assam Rifles officers on duty, in an ambush in Wino Bazar of Ukhrul town, without any provocation. When the wounded officers were being rushed to the hospital, the guerillas fired at them again, and as a result, the two officers succumbed to their injuries and four others were wounded.

Peace meetings were arranged between prominent church leaders and others in Ukhrul town and the District Collector and Superintendent of Police. The Court of Inquiry set up by the General Commanding Officer expressed the opinion that maximum restraint was exercised by Assam Rifles and that, contrary to the allegation that 20 mortars were fired, only two had been fired, and that the Assam Rifles did not engage in torture, illegal detentions or looting.

The NHRC found the Army report satisfactory but it recommended in its proceedings on February 09, 1995 that compensation of Rs. 50,000 be paid to the next of kin of each of the three civilians who were killed in the crossfire. The MoD issued instructions on March 31, 1995 for the payment of the compensation.

***The death of Allen Kuki in Khoijang village, Manipur***

On the basis of a press report appearing on *The Statesman* on March 09, 1994, alleging that a rebel died in the custody of the armed forces, the NHRC called for a report from the MoD. According to the report from the Army Headquarters, on the night of March 5, 1994, Khoijang village was cordoned by the 4th Regiment of the Assam Rifles to apprehend certain persons who were reportedly hiding in the area. At around 3:30 a.m. on the following day, three persons were seen coming towards a group of the armed forces. Upon being questioned, those persons opened fire and the security forces returned fire. One of the three persons, later identified as Allen Kuki, jumped into a ravine full of boulders and bamboo stumps to evade capture. The report added that Kuki succumbed to his injuries at around 3:30 p.m. on that day.

The NHRC noted, however, that Kuki had been taken into custody at around 3:30 a.m., but no medical help had been provided to him nor any attempt appeared to have been made to seek medical assistance for him, until his death about 12 hours thereafter. It observed that it was the obligation of the security forces, which held Kuki in custody, to take steps for his immediate treatment from the moment of his capture in an injured condition.

Quoting from the case of *Katia v. Union of India* (1989), the NHRC pointed out that, “There can be no second opinion that preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the status quo ante cannot be restored. Whether he be an innocent person or a criminal liable to punishment under the laws of society, it is the obligation of those who are in charge of the patient to preserve life so that the innocent may be protected and the guilty may be punished. Social laws do not contemplate death by negligence to be tantamount to legal punishment.”

It recommended the payment of Rs. 50,000 as compensation payable to the next of kin of Kuki. Army authorities indicated that the amount was already paid to the mother of the deceased.

***The death of 125 children in Phulbani district, Orissa***

The NHRC took cognizance of a complaint filed by an advocate, Shri A.C. Pradhan, alleging that some 400 children died in Phulbani district as a result of acute malnutrition, accompanied by repeated attacks of malaria, chickenpox and various waterborne diseases. The report from the State Government stated that a medical team headed by the Chief District Medical Officer inquired into the matter and found that the number of deaths was an exaggeration, but admitted, however that in the Daringbadi block, 125 children below 10 years of age died in August and September 1993.

In its directives on October 25, 1994, the NHRC commented that adequate and satisfactory arrangements had not been made to prevent the tragedy. The NHRC, unimpressed by the State government's claims of opening health sub-centres and deploying paramedical staff in the area, observed that the fact that persons belonging to the STs preferred to treat their children with witchcraft, what happened reflected on the inability of the State government to adequately educate tribal citizens on health matters. It

recommended that the State government pay, within a month, a sum of Rs. 652,000 to the families of the 125 children.

In a letter dated 19 January 1995, the State government asked for a reconsideration of the recommendation to pay, stating that it on ready set up a number of Auxiliary Nurse Midwife at sub-centres and in two primary health centres in the area, and that doctors and paramedical staff were already in position. It asserted that mass awareness through health education system is a time-consuming process and that natural calamities are beyond the control of the administration and could not be attributed to negligence. It further stated that the award of compensation would serve as a disincentive to tribals to change their ways, and the State would be seriously limited in its capacity to pursue regulatory and welfare activities if every death earns lucrative compensation.

The NHRC maintained the view that negligence had occurred, and held that under the circumstances, there was no justification for it to take a different view. It called on the State government to find ways to implement its recommendation within an extended period of one month.

### ***The illegal detention of three Adivasis in Agali, Kerala***

The Christian Cultural Forum submitted a complaint to the NHRC alleging that police officials of Agali in Attappaddi, in the Palakkad district of Kerala, arrested three Adivasis<sup>31</sup> -- Manikandan, Parameshwaran and Kuppamma -- on May 25, 1997 and kept them in illegal detention for 23 days. During detention, Kuppamma, an Adivasi woman, was severely beaten up by the police, and chili powder was stuffed into her vagina. According to the complaint, the Circle Inspector falsely implicated around 100 Adivasis in a fabricated case, and Adivasis left their houses as a result thereof.

The NHRC issued a notice under Section 18(c) of the Protection of the Human Rights Act of 1993 to the Chief Secretary of the Government of Kerala to show cause why its recommendation for the payment of Rs. 10,000 to each of the victims as an immediate interim relief should not be implemented in favor of the victims against their illegal detention. The State government contended that it is not in a position to make any payment until the criminal cases pending before the court have been disposed of, since the alleged perpetrators were liable to pay the compensation that may be awarded by the court. The NHRC held that proceedings under Section 18(c) of the Protection of the Human Rights Act of 1993 are independent and the pendency of criminal case is no impediment to the award of immediate interim relief. Pursuant thereto, the State government informed the NHRC that the interim relief of Rs. 10,000 was paid to each of the victims.

### ***The rehabilitation and resettlement of tribals in Karnataka***

The NHRC received a complaint from Shri G. Mohan of the Swami Vivekananda Youth Movement in Karnataka regarding the issue of the rehabilitation and resettlement of

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31 Adivasis, or original inhabitants, is the collective name used for the many tribal peoples of India, other than the official term Scheduled Tribes. See <<http://www.faqs.org/minorities/South-Asia/Adivasis-of-India.html>>.

the tribals in H.D. Kote Taluk district, Mysore, Karnataka, and who were adversely affected by the construction of the Kabini Reservoir in the early 1970s and the formation of Bandipur Project Tiger National Park in 1973-74.

On January 01, 2003, the NHRC deliberated on the issue of earmarking a suitable land for 154 displaced tribal families, and directed the Government of Karnataka to send a formal proposal for the diversion of forest land into a rehabilitation area to the Union Ministry of Forest and Environment for its approval. In order to facilitate a speedy and proper rehabilitation, the NHRC monitored the process thereof.

In response, the State government sanctioned the diversion of 200 hectares of forest land in favor of the Revenue Department for the rehabilitation and resettlement of the displaced tribal families. It also constituted a committee to monitor the same and consider the facilities to be extended to the affected tribal families (e.g., housing, medical aid).



## **6. Recommendations**

Despite over nearly 70 years of targeted interventions through legislative and policy initiatives, the socio-economic condition of the STs has not improved significantly. In this context, it is important for India's governmental institutions, not only its NHRI, to take cognizance of the minimum standards laid down in the UNDRIP for the treatment of the STs in India.

If the Government could review and amend its laws to comply with the international human rights instruments, it would allow the STs in India to be officially accepted and recognized as indigenous peoples. This would significantly strengthen the resolve of the NHRC and various commissions to promote and protect the rights of indigenous peoples in India.

By examining and reviewing the existing central and state laws in accordance with the constitutional provisions for STs, the NHRC would permit to remove their incompatibility with the promotion and protection of indigenous peoples' rights. It would be interesting for the NHRC to study and examine the extent of compliance by India's governments at the Centre and the States and Union Territories with the protective laws for STs, in order to ascertain the nature and significance of the actual implementation thereof, if any, and recommend legal and administrative measures for concrete and effective implementation of such laws. Establishing a mechanism to monitor and strengthen the institutions of governance at the State, district or village level could be an initiative taken by the MoTA and NCST.

## C. Philippines

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Contributor: Mary Ann Manja Bayang



## 1. Indigenous Peoples in the Philippines<sup>1</sup>

In the Philippines, indigenous peoples are among the marginalized groups in terms of wealth, social services and political representation. Except in the Cordillera region where majority of the population are indigenous peoples, they are basically a numerical minority throughout the other parts of the country where they reside, which are 50 of the 78 provinces nationwide. There is a varying estimate of the actual number of indigenous peoples in the Philippines, ranging from 12 percent to 15 percent of the national population, and sixty-one percent of indigenous peoples are in Mindanao.

Most of their communities continue to have a defined territory where they practice their subsistence economy. Communal ownership of lands and traditional resource management systems still exist in some areas. Primarily, they engage in wet-rice and swidden agriculture, hunting, fishing, and small trades. All these are done within the greater environment of cash or market economy, which influences wholly their economy. Their political and social lives evolve around the rubrics of their own economy. At the core of their ways of life is the protection of the ecosystem for their and the future generations' subsistence.



The indigenous social, cultural and political institutions, while evolving in view of the influence of the mainstream systems, remain and persist to function in a considerable number of communities. These institutions are constantly challenged, however, and even threatened to extinction unless necessary measures for preservation and protection are installed by the government. For instance, traditional justice systems including conflict resolutions are prominent in certain communities and often resorted to for settlement of disputes because of their lack of access to and familiarity with the Philippine justice system.

Their intense defense of their lands and resources have subjected them to violations of their economic, social, cultural, civil and political rights by State forces and investment companies like mining firms. Hence, a considerable number of victims of human rights violations all over the country are indigenous peoples, in the form of extrajudicial killing, torture, enforced disappearance, illegally search

<sup>1</sup> Unless otherwise indicated, most of the information under this section were derived from "The Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples in the Philippines", IPRM, Manila, December 2007.

and arrest, and displacement from their communities due to armed conflict or mining activities and other development projects.<sup>2</sup>

## 2. Legal Framework

The Philippine government has either ratified or acceded to nine of the ten core international human rights treaties, with only the International Convention for the Protection of All Persons from Enforced Disappearance not having been acted upon, thus:

Treaty	Ratification / Accession(a)
International Convention on the Elimination of All Forms of Racial Discrimination	September 15, 1967
International Covenant on Economic, Social and Cultural Rights	June 07, 1974
Convention on the Elimination of All Forms of Discrimination Against Women	August 05, 1981
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	June 18, 1986 a
International Covenant on Civil and Political Rights	October 23, 1986
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	July 5, 1995
Convention on the Rights of Persons with Disabilities	April 15, 2008
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	April 17, 2012 a

The non-signing or non-ratification of, and consequently the non-accession to, the International Convention for the Protection of All Persons from Enforced Disappearance may be understood within the backdrop of the political situation prevailing in the Philippines at the time it was passed by the UN General Assembly in 2006. This was during the administration of then Philippine President Gloria Macapagal-Arroyo when extrajudicial killings and enforced disappearances were very prevalent in the country. In the United States State Department's report on the status of human rights



<sup>2</sup> [ See for instance, 'The Indigenous World', IWGIA, 2013, pp. 241-248.]

in the Philippines, there were 72 cases of enforced disappearances in 2006.<sup>3</sup> In 2007, 35 victims of enforced disappearance were recorded.<sup>4</sup>

Regrettably, the cases of disappearances continued up to the current administration of President Benigno Simeon Aquino III.

In 2007, the Philippines signed the UNDRIP after its adoption by the UN General Assembly. The legally binding international instrument, however, on the rights of indigenous and tribal peoples, the Convention No. 169 -- the Indigenous and Tribal Peoples Convention or ILO 169 -- adopted by the ILO in 1989, has not been ratified by the Philippines to this day despite stringent calls therefore from the civil society.

The accepted principles of international law are part and parcel of the national law in the Philippines without the need of legislation,<sup>5</sup> following the doctrine of incorporation. This puts the Philippines under a binding commitment to adhere to these principles and standards.



The Philippine Constitution itself is full of provisions protecting human rights and recognizing the rights of indigenous peoples. Its Bill of Rights adopted all the major principles of the ICCPR, and spread throughout other chapters of the Constitution are terms found in the ICESCR. It is a State policy to “recogniz[e] and promot[e] the rights of indigenous cultural communities within the framework of national unity and

development”<sup>6</sup> and a mandate to “protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.”<sup>7</sup> The State’s agrarian reform and disposition or utilization of natural resources is subject to the “rights of indigenous communities to their ancestral lands.”<sup>8</sup> Similarly, the Constitution imposes upon the State the use of indigenous learning systems and the support of indigenous scientific and technical capabilities.<sup>9</sup> Also, “The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.”<sup>10</sup> In recognition of indigenous peoples’ right to self-determination, the Constitution proposed the creation of an autonomous region in the Cordillera, one of the regions where majority of the population are indigenous peoples.

3 US Department of State, ‘Philippines’ (March 2007), <<http://www.state.gov/j/drl/rls/hrrpt/2006/78788.htm>>.

4 US Department of State, ‘Philippines’ (March 2008), <<http://www.state.gov/j/drl/rls/hrrpt/2007/100535.htm>>.

5 Article II, Section 2, 1987 Philippine Constitution: The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

6 Article II, Section 22, 1987 Philippine Constitution.

7 Article XII, Section 5, 1987 Philippine Constitution.

8 Article XIII, Section 6, 1987 Philippine Constitution.

9 Article XIV, Sections 2 and 10, 1987 Philippine Constitution.

10 Article XIV, Section 17, 1987 Philippine Constitution.

In 1997, the Indigenous Peoples Rights Act (IPRA), or Republic Act No. 8371, was passed into law. It was intended to recognize, promote and protect the rights of indigenous cultural communities and indigenous peoples. It created the National Commission on Indigenous Peoples (NCIP), which is the country's premier government agency for the promotion and protection of indigenous peoples' rights. This law paved the way for the statutory recognition of indigenous peoples' ownership over their ancestral lands and resources. It set the procedures for establishing title over these territories through the NCIP. The latter's recognition of title through the Certificate of Ancestral Domain Title (CADT) mandates the Philippine government to respect such ownership. Individual land ownerships were also subject to titling under the Certificate of Ancestral Land Title (CALT). These certificates of title are issued under terms different from those governing the mainstream law on land registration, or Presidential Decree No. 1529.<sup>11</sup>

Though predating the UNDRIP by ten years, the IPRA already enlists the primary provisions of the UNDRIP. Within the general objective of promotion and protection of the rights of indigenous peoples, the IPRA may likewise be treated as embodying the more detailed provisions of ILO 169. Still, the clamor for the Philippine government to ratify ILO 169 continues. If ratified, it becomes a binding international instrument that will complement the IPRA's aspirations.

Behind the seemingly favorable legal backdrop, however, the reality on the ground is a direct contrast thereto.



<sup>11</sup> Property Registration Decree (1978).

### **3. National Commission on the Rights of Indigenous Peoples (NCIP)**

The NCIP has the mandate to protect and promote the interest and well-being of the indigenous cultural communities and indigenous peoples with due regard to their beliefs, customs, traditions and institutions.”<sup>12</sup> It is not, however, the NHRI in the Philippines. It is focused only on indigenous peoples’ rights, and it is not an independent body as it is directly under the authority of the President. Its powers and functions are the following:



- 1.) Review and assess the conditions of indigenous cultural communities and indigenous peoples, including existing laws and policies pertinent thereto and to propose relevant laws and policies to address their role in national development;
- 2.) Formulate and implement policies, plans, programs and projects for the economic, social and cultural development of indigenous cultural communities and indigenous peoples, and to monitor the implementation thereof;
- 3.) Issue certificate of ancestral land or domain title;
- 4.) Coordinate development programs and projects for the advancement of indigenous cultural communities and indigenous peoples, and to oversee the proper implementation thereof;
- 5.) Convene periodic conventions or assemblies of indigenous peoples to review, assess as well as propose policies or plans;
- 6.) Advise the President of the Philippines on all matters relating to indigenous cultural communities and indigenous peoples;
- 7.) Submit to Congress appropriate legislative proposals intended to carry out the policies under the IPRA;
- 8.) Issue appropriate certification as a pre-condition to the grant of permit, lease, grant, or any other similar authority for the disposition, utilization, management and appropriation by any private individual, corporate entity or any government agency, corporation or subdivision thereof on any part or portion of the ancestral domain, taking into consideration the consensus approval of the indigenous cultural communities and indigenous peoples concerned; and
- 9.) Decide all appeals from the decisions and acts of all the various offices within the NCIP.<sup>13</sup>

<sup>12</sup> R.A. 8371, Chapter VII, Section 39.

<sup>13</sup> R.A. 8371, Chapter VII, Section 44.

#### 4. Commission on Human Rights (CHR)

The NHRI in the Philippines is the Commission on Human Rights (CHR), an independent body created under the Constitution.<sup>14</sup>

It has the following powers and functions:

- 1.) Investigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights;
- 2.) Adopt its operational guidelines and rules of procedure, and cite for contempt for violations thereof in accordance with the Rules of Court;
- 3.) Provide appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the under-privileged whose human rights have been violated or need protection;
- 4.) Exercise visitorial powers over jails, prisons, or detention facilities;
- 5.) Establish a continuing program of research, education, and information to enhance respect for the primacy of human rights;
- 6.) Recommend to Congress effective measures to promote human rights and to provide for compensation to victims of violations of human rights, or their families;
- 7.) Monitor the Philippine government's compliance with international treaty obligations on human rights;
- 8.) Grant immunity from prosecution to any person whose testimony or whose possession of documents or other evidence is necessary or convenient to determine the truth in any investigation conducted by it or under its authority;
- 9.) Request the assistance of any department, bureau, office, or agency in the performance of its functions;
- 10.) Appoint its officers and employees in accordance with law; and
- 11.) Perform such other duties and functions as may be provided by law.<sup>15</sup>

In 1987, the CHR was organized administratively through Executive Order No. 163. Its central office is situated in Metro Manila, and it has 15 regional offices and eight regional sub-offices covering all the 17 regions in the country.

It is composed of a chairman and four members, with a term of seven years without reappointment, and a majority thereof should be members of the Philippine bar. They are appointed by the President, a fact that deprives the CHR of its political independence. It also does not have fiscal autonomy.<sup>16</sup> Therefore, it operates within a clear level of control by the President.



<sup>14</sup> Article XIII, Sections 17 and 18, 1987 Philippine Constitution.

<sup>15</sup> Article XII, Section 18, 1987 Philippine Constitution.

<sup>16</sup> Commission on Human Rights Employees Association v. Commission on Human Rights (G.R. No. 155336, November 25, 2004).

Though the CHR enjoys an accreditation of status A, it does not have a specific program that distinctly addresses issues on indigenous peoples' rights. And though it has a special program on women, the CHR's works relating to indigenous peoples are integrated into the whole gamut of its programs and activities. While it is true that it has identified point persons on indigenous peoples -- one among its commissioners and one among its personnel, the roles of these point persons and their authority, however, are not clear within the CHR's structure and mechanisms.<sup>17</sup>

As such, it does not have an institutionalized plan that specifically deals with indigenous peoples' rights, and it ordinarily depends on projects funded by foreign institutions.

#### **4.1. Foreign-funded Projects on Indigenous Peoples**

A number of projects on indigenous peoples that are funded by foreign institutions have been launched by the CHR. In these cases, the funders primarily determine the project objectives and the CHR's role is to implement the same in partnership with the funders and other organizations.

The Metagora project,<sup>18</sup> for instance, was funded by the European Initiative for Democracy and Human Rights, with the CHR as the implementing organization. In pursuing this project, the CHR partnered with the NCIP, National Statistics Office, National Statistical Coordination Board, and Statistical Research and Training Center. The project's objective was to conduct a pilot study on the "Diagnosis of Indigenous People's Rights to Ancestral Domains in the Philippines," which showed that indigenous peoples have a high awareness of their rights to their ancestral lands. The study resulted in a statistical ranking of the various violations of the indigenous peoples' rights to their lands, including illegal entry, pollution, and displacement. It mentioned development aggression, discrimination and inadequate social services as significant grievances of indigenous peoples.

Another project, "Building Human Rights Communities," in partnership with the New Zealand Human Rights Commission (NZHRC), was funded by the New Zealand Aid Programme. This was envisioned by the NZHRC to build the capacities of indigenous peoples' communities in human rights investigation, documentation, reporting, and monitoring.

Though the aims of these projects are relevant for indigenous peoples, the same were only project-based and time-bound, and thus readily terminated upon the end of the project. This means that without these funders with specific agenda, the CHR would not have engaged in these projects. The CHR's lack of initiative or continuity of these project-based programs based on its own efforts may be attributed to the absence of their own concrete and adequate programs for indigenous peoples.

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<sup>17</sup> <<http://www.chr.gov.ph/index.php>>

<sup>18</sup> Information on the Metagora project was provided by Atty. Krissi Shaffina Twyla A. Rubin, Attorney-IV, CHR Investigation Division.

## 4.2. Investigation of Human Rights Violations

An example of the CHR's efforts on investigating violations of civil and political rights of indigenous peoples is the enforced disappearance of James Balao, an activist and an indigenous person from the Cordillera region. Balao was a founding member of the Cordillera Peoples Alliance (CPA), a regional organization advocating indigenous peoples' rights especially the right to their lands and resources.

On September 17, 2008 he was abducted by suspected members of State security forces. A campaign for his surfacing was immediately launched by his peers and relatives, and this reached the CHR which took on the case for investigation. In a resolution dated October 10, 2008, the CHR called for the investigation of the case by the CHR and the Philippine National Police (PNP), and for a dialogue with the Armed Forces of the Philippines.<sup>19</sup>

Though the CHR's constitutional mandate is technically limited to civil and political rights for purposes of investigation, and the Constitution does not explicitly state



<sup>19</sup> Commission on Human Rights, Resolution CHR (IV) No. A2008-035, October 8, 2008.

economic, social and cultural rights for such purpose, the CHR nevertheless looked into such rights. A case in point is the displacement of indigenous peoples from Didipio, Kasibu, Nueva Vizcaya where they faced numerous human rights violations, which arose from their opposition to the large-scale mining activities of Oceana Gold Philippines Inc. (Oceana Gold) within their ancestral domain.<sup>20</sup>

Numerous complaints have been filed with the CHR by the residents, indigenous peoples' organizations and support groups, and this led the CHR to conduct its own investigation.

In a resolution released on January 10, 2011, the CHR stated that indeed, numerous violations on the rights of indigenous peoples in Didipio were committed. It declared that Oceana Gold violated the right to residence, right to adequate housing, property rights, right to freedom of movement, right not to be subjected to arbitrary interference within the home, right to security of persons, right to manifest indigenous culture and identity, and right to access to clean water. The CHR also said that the PNP violated its own operational procedures when its officers carried high-powered firearms and employed unnecessary and unreasonable force. It also noted that the PNP was in effect utilized to protect the interest of "rich people," referring to the mining company, Oceana Gold.

Despite these strong findings of human rights violations, the CHR, restricted by the limits of its authority (i.e., investigate and make recommendations only), was only able to recommend to the Philippine government the review of the mining agreement with Oceana Gold, the monitoring of human rights violations, and for Oceana Gold to be advised accordingly.<sup>21</sup>

To this day, Balao remains a *desaparecido* with little or no effort from law enforcement authorities to locate his whereabouts, and Oceana Gold continues to mine the ancestral domains of indigenous peoples in Didipio.

The CHR also conducted an investigation on the extrajudicial killings of indigenous peoples and the militarization of indigenous communities in Tampakan, South Cotabato. It led a field investigation in March 2013, or three months after the mass murders of members of the Capión family who belonged to the indigenous B'laan tribe. The killings and militarization are linked to the mining activities of Sagittarius Mines, Inc. (SMI) in the ancestral domains of the B'laan tribes.<sup>22</sup>

A similar investigation is being undertaken by the CHR in the case of the indigenous community in Barangay Runruno, Quezon, Nueva Vizcaya where the houses and farm lots of indigenous peoples were bulldozed by Philippines FCF Minerals Company, owned by the British Metals Explorations,<sup>23</sup> for its Gold and Molybdenum Project.

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20 The CHR opines, however, that the land is not the ancestral domain of the indigenous peoples in Didipio because they are not "originally" from the area.

21 Information in this paragraph was derived from the CHR Resolution, Case No. CHR-H-2008-0055, In Re: Displacement Complaint of Residents of Didipio, Kasibu, Nueva Vizcaya, January 10, 2011.

22 'Tampakan: Updates from March 2013', Alyansa Tigil Mina, May 1, 2013, <<http://alyansatigilmina.net/2013/05/01/tampakan-update-for-march-2013/>>.

23 Defend Patrimony press release, September 21, 2013.



The CHR is not foreign to criticisms about its lack or inadequate responses to human rights violations, including those involving indigenous peoples. Some cases, as those discussed above, have fortunately received the CHR's attention. It then needs to step up its current efforts to actually produce concrete and positive impacts on the promotion and protection of indigenous peoples' rights.

#### 4.3 CHR's Legislative Agenda and Policy Advocacy

The CHR's Legislative and Programs Division is the main office tasked with monitoring the legislative measures in Congress involving human rights. It examines these proposed measures in relation to international human rights standards, and coordinates the preparation of the CHR position on the matter. One of the bills that is currently being monitored is the Alternative Minerals Bill, which seeks the repeal of the Philippine Mining Act of 1995 and the removal of the discriminatory provisions of the latter. It aims to establish a mining law that respects indigenous peoples' rights.

The bills monitoring program is complemented by the efforts of the CHR's Legal Division in participating in the proceedings and submitting position papers before the concerned committees in Congress. Currently, it is participating in the proceedings before the House of Representatives<sup>24</sup> Committee on National Cultural Communities where it is submitting case status updates, position papers, and documents in relation to the investigations being conducted by the Committee on indigenous peoples' concerns.

According to the CHR's Legal Department, the CHR has supported various resolutions of members of the House of Representatives against violations of indigenous peoples' rights. Some of these resolutions are the following:

<sup>24</sup> The House of Representatives is the lower house of Congress, the legislative department of the Philippine government.

- 1.) House Resolution (HR) No. 1318, on the assassination of Armando Maximino, indigenous leader of the Dumagat Tribe;
- 2.) H.R. No. 1319, on the assassination of indigenous leader Florita Caya;
- 3.) The harassment and intimidation constituting human rights violations committed by elements of 73rd Infantry Battalion, Philippine Army on the B'laan Communities in Malapatan, Sarangani Province that caused the halt of delivery of social services by non-government organizations to said neglected tribal communities;
- 4.) H.R. No. 1537, on the attack perpetuated by Wild Dogs, a paramilitary group that killed Datu Lapugotan, a Manobo tribal leader and an anti-mining activist in Esperanza, Agusan del Sur, focusing on the policy wisdom of the AFP's use of indigenous peoples in counter-insurgency programs and operations;
- 5.) H.R. No. 1600, on the human rights violations committed by security personnel of Fast Tech security agency, members of the PNP and local officials against residents of Delebsong, Nipoo, Dinalungan, Aurora who are members of indigenous cultural communities;" and
- 6.) H.R. No. 1857, on the practice of government soldiers of setting up camp in schools, barangay centers and other public civilian facilities in indigenous communities.<sup>25</sup>

This mechanism is essential to ensure that human rights are promoted and protected in the laws passed by Congress. One limitation, however, is the inadequacy of the CHR's human resource to cover the whole range of measures and bills that have an impact on human rights.<sup>26</sup>

## **5. CHR's Report on Indigenous Peoples**

The CHR contributes in human rights reporting before international human rights bodies. In 2009, during the review of the Philippines by the Committee on the Elimination of Racial Discrimination, the CHR submitted a report that, while being criticized as lacking in authority, nevertheless took on some of the issues of indigenous peoples that were contained in the 'Shadow Report' submitted by a consortium of indigenous peoples' organizations and support groups.

When the Universal Periodic Review (UPR) took off in 2008, the CHR regularly propounded its own reports on the Philippines. In these reports, as that of the one submitted in 2012, the CHR mentioned the plight of indigenous peoples though the treatment thereof was very trivial and minimal. It merely stated that a bill that would address development aggression threatening the rights of indigenous peoples was still in the "laborious legislative mill."

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<sup>25</sup> Information in this paragraph was provided by Atty. Krissi Shaffina Twyla A. Rubin, Attorney-IV, CHR Investigation Division.

<sup>26</sup> CHR, Government Cooperation Office, Legislative and Program Division, <[http://www.chr.gov.ph/MAIN%20PAGES/services/link\\_devt1a\\_gco.htm](http://www.chr.gov.ph/MAIN%20PAGES/services/link_devt1a_gco.htm)>.

The CHR's reporting obligation to the international human rights bodies is a important opportunity for it to complement its domestic functions, and in a way can fill in some of the CHR's power limitations. This forum may be explored by the CHR to make a report independently of the government, in order to encourage the international community to push the Philippine government to comply with its international obligations on human rights, including those involving indigenous peoples.



## 6. Recommendations

When all the powers and functions of the CHR are maximized to their full capacity, the CHR can make a significant difference in the promotion and protection of indigenous peoples' rights. But as a recommendatory body, the CHR's recommendations to the Philippine government and State security forces are ordinarily ignored and not accorded with urgency and importance.

The political, social, cultural and economic marginalization of indigenous peoples can only be truly addressed when a multi-pronged, comprehensive and far-reaching approach is adopted to cover all corners of the raggedly stitched quilt of issues confronting indigenous peoples in the Philippines. While they share a history of pre-existing disadvantage, prejudice and stereotypes with the poor sectors of Philippine society, the indigenous peoples have their own distinct human rights concerns that are particularly focused on rights to their lands and resources, cultures and indigenous systems.



Without a sincere effort from the Philippine government as the duty-bearer of human rights, the inequality and discrimination being experienced by indigenous peoples will continue to persist. Although the Government of the Philippines adopted the UNDRIP, it does not ensure the compliance to its standards. An initiative leading to the review of its development policies on mining, dams and energy projects by the Government

would prevent further violations of indigenous peoples' rights to life, land, resources and territories. Ratifying ILO 169 would be a step further from the Government as a sign of a sincere adherence to the international human rights standards on indigenous peoples.



The Philippine government is also long overdue in reviewing the mandates and structure of the CHR. The goal is to strengthen its independence and integrity. According to the Paris Principles, an NHRI must possess an unhampered authority not only to investigate, monitor, and report on human rights violations but also to impose sanctions with equal authority but within limits as the courts of



law. The CHR indeed has an investigation power but is weaker when it comes to ensure the implementation of subpoenas and findings. Hence,

There should be a variety of penalties available for the CHR to enforce its recommendations, such as collection of fines, dismissal of public officers from government service, decree on cessation of cases of infringement of government practices, and other remedies or forms of relief, in the context of promotion and protection of human rights. The CHR's efforts to facilitate the passage of a strengthened NHRI Charter by the Philippine Congress should be aligned among its highest priorities.

The CHR, in the meantime, could embark on an institutionalized program for indigenous peoples with a clear and continuing mandate to protect their civil, political, economic, social, and cultural rights. Necessary coordination with the NCIP is essential in view of the NCIP's specialized mandates concerning the indigenous peoples.

Despite its limited powers at present, indigenous peoples wish that the CHR could creatively expand the reach of its mandate and be more vigilant in pushing for its goals so that the victory of the indigenous peoples in their fight for human rights does not end with the CHR's paper recommendations, but flows into and makes considerable impact in their lives.

## D. Nepal

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Contributor: Krishna B. Bhattachan



## 1. Indigenous Peoples in Nepal

The term “indigenous nationalities” is defined in Nepal under the National Foundation for Development of Indigenous Nationalities Act of 2002 as “a tribe or community as mentioned in the Schedule having its own mother language and traditional rites and customs, distinct cultural identity, distinct social structure and written or unwritten history.”<sup>1</sup> The Act identified only 59 indigenous nationalities, or Janajatis, in the country --18 in the Mountain (Himalaya), 24 in the Hills, 7 in the Inner Terai, and 10 in Terai. However, controversial recommendations for a revision of the list have recently been made.

The 2011 census, however, listed the national population as belonging to 125 caste and ethnic groups, composed of 63 indigenous peoples, 59 castes with 15 Dalit castes, and three religious groups. Based on the census, Nepal’s indigenous nationalities comprise 35.81 percent of the total population of 26,494,504. In the latest data from the Nepal Federation of Indigenous Nationalities (NEFIN), an NGO with 54 indigenous member organizations in Nepal, the indigenous peoples make up 37.2 percent<sup>2</sup> of the country’s population.

The NEFIN has categorized<sup>3</sup> the 59 indigenous nationalities according to their respective degrees of development (i.e., literacy rate, housing unit, landholding, economic assets, education, and population size), as follows:

- 1.) Endangered Group: Kusunda, Bankariya, Raute, Surel, Hayu, Raji, Kisan, Lepcha, Meche, and Kusbadiya
- 2.) Highly Marginalized Group: Majhi, Siyar, Lohmi (Shingsawa), Thudam, Dhanuk, Chepang, Satar (Santhal), Jhagad, Thami, Bote, Danuwar, and Baramu
- 3.) Marginalized Group: Sunuwar, Tharu, Tamang, Bhujel, Kumal, Rajbansi, Gangai, Dhimal, Bhote, Darai, Tajpuriya, Pahari, Topkegola, Dolpo, Free, Mugal, Larke, Lohpa, Dura, and Walung
- 4.) Disadvantaged Group: Chhairrotan, Tangbe, Tingaunle Thakali, Bahragaunle, Marphali Thakali, Gurung, Magar, Rai, Limbu, Sherpa, Yakkha, Chhantyal, Jirel, Byansi, and Yolmo
- 5.) Advanced Group: Newar and Thakali

Significant information<sup>4</sup> from NEFIN provides a crucial overview on the situation of indigenous peoples in Nepal: only 14 percent of indigenous peoples are in the civil service; majority of the 13,000 people killed during the 1996-2006 Maoist People’s War are indigenous people; 65 percent of their ancestral lands are occupied by national parks and conservation, forcing them to migrate elsewhere; majority of school dropouts, girls sold for prostitution, and prisoners are indigenous peoples; many sell their kidneys and blood to buy food for their families; the word “indigenous” or “Adivasi” is not mentioned in any of the school textbooks, in the past five Nepal Constitutions, and in history books and museums

1 Section 2(a), National Foundation for Development of Indigenous Nationalities Act, 2058 (2002).

2 Facts, Figures and Information on Indigenous People, National Federation of Indigenous Nationalities, <<http://www.nefin.org.np/list/Indigenous-People-of-Nepal/5/0/5>>.

3 Categorization of Indigenous People Based on Development, National Federation of Indigenous Nationalities, <<http://www.nefin.org.np/list/Categorization-of-Indigenous-People-based-on-development-/5/95/6>>.

4 See note 106..



in Nepal; there are public holidays in the name of dog, cow and crow but there are no public holidays for many indigenous festivals; many indigenous peoples eating beef are jailed for 10 years, allegedly for killing cows, because cow is the national animal of Nepal, but the Bahun<sup>5</sup> and Chhetri<sup>6</sup> owners of restaurants selling beef freely have not been subjected to any legal action; Buddhist indigenous soldiers are forced to worship the Hindu religion in police and army barracks; Nepal's government spends over 200 million rupees to preserve the dead Sanskrit language, but there is no sufficient budget to print indigenous language textbooks and hire teachers to teach indigenous languages; the Bhote indigenous people of Bajura District, including many indigenous peoples in the far west of Nepal, are forced to take a citizenship with Brahman and Chhetri identity; and indigenous groups Raji, Kusunda and Tharu are still working as slaves and bonded laborers.

By 1964, after the territorial integration of Nepal by King Prithvinarayan Shah in 1768, the indigenous peoples lost full control over their lands, territories and resources due to the continuing domination of the Bahuns and the Chhetris, as well as the Hindu religion and culture. The first National Code of Nepal of 1854 included indigenous peoples as the Liquor Drinking caste, and placed them second in the hierarchy of the four castes. Indigenous peoples suffered most during the partyless Panchayat political system due to its mission of transforming all diverse groups (i.e., caste, ethnic, linguistic, religious and regional) into one caste (Nepali) which speaks one language (Khas Nepali) and wears one dress (Daura-Suruwal for men and Cholo-Sari for women).

<sup>5</sup> The Bahuns (Brahmin) represent the highest of Nepal's four varna or castes.

<sup>6</sup> The Chhetris (Kshatriya) represent the second highest of Nepal's caste system.

The imposition of Brahmanism and patriarchy has devastated impacts on the life of indigenous peoples. After the peoples' movement in 1990 and the recognition of Nepal as a multi-caste/ethnic, multi-lingual, multi-religious and multi-cultural society, indigenous peoples began to get organized under NEFIN, with the demands for indigenous peoples' rights, including self-determination, autonomy and self-rule. The Maoist People's War transformed indigenous peoples' issues from being a social and cultural front to a political front. The People's Movement of 2006 and the subsequent Madhesi Movement of 2007 eliminated the institution of monarchy and transformed the Hindu Kingdom into a secular State, mandating the restructuring of the State in an inclusive manner through federalism and the writing of the constitution by the elected Constituent Assembly. The first Constituent Assembly in 2009-2013 failed to draft the constitution as it was divided on the issue of single versus multiple identity federalism. The election of the second Constituent Assembly was held in November 2013, and since then, it has been mandated to write the constitution. Indigenous peoples are struggling to ensure the guarantee of their rights in the new constitution as per international standards. Indigenous peoples are therefore campaigning for the right to self-government under a federal system of government in order to have control of their social, cultural and political development. However, they remain having the least meaningful political representation in the country, with their freely chosen representatives largely excluded from the process of decision-making.

## **2. National Legislation**

The first ever written law enacted in Nepal was the Old National Code of Nepal of 1854, and all of its provisions were based on the Hindu caste hierarchy. Indigenous peoples were referred to as the Liquor Drinking caste and placed second in the caste hierarchy after the Twice Born castes and before the two categories of Untouchable castes. All the constitutions of Nepal from the 1950s to 1990s have directly or indirectly considered Nepal as the only Hindu state in the world, and laws were fully guided by the norms and values of the Hindu society and culture.

Although the Interim Constitution of Nepal of 2007 declared the country as a secular republican State, all existing laws are continued to be guided by the same norms and values. National legislation of the past and present were and are adverse to indigenous peoples' collective identity, collective rights, autonomy and self rule, lands, territories and resources, and customary laws. Although the Nepalese government, in the draft National Action Plan on the implementation of ILO 169, which it ratified on September 14, 2007, stated the need to carry out a study on the incompatibility of existing laws with ILO 169 and to make the former compatible with the latter, nothing substantial has been done so far. The legislative measures drafted, debated and passed by the Parliament after ILO 169's ratification have completely ignored it.

A government entity named National Foundation for Development of Indigenous Nationalities (NFDIN) was established in 2002 through an Act which provided for its creation. The preamble of the said Act states:

Whereas, it is expedient to establish and operate a Foundation for Development of Indigenous Nationalities for social, economic and cultural development and upliftment

of various Indigenous Nationalities of Nepal and for their equal participation in the mainstream of national development, therefore be it enacted by the Parliament in the first year of the reign of His Majesty King Gyanendra Bir Bikram Shah Dev.

The NFDIN's objectives,<sup>7</sup> as enumerated in the said Act, are as follows:

- 1.) To make overall development of the indigenous nationalities by formulating and implementing programs relating to the social, educational, economic and cultural development and upliftment of indigenous nationalities;
- 2.) To preserve and promote the languages, scripts, cultures, arts, and histories of the indigenous nationalities;
- 3.) To preserve and promote the traditional knowledge, skills, technologies and special knowledge of the indigenous nationalities and to provide assistance in its vocational use;
- 4.) To cause the indigenous nationalities to participate in the mainstream overall national development of the country by maintaining a good relation, goodwill and harmony between different indigenous groups, castes, tribes and religious communities of Nepal; and
- 5.) To provide assistance in building an equitable society by making social, economic, religious and cultural development and upliftment of indigenous nationalities.

As earlier stated, by the year 1964, all indigenous peoples lost control over the Kipat land (collectively owned ancestral lands). The last indigenous people to lose it were the Limbus. The Lands Act of 1964 denied such collective or communal ownership of lands. Article 3A thereof states that, "(1) The Kipat land may, like the Raikar land, be transferred by conveyance (Pharchhe Rajinama)" and "(2) The Kipat land shall, like the Raikar land, be subjected to land revenue."<sup>8</sup> Raikar land means the land owned by the State (e.g., any individual may own land but the owner(s) should pay taxes to the State). Even in Raikar land, Article 7 of the Act provides for the upper ceiling of land allowed to be owned by person as landowner, as follows:

- (1) Any person or his/her family may, as a landowner, own land within the following ceiling in the following area, not exceeding a total of 10 Bigaha:<sup>9</sup>
  - (a) All Terai regions including inner Terai – 10 Bigaha
  - (b) Kathmandu Valley – 25 Ropani
  - (c) All hilly regions except Kathmandu Valley – 70 Ropani
- (2) Notwithstanding anything contained in Sub-section (1), any person or his/her family may, in addition to the land as referred to in Subsection (1), own such land as is required for house and premises not exceeding the following ceiling:
  - (a) All Terai regions including inner Terai – 1 Bigaha
  - (b) Kathmandu Valley – 5 Ropani
  - (c) All hilly regions except Kathmandu Valley – 5 Ropani

<sup>7</sup> Section 5, National Foundation for Development of Indigenous Nationalities Act, 2058 (2002).

<sup>8</sup> Second Amendment of 25 October 1968.

<sup>9</sup> One Bigaha equals to 1.6 acres.

In the Private Forests Nationalization Act of 1957, Article 3 on nationalization of private forests states that, “The ownership of all private forests in the State of Nepal shall devolve on the Government of Nepal after the date of commencement of this Act,” and Article 5 on prohibition on claiming compensation provides that, “No claim for any compensation may be made in relation to the right to the private forests deprived pursuant to this Act.”

The Forest Act of 1993 identifies five types of forests: (a) protected forest, (b) community forest, (c) leasehold forest, (d) religious forest, and (e) private forest. Article 17 of the Act states that, "No Person to have any Rights in the National Forest: Except when any right or facility has been obtained through a lease or permit or in any other way from the Government of Nepal or the authority empowered by the Government of Nepal, no person shall have any right or facility of any type in the National Forest." This clearly denies the indigenous peoples' customary rights on forest.

On the community forest, Article 25 thereof provides that, “The District Forest Officer may handover any part of a National Forest to a Users' Group in the form of a Community Forest As Prescribed entitling to develop, conserve, use and manage the Forest and sell and distribute the Forest Products independently by fixing their prices according to Work Plan. While so handing over a Community Forest, the District Forest Officer shall issue a certificate of alienation of the Community Forest,” and that, “The District Forest Officer may constitute a Users' Group as Prescribed by mobilizing users and provide technical and other assistance required to prepare the Work Plan for the purpose of Sub-section (1).”



### 3. International Human Rights Instruments

The Nepalese jurisdiction follows the doctrine of incorporation in cases of international treaties that it has ratified, acceded to, accepted or approved, that is, without the need of legislation for effectivity and enforcement. Article 9 of the Nepal Treaty Act of 1990 states:

Article 9. Treaty Provisions Enforceable as good as Laws:

- (1) In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification, accession, acceptance or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.
- (2) Any treaty which has not been ratified, accede to, accepted or approved by the Parliament, though to which Nepal or Government of Nepal is a party, imposes any additional obligation or burden upon Nepal, or Government of Nepal, and in case legal arrangements need to be made for its enforcement, Government of Nepal shall initiate action as soon as possible to enact laws for its enforcement.

Nepal has either ratified or acceded to seven of the core international human rights treaties:

Treaty	Ratification / Accession(a)
International Convention on the Elimination of All Forms of Racial Discrimination	January 30, 1971 a
Convention of the Rights of the Child	September 14, 1990
Convention on the Elimination of All Forms of Discrimination Against Women	April 22, 1991
International Covenant on Economic, Social and Cultural Rights	May 14, 1991 a
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	May 14, 1991 a
International Covenant on Civil and Political Rights	May 14, 1991 a
Convention on the Rights of Persons with Disabilities	May 07, 2010

Nepal voted for the adoption of the UNDRIP at the UN General Assembly on September 13, 2007 and also ratified ILO Convention 169.

## **4. NHRI**

The NHRI of Nepal is the National Human Rights Commission (NHRC). It was established in 2000 after the enactment of the National Human Rights Commission Act of 1997. Nepal's Interim Constitution of 2007 made the NHRC a constitutional body with the mandate to ensure, respect, protect and promote human rights in Nepal. It can receive complaints in writing, orally or through telephone, fax or e-mail, conduct investigations based on the complaints or suo motu, monitor human rights violations, and make recommendations to the government.

A complaint may be filed at any of the NHRC's nine sub-regional offices located in Lalitpur in the Kathmandu Valley, Khotang in the eastern Hills, Biratnagar in the eastern Terai, Janakpur in the central Terai, Pokhara in the western Hills, Butwal in the western Terai, Nepalgunj in the mid-western Terai, Jumla in the mid-western Hills, and Dhangadhi in the far-western Terai.



### **4.1. Integration**

Despite the persistent demand from indigenous leaders since 2002 for the NHRC to integrate indigenous peoples' rights in its programs, including the establishment of a separate unit, nothing was done by it until 2011.

In 2011, the NHRC has identified seven priority issues: (a) Support to protect life, liberty and security; (2) Support to end impunity; (3) Support to end discrimination; (4) Capacity development of human rights defenders, (5) National capacity building on human

rights based approach and ensure development initiatives to needy people, (6) Support to increase realization of economic, social and cultural rights, and (7) Promotion and protection of collective or group rights.<sup>10</sup>

The NHRC has categorically stated that “[t]he rights of minorities based on ethnicity, culture, religion, language, origin, sex and caste is an important issue.”<sup>11</sup> It added that:

Respect of their rights would help ensure equality and equity among them. The NHRC primarily plans to monitor and advocate on the rights of minorities, rights of PWD/SOG<sup>12</sup> groups.<sup>13</sup>

Based on the recommendations made by John Pace of Australian National University in 2009, the NHRC’s Collective Rights Division was established in 2012. It is dedicated to the promotion of all issues relating to collective rights, and has a special focus on child rights, rights of persons with disabilities, indigenous peoples, senior citizens and minorities. Further, the NHRC conducted a capacity development training of human rights defenders on indigenous peoples’ rights in 2011, formed a national Alliance for Human Rights of Indigenous Peoples in 2011, and provided a training for trainers on ILO 169 in 2013. The NHRC provided its inputs in the periodic report on ILO 169 prepared by the Ministry of Federal Affairs and Local Development (MFALD), and participated as an observer in a discussion on the draft of the frequently asked question on ILO 169 prepared by the ILO and the MFALD.

In its Strategic Plan 2011-14, one of the NHRC’s strategic objectives is the improvement of the enjoyment of economic, social and cultural rights and collective rights.<sup>14</sup> One of its areas of strategic interventions therein is “advocacy on the issues of group rights”<sup>15</sup> through the following means:

- 1.) Increasing advocacy on the right to development and right to environment;
- 2.) Increasing advocacy on the rights of various groups that include child, women, senior citizens, consumers, migrant workers, SOGI and person with disabilities, minorities, Madhesies, Dalits, indigenous population, mentally ill, people living with HIV/AIDS and people suffered by stigmatization and helplessness; and
- 3.) Mainstreaming gender concerns and social inclusion policies in the overall activities of NHRC.

Thus far, the NHRC has received more than 10,000 complaints and initiated about 100 thereof suo motu. But these are not directly related to violations of indigenous peoples’ rights, as the indigenous peoples have not yet lodged any complaint pertaining thereto. Many of them have no idea or awareness on the importance of filing a complaint, as well as about the NHRC and its complaint procedures. Almost all indigenous leaders who are familiar

<sup>10</sup> Strategic Plan 2011-2014, National Human Rights Commission, Nepal, p. 7.

<sup>11</sup> Id. at 9.

<sup>12</sup> People with Disability and Sexual Orientation and Gender Identity.

<sup>13</sup> See note 114, p. 9.

<sup>14</sup> Id. at 12.

<sup>15</sup> Id.

about the complaint procedures seem to have no faith in the NHRC since it is dominated by the dominant caste groups, and it appears to have not been protecting indigenous peoples' rights. The Khas Nepali language used in the complaint form is also a problem to many indigenous peoples who speak and write in their respective mother languages.

The NHRI sends fact-finding missions on several issues such as the Khimti hydropower project, the waste management project in Morang, the controversy over the sacred religious site in Kakre Bihar in Surkhet, and the allegations against indigenous peoples over the slaughter of cows. The NHRC has formed an informal working group with the NEFIN, the NFDIN, the lawyers' rights group Lawyer's for Human Rights of Indigenous Peoples of Nepal (LAHUR-NIP), and the ILO on indigenous peoples' issues but it has not been functioning.

The NHRC has published in seven different languages, including several languages of indigenous peoples, the text of the 2006 Comprehensive Peace Accord between the Nepalese government and the Communist Party of Nepal (Maoist) that formally ended the people's war.

#### 4.2. Gaps and Challenges



According to the NHRC staff, the main gaps and challenges on its work are the lack of personnel to focus on the issues of collective rights, which include indigenous peoples' rights; the lack of necessary laws; the lack of awareness among indigenous peoples at the grassroots level about their rights; the intention of decision makers to follow the status quo; and the diversity in caste and ethnicity and among indigenous peoples.

Indigenous leaders, activists and academics pointed out, however, these gaps and challenges, viz.: the continuation of the ideology, policies and practices of Brahmanism and patriarchy; the lack of political will of the government for the effective implementation of international human rights instruments; the continued domination of one caste, language, religion, culture, and sex; the lack of commitment of international donors to uphold international human rights standards for indigenous peoples; the lack of representation in the NHRC members and staff of indigenous peoples who are aware and knowledgeable on indigenous peoples' rights; and the lack of awareness of NHRC members and staff on ILO 169 and UNDRIP, or their lack of commitment to assert the implementation thereof.

## 5. Actual Cases

Until 2013, there was no single case handled by the NHRC in relation to the identity and recognition of indigenous peoples. The only case being handled now is the issue of the high-tension transmission line project in Sindhuli district. The Nepalese government, with the



support of the World Bank, is determined to implement the project, but indigenous peoples in the area, with the non-indigenous community members, are demanding that their free, prior and informed consent be obtained first. The World Bank has sent several missions to study the situation, but the conflict is mounting between the World Bank and the Nepalese government, on the one hand, and the indigenous peoples and other local people, on the other hand.

The NHRC sent a fact-finding mission to the area and suggested to the government not to use force against the indigenous peoples and community members. The NHRC, however, does not share information about its activities, including the details of the fact-finding mission, to indigenous peoples' organizations. As such, it is very difficult for indigenous leaders to know what the NHRC is actually doing and what has already been done.

In other cases, the NHRC contributed in stopping the deployment of police in the Khimti hydropower project, and made recommendations supporting the indigenous peoples over the waste management project in Morang and the issue of sacred religious site in Kakre Bihar.

## **6. Recommendations**

An enhanced knowledge on indigenous peoples by the NHRC would ensure that the Nepalese government enforce their rights. Having indigenous peoples aware and knowledgeable about indigenous peoples' rights as NHRC officers and staff will permit this implementation of their rights as well as it will make a significant difference in its approach towards indigenous peoples issues. The peculiarities of the collective rights of the indigenous peoples from vulnerable sectors need to be taken into account specifically by the NHRC, which could also consider establishing a special rapporteur to focus on indigenous peoples issues. A revision of the NHRC Act and other related laws and rules and regulations to make them compatible with the UNDRIP and ILO 169 would be a step forward for the government, comprising the recognition of the collective rights of indigenous peoples.

In the NHRC's partnership with indigenous peoples organizations, the NHRC can assert its independence in the performance of its duties and functions. The Nepalese Government having adopted the UNDRIP as well as it signed ILO 169, the NHRC can know push forward the implementation of those standards on the ground.

Human rights organizations and defenders should push for the collective rights of the indigenous peoples, and maximize all available means to propagate indigenous peoples issues and struggles.

## E. Indonesia

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Contributor: Patricia Wattimena-Shirane



## **1. Indigenous Peoples in Indonesia**

As of 2013, Indonesia, the largest archipelagic country in the world with more than 18,306 islands,<sup>1</sup> has a total population of almost 250 million.<sup>2</sup> Currently, no official data is available on the number of indigenous peoples in the country, since the indigenous or ethnic identity is not included in the national census. Indigenous peoples' organization Aliansi Masyarakat Adat Nusantara (AMAN) estimates about 50 to 70 million.<sup>3</sup> The Indonesian government recognizes 1,128 indigenous groups in the country, and identifies indigenous communities as komunitas adat terpencil or geographically-isolated indigenous communities.<sup>4</sup>

While Indonesia voted in favor of the adoption of the UN Declaration on the Rights of Indigenous Peoples, government officials argue that the concept of indigenous peoples is not applicable as almost all Indonesians (with the exception of the ethnic Chinese) are indigenous and thus entitled to the same rights. Consequently, the government has rejected calls for specific needs by groups identifying themselves as indigenous.<sup>5</sup>

Indigenous peoples in Indonesia live mostly in rural environments, which are rich in natural resources. The systematic impoverishment of indigenous peoples has occurred through the transfer of ownership of land and natural resource, resulting in the loss of their livelihoods and the denial of their right to life. In the name of development, the Indonesian government has and continues to transfer land ownership to private industrial enterprises such as mining and industrial timber companies, forest concession holders and other industries, without obtaining any free, prior and informed consent from the indigenous peoples. Structural inequities and inequalities are further reinforced by discriminatory and oppressive land laws, ignoring the indigenous peoples' customary land tenure systems and laws.

There is no singularly used legal term in Indonesia, at least in the domestic laws and by the authorities, embodying the concept of indigenous peoples as recognised in international instruments. Indigenous peoples themselves prefer and promote the use of the term masyarakat adat to refer to them. While the term masyarakat adat is used in some national laws, it is either often not defined, failing to embody the full concept of indigenous peoples, or used in a conditional wording, resulting in the limited application of the concerned laws. Masyarakat hukum adat, literally means customary law community, is another term that has been recently accepted for practical purposes by indigenous peoples as referring to them, and it is more often used in the national legal framework like the Constitution. The term komunitas adat terpencil used by government officials is rejected by indigenous peoples.

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1 National Institute of Aeronautics and Space, 2002.

2 <<http://www.data.worldbank.org/country/indonesia>>.

3 <<http://www.iwgia.org/regions/asia/indonesia>>.

4 Id.

5 Id.



## 2. National Legislation and Jurisprudence

In Indonesia's legal framework regarding indigenous peoples:

The third amendment to the Indonesian Constitution recognizes indigenous peoples' rights in Article 18b-2. In more recent legislation, there is an implicit, though conditional, recognition of some rights of peoples referred to as *masyarakat adat* or *masyarakat hukum adat*, such as Act No. 5/1960 on Basic Agrarian Regulation, Act No. 39/1999 on Human Rights, MPR Decree No. X/2001 on Agrarian Reform, Act No. 27/2007 on Management of Coastal and Small Islands and Act No. 32/2010 on Environment clearly use the term *Masyarakat Adat* and use the working definition of AMAN. The Constitutional Court in May 2013 affirmed the Constitutional Rights of Indigenous Peoples to their land and territories including their collective rights over customary forest.<sup>6</sup>

Article 18B(2) of the Indonesian Constitution states that, "The State recognizes and respects traditional communities<sup>7</sup> along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law,"<sup>8</sup> while Article 28I(3) provides that, "The cultural identities and rights of traditional communities<sup>9</sup> shall be respected in accordance with the development of times and civilisations."<sup>10</sup>

6 Id.

7 The original text uses the term *masyarakat hukum adat*.

8 Unofficial translation made by the Indonesian government, <<http://www.embassyofindonesia.org/about/pdf/IndonesianConstitution.pdf>>.

9 The original text uses the term *masyarakat tradisional*.

10 Unofficial translation made by the Indonesian government, <<http://www.embassyofindonesia.org/about/pdf/IndonesianConstitution.pdf>>.

***Agrarian Law, Act No. 5/1960***

Article 3 recognises the right of indigenous peoples [the original text uses the term *masyarakat hukum adat*] and Article 5 recognises their customary law. While Article 3 and 4 of this law recognize indigenous peoples' territory with the term *hak ulayat*, such recognition is subject to conditions.

***Law on Human Rights, Act No. 39/1999***

Article 6(1) states that, in the enforcement of human rights, the distinctive nature and the needs of indigenous peoples<sup>11</sup> should be taken into account and protected by law, society and the government, and Article 6(2) stipulates that, in the enforcement of human rights, the cultural identity of indigenous peoples including their right to land shall be protected in line with the development of civilization.

***Law on Forestry, Act No. 41/1999***

Since its enactment, this Act is one of the most dangerous laws affecting indigenous peoples in the country. It states that customary forest is part of State forest. In 2011, AMAN, together with community members, challenged the constitutionality of the Act before the Constitutional Court of Indonesia. From September 2012 to March 2013 alone, the authorities used the Act as a legal basis in the arrest of at least 218 members of indigenous peoples. On May 16, 2013, the Constitutional Court held that the Act is unconstitutional and needs to be immediately revised.

***Constitutional Court Ruling No. 35/PUU-X/2012 on the Judicial Review of the Law on Forestry Act No. 41/1999***<sup>12</sup>

In its Ruling No. 35/PUU-X/2012, the Constitutional Court of Indonesia declared that customary forest is not included in the scope of State forest, and recognized the right of indigenous peoples over their land and territories:

For more than ten years in the implementation, the Law on Forestry 41/1999 has been used as an instrument by Indonesian Government to deprive the right of indigenous peoples over their land and territories. Indigenous forest has been taken away and transferred as State Forest. Ironically, in the name of the State, forest is further given to private sectors through various concession schemes without considering or respecting the rights of the respective indigenous community concerned.

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11 The original text uses the term *masyarakat hukum adat*.

12 The terms *masyarakat adat* and *masyarakat hukum adat* are used in the Constitutional Court Ruling No. 35/PUU-X/2012.

***Decree of People's Consultative Assembly, IX/2001 on Agrarian Reform and Natural Resource Management***

Article 5 stipulates the respect for human rights, recognition of and respect for indigenous peoples' rights, and cultural diversity as part of the principles in the implementation of agrarian reform and natural resource management. Article 6 elaborates the directions of agrarian reforms and policies in natural resources management based on the principles stated in Article 5, and Article 7 mandates the Parliament, together with the Indonesian President to immediately regulate the further implementation of agrarian reform and natural resource management, and to revoke, amend or revise all laws, and regulations that are not in line with the Decree.

***Law on Oil and Gas, Act No. 22/2001***

Article 11(3)(p) states that the rights of indigenous peoples shall be respected by business entities from the exploration to the exploitation phases. Further, Article 33(3)(a) regulates the area where oil and gas business activities are prohibited, which includes the land of indigenous peoples, together with areas such as graveyards, sacred sites and public facilities. Article 33(4) stipulates the replacement of buildings and structures by business entities from the site of their operation after obtaining the license, and that the consent of the affected communities must be obtained before the license is issued, especially for the graveyards, sacred sites and land of indigenous peoples.

***Law on National Education System, Act No. 20/2003***

Article 5(3) and Article 32(2) identify indigenous peoples<sup>13</sup> as one of the target groups entitled to the right to special education service.

***Law on Geothermal, Act No. 27/2003***

Article 16(3)(a) prohibits geothermal mining activities on the land and territory of indigenous peoples.<sup>14</sup>

***Law on Water Resources, Act No. 7/2004***

In this Act, the rights of indigenous peoples<sup>15</sup> are highlighted in Article 6(2) and (3), Article 9(2) and (3), Article 11(1), and Article 17. Indigenous peoples are defined under Article 6(3) as a group of people that are regulated by their own customary law as a unity of peoples based on living area or descent. It further explains that the right of indigenous peoples to their territory is considered as existing when three elements are identified: (a) it is a group of people bound by customary law, (b) the group has a territory as their living space, and (c) the group and territory are governed through their customary law.

<sup>13</sup> The original text uses the term *masyarakat adat*.

<sup>14</sup> The original text uses the term *masyarakat adat*.

<sup>15</sup> The original text uses the term *masyarakat hukum adat* and *masyarakat adat*.

***Law on Plantation, Act No. 18/2004***

Article 9(2) states that, prior to the implementation of plantation activities in the land and territory of indigenous peoples,<sup>16</sup> it is an obligation for the company, through a deliberation process, to obtain the consent of indigenous peoples on compensation and the modality of the transfer of land ownership, though indigenous peoples are not obliged to give up their land. Indigenous peoples are regarded as existing when the following elements are identified: (a) there is group of people or paguyuban; (b) the people have customary institutions; (c) the people have a clear territory based on customary law; (d) the people have a customary judicial institution still in place, especially a judiciary; and (e) the people are recognised in the local regulation.

***Law on Local Governance, Act No. 32/2004***

Article 1(12) recognises the authority of a village[ Not only desa or village but also nagari, kampung, huta, bori, marga and other similar forms.] in Indonesia, as a unity of peoples with territory and boundaries, to manage the interests of the respective communities based on their origin and customary system. Article 2(9) reaffirms the policy that the State should recognize and respect the indigenous peoples<sup>17</sup> and their traditional rights.

***Law on Mineral and Coal Mining, Act No. 4/2009***

There is no provision on indigenous peoples in this Act despite the massive mineral and coal mining projects in Indonesia in or near indigenous territories adversely affecting the indigenous peoples.

***Law on the Protection and Management of the Environment, Act No. 32/2009***

Article 1(31) defines indigenous peoples<sup>18</sup> as a group of peoples living for generations in a specific geographical area because of the ancestral origins, strong relationship with the environment, as well as their own system and values that determined their economic, political, legal, and social institutions. Article 63(1)(t) states the obligation of the Indonesian government, and Article 63(2)(n) provides the obligation of the provincial governments to formulate a policy on the mechanism of recognition of the indigenous peoples, as well as the local wisdom and their rights, and the district governments have the duty to implement those policies, as stated in Article 63(3)(k).



<sup>16</sup> The original text uses the term masyarakat hukum adat.

<sup>17</sup> The original text uses the term masyarakat hukum adat.

<sup>18</sup> The original text uses the term masyarakat hukum adat.

***Law on Land Acquisition in Development for Public Interest, Act No. 2/2012***

Through this Act, the land and natural resources of indigenous peoples are taken away and exploited without their free, prior and informed consent. It does not recognize community rights, and the process of land acquisition is not participatory or transparent. There are no easily accessible complaint mechanisms for the public, and the judiciary is seen as unable to provide appropriate reliefs to the affected indigenous peoples.

***Law on Prevention and Eradication of Forest Destruction, Act No. 18/2013***

Despite strong objections from various parties, this Act was enacted in 2013. Problematic definitions in the Act result in the criminalization of indigenous practices and threaten their access to their ancestral forests. Six months after its enactment, the Act has been used as the legal basis to arrest 11 indigenous persons for allegations of forest destruction.

***Law on Village, Act No. 6/2014***

This was enacted in December 2013, and it regulates village governance, including customary village.

***Revision of the Law on the Management of Coastal Area and Small Islands***

The Law on the Management of Coastal Area and Small Islands (formerly Law No. 27 of 2007) was revised on December 18, 2013. Under these revisions, Article 1(33) defines indigenous peoples<sup>19</sup> as a group of people who are living in a certain geographic area in Indonesia for generations based on the relationship to their ancestral origin and having strong relationship to their land, territories and natural resources, and who have traditional governance institutions and customary law in the territory in accordance with the Indonesian laws.



<sup>19</sup> The term *masyarakat hukum adat* now replaces the term *masyarakat adat* used in the Law on the Management of Coastal Area and Small Islands, 27/2007.

***Law on the Ratification of Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biological Diversity, 11/2013***

This law recognizes that traditional knowledge on genetic resources is an integral part of what the indigenous peoples<sup>20</sup> inherited from their ancestors. It highlighted the importance of the indigenous peoples' meaningful participation in the management of genetic resources and traditional knowledge. The Act, however, affirms the State control over the natural resources as mandated by Article 33 of the Constitution, which is deemed as incompatible with the spirit, context and principle of the Protocol as well as the Convention on which the Protocol is based.

### **3. International Human Rights Treaties**

Indonesia has ratified or acceded to eight out of the ten core international human rights instruments, as follows:

<b>Treaty</b>	<b>Ratification / Accession(a)</b>
International Convention on the Elimination of All Forms of Racial Discrimination	June 25, 1999 a
International Covenant on Economic, Social and Cultural Rights	February 23, 2006 a
Convention on the Elimination of All Forms of Discrimination Against Women	September 13, 1984
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	October 28, 1998
International Covenant on Civil and Political Rights	February 23, 2006 a
Convention on the Rights of the Child	September 05, 1990
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	May 31, 2012
Convention on the Rights of Persons with Disabilities	November 30, 2011

### **4. NHRI**

The Komisi Nasional Hak Asasi Manusia<sup>21</sup> (Komnas HAM) is the NHRI of Indonesia. Established in 1993 through Presidential Decree No. 50, it has the function to conduct study and research, disseminate relevant information, monitor and mediate human rights issues.

<sup>20</sup> The original text uses the term masyarakat hukum adat.

<sup>21</sup> Translated in English as National Commission on Human Rights.

The Law on Human Rights Act of 1999 sets out the general mandate, objectives and principles of Komnas HAM, but the same are applicable only when State actors are involved. Moreover, the Law on Human Rights Court of 2000 directs Komnas HAM to investigate gross human rights violations in Indonesia. Under the Law on the Elimination of Ethnic and Racial Discrimination of 2008, Komnas HAM is mandated to monitor the actions taken by the State for the elimination of ethnic and racial discrimination.

Komnas HAM commissioners have a term of five years, and the chairman used to have a term of two and a half years. In 2013, despite strong objections from various parties, especially the civil society organizations and coalitions, several changes have been introduced in Komnas HAM through a closed door plenary session, including the decision to reduce the chairman's term to one year. Currently, there are 13 Komnas HAM commissioners for the period 2012-2017.

Since 2002, indigenous peoples' rights are one of the priority issues in its work. Komnas HAM has conducted researches and issued a number of publications on indigenous peoples -- the *Inventarisasi dan Perlindungan Hak Masyarakat Hukum Adat*<sup>22</sup> in August 2005; the *Masyarakat Hukum Adat (Inventarisasi dan Perlindungan Hak)*<sup>23</sup> in December 2005; the *Indigenous Peoples, The Structural Relationship between Tribal Groups, Nations and The State (From a Human Rights Perspective)* in 2006; and the *Kertas Posisi Hak Masyarakat Hukum Adat*<sup>24</sup> in January 2006. It has a Commissioner on Indigenous Peoples' Rights under the Sub-Commission on Economic, Social and Cultural rights.

In 2006, or a year before the UN General Assembly adopted the UNDRIP in 2007, Komnas HAM organized a celebration of International Indigenous Peoples Day in Jakarta. It was a historical celebration where Indonesian President Susilo Bambang Yudhoyono affirmed the importance of the formulation of a law on indigenous peoples in order to promote and protect their rights in the country.

In that period, included in Komnas HAM's priority agenda were urging the Indonesian government to ratify the ILO 169 and



22 Translated in English as *Inventarisasi and Protection on the Rights of Indigenous Peoples*.

23 Translated in English as *Indigenous Peoples (Inventarisasi and Protection of the Rights)*.

24 Translated in English as *Position Paper on Indigenous Peoples*.

the promotion of an alternative land and natural resources conflict resolution. As of now, however, the Indonesian government has not yet ratified the ILO 169 while continuously rejecting to accept the concept of indigenous peoples as established by international standards.

There have been several progressive developments, however, in Komnas HAM's current term (2012-2017) regarding indigenous peoples advocacy. Sandrayati Moniaga, a candidate of the civil society, was designated in 2012 as one of Komnas HAM commissioners with the full support of the indigenous peoples in Indonesia. In 2013, Moniaga was appointed as Komnas HAM Special Rapporteur on the Rights of Indigenous Peoples. Komnas HAM has also been providing assistance, in cooperation with AMAN, in drafting the proposed Act on the Recognition and Protection of the Rights of Indigenous Peoples. It also assisted the District Parliament of Malinau in the East Kalimantan Province in developing the local regulation on indigenous peoples.

Komnas HAM has expressed its strong support to the Constitutional Court Ruling No. 35/PUU-X/2012, and is urging the Indonesian government to implement it, maintaining the position that the ruling is a correction of the State's approach and the Law on Forestry Act of 1999, which are not based on indigenous rights and have been used to deprive indigenous peoples of their rights. A number of Komnas HAM commissioners have attended various national and regional events organized by indigenous peoples and AMAN, and their presence are perceived as a moral and political support for the indigenous peoples' movement in the country.

Komnas HAM also signed a Memorandum of Understanding with AMAN in March 2009, and the parties agreed to formulate necessary steps to put in the mainstream the indigenous peoples' human rights-based approach in Indonesia, through promoting the UNDRIP, regularly exchanging information, researching on indigenous peoples and their rights, developing mechanisms on resolving cases of indigenous peoples' rights violations, and encouraging the ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

From 2010 to 2013, there were 363 cases of indigenous peoples' rights violations reported to Komnas HAM, and a significant portion thereof involves land conflict:

Year	Number of Cases	Number / Percentage of Land Conflict
2010	79	64 (81%)
2011	93	61 (66%)
2012	117	83 (71%)
2013	74	50 (68%)

In 2011, Komnas HAM received 4,502 complaints, 1,262 thereof are against the police and 755 against private companies. In 2012, it received 1,009 complaints against private companies and 1,635 against the police out of a total of 5,442 complaints. In 2013 there were around 7,000 complaints received by Komnas HAM, 1,785 thereof are against

the police, 937 against private companies and 828 against the government, and the main cause of these complaints is agrarian conflict.

Komnas HAM finds that large-scale activities of private companies, especially plantation and natural resources exploitation, are causing massive conflicts and socio-economic damage on indigenous peoples, including environmental destruction, increase in poverty level and displacement of indigenous peoples. It must be noted, however, that there is a gap between the data from Komnas HAM and the actual number of cases on the ground involving indigenous communities.

## 5. Recommendations

Despite its good practices for indigenous peoples issues in Indonesia, Komnas HAM is facing difficulties in the performance of its mandate. Its independence from the Indonesian government is under severe pressure, especially on issues involving massive violations of indigenous peoples' rights. Adequate resources are not made available to it, and the quality and quantity of the work of Komnas HAM commissioners can be improved through a comprehensive capacity building of its officers and personnel.

Amendments or revisions should be introduced to existing laws, like the Law on Human Rights Act of 1999 which limits Komnas HAM's mandate since it deals only with violations committed by State actors, and non-State actors (e.g., private companies) are excluded therefrom. Under Article 1(7) of the Law on Human Rights Act of 1999, Komnas HAM is at the same level as that of other state institutions. But since it is not established under the Constitution, any conflict of authority between Komnas HAM and other institutions, such as the Law and Human Rights Ministry or the Parliament, cannot be settled before the Constitutional Court. This Act needs to be revised to incorporate international human rights standards and principles for purposes of engraving the importance of human rights concept and values in the peoples' consciousness. Other laws that should be changed or repealed are those stated above that have been used to harass indigenous peoples and deprive them of their land, forest and resources and the use thereof, including the Law on Prevention and Eradication of Forest Destruction Act of 2013.

Steps can be undertaken to make Komnas HAM's recommendations legally binding for purposes of enforcement, as its existing

recommendations are often ignored by the Indonesian government. The current modality of mediation process is another concern because the provincial human rights commissions have no authority to conduct them, as they can only be conducted by the commissioners at the national level. Since the latter does not have the benefit of familiarity and interactions with the affected people on the ground, the mediations conducted by Komnas HAM at the national level do not have positive results, often leaving perpetrators with impunity, massive violations of indigenous peoples' rights but it also hinders the official documentation of the data needed for determining the many important aspects of their way of life for purposes of policy-making. Thus, for the Indonesian government would make a step forward by accepting the fact that a significant portion of the country's population is composed of indigenous peoples, whose struggling situation is aggravated by the government's policies on development, among others, in favor of private companies. Human rights-based approach to development to ensure the promotion and protection of indigenous peoples' rights while pursuing the country's development.



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## F. Malaysia

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Contributor: Suzzanah Masalin



## 1. Indigenous Peoples in Malaysia

In 2013, Malaysia's total population is 29.72 million.<sup>1</sup> According to IWGIA, the indigenous peoples, or *Orang Asal*,<sup>2</sup> in Malaysia constitute 12 percent of the 28.6 million people in the country in 2010:

The *Orang Asli* are the indigenous peoples of Peninsular Malaysia. They number 180,000, representing a mere 0.6% of the national population. Anthropologists and administrators have traditionally categorized the 18 *Orang Asli* subgroups into Negrito (Semang), Senoi and Aboriginal-Malay.

In Sarawak, the indigenous peoples are collectively called *Orang Ulu* or *Dayak* and include the Iban, *Bidayuh*, *Kenyah*, *Kayan*, *Kedayan*, *Murut*, *Punan*, *Bisayah*, *Kelabit*, *Berawan* and *Penan*. They constitute around 1,248,600 or 48.3% of Sarawak's population of 2,583,000 million people.

In Sabah, the 39 different indigenous ethnic groups are called natives or *Anak Negeri* and make up about 1,898,800 or 55.1% of Sabah's population of 3,442,300. The main groups are the *Dusun*, *Murut*, *Paitan* and *Bajau*.<sup>3</sup>

## 2. National Legal Framework

The Federal Constitution of Malaysia specifically states who is a native of Sabah and Sarawak, whereas the *Orang Asli* of Peninsular Malaysia are made to "prove" that they are indigenous in that there is no clear constitutional definition of a native for the *Orang Asli* in the Federal Constitution. Under Part IV, Article 45(2) of the Federal Constitution, the King can appoint an *Orang Asli* as a senator into the Malaysian Senate (*Dewan Negara*), but in the Sabah and Sarawak Constitutions, there is nothing in the Constitution or laws that specifies the formal representation of the *Orang Asal* in a body or mechanism. As such, an *Orang Asli* representative has been appointed as senator.

Despite Malaysia having voted in favor of the adoption of the UN Declaration on the Rights of Indigenous Peoples, the laws and policies that affect the *Orang Asal* of Malaysia do not expressly reflect the provisions of the Declaration.

### 2. 1 Peninsular Malaysia

Article 160(2) of the Federal Constitution of Malaysia defines an "aborigine" as "an aborigine of the Malay Peninsula" without further definition. The Aboriginal Peoples Act 1954 (APA) [sec. 3(1)] states that an aborigine is a person whose parents are both aborigines or one parent, male or female, is or was, a member of an aboriginal ethnic group, speaks an aboriginal language and habitually follows an aboriginal way of life, customs and beliefs.

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1 <<http://www.data.worldbank.org/country/malaysia>>.

2 The *Orang Asal* are the indigenous people of Malaysia. The term is Malay for "Original People." The *Orang Asal* in Peninsular Malaysia are collectively known as the *Orang Asli*.

3 <<http://www.iwgia.org/regions/asia/malaysia>>.

The difficult and rather vague definition of who is an Orang Asli in the Federal Constitution and the APA jeopardises the continued existence of the Orang Asli as indigenous peoples. The qualifications put in place for the Orang Asli to “prove” that they are natives have further weakened their status and right to self-determination in Malaysia. The final determination of whether a person qualifies to be an Orang Asli lies with the Minister concerned.

According to the 1961 Statement of Policy Regarding the Administration of the Orang Asli of Peninsula Malaysia, together with the APA, the Government does not issue ownership titles for a land within an aboriginal area and only grants a “right to occupy” permit. It is to be noted that, according to the APA, although there is a payment in compensation for damages to crops for a land acquired under the Aboriginal Peoples Act, there is no provision to replace such a land [sections 11(1) and (12)].

Although the aforementioned Statement is mindful of Orang Asli welfare and of the need to protect the Orang Asli lands, customs, institutions and languages, it still charts the course for the “development” and for an ultimate “integration” of the Orang Asli into mainstream Malay society. Inconsistent with the concepts of self-determination and free, prior and informed consent and consultation, the 1961 Policy fails to meaningfully include Orang Asli in any policy decisions affecting them.

Thereafter are listed other legislations affecting the Orang Asli land rights.

#### ***National Land (Group Settlement Areas) Act 1960***

This act permits land agencies such as the Federal Land Development Authority (FELDA) and the Federal Land Consolidation and Rehabilitation Authority (FELCRA) to take land for the purposes of land resettlement culminating in the issuance of land titles to settlers. Most of these early development and land settlements were on traditional lands of the Orang Asli but the Orang Asli did not necessarily benefit from such initiatives.

#### ***Land Acquisition Act 1960***

This Act is the primary land acquisition legislation in Malaysia used against the Orang Asli. As Orang Asli are not given titles for their lands, the difficulty here is for the Orang Asli to prove continuous occupation of their lands. This can be difficult as documentary evidence is has not been made accessible to Orang Asli, and the evidence of their occupation like their crops and abodes are usually destroyed, and not accepted as proof, thereby denying the Orang Asli their right to their ancestral lands and to compensation.

#### ***National Land Code 1965***

Although there are no specific provisions concerning the Orang Asli in this law, the customary tenure of the Orang Asli is recognized. Section 4(2) states: “Nothing in this Act shall affect the past operation of, or anything done under, any previous land law or, so far as they relate to land, the provisions of any other law passed before the commencement of this Act, Provided that any right, liberty, privilege, obligation or liability existing at the commencement of this act...be subject to the provisions of this Act.”

### ***Town and Country Planning Act 1976***

This Act has no specific reference to the Orang Asli but affects them as development is done to expand townships. Generally, several provisions require that surveys be publicly exhibited by way of advertisements so as public objections can be recorded. In practice, the public is generally not informed of their rights and therefore there is a lack of participation and consent from the affected parties, including the Orang Asli. Most advertisements of developments are merely procedural and do not necessarily have the participation of the interested affected parties. Also, the notices are placed where Orang Asli cannot easily read them and/or it is written in a language they cannot read and understand.

### ***National Forestry Act 1984***

The entire property of all forests products within a permanent reserved forest or within a State land is vested in the State Authority and no one can take forest products from a State land or from a permanent reserved forest. This impacts directly on the access of indigenous peoples to their traditional livelihood sources which are mostly located in forests. It should be noted that these forests had been declared as national forests without the information given neither to indigenous peoples or their consent sought.

## **2.2 Sabah**

There are two definitions of a Native for Sabahans and this has led to some form of confusion. There is the Federal Constitution definition and the interpretation ordinance, the Sabah Cap 64 definition. Confusion arises as some laws use the Constitutional definition while others use the State Ordinance definition. Problems also arise when trying to establish “native” status as the Constitutional definition limits the lineage up to ‘grandchildren’, while the State ordinance definition has no limit.

Article 161A(6)(b) of the Federal Constitution states that a Sabahan is a native if he or she is a citizen, the child or grandchild of a person of a race indigenous to Sabah, who was born either in Sabah or to a father domiciled in Sabah at the time of the birth. However, the Sabah Interpretation Ordinance 1952 (Sabah Cap. 64) section 2(1)(a) does not spell out who are meant as “indigenous to Sabah” and problems have arisen from the differing lists that were drawn by Federal and State departments on who are Sabah’s natives.

In Sabah, there are no specific legislations that invoke the participation or consent of the natives of Sabah especially when it concerns their affected territories. Although recognizing the existence of native customary rights to land of the natives, most legislation in Sabah are development-centric thus often disregard the current practices of the natives on these lands. The requirement of a notice and the time to respond to such a notice makes the claims by Natives almost impossible to be implemented. There are mainly implied provisions as contained in the following legislations and policies.

### ***Land Ordinance 1930***

Under this ordinance, section 13 provides that anyone wishing to apply for the ownership of a non-alienated land shall publish a notice to require anyone with native

customary land rights to the said land to come forward and make a claim to the land within a specified period. However, section 14 states that the notice should be published in the office of the Collector whereas the affected natives usually live far away in the villages. They therefore never hear of such a notice.

### ***Land Acquisition Ordinance 1950***

The ordinance explicitly provides for the determination of claims to compensation which allows only three months for the owner to register its interest to the authorized officer after which claims to compensation are considered invalid [section 9].

### ***Forest Enactment 1968***

The Forest Enactment has a number of provisions implying the necessity to obtain consent from affected indigenous communities. Sections 8 and 9 state that prior to any creation of forestry reserves, a notification of proposal is to be published in the Gazette and requires the District Officer (DO) or Collector to conduct an enquiry. However, these provisions have not been complied with in most cases resulting in indigenous communities being included in proposed forest reserves.

### ***Wildlife Conservation Enactment 1997***

The Enactment incorporates a component of community participation by establishing a community hunting area, and the recruitment of honorary wildlife wardens from the community. Section 9(2)(c) mentions that a notice is required before declaring an area as a wildlife sanctuary, particularly concerning the “native or traditional rights that will continue to be exercisable after the coming into effect of the declaration of the proposed Sanctuary”. According to section 9(2)(d), consultations must be conducted with the communities likely to be affected by the proposed Sanctuary.

### ***Sabah Water Resource Enactment 1998***

This Enactment recognizes private water rights, including the water rights of indigenous peoples. Its primary purpose is to protect ‘environmentally sensitive’ zones. It takes into consideration the economic and social impacts on the owner or occupier of the land when making a water resource management decision, implying the necessity to examine land ownership and occupation rights of indigenous peoples. Although the Enactment appears progressive with respect to management of water resources, there are gaps with respect to setting aside water protection areas. In section 36, interest to protect areas precedes the rights of indigenous peoples to land and does not recognize the fact that indigenous peoples may have been traditionally protecting the area adequately.

### ***Inland Fisheries and Aquaculture Enactment 2003***

Section 35 of the Enactment allows for the declaration and recognition of the indigenous system of river and fisheries management (Tagal). The Tagal system is a community-based fisheries resource management. Sections 36 and 37 create a new protocol

by providing for the creation of a committee to administer such zones. Although the Sabah Inland Fisheries and Aquaculture Enactment 2003 is progressive in recognizing the community system of managing riverine resources, it has also contributed to the weakening of the traditional authority for the Tagal system. There are concerns that the institutionalization of the Tagal rules will weaken the local governance, which is based on the adat [customary law] and generations of traditional knowledge.

### ***Sabah Land Use Policy 2010***

This policy was adopted in 2010 in an attempt to provide a land use orientation that balances social, environmental and economic functions. Although still considering that all untitled lands are State lands, the Policy advocates for the formalization of the concept of native community domains. This concept of native community domains requires the government to take into account ‘the traditions and needs of native communities’. Reference was made particularly to the practice of hill rice cultivation. Boundaries for community domains are to be agreed upon by native communities in collaboration with the relevant government departments. With respect to security of the tenure, the Policy supports the formation of more native reserves so that traditional farming of hill rice could continue.

## **2.3 Sarawak**

In Sarawak, a native is defined through an exhaustive list in the Federal Constitution and State Legislation. A “native” in Sarawak is an indigenous person who is born of parents who are both natives. The problem with the exhaustive list definition is that there are certain groups left out of the definition and therefore it is not quite exhaustive resulting in smaller groups such as the Berawan, Narum, Jatti Miriek and Saban being left out. The strict identification of who are natives in the law exclude natives who marry non-natives and those who identify themselves as natives is viewed as going against the right of self-identification of children of natives. It has also allowed discrimination. For instance, children born from a native mother and a non-native father are not considered native, while children born from a native father and a non-native mother are considered native.

The main legislation for the administration of land in Sarawak is the Sarawak Land Code 1958. One of the main features of the Sarawak Land Code is to clarify the definition of the native customary rights to land, which cannot be created after 1 January 1958. The narrow legislative definitional requirement as to what constitutes NCR, mainly based on cultivation and settlement, ignores the traditional features of land use by the natives in Sarawak wherein the natives would maintain and preserve, but not cultivate, vast areas within their territories for hunting, gathering, recording their history and commemorating significant events and people.

### ***Sarawak Land Consolidation and Rehabilitation Authority Ordinance 1976***

This legislation aims to develop agricultural lands in situ and often involves owners of native customary lands to enter into joint ventures to develop their lands and to plant cash crops.

### *Sarawak Land Consolidation and Development Authority Ordinance (LCDA) 1981*

This ordinance allows the Land Consolidation and Development Authority as a government agency to acquire lands for private estate development. LCDA can therefore form joint venture companies with private investors and NCR land owners.

### *Natural Resources and Environment Ordinance 1993*

Its section 11A(a) requires any person undertaking activities such as forest clearance, logging, mining exploration or commercial development to submit an environmental impact assessment report of such activities. However, these requirements are undermined by the First Schedule of the Natural Resources and Environment (Prescribed Activities) Order 1994. This Order will only require a mandatory EIA if logging falls into (i) areas exceeding 500 hectares; and (ii) areas declared to be a water catchment area under the Water Ordinance 1994. This has allowed developers to circumvent these by parceling out land into less than 500 hectares.

## **3. International Human Rights Treaties**

Malaysia has ratified or acceded only to three of the core international human rights instruments:

Treaty	Ratification / Accession(a)
Convention on the Elimination of All Forms of Discrimination Against Women	July 05, 1995 a
Convention on the Rights of the Child	February 17, 1995 a
Convention on the Rights of Persons with Disabilities	July 19, 2010

It should be noted that Malaysia voted in favor of the adoption of the UNDRIP at the UN General Assembly on September 13, 2007.

## **4. NHRI**

Malaysia's NHRI is the Human Rights Commission or Suruhanjaya Hak Asasi Malaysia, locally known as SUHAKAM, which was established under the Human Rights Commission of Malaysia Act of 1999. The lack of transparency in the appointment process of SUHAKAM commissioners has been a concern. In 2009, amendments to the Act were introduced establishing a committee to select SUHAKAM commissioners, fixing the terms of office, and requiring them of having knowledge of or practical experience on human rights issues.

It may inquire into an allegation of infringement of human rights, *motu proprio* or on a complaint made by an aggrieved person or group of persons, or a person acting on behalf of an aggrieved person or a group of persons.<sup>4</sup>

SUHAKAM is reviewing the Act to have its role and functions be reflected in the law in a more precise manner. The inadequacies in the Act include SUHAKAM's limited mandate to prosecute or implement its decisions, as well as visiting places of detention with prior notification. SUHAKAM has been taking the approach of reading the Act in a more general sense that is compatible with the spirit thereof, and using other avenues in the performance of its duty, like working with the judiciary as *amicus curiae*.<sup>5</sup>

NGOs in Malaysia are also engaged in indigenous peoples issues, such as the Indigenous Peoples Network of Malaysia or Jaringan Orang Asal SeMalaysia,<sup>6</sup> which has been working on the promotion of the UNDRIP, and the Malaysian Bar, which, through its Committee on Orang Asli Rights,<sup>7</sup> works closely with the Orang Asli and often supports SUHAKAM's recommendations on the challenges being faced by the Orang Asli.

#### **4.1. Integration**

SUHAKAM has had several programs on indigenous peoples' rights. It has also been assigned as the lead NHRI for joint projects on indigenous peoples under the Strategic Plan 2012-2016 for the Southeast Asian National Human Rights Institute Forum (SEANF).<sup>8</sup>

#### ***National Inquiry into the Land Rights of Indigenous Peoples***

From 2011 to 2013, SUHAKAM held a National Inquiry into the Land Rights of Indigenous Peoples for purposes of studying the issues and gathering information on areas of conflict, as well as applicable laws, procedures and policies, relating to indigenous peoples' land rights.<sup>9</sup> SUHAKAM received numerous complaints from the Orang Asli regarding human rights violations on customary land rights, most of which, however, have not been resolved.

The complaints reveal a historical and systemic problem such that land laws, policies and administrative procedures over the years have contributed in the conflicts which have become very serious concerns. The issues cannot be addressed using piecemeal approaches or on a case by case basis, thus the national inquiry, which was deemed the best way to confront the root causes of these issues.

The SUHAKAM Report is based on consultations, hearings, independent research and lengthy submissions involving Indigenous Peoples, government departments and agencies, the private sector and non-governmental organisations. It is a comprehensive

4 Section 12(1), Human Rights Commission of Malaysia Act of 1999.

5 <<http://www.asiapacificforum.net/support/capacityassessment/downloads/resources/file.2011-07-14.7924144972/view>>.

6 <<http://orangasal.blogspot.com/>>.

7 <[http://www.malaysianbar.org.my/committee\\_on\\_orang\\_asli/](http://www.malaysianbar.org.my/committee_on_orang_asli/)>.

8 <<file:///C:/Users/user/Downloads/Final%20Report%20SUHAKAM%20and%20AIPP%20Regional%20Consultation%20on%20IPs%2014%20March%202013.pdf>>.

9 <<http://docs.google.com/file/d/0B2PpIT5XsFQfbE15V0YtdmdETIE/edit>>.

document that contains 18 critical recommendations under six main themes, namely:

- (1) Recognition of indigenous customary lands;
- (2) Remedy for loss of customary lands;
- (3) The need to address land development issues and imbalances;
- (4) Prevention of future loss of customary lands;
- (5) The need to address land administration issues; and
- (6) Recognition of land as central to the identity of Indigenous Peoples.



The terms of reference and methods used in the national inquiry are comprehensive (e.g., calling for public submissions, holding consultations and public hearings, research) and helped to mobilize indigenous communities. The lessons and experiences gathered



from national inquiry helped to elevate SUHAKAM's name internationally, and conducting the same was referred to by the United Nations Expert Mechanism on the Rights of Indigenous Peoples as an example of a good practice.<sup>10</sup>

### ***Research and Publications***

SUHAKAM has undertaken the review of relevant laws and policies under Malaysia's treaty obligations, for purposes of gradually putting pressure on Malaysia to improve its compliance with international standards, make the necessary changes in the domestic laws, and withdraw its reservations to certain provisions of the aforesaid three international human rights instruments that it has ratified or acceded to. SUHAKAM has also conducted visits and investigations to specific areas of concerns related to the Orang Asal, and has published several reports such as the Murum Hydroelectric Project and its Impact towards the Economics, Social and Cultural Rights of the Affected Indigenous Peoples in Sarawak; Legal Perspectives on Native Customary Land Rights in Sarawak; Penan Benalih Blockade Issue; and the Report on Penan in Ulu Belaga: Right to Land and Social-Economic Development.

### ***Advocacy and Public Education***

Over the years, SUHAKAM has had the opportunity to organize roundtable discussions, meetings, seminars or workshops with the government, civil society, and the private sector insofar as indigenous peoples' rights are concerned. It held or participated in events to gather views on the UNDRIP's implementation.

It conducted roadshows, exhibitions and dialogues to educate the public on indigenous peoples' rights. Its office in Sabah has been active in organizing public talks, in collaboration with the public complaints bureau and indigenous peoples organizations, for indigenous peoples in the field of indigenous legal systems, economy, and education.

SUHAKAM has indicated its plan of continuing to bridge the gaps between the Orang Asli's educational program on their children and that in the mainstream, and to continue to raise awareness in the Orang Asli community regarding the importance of education. This may address the high rate of school dropouts among Orang Asli children.<sup>11</sup>

## **4.2. Gaps and Challenges**

The National Inquiry into the Land Rights of Indigenous Peoples has helped in elevating SUHAKAM's reputation and put indigenous peoples' rights as one of SUHAKAM's core themes in its 2012-2016 Strategic Plan, but its report on the results of the national inquiry has been made inaccessible to the public. The said report had not been submitted to the Parliament nor released publicly, and instead only a formal hand-over of the same was done to the government during the announcement of the creation of a government task force having the duty to study the said report. To date, the task force has not yet released the results of its study.

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<sup>10</sup> Para. 78, A/HRC/18/42.

<sup>11</sup> <<http://www.suhakam.org.my/about-suhakam/pendidikan/orang-asliasal-oa/>>.

The national inquiry conducted by SUHAKAM was cooperative, responsive and useful in developing solutions for the complaints and issues raised by the Orang Asal regarding land rights. Despite the support from the Jaringan Orang Asal SeMalaysia<sup>12</sup> and the Malaysian Bar Council,<sup>13</sup> however, the non-implementation of the national inquiry's recommendations remains a serious concern. Based on SUHAKAM's annual reports, the highest number of complaints it received refers to land rights issues raised by the Orang Asal from Sabah and Sarawak, yet the number of resolved complaints remains very low.<sup>14</sup> SUHAKAM has also lamented on the lack of adequate consideration by the government and the Parliament of its views and advice, including the absence of a debate on its annual report in the Parliament. To date, a Parliamentary Select Committee on Human Rights has not yet been established.<sup>15</sup>

SUHAKAM's current focus appears to be on the rights of children with learning disabilities and the elderly, and with just over 80 staff, SUHAKAM is having a difficulty to cover indigenous peoples issues at a sustained level or to conduct follow-ups, monitoring and evaluation of its projects. For example, its two regional offices in Sabah and Sarawak, where most of the Orang Asal reside, SUHAKAM has only two and one officers, respectively. There is no specific officer in charge of indigenous peoples issues, although at one time SUHAKAM had established an Indigenous Peoples' Rights Committee.

SUHAKAM had an important project in 2010 to advocate for the indigenous legal systems in Sabah and explore the possibilities for the recognition of the Orang Asli legal system, as well as for such legal systems to remain autonomous. This was the result, however, of repeated demands by indigenous leaders and institutions. This project resulted in getting financial support from the government in the improvement of the image of indigenous peoples' courts in Sabah and contributed in getting the interests of the youth and community leaders.<sup>16</sup> Like in many other projects, however, that had been started by SUHAKAM over the years, the working groups<sup>17</sup> in SUHAKAM have not undertaken the necessary follow-ups thereon except with respect to the Orang Asli educational program.

The government views indigenous land issues as "sensitive" and puts a defensive stance about its lack of response to said issues. All this create serious concerns on how SUHAKAM may effectively engage in the promotion and protection of the land rights of indigenous peoples.

12 <<http://www.freemalaysiatoday.com/category/nation/2013/11/09/orang-asal-govt-must-apologise-to-us/>>.

13 <[http://www.malaysianbar.org.my/press\\_statements/press\\_release\\_implement\\_recommendations\\_made\\_in\\_suhakam\\_report\\_of\\_the\\_national\\_inquiry\\_into\\_land\\_rights\\_of\\_indigenous\\_peoples.html](http://www.malaysianbar.org.my/press_statements/press_release_implement_recommendations_made_in_suhakam_report_of_the_national_inquiry_into_land_rights_of_indigenous_peoples.html)>.

14 Para 1.2, ch 1. National Inquiry Report.

15 <<http://www.thestar.com.my/News/Nation/2012/10/23/Nazri-suggests-permanent-Parliamentary-Select-Committee-to-discuss-human-rights-issues/>>, see also <<http://www.suhakam.org.my/wp-content/uploads/2013/12/The-Setting-Up-Of-a-Parliamentary-Select-Committee-on-Human-Rights-is-Welcomed.pdf>>.

16 Jannie Lasimbang, "Development and customary law", Indigenous Affairs, International Work Group for Indigenous Affairs, 2010, <[http://issuu.com/iwgia/docs/ia\\_1\\_2\\_2010](http://issuu.com/iwgia/docs/ia_1_2_2010)>.

17 <<http://www.suhakam.org.my/about-suhakam/kumpulan-kerjawatankuasa/>>.

## 5. Recommendations

The Malaysian government could accord primary importance on seriously addressing the issues regarding the land rights of indigenous peoples in the country, particularly the concerns raised by the indigenous community leaders during the national inquiry. Together with the Parliament, the government should openly and sincerely engage in a national dialogue with the stakeholders for the promotion and protection of indigenous peoples' rights.

SUHAKAM's financial capacity must be increased by the government in order to sufficiently fund its human rights programs and hire more personnel. For a sustained focus on indigenous peoples' rights, SUHAKAM should dedicate a particular committee for such issues, from investigation to making recommendations, from conducting follow-ups to continued monitoring and evaluation.

Indigenous peoples' movements in Malaysia are very active, and SUHAKAM can further enhance its work by collaborating with indigenous organizations such as the Jaringan Orang Asal SeMalaysia at the national level, Centre for Orang Asli Concerns and Jaringan Kampung Orang Asli Semenanjung Malaysia, Borneo Resources Institute and SADIA in Sarawak, and PACOS Trust in Sabah.

As the lead NHRI on indigenous issues in SEANF, SUHAKAM should further take advantage of the current favorable international situation on indigenous peoples' rights in Malaysia, like when nine countries have made recommendations to safeguard the rights and interests of indigenous peoples in Malaysia during its Universal Periodic Review, and where SUHAKAM urged the Malaysian government to implement the said recommendations over the next succeeding years before Malaysia is reviewed for the third time in 2018.<sup>18</sup>

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18 <<http://www.asiapacificforum.net/news/malaysia-suhakam-urges-government-to-accept-upr-recommendations>>.

## G. Thailand

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Contributor: Ekachai Pinkaew



## 1. Indigenous Peoples in Thailand

In 2013, Thailand's population is estimated to be 67.01 million.<sup>1</sup> There is no official data on the total number of indigenous peoples in the country. They are in three regions in Thailand:

- 1.) The Chaoley or indigenous fishermen communities and the Mani or hunter-gatherers in the south;
- 2.) The small groups in the Korat plateau in the north-east and in eastern Thailand, particularly in the border with Cambodia and Laos; and
- 3.) The Chao Khao or hill people in the north and north-west.<sup>2</sup>

In 2002, Thailand's Department of Social Development and Welfare stated that there are a total of 925,825<sup>3</sup> hill tribe people in 20 provinces in the country. No figures are available for the indigenous peoples in the south and northeast. The ten officially recognized hill tribes in the north and northwest of the country are the Akha, Hmong, H'tin, Karen, Khmu, Lahu, Lisu, Lua, Mien and Mlabri.<sup>4</sup>

Indigenous peoples in Thailand have been subjected to stereotyping and discrimination:

The official term *chao khao* has been used since the late 1950s, with the earlier term *chao pa* ("forest people"), which was used to denote to non-Thai minority groups. For the Thais, *pa* – meaning "forest" – has the connotation of "wild," which is generally conceived in opposition to the "civilized." The adoption of the term *chao khao* was part of a nation-building process in which national identity and definition of "Thai-ness" was linked to cultural traits, particularly Buddhism, Thai language and the monarchy. With the negative stereotyping of the hill tribes as forest destroyers, opium cultivators and communist sympathizers, the social category of the *chao khao* came to be defined as being "non-Thai," underdeveloped and environmentally destructive. Other terms applied in Thailand are more or less equivalent to terms commonly used in English for the region, like *klum chat tiphan* ("ethnic groups") or *chon klum noy* ("ethnic minorities"). The (former) hunter-gatherer groups in the South are still often referred to by the derogatory terms *sakai* (literally meaning "slave"). These stereotyping and discrimination have been reinforced directly and indirectly in the national education curriculum from primary to university levels.<sup>5</sup>

In order to counter these negative terms, indigenous organizations have been promoting since over ten years ago the term *chon phao phuen mueang* for indigenous peoples. But the Thai government rejects the use of the term indigenous peoples, however,

1 <<http://www.data.worldbank.org/country/thailand>>.

2 <<http://www.iwgia.org/regions/asia/thailand>>.

3 See Department of Social Development and Welfare, *A Directory of Ethnic Highland Communities in Twenty Provinces*, B.E. 2545 (2002).

4 Report on the Situation of Human Rights and Fundamental Rights of Indigenous Peoples in Thailand, Submitted to Prof. James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, January 19, 2010, <[http://www.aippnet.org/pdf/Thai %20IPs%20submission%20to%20the%20Special%20Rapporteur%202010.pdf](http://www.aippnet.org/pdf/Thai%20IPs%20submission%20to%20the%20Special%20Rapporteur%202010.pdf)>.

5 Id.

and claims that they are also considered Thais, protected by laws and deserving to be accorded their fundamental rights. To this day, however, they continue to suffer from such stereotyping and discrimination.<sup>6</sup>

Indigenous peoples in Thailand have been subjected to violations of their right to liberty and security of persons; right to nationality or citizenship; right to land, forests and natural resources; and right to traditional occupation, livelihood and food security.<sup>7</sup>



## 2. Legal Framework

The treatment of indigenous peoples as uncivilized and a threat to national security constitutes the basic framework that governs the country's laws, policies and programs insofar as indigenous peoples are concerned:

The historical discrimination against the indigenous peoples of Thailand as “uncivilized,” in opposition to the “civilized” majority Thais, and now also as threat to national security, continue to shape the laws, policies and programs affecting them. Thailand does not have laws recognizing and protecting the rights of indigenous peoples and the new Constitution passed in 2007 does not explicitly recognize their identity. This is despite the fact that during the drafting of the new Constitution, indigenous peoples’ representatives participated in different constitution-drafting discussion forums at the provincial as well as national levels.<sup>8</sup> About 296,000 indigenous peoples in the country lack citizenship. Under the

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

Citizenship Act of 1965, indigenous peoples can be granted Thai citizenship provided they were born in Thailand and their parents are Thai nationals. But many of them have been denied Thai citizenship due to the absence of any evidence that can prove their birth, like a birth registration, resulting in the restriction of their freedom of movement and access to public services like health care and education.<sup>9</sup>

Several laws and resolutions in the country have adversely affected the lives of indigenous peoples, viz.: Forest Act of 1941; National Forest Reserve Act of 1964; Wildlife Sanctuary Act of 1964; National Park Act of 1961; Cabinet Resolution dated June 30, 1998; Community Forest Act of 2007 and Cabinet Resolution dated April 29, 2008.

These laws and resolution have had severe impacts on indigenous peoples' rights to residence and farming. x x x millions of hectares of land have been declared as reserved and conservation forests, or protected areas. Today, 28.78% of Thailand is categorized as protected areas. As a result, thousands of farmers previously living in the forest or relying on the forest for their livelihood have been arrested and imprisoned and their lands seized. Cases have been filed against them for so-called encroachment on government lands.<sup>10</sup>

Since the late 1950s, policies regarding the hill tribes have been implemented, and until the 1980s, such policies were mainly about concerns on opium cultivation and communist insurgency. In the 1980s, the policies that became national issues were deforestation and regulation of resources in the highlands.<sup>11</sup>

The enactment of the National Security Act of 2007 has caused the increase in human rights violations against indigenous peoples:

Throughout 2008, while claiming to help combat the “drug epidemic” in the country, this law was used for controlling and suppressing indigenous peoples and other forest dependent communities from (supposedly) “encroaching” on the forests, for cross-border labour migration and, in the three southern provinces i.e., Narathiwat, Yala and Pattani, for addressing the “problem of terrorism.” Aside from the three southern provinces this law is also frequently employed by government officials in addressing the “problem of so-called terrorism” in the border areas of Chiang Rai, Chiang Mai, Mae Hong Son, Tak, Kanchaburi and Ratburi Provinces.<sup>12</sup>

The summary executions and disappearance of persons in Thailand carried out by government officials include the cases of execution of six Mien people in Huay Chompu Tambon, Municipal District, Chiang Rai Province on 22 February 2003. In addition, 20 Lahu people in Mae Ai and Fang Districts of Chiang Mai Province accused by government officials as drug pushers suffered severe beatings and electrical shocks and were incarcerated in pits in the ground, and were either executed or disappeared between 2002 and 2004.<sup>13</sup>

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9 Id.

10 Id.

11 Id.

12 Id.

13 Id.

Former Prime Minister Thaksin Shinawatra's drug suppression policy, which was implemented starting 2003, has caused many violations including arbitrary arrests and detention, torture, disappearances and extrajudicial killings<sup>14</sup> of indigenous peoples.

### 3. International Human Rights Treaties

Thailand has ratified or acceded to seven of the core international human rights instruments, as follows:

Treaty	Ratification / Accession(a)
International Convention on the Elimination of All Forms of Racial Discrimination	January 28, 2003 a
International Covenant on Economic, Social and Cultural Rights	September 05, 1999 a
Convention on the Elimination of All Forms of Discrimination Against Women	August 09, 1985 a
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	October 02, 2007 a
International Covenant on Civil and Political Rights	October 29, 1996 a
Convention on the Rights of the Child	March 27, 1992 a
Convention on the Rights of Persons with Disabilities	July 29, 2008

Thailand voted in favor of the adoption of the UNDRIP at the UN General Assembly on September 13, 2007 .

### 4. NHRI

Thailand's NHRI is the National Human Rights Commission (NHRC), which was established in July 2001 after the enactment of the National Human Rights Commission Act of 1999 in accordance with the 1997 Constitution, also known as the "People's Constitution."<sup>15</sup>

Its functions under the National Human Rights Commission Act of 1999 are as follows:

- 1.) Promote the respect for human rights domestically and internationally;
- 2.) Examine acts of human rights violations or those which do not comply with the country's international human rights obligations, and propose remedial measures to individuals or organizations concerned;

<sup>14</sup> Id.

<sup>15</sup> <<http://www.nhrc.or.th/en/History.php>>.

- 3.) Submit an annual report on the country's human rights situation to the Parliament and the government;
- 4.) Propose to the Parliament and the government the revision of laws, rules or regulations, and policy recommendations for the purpose of promoting and protecting human rights;
- 5.) Disseminate information and promote education and research in human rights; and
- 6.) Cooperate and coordinate with government agencies, NGOs and other human rights organizations.

Thailand's 2007 Constitution has expanded the mandate of the NHRC, viz.: to submit cases together with opinions to the Constitutional Court or the Administrative Court, as the case may be, where any provision of laws, rules, regulations or administrative acts is detrimental to human rights and begs the question of constitutionality and legality, for the purpose of promoting the respect for human rights; and to file a lawsuit on behalf of a complainant for the purpose of redressing the problem of human rights violation in general.<sup>16</sup>

The first NHRC formed a team to investigate human rights violations in relation indigenous peoples who have disappeared or been killed as a result of the Thailand's drug suppression policy:

The team was headed by Mr. Vasant Panich, a prominent lawyer. In response, the government of General Surayud Chulanont established a commission named "Independent Commission to Investigate, Study and Analyze Thai Drug Suppression Policy and Practice and the Impacts on People's Life, Reputation and Property," which submitted its report on 1st December 2008. However, the government failed to take actions in accordance with the recommendations of the report, which included punishing those state officials responsible for cases of executions despite the presence of clear evidence against them.<sup>17</sup>

Although the drug suppression policy is no longer in effect, violations of indigenous peoples' rights continue to happen, especially in the border areas, as a consequence of supposedly enforcing laws against drug trafficking.<sup>18</sup>

As to the status of hill peoples, the NHRC has recommended to the government the streamlining of the process:

The Thai government should streamline the process to verify personal records of those applying for a status to accelerate the granting of status in accordance with the 2005 Strategy to Address the Problem of Status and Rights of Persons. It should also address the problem of inaccessibility to relevant information faced by some members of ethnic groups by using locally spoken language(s) and undertake measures to prevent corruption by some public officials, especially at local level.

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<sup>16</sup> <<http://www.nhrc.or.th/en/Mandates.php>>.

<sup>17</sup> See note 170.

<sup>18</sup> Id.

While the application for a status is being processed, the government should ensure that the applicant's basic rights are protected.<sup>19</sup>

Thailand allows the children of hills peoples with status problem to study in public schools, but the NHRC said that it is not enough:

On the right to education, although Thailand has a policy to allow children with status problem to study in public schools and the government has instructed educational institutions under its supervision to comply with such policy, the measure has proven to be inadequate. There are cases where children with status problem are rejected by certain schools. The government should, therefore, adopt other administrative measures, including an adjustment in budget allocation system, to ensure that the school that admits children with status problem during the fiscal year will receive additional funds necessary for providing education to those children. The government should promote the use of local dialect in public schools in some localities.<sup>20</sup>

The NHRC has also recommended to the government the following:

The Thai government should ensure respect for and protection of the rights of ethnic groups by enhancing the knowledge and understanding of these groups among public official, especially the police and administrative officers at both provincial and local levels. The government should also incorporate in school curriculum, starting from the elementary level, content relating to ethnic groups in Thailand to create awareness among children and young people about cultural diversity in the country. With regard to the right to vote and to stand for elections, the government should undertake review of relevant laws and consider granting such rights to those who acquire Thai nationality though naturalization in cases where it does not impact national security.

The access to the right to housing and to earn a living on arable land is a major problem facing ethnic groups living in areas that have been declared national reserved forests or national parks. While recognizing the need for conservation of depleting forest areas, the NHRC is of the view that the government should recognize the right of the community that has traditionally lived in certain forest areas before they are declared national parks or reserved forests to take part in the management, maintenance and exploitation of natural resources there in a balanced and sustainable manner as guaranteed in the 2007 Constitution. In enforcing the laws on national reserved forests and national parks, authorities should not discriminate against any particular groups and should follow the guidelines approved by the Cabinet resolution of June 1998 strictly. Neglect or non-compliance should be punished to ensure that the Cabinet resolution is effectively carried out.<sup>21</sup>

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19 Alternative report on Thailand's Implementation of the Convention on the Elimination of All Forms of Racial Discrimination, Submitted to the Committee on the Elimination of Racial Discrimination by the National Commission on Human Rights of Thailand, pp. 7-8.

20 Id. at 8.

21 Id. at 8-10.

## **5. Sample Cases**

### *The case of Mr. Da Songsawatwong<sup>22</sup>*



Mr. Songsawatwong, a wage laborer, is from the Hmong ethnic group in Khaokaw District, Phetchaboon Province. In two occasions February 01, 2002 and November 02, 2009 -- his house was illegally searched for possible illegal drugs, but nothing was found. He had been subjected, however, to continued surveillance and intimidation by security officers. As such, he feared for his life since numerous people in the area had been reported missing or became victims of extrajudicial killings.

In 2003, his wife filed a complaint with the NHRC. It turned out that Mr. Songsawatwong was not in the list of alleged drug traffickers, after the NHRC's Sub-committee on the Protection of Human Rights checked with the Operation Centre for Fighting Narcotic in Phetchaboon Province.

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<sup>22</sup> See note 170.

*The case of Wang Mai village<sup>23</sup>*

The violation of indigenous peoples' right to land, forests and resources is best illustrated in the case of Wang Mai Village, a newly established area due to the government's relocation policy in 1994. Located in Wang Neua District, Lampang Province, the village has degraded land not suitable for farming, severely affecting the villagers -- 12 families with 89 members -- since they have no land for their livelihood. They are also facing a legal action from park officials. The indigenous peoples filed a complaint with the NHRC, which conducted an investigation thereon and found that the villagers' rights were violated. The NHRC requested the park officials to address the issue but no action has been taken.



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23 Id.

## **6. Recommendations**

First of all, given the diverse and serious concerns affecting the lives of indigenous peoples in Thailand, the NHRC would make a step forward by dealing with them with urgency and importance. The NHRC should be further equipped with more resources and personnel in order to significantly perform its functions in relation to indigenous peoples' rights. There could be more efforts exerted in ensuring that its recommendations are adopted and acted upon by the authorities, through consistent monitoring and follow-ups. As such, the NHRC should also investigate, as a form of oversight, in case of inaction by the authorities on its recommendations, and expose how such inaction continues to further aggravate the violations of indigenous peoples' rights.

The Thai government should initiate a comprehensive census on all indigenous peoples in the country, and recognize that indigenous peoples issues, though essentially the same with the issues of other vulnerable sectors in the broader context, are substantially different insofar as these are affecting their culture, custom, practices, livelihood and language. The Thai government could make sure that NHRC recommendations are acted upon by the authorities, and that measures are put in place to immediately implement such recommendations.

A non-discriminatory policy in its law enforcement practices, and direct the security forces to strictly respect indigenous peoples' rights in their operations. It must prosecute and punish the perpetrators of violations of indigenous peoples' rights, especially in cases of arbitrary arrest and detention, torture, disappearances and extrajudicial killings.

It should review and amend the laws affecting the indigenous peoples insofar as land, forests and natural resources are concerned, with the view of recognizing their collective rights. Adequate mechanisms should be established to provide the displaced or relocated indigenous peoples with the necessary access to remedial measures, including for restitution and compensation, as the case may be.

## IV. Conclusion

The role of NHRIs remains indispensable in the promotion and protection of human rights. However, the major factors in the worsening human rights condition of indigenous peoples in many countries in Asia are the weak national legal framework and/or enforcement of national laws and policies relating to the recognition and respect of human rights, the lack of an effective justice system and the limited mandate and resources of NHRIs.

The increasing engagement of indigenous peoples with NHRIs and other human rights mechanisms has compelled the NHRIs to give more attention to indigenous peoples' rights, albeit at varying degrees. Some NHRIs with broader mandates are now starting to optimize these to increase their action in addressing the human rights issues of indigenous peoples including their collective rights. Indigenous organisations in Malaysia and Indonesia recognize the efforts of their respective NHRIs with the national inquiries on land rights and the positive impact of these. In Thailand, the NHRI conducted surveys and submitted reports including the issues of hill tribes, though sustained action to address the concerns of the hill tribes is still very much needed. In Bangladesh, indigenous peoples consider their NHRC to be responsive, though depending on who heads it. Nevertheless, the NHRC-Bangladesh continues to raise complaints against the Government regarding the serious human rights violations of indigenous peoples. In India, the NHRI is prevented from addressing human rights violations committed by the AFSPA (Armed Forces Special Power's Act). This has resulted to deep frustrations among the indigenous peoples in their engagement with NHRIs to take action against the systematic and widespread violations committed by armed forces.

While a growing number of NHRIs are willing to tackle the concerns of indigenous peoples' rights more effectively, they have limited power and resources to act and implement. Some NHRIs also need to be more independent, inclusive and sensitive to the human rights concerns of indigenous peoples. These factors, in addition to the lack

of access to NHRIs especially by those living in the remote areas, as well as the lack of resources and language barriers are the reasons for the relatively low rate of indigenous peoples' submissions of complaints on violations of their rights to NHRIs.

These conditions need to be addressed fully for the NHRIs to be more effective in their mandate to promote and protect human rights. Towards this, the recommended actions include providing adequate, if not increased budget and resources, appropriate training of NHRI staff to reach out and be more sensitive to the conditions of indigenous peoples, and appointing human rights experts among indigenous peoples to be members and/or staff of NHRIs. Effective mechanisms and regular dialogues as well as partnerships between indigenous peoples and NHRIs are crucial in promoting and protecting indigenous peoples rights. This cooperation can be developed in the conduct of awareness-raising and capacity-building of both indigenous peoples and NHRIs, joint advocacy and networking with legal and judicial bodies, UN agencies and wider civil society, among others. Finally, indigenous peoples, along with human rights organizations, social movements, civil society organizations and human rights advocates need to step up pressure for governments to abide by their obligations to uphold human rights and generate the enabling environment and mandate for NHRIs to perform their duties independently and effectively, and provide effective access to justice and remedies for all its citizens without discrimination.

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## **AIPP at a glance**

The Asia Indigenous Peoples Pact (AIPP) is a regional organization founded in 1988 by indigenous peoples' movements as a platform for solidarity and cooperation. AIPP is actively promoting and defending indigenous peoples' rights and human rights, sustainable development and management of resources and environment protection. Through the years, AIPP has developed its expertise on grassroots capacity building, advocacy and networking from local to global levels and strengthening partnerships with indigenous organizations, support NGOs, UN agencies and other institutions. At present, AIPP has 47 members from 14 countries in Asia with 7 indigenous peoples' national alliances/networks and 35 local and sub-national organizations including 16 are ethnic-based organizations, five (5) indigenous women and four (4) are indigenous youth organizations.

Through our Indigenous Women (IW) programme, AIPP aims to empower indigenous women through networking, education and capacity building activities with the overall goal for indigenous women to assert, promote and protect their rights as women and as indigenous peoples.

### **Our Vision**

Indigenous peoples in Asia are living with dignity and fully exercising their rights, distinct cultures and identity, and enhancing their sustainable management systems on lands, territories and resources for their own future and development in an environment of peace, justice and equality.

### **Our Mission**

AIPP strengthen the solidarity, cooperation and capacities of indigenous peoples in Asia to promote and protect their rights, cultures and identities, and their sustainable resource management system for their development and self-determination.

### **Our Programmes**

Our main areas of work among the different programmes are information dissemination, awareness raising, capacity building, advocacy and networking from local to global. Our programmes are:

- Human Rights Campaign and Policy Advocacy
- Regional Capacity Building
- Environment
- Indigenous Women
- Communication Development

AIPP is accredited as an NGO in special consultative status with the UN Economic and Social Council (ECOSOC) and as observer organization with the United Nations Framework Convention on Climate Change (UNFCCC), Convention on Biological Diversity (CBD), Green Climate Fund (GCF), Global Environment Facility (GEF) and the World Intellectual Property Organization (WIPO). AIPP is a member of the International Land Coalition (ILC).



This study covers the NHRIs of Bangladesh, India, Indonesia, Malaysia, Nepal, the Philippines, and Thailand. More than the aim of assisting indigenous peoples, their communities and organizations, and advocates in the said areas in establishing a better understanding of how these specific NHRIs operate, the focus is in seeking opportunities for the integration of indigenous peoples' rights in the work of NHRIs. Access to NHRIs by indigenous peoples is a basic issue that needs to be urgently addressed.

Establishing concrete mechanisms in engaging NHRIs in the field of indigenous peoples' rights is necessary, taking cognizance of the particular challenges that the sector is facing, in order to institutionalize in the NHRIs the promotion and protection of indigenous peoples' rights as a normative behavior.



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