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Title

**Indigenous Peoples' In Bangladesh: Land  
Rights and Land Use  
In The Context of Chittagong Hill Tracts (CHT)**

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# Preface

The topic dealt with in this paper is the right to land of indigenous peoples in the Chittagong Hill tracts, Chittagong, Bangladesh. The methodology of the research has consisted in the analysis of a bibliography and documentation regarding the topic and the application of the analysis to the present situation. The indigenous peoples of the CHT have been living in harmony with the forests for many centuries. Even today, they are successfully managing many biologically diverse common village forests outside of the RFs and PFs quite efficiently. They are the people who are culturally the most suited to make the CHT green again, provided they are given a proper chance and treated as partners in equal. Recent Peace Accord between the Government of Bangladesh and the JSS suggested to the establishment of partially autonomous councils at district and regional levels with an indigenous majority. The bibliographic sources have been found mainly in the library of the Raoul Wallenberg Institute, Chittagong Hill Tracts District Library, Chittagong Public Library and SEHD (Society for Environment and Human Development). Articles and other documents on the topic have been supplied to me by one of my former teacher Mr. Abdullah Faruque. The web sites visited have been several: UN, ILO, World Bank and various NGOs. The second chapter has analysed the historical background of the conflict between JSS and Government of Bangladesh. It also analysed the land structure of the CHT, politics against land, different modes of violations and possible remedies for those violations.

Then, chapter 3 analysed the traditional land rights in Bangladesh and how the Constitution of Bangladesh protects these rights.

In chapter 4, an analysis of the traditional rights over forests can be found. It also dealt with the development at the international level and how Bangladesh deals according to those developments.

The 5<sup>th</sup> Chapter has made an assessment of the possible legal instruments or procedures that indigenous people can apply at the international level to protect their rights to land.

At the end, some suggestions have been made towards some reasonable solutions to the prevailing crisis and for the adoption of measures for sustainable and equitable use of the CHT land in consonance with the rights of the indigenous peoples of the CHT. The cultural and spiritual value that land assumes in indigenous peoples' life should be at the basis of the recognition of indigenous peoples collective rights to effective participation and to free and informed consent to every project or decision affecting them.

# Abbreviations and Terms Used in this Writing

ADB	Asian Development Bank
Adivasi	Original Inhabitants
BADC	Bangladesh Agricultural Development Corporation
BKB	Bangladesh Krishi Bank (Agricultural Bank)
BTA	Bengal Tenancy Act
CERD	Convention on the Elimination of Racial Discrimination
CHT	Chittagong Hill Tracts
CHTDB	Chittagong Hill Tracts Development Board
CIA	Central Intelligence Agency
CRC	Convention on the Rights of the Child
CS	Cadastral Survey
DC	Deputy Commissioner
DC	District Commissioner
DoF	Department of Fisheries
DP	Displaced People
ECOSOC	Economic and Social Council
EPADC	East Pakistan Agricultural Development Corporation
FAO	Food and Agricultural Organization
FD	Forest Department
FSO	Forest Settlement Officer
GOB	Government of Bangladesh
Hat	Small Market Place Where People Gather Once or Twice a Week
HDB	Horticulture Development Board
HDC	Hill District Commission
HRC	Human Rights Committee
IBRD	International Bank for Reconstruction and Development
IDA	International Development Association
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICIMOD	International Centre for Integrated Mountain Development
ILO	International Labour Organization
JSS	Jana Samhati Samiti
Jum	Traditional Way of Cultivation
Khas	Government Owned Land
NGO	Non Governmental Organization
OD	Operational Directive
OMS	Operational Manual Statement
PF	Protected Forests
RF	Reserved Forests
SALT	Sloping Agricultural Land Technology
SAT	State Acquisition and Tenancy Act
Thana	Police Station
UN	United Nations

UNCED United Nations Conference on Environment and Development  
UNESCO United Nations Educational, Scientific and Cultural Organization  
UNDP United Nations Development Programme  
UNGA United Nations General Assembly  
USAID United States Agency for International Development  
USF Unclassed State Forest  
WGIP Working Group on Indigenous Populations  
WHO World Health Organization  
Zamindar Landlord

# 1 Introduction

Bangladesh is one of the most densely populated countries in the world. Its economy is largely agrarian. Most of the country is flat and populated by Bengali-speaking people who are predominantly of the Islamic faith. At 55,598 square miles, it is roughly the size of England with a population of more than 133 million.<sup>1</sup> In contrast, the border region of the Chittagong Hill Tracts (CHT) in the Southeast is mountainous, with sparse population, estimated at about 9,74,445 according to the official population census of 1991. The CHT is the traditional home of thirteen indigenous peoples<sup>2</sup>, hereafter collectively referred to as the hill people, who are ethnically more similar to the peoples inhabiting the hilly regions across the international border in Myanmar (Burma) and India than to the Bengalis. The vast majority of the hill people are Buddhist, although a significant number follow Hinduism. Next in a number are the Christians, largely descendants of those converted in the 19<sup>th</sup> century by European missionaries. A small number also follow indigenous faiths, not infrequently in conjunction with Buddhism, Hinduism or Christianity.

Linguistically too the hill people are minorities in Bangladesh. Although the languages of the *Chakma* and the *Tanchangya* have close links with Bengali and Assamese, these languages have developed their own distinctive identity over the centuries. The languages spoken by most of the other indigenous peoples belong to what is known as the Tibeto-Burman family of languages. Today, in addition to the indigenous people, a large number of Bengalis also live in the CHT. It is said that the number of Bengalis now living in the CHT is almost the same or about the same as that of the hillpeople.<sup>3</sup> A significant number of shopkeepers and small traders in the CHT are Hindu, but it is rare to find Hindus in the CHT who live off the land. Overall, the vast majority of the Bengalis in the CHT are followers of Islam as in the rest of the country.

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<sup>1</sup> As of July 2002, the estimated total population of Bangladesh is 133,376,684. The World Fact Book 2002 By CIA.

<sup>2</sup> According to the 1981 census the religious orientation and the numbers of the Jummas were as following: Chakmas, Marmas, Tripuras, Mros, Tanchangyas, Ryangs, Khumis, Chaks, Murungs, Khyangs, Bunjugis, Pankhus and Lushais.

<sup>3</sup> According to the Bangladesh Population Census of 1991, the total population of the CHT was 974,445 out of which the 'tribal' population was 501,144 or 51.4%. For details of the CHT population with break-up according to ethnicity, religion, marital status, occupation, income, etc., see M.R. Khan, Chittagong Hill Tracts: A Socio-economic Profile: Paper presented at the 'National Workshop on Development Experiences and Prospects in Chittagong Hill Tracts', Rangamati, Rangamati Hill Tracts, 23.25 January, 1995, pp. 27-44. It is a widespread belief amongst the indigenous people in Bangladesh, including those in the CHT, that their actual population is far higher than estimated in the official census reports. Furthermore, it is now known whether the 1991 census accounted for the more than 50,000 refugees in the Tripura state, India. If it did not so, then the number of the indigenous people of the CHT would of course be far higher than it has been mentioned in the report.

The CHT includes the three hill districts of Rangamati, Khagrachhari and Bandarban and covers an area of about 5,098 square miles, being roughly the size of Northern Ireland.<sup>4</sup> Thus it is a region, which covers about one-tenth of the landmass of the country with hardly one percent of the population. Although the average elevation of the valley lands of the rarely exceeds 200 feet above sea level, most of the countryside is extremely hilly and rugged with flat lands fit for irrigated intensive agriculture being extremely scarce. The CHT has a number of mountain ranges that crisscross the region in a north-southerly direction between which are situated the fertile valleys of the rivers Karnaphuli, Chengi, Kassalong, Matamuhuri, and Sangu and their respective tributaries. The highest peak in the CHT is Tajingdong in Bandarban district. The CHT has few large industries and the volume of trade and commerce in the region is also relatively small. Most of the CHT people, especially the hill people, are directly or indirectly dependent on land for their livelihood. Thus land is absolutely vital to the economy of the CHT.

As mentioned above, most of plains Bangladesh is both lands pressed and dependent predominantly on agriculture. Thus economic factors alone would have indicated the likelihood of migration of people from the plains to the hills as the hills were relatively thinly populated. Indeed Bengalis began to migrate to the CHT from the 19<sup>th</sup> century onwards, but the pace migration did not reach significant proportions until the late 1940s. About two hundred years ago, the only few Bengali people in the region were fishermen or traders who made a living in the CHT, moving about in boats, but they never settled in the CHT. In fact, up to the last quarter of the 18<sup>th</sup> century, hill people, especially the *Chakma*, *Tanchangya*, *Tripura* and *Marma* resided not just in the hills but over a large part of what is now Chittagong and Cox's Bazar districts. The pressure of population of plains Bengal changed all that. Now only a very small number of hillpeople live scattered about in these areas. In fact, it is a fact of history that with the British colonization of Bengal in 1760, the population of this extremely fertile land began to grow phenomenally. The pressure of population led to migrations not just to the eastern and southern frontiers of Chittagong but to the Indian states of Assam and Meghalaya to the north and to the Indian state of Tripura and to Rakhine state in Myanmar (Burma) in the south-east.<sup>5</sup>

Quite naturally, the effects of this population growth were felt even amongst the *Chakma*, *Marma*, *Tripura* and *Tanchangya* who lived near the Rangunia, Ramu and Sitakunda areas of plains Chittagong, and even in Noakhali, Sylhet and Comilla (formerly Tripura) not far from the more ruggedly hilly region. The stories of this unequal struggle for land still

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<sup>4</sup> Between 1860 and 1980 the CHT constituted one administrative district. The Bandarban sub-division in the south was upgraded into a district in 1980 and the Ramgarh sub-division in the north-east was created a separate district in 1983.

<sup>5</sup> Bangladesh Group Netherlands, The Road to Repression in Organizing Committee, the Chittagong Hill Tracts Campaign, 'The Change of Genocide: Human Rights in the Chittagong Hill Tracts of Bangladesh' Amsterdam (1986), pp. 15-34

survives among the Chakma people in the form of a historical ballad called *Chadigang Chara* ('Exodus from Chittagong') sung by minstrels known as *genkhuli*. Very recently, the discovery of the travel accounts of a British surveyor of the late 18<sup>th</sup> century has soundly established this historical fact.<sup>6</sup> The unique, and unhappy, feature about the CHT is that it has not only been the scene of natural migrations of people from other regions and been subjected to unsustainable and economically, ecologically and socio-culturally disruptive 'development' and 'afforestation' projects,<sup>7</sup> but it has also had to receive hundreds of thousands of government-sponsored settlers from other regions of the country who were ostensibly brought in to ease the population pressure of thickly-populated plains, but actually for political reasons, namely, to combat the rising insurgency and political unrest in the region. Not surprisingly, the CHT is today in the throes of a land crisis that is partly due to natural factors such as poor soil conditions, lack of communications and infrastructural and credit facilities and partly due to human agencies such as the type of government projects mentioned above. The following sections will trace these developments and attempt to analyse the same from a historical, legal and humanitarian perspective.

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<sup>6</sup> Willem Van Schendel, Francis Buchanan in Southeast Bengal (1798), University Press Limited, Dhaka (1992).

<sup>7</sup> For a critique of the development and afforestation project undertaken by the Government of Bangladesh in the CHT, see Anti Slavery Society (Julian Berger and Alan Whittaker eds.), The Chittagong Hill Tracts Militarization, Oppression and the Hill Tribes, London (1984) pp.32-43

# 2 Historical Perspective: CHT and Its People & Land

## 2.1 General Background

The right to land, usually protected in international and national laws under the right to individual property, assumes a completely different consideration when it comes to the indigenous peoples. The reason is in the particular conception indigenous peoples have of land. For them land is not only a mean of production or a possession, they consider that the land is part of the total environment in which they carry on their life. **They do not own the land but the land (the ‘Mother Earth’) owns them** and generates them as sons. In this sense they do not conceive land as a good, so they use it in common (that explains why their right to land is a collective one). In the same way many times they do not have legal title proving their individual property, because it is not in their culture. The CHT people had the same culture. But, governments always tried to evict them from their lands. The reasons are discussed below:

### 2.1.1 Ethnic Identities Before British Rule

From the late eighteenth century onwards the documentation on the Chittagong Hills is fairly rich. Before that time, there are scattered references to life in the hills, mostly in relation to events on the coastal plain. For centuries this plain was a battleground between three centres of power that sought to expand their spheres of influence, notably Portuguese traders and pirates, Burmese state agents and Mughals.<sup>8</sup> When the British in the mid- eighteenth century defeated the Mughals the Chittagong plain passed into the British sphere of influence.

References to the adjacent hills, which were beyond any formal state administration till 1860, usually crop up in connection with political refugees from Burmese or British territory seeking shelters there, or in connection with the cotton trade, which increasingly had taken on the shape of state tribute during the Mughal period.<sup>9</sup> An important manuscript by Francis Buchanan, which was ignored by the historians of the region;

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<sup>8</sup> Schendel Willem Van, *Modern Asian Studies*, 26: 1 (1992) , pp. 95- 128

<sup>9</sup> In the precolonial period both raw cotton and hill textiles were exported from the port of Chittagong. Suniti Bhushan Kanungo, *A History of Chittagong, Volume One (From ancient Times Down to 1761)* (Chittagong: Signet Library, 1988), 615. Cf. A.M.Serajuddin, *The Origin of the Rajas of the Chittagong Hill Tracts and their Relations with the Mughals and the East India Company in the Eighteenth Century*, *Journal of the Pakistan Historical Society*, 19:1 (January 1971), 51-60

provides unique insights into ethnic identities in the hills.<sup>10</sup> During the whole trip he interviewed people and asked them about their ‘nation’ or ‘tribe’ as well as about others in the hills. The groups, which he visited, were the Marma (Marama), the Chakma (Saksa), the Mru (Moroo-sa), the Bawm (Bon-zu), the Zo (Zou), the Sak (Thaek), the Mrung (Doingnak), and the Tippera, in addition to some Bengalis, Baruas and Arakanese who were neither swidden cultivators nor permanent residents.

What is remarkable about Buchanan’s account is that he makes an effort to understand ethnic identities from ‘within’, from the viewpoint of people concerned. This concern for an ‘emic’ perspective contrasts with his contemporaries and many later writers who content themselves with describing the people of the Chittagong hills in terms of the ethnic categories used by their Bengali neighbours.

### **2.1.2 Two Views Of Ethnic Identities**

The ethnographic map of the Chittagong hills remains confused well into the twenty first century. Officials such as Lewin (1869, 1870), Hutchinson (1906) and Mills (1927, 1931) produced more or less detailed accounts of the different groups living in the area,<sup>11</sup> and the colonial population censuses attempted to clarify the statistical picture, but it is only with the arrival of professional anthropologists in the 1950s that the ‘emic’ perspective first hinted at by Buchanan reasserts itself strongly. On the other hand Bangladeshi scholars have done relatively little work on the Chittagong hills.<sup>12</sup> The latest work in this field is Rosen Hockersmith’s study of the Barua community, living on the border of the hill region.<sup>13</sup>

### **2.1.3 British Period (1787-1947)**

Similar to other indigenous peoples of the world, the Jumma people were also independent before the British colonial period. The British annexed the CHT area in 1860 and created an autonomous administrative district known as “The Chittagong Hill Tracts” within the undivided British Bengal. In 1900, the British enacted the Regulation 1 of the 1900 Act in order to

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<sup>10</sup> ‘An account of a journey undertaken by Order of the Board of Trade through the Provinces of Tiperah, in order to look out for the places most proper for the cultivation of Spices, by Francis Buchanan, M.D. [Manuscript (1798). British Library ADD 19286]

<sup>11</sup> T.H. Lewin, *The Hill Tracts of Chittagong and the Dwellers Therein, with Comparative Vocabularies of the Hill Dialects* ( Calcutta: Bengal printing Company, LTD, 1869; *Wild Races*; R.H. Sneyd Hutchinson, *An Account of the Chittagong Hill Tracts* (Calcutta: Bengal secretariat Book Depot, 1906); J.P. Mills, ‘ Reports on the Chiefs of the Chittagong Hill Tracts’ and ‘Proposals Regarding the Chiefs’ (typescripts, 1927)

<sup>12</sup> For an overview of anthropological studies, see Mahmud Shah Qureshi (ed.), *Tribal Cultures in Bangladesh* (Rajshahi: Institute of Bangladesh Studies, Rajshahi University, 1984).

<sup>13</sup> Eva Rosen-Hockersmit, *Buddhismen I Bangladesh: En studie av en minoritetsreligion* (Uppsala: Religionshistoriska Institutionen vid Uppsala Universitet, 1985)

protect the Jumma people from economic exploitation of non-indigenous people and to preserve their socio-cultural and political institutions based on customary laws, common ownership of land and so on. Throughout the British colonial period the 1900 Act functioned as a safeguard for the Jumma people, prohibited land ownership and migrations of the non-indigenous people in the CHT. In 1947, Indian subcontinent was partitioned on the basis of religion, Pakistan for Muslims and secular India for non-Muslims and Muslims alike. Despite 98.5% of the population of the CHT were Jummas and thus non-Muslims, the Pakistani leadership conspired and the Boundary Commission Of Great Britain ceded the CHT to East Pakistan (now Bangladesh) in violation of the principles of partition and against the wishes of Jumma people. On 15 August, 1947 the Chakma youths under the leadership of Sneha Kumar Chakma hoisted tricolor Indian flag at Rangamati, capital of the CHT and the southern CHT at Bandarban the Marmas who have cultural similarity with Burma (Myanmar) hoisted Burmese flag. Six days later the Pakistani Army at gunpoint lowered the Indian flag at Rangamati.<sup>14</sup>

#### **2.1.4 Pakistan Period (1947-1971)**

From the outset of Pakistani Government looked at the Jummas with an eye of suspicion for being anti Pakistani during the partition. Jummas were discriminated in jobs, business and education. During the Pakistani rule, the Government of Pakistan amended the 1900 Act several times against the wishes of the Jumma people in order to find a legal excuse for migration of non-indigenous people into the CHT. It deliberately ignored the fact that the 1900 Act was an indispensable legal instrument for ensuring the safeguard of the Jummas, and that it could not be amended without mutual agreement. On contrary, Pakistani Government interpreted the 1900 Act as a legacy of British colonial administration that helped separating the CHT from the rest of the country. The predicament of the Jumma people begun with a building of hydroelectric dam in the early sixties which flooded 1,036 square kilometres of land, submerged 40% of the best arable land and displaced 100,000 Jummas from their ancestral homes.<sup>15</sup>

#### **2.1.5 Bangladesh Period (1971-Present)**

After nine months of war of independence with Pakistan, Bangladesh emerged as an independent state on 16<sup>th</sup> December 1971. During the war of independence it was alleged that the Jummas in general indifferent to the cause of war against Pakistan. Soon after the Pakistani army withdrew, the Mukti Bahini (liberation forces of Bangladesh) went on rampage against the Jummas in the CHT. On 15<sup>th</sup> February 1972, a delegation of the Jumma people led by M.N. Larma, called on Prime Minister Sheikh Mujibur Rahman and submitted a written memorandum with four points charter of

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<sup>14</sup>[http:// www.angelfire.com/ab/jumma/people.html](http://www.angelfire.com/ab/jumma/people.html)

<sup>15</sup> Ibid.

the demands consisting of 1) Autonomy for the CHT; 2) Retention of the CHT Regulation; 3) Recognition of the three kings of Jummas; 4) Ban of the influx of the non Jummas into the CHT. Prime Minister Sheikh Mujibur Rahman categorically rejected these demands. In March 1972, M.N. Larma formed Jana Samhati Samiti (JSS), later a military wing the Shanti Bahini was added to it.<sup>16</sup> From then the tension begun between the JSS and the GOB.

### **2.1.6 Peace Accord of 1997**

The 23 year old struggle for autonomy of the *jumma* peoples of the Chittagong Hill Tracts in Bangladesh came to a close with the signing of a peace accord on December 2, 1997 between the Government of Bangladesh and the *Parbattya Jana Samhati Samiti*, political front of the armed Group. Nearly two and a half years later, the armed members of the PCJSS have deposited their arms and returned to normal life. However, doubts are increasing about the government's implementation of the accord in view of the protracted delays and it's diluted enactment, especially in the commitment to the transfer of administrative responsibility to a Regional Council and the functioning of the Land Commission, which was, have been set up only in April 2000. Most of the army camps have yet to be dismantled and only 40% of the refugees have been resettled on their lands. Within the tribal peoples and their support groups, it has widened the split between the pro-accordist and anti accordists who have challenged the accord as not fulfilling the demand for full autonomy. Moreover, with the peace accord becoming a hostage to the polarized politics of Bangladesh, there is a question mark on the survival of the accord in the event of a change in government.

## **2.2 Land Structure and Land Use Patterns in the Chittagong Hill Tracts**

### **2.2.1 Overview**

Until today the legal system in the CHT has significant differences with that prevailing in the rest of the country. Laws passed for the rest of the country do not automatically apply to the CHT unless they are specially extended to the CHT in the manner and to the extent laid down in the CHT Manual. The criminal justice system of the CHT is similar to that of the plains districts both with respect to the penal provisions, and to a lesser extent, the mode of trial, but there are significant differences. For example, the CHT courts are presided over by civil servants instead of judicial officers. Also, some of the

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<sup>16</sup> Ibid.

newer laws with regards of drug offences, terrorist acts, etc. do not apply to the CHT or apply only in a qualified manner. Civil justice is also significantly different in the CHT. In the first place, the ordinary civil courts in the CHT are presided over by civil servants and not judicial officers. The courts of the headmen and the Chiefs administer matters of ‘indigenous’ personal law although the executive branch of the Government exercises revisional jurisdiction over the indigenous courts. The land laws of the CHT are significantly different from the land laws of the plains districts. Although the Deputy Commissioners of the CHT exercise powers as chief of the District collectorate like the Deputy Commissioners of the plains districts, The Bengal Tenancy Act that are valid in the plains districts do not apply to the CHT. The most significant differences in the land laws of the plains and the CHT are the following. In the first place, swidden or jum cultivation, which is banned in the plains districts, is allowed in the CHT. Secondly, usufructuary rights of the hill people to unsettled lands outside the Reserved Forests are recognised in the CHT. This is not the case in the plains districts even in the areas inhabited by indigenous people. Thirdly, The Deputy Commissioners in the CHT are obliged to consult the chiefs and the headmen on all important land administrative matters. There are no parallel provisions in the plains districts.

As for general laws, most of the laws applicable to the rest of the country also apply to the CHT except for the fiscal and land laws, the laws concerning legal procedure and the court system.

As with the legal system, the pattern of the land use in the CHT is also significantly different from that in the rest of the country. Whilst in the plains districts, most of the arable lands may be used for sedentary plough cultivation with irrigation to produce more than one harvest a year, only a very small percentage of lands in the CHT may be profitably utilised for such cultivation. The bulk of the CHT lands are suitable only for horticulture or forestry in addition to the traditional swidden or ‘slash-and-burn’ cultivation known locally as *jum*. Therefore most of the lands in the CHT did not allow intensive cultivation as in the plains of Bengal. Consequently, the hills did not have a high population growth unlike the plains. This encouraged notions in the plains that the CHT could sustain a much larger population than it held, and led to migrations of Bengali plains people into the hill region. Various myths encouraged this migration, most notably that which concerned the availability of vast tracts of fertile fallow land waiting to be cultivated.

### **2.2.2 Jum Cultivation**

Until about three decades ago, swidden cultivation- known locally as jum cultivation – was the mainstay of the economy of the CHT. Jum cultivation is also known in various parts of the world as ‘slash-and-burn cultivation’ or rotational agriculture. According to the jum method, a secondary growth forest of about three or four acres will be cut down in mid winter. After

burning the jum field in the spring, the jumia farmer will start planting his seeds with the onset of the rains. His harvest will consist of rice, corn, cotton, fruits and vegetables, almost all that he needs for his family. The variety of his crops would have impressed many a biodiversity enthusiast. It is no wonder that jumming has been said to an extremely successful human adaptation to the rigours and constraints of the humid tropics.<sup>17</sup>

Jum cultivation is looked upon as primitive, unproductive, and wasteful in the plains district of the country. Jumming has also been blamed for deforestation and soil erosion. A closer look, however, reveals that although irresponsible jumming can be ecologically harmful and economically unviable in the long run, it is not necessarily so, and moreover, in the more inaccessible areas of the CHT, it is the only sensible way to make a living. Fruit gardening, tree plantations and private forestry in the inaccessible areas are not economically viable because of problems in transportation of the produce to the markets. On the other hand, with jumming, the farmer need not be over-dependant on the market which is miles away from his home. In many such areas there are also little or no flat lands suitable for plough cultivation. Migration to other areas too is no longer an option with the crisis of cultivable lands prevailing in the entire region.

Up to the 1960s, apart from the small number of farmers who were fortunate enough to own ploughlands or fringelands, by far the most of the CHT farmers were engaged in *jumming*. However, by this time the jumming cycle had so shortened due to the rise of population that the harvests became poorer and poorer. Even then jumia farmers were seeking alternative means of livelihood. By the 1990s the jumming cycle had shortened even further leading to constantly diminishing harvests caused by overcropping and soil erosion. With traditional methods of jumming, especially with the ridge-dwelling peoples such as the Pankho and Lushai, the fallow period used to be as long as 18 years and so. Within such a long period, the cultivated land was allowed to replenish itself and became a forest again naturally, and the harvests too were rich. In the inaccessible areas, unless the communications system improves and alternative modes of cultivation are proved to be viable, jumming will continue to remain indispensable to the farmers, although it will become less and less productive due to overcultivation unless it can be monitored closely and regulated or viable alternative occupations are available as options to local farmers.

Jumming is also prevalent in the relatively accessible regions of the CHT although in many of these cases it is not the traditional subsistence-oriented cultivation that prevails, but an innovated method which concentrates on fruits and vegetables, and trees, to be sold in the market. For the first year, the jums look pretty much the same as traditional jums, the difference being that in the case of the new-method jums, the harvested jum or ranya is not given up at year-end as is the case with the traditional jum-ranyas as the

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<sup>17</sup> Tej Pratap and Harold R. Watson, ICIMOD Occasional Paper No. 23, International Centre for Integrated Mountain Development, Kathmandu, Nepal (1994), Nepal, p. 11.

farmers stay behind to tend to their turmeric, ginger, corn, banana or other marketable crops or tree plantations to be ultimately sold in the market. These plantations through the innovated Taungya or jum method are in many instances seen to control erosion through afforestation of deforested areas, rather than causing erosion. Also, with the jum method the land is dibbled and not hoed or ploughed, thus leading to very little erosion which is common wherever sloping lands in tropical regions are hoed and ploughed.<sup>18</sup> Where wasteful and ecologically harmful methods do prevail, such as cultivating steep slopes or setting a fire a larger area than can be jumbed, or leaving too short a fallow period, the matter can be addressed better through regulation than by banning the system altogether as was done in 1988.

Given the recent trends, it would seem that although traditional subsistence – oriented jumming is in sharp decline, innovated jumming is still continuing and is likely to continue to be practised in the CHT for many more years to come. This is especially so in the field of forestry and tree plantations where the jum technology and other related traditional indigenous technologies are applied.

### **2.2.3 Ploughlands and Fringelands**

The most serious problem regarding plough lands and fringe lands belonging to the indigenous people is that of dispossession by newcomers from the plains districts as mentioned above. For plough lands, the other serious problem is the lack of irrigation facilities. Most plough lands in the CHT provide only one crop because of lack of water during the dry season. With proper irrigation, for most of these lands, even three crops are easily possible, irrigation through concrete drains or plastic tubes fed by tube wells seem to be the most favoured facility in the region.

Lack of credit is a serious problem. The Bangladesh Agriculture Bank (BKB) is about the only institution, which provides credits to the small farmers, but the volume of credit is low both in individual cases and for the region as a whole. Moreover, unlike the other districts, there are hardly any non-governmental organizations (NGOs), which offer credit in the CHT. Therefore, larger volume soft-term credit by government banks and development institutions – e.g., by the CHT Development Board – could improve matters significantly. Credit by NGOs may or may not be desirable, depending on the terms of the credit. Going by the widely prevalent traditional co-operative practices of swidden farming societies, co-operatives run by farmers would probably be the best answer for the CHT.

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<sup>18</sup> Studies in the north-east India have also shown that jum cultivation does not cause soil erosion as widely believed but rather, controls erosion. See for example, D.N. Majumder, "An Assessment of Shifting Cultivation in India" in D.N. Majumdar (ed.), "Shifting Cultivation in North-East India", Omsons Publications, New Delhi, India (1990), p.29. See also, P.K. Bhoumik, "Shifting Cultivation: A Plea for New Strategies" in Majumdar, op. at., p. 38.

Some small informal farmers' co-operatives are already running well in many villages within the CHT. These experiences may be replicated and combined with modern co-operative practices under government supervision.

In the case of the fringelands, the biggest complaint is that the rise water level of the Karnaphuli reservoir is too haphazard and unpredictable for proper utilisation of such lands. With a very fast rise in the water level, the rice paddies planted in the fringelands become submerged in the water of the reservoir long before the harvest is due. On the other hand, if the water level of the reservoir falls too slowly, then the fringelands remain too dry to be suitable for cultivation. The logical solution would be to co-ordinate the requirements of the Power Development Board – which regulates the water level of the reservoir – with the requirements of the fringeland farmers. Furthermore, the farmers deserve to be informed before-hand of the expected rise and fall of the water level of the reservoir each month of the year. This used to be done during the Pakistan period. There is no suitable reason why this sound practice should not be resumed. Given the land crisis and political unrest now prevailing in the CHT, the reintroduction of the practice of consultation and dissemination of information is required now more so than ever before.

#### **2.2.4 The Problems in Fruit Gardening**

The hill people of CHT are traditionally agriculturists. Yet by the end of the last century, a large number of hill farmers, especially from the Chakma, Marma and Tanchangya peoples became plough cultivators. The transition was not so easy and it took many decades despite government support in favour of the change. In this backdrop, it is ironic to note that the government sponsored Kaptai Hydro-Electric Project forced many erstwhile plough cultivators to become jumias due to the shortage of ploughlands. However, because of the long cropping cycle, jumlands too were in great shortage. Thus it is quite understandable that displaced people of the reservoir area enthusiastically took to fruit gardening with the guidance and assistance of the Government in 1960s. The East Pakistan Agricultural Development Corporation (EPADC) – now Bangladesh Agricultural Development Corporation (BADC) – started operating in the CHT in 1962. A large number of EPADC – assisted fruit gardens were initially quite successful, especially because of the then-favourable soil conditions, easily-arranged land leases and the soft-term credit facilities extended to the growers by the Agriculture Bank through the active co-operation of the EPADC. The Horticulture Development Board or HDB [functional in this regard largely replaced the role of the EPADC/BADC since 1973] and later, by the Chittagong Hill Tracts Development Board (CHTDB), which started operating since 1976. Both these government agencies set up Joutha Khamar or collective farms. The HDB initially met with some success, but by the time the collective farms of the CHTDB started to bear fruits and

other produce for sale in the market, fruit production in general had already started to decline because of soil erosion and other problems.

Several factors are responsible for the decline in fruit gardening and fruit production, one of the most important of which being marketing and storage problems. In the case of such perishable fruits as pineapple, for example, insufficient facilities for cold storage, preservation and canning has meant that growers have many a time been forced to sell at below-production costs to unscrupulous middlemen. Communication facilities in most places in the CHT are grossly inadequate. Another important drawback in this regard is the system of having the same market day all over the CHT. Instead of the prevailing system of two market days a week for the entire region, if there were separate market days for the neighbouring markets, farmers who failed to sell their perishable fruits on one market day at a certain market centre or bazar could try their luck at the neighbouring bazar on the next day.<sup>19</sup> As a result of the difficulties related to marketing, pineapple production has steadily decreased since the mid seventies. Since the early nineties, production is rising again but a saturation point may be reached undesirably soon unless the above problems are addressed. The fate of cashew nut plantations has also been similar. Here the problem was not so much with regard to preservation but with regard to the costs involved in manually decorticating the nut from the kernel and the constantly diminishing fruiting caused by soil erosion on the hill slopes that remain unprotected during monsoon downpours. Nowadays, most farmers prefer citrus fruits and banana to pineapple and cashew nut.

The second major problem of fruit farmers was the lack of cash and credit facilities. Unfortunately, the Horticulture Board and the CHTDB failed to provide the necessary cash and credit facilities unlike their predecessor, EPADC/BADC. Consequently, many growers had to spend a lot of time on subsistence farming (e.g. jumming) at the expense of neglecting their fruit gardens. In other cases, economic hardships led to growers deserting their gardens altogether. Thirdly, lack of transport and communications facilities has also meant that fruit gardening has had to be restricted to areas near motorable roads or navigable waterways. Needless to mention, such well-situated lands are not in abundance in the CHT. Fourthly, many farmers, from collective farms arbitrarily and whimsically chosen at the behest of government officials had to be abandoned within a year or two from the beginning of the project, as the nearby fresh-water springs, the only local source of water, dried up due to erosion caused largely by widespread deforestation. Fifthly, the prevailing unrest in the CHT, which took a violent turn in 1975 after the promulgation of martial law and the start of an armed movement by the armed wing of the Jana Samhati Samiti (JSS) known commonly as Santi Bahini or 'Peace Force', has created problems in the

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<sup>19</sup> This was the unanimous opinion of indigenous farmers at a workshop on Horticulture, Forests, Forestry and Environment organized by Taungya at Rajbari, Rangamati on 5 September, 1997.

transportation of farm produce to markets.<sup>20</sup> Moreover, the unrest has also meant that many farmers did not want to invest in long-term crops fearing that they might have to move from their homes. This problem is especially acute where the occupied lands are not settled in the names of the farmers, meaning also that financial institutions will not advance loans against such lands, which brings us to the other important problem in this regard. It has been seen that the absence of ownership titles in the hands of the gardeners also worked as a serious disincentive towards substantial investments (where affordable) and meaningful efforts. Sixthly, because of the Government's centralised pattern of land use planning, the farmers were allowed very little freedom to plant the crops of their choice or to choose their sites, against their better judgement. Lastly, and perhaps most importantly, the absence of cost-effective soil erosion control measures has led to constantly diminishing fruiting in various species of fruit trees in the CHT.

### **2.2.5 Possible Solutions To Problems in Fruit Gardening**

The most serious problem with regard to fruit gardening is soil erosion, which not only leads to gradually diminishing fruiting – both as to size and number – in the short term, but also ultimately renders the land virtually useless for cultivation purposes. This problem has been seen to occur in the case of such fruits as pineapple, cashew nut, coconut, betel nut and citrus fruits, among others.

It has at times been suggested that terracing of the hill-slopes might be the best method to control or stop soil erosion in the CHT. Practical experiences have shown, however, that terracing the hill slopes is so far too expensive a soil-erosion control measure to be affordable by most CHT farmers. This is primarily because the hills in the CHT, unlike those in northern Pakistan or northeast India or Nepal are too sandy, and devoid of rocks suitable to be used in terrace walls. A far better alternative would seem to be to introduce contoured lines of hedgerows of suitable plants, with the hedgerows acting both as a measure against soil erosion and as a marketable crop in line with the 'Sloping Agricultural Land Technology' or 'SALT' advocated by the 'International Centre for Integrated Mountain Development' (ICIMOD) based in Nepal. It has been argued that the SALT system, which emphasises a 'local resource based, low external input-oriented, integrated technological option', is suitable for introduction in the CHT.<sup>21</sup> The SALT method has been seen to be successfully implemented in the highlands of the Philippines.<sup>22</sup> In the CHT, CHTDB has started two experimental SALT –style farms, one at Alutilla in Matiranga Thana, Khagrachari district and

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<sup>20</sup> Negotiations between the Government of Bangladesh and the JSS had been made in 1997 as stated earlier.

<sup>21</sup> Partap and Watson, op. cit., cited in Sudibya Kanti Khisa, *The Prospect of Sloping Agricultural Land Technology for Replacing Swidden Agriculture in Chittagong Hill Tracts*. Paper presented at the Workshop at Rangamati, 23-25 January, 1995, p. 10.

<sup>22</sup> Khisa, op. cit., p. 14.

the other at Linejhiri in Lama thana in Bandarban district. The Government should closely monitor the Alutilla and Linejhiri projects so that if successful, the same can be replicated on a larger scale all over the CHT.<sup>23</sup>

The other major problems that mentioned above include the lack of communications facilities, lack of canning and storage facilities and the lack of capital. Although the Government of Bangladesh has, with assistance of the international banks and other sources, spent millions of dollars in constructing roads and highways in the CHT, apart from parts of Khagrachari district, the CHT still has a smaller network of motorable roads and highways than any other comparable region in the country. Fruit gardening and private afforestation are doing better in the Rangamati district than elsewhere because, despite its other shortcomings, the Karnaphuli reservoir provides an extensive network of water-borne communication, which is much cheaper than transportation by road. Therefore, the road network in the CHT, especially outside the lake areas needs to be expanded. No doubt, this cannot be expected overnight, given the financial constraints, but in the absence of an extensive road network, the isolated regions will not be able to be utilised for fruit gardening or forestry on a commercial scale for the present time.

Unfortunately, settlement of lands in the CHT is going too slow. In the long run, unless settlement is started, the large number of farmers without lands recorded in their names will continue to have little initiative to grow fruit trees, especially those trees which need a long time to bear fruit. In one study of fruit plantations and agro-forestry farms at Betagi and Pomora villages in Chittagong district, it was seen that there was a clearly positive relationship between high production and farms with tenurial security. Conversely, it was seen that those farms with less tenurial security also had less production. Field trips in the CHT have shown a very similar situation.<sup>24</sup>

## **2.2.6 Forestry: Problems and Prospects**

Already mentioned earlier that soil condition in the CHT is such that more than three-fourths of the CHT lands are suitable only for afforestation.<sup>25</sup> This factor alone indicates that forestry should be the mainstay of the CHT economy. In fact, about a quarter of the entire lands in the CHT are marked as government forests under the control of the Forest Department either as 'Reserved' or 'Protected' Forests.<sup>26</sup> On the other hand, there are small

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<sup>23</sup> Ibid., p. 11.

<sup>24</sup> Green Peace field trips to farms and interviews with farmers.

<sup>25</sup> Forestal Forestry and Engineering International Limited, *Chittagong Hill Tracts: Soil and Land Use Survey (1964-66)*, Vancouver (1966), Appendix 1, Vol.2.

<sup>26</sup> Under the Forest Act of 1927, if an area of land is declared to be a 'Reserve Forest' or 'Protected Forest', it theoretically becomes an area where people may reside, or exercise customary and other rights only in a controlled and conditional manner. For all practical purposes, most customary land rights hitherto enjoyed by local people are rendered almost

pockets of woods and hardwood plantations under private ownership that cover a far smaller area than the government forests. The government forests include both natural tropical forests and single-species plantations of teak or rubber along with other expensive varieties while the private forests usually have single-species teak or *gamar* plantations and mixed-species plantations.<sup>27</sup> The problems of the government and private forests are quite different to each other except perhaps in one important respect, in that the problem of erosion is seen to be worst where there is monoculture, especially of teak and rubber in both government and private plantation.<sup>28</sup>

The most serious problem confronting the government forests is appropriation of forest resources for sale in the lucrative black market. The rate of deforestation in Bangladesh and particularly in the CHT is far higher than the rate for the whole South Asia and possibly about the highest in the world.<sup>29</sup> The effective response in protecting the forests would be to improve the economic condition of the villagers living in and around the public forests so that economic hardship did not force them to risk criminal sanctions. Protection of nearby forest was also one of the major aims of the Betagi and Pomora projects mentioned above and although there are no clear findings on the matter, the very improvement in the income of the villagers indicates a lesser dependence on wood gathering from the nearby forests.<sup>30</sup>

Unlike in the case of the government forest, theft is not a major problem in the private forests. However, the prevailing unrest has sometimes led to security measures, which have resulted in private forests being cleared away.<sup>31</sup> In addition, a very severe problem with regard to private afforestation is that the existing procedure to obtain the necessary extraction permit and/ or export permit (for transportation to the plains districts) is so cumbersome and expensive (to bribe officials) that it is actually working as a disincentive against private afforestation by local farmers increasing at a faster pace. Perhaps one of the main reasons for the presence of such a cumbersome permit-making process is that it might prevent theft from the

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useless other than as licensual rights under the control of the Forest Department. The major difference between Reserved and Protected forests, is that in the case of the former, there are more restrictions against the use of forest produce and the provisions concerning punishment to offenders guilty of 'appropriating' forest produce are also far more stringent.

<sup>27</sup> Despite the visibly harmful effects of teak on the soil, teak plantations have been the favourite of the Government since the last century upto the 1990. See, W. E. Webb and R. Roberts, *Reconnaissance Mission to the Chittagong Hill Tracts, Bangladesh*, Vol. 2, Asian Development Bank, May 1976, p.3. See also, Roy (Biodiversity), 1994.

<sup>28</sup> Roy (Biodiversity, 1994), pp. 3,4,7,8. See also, CHT Gazetteer, p. 106.

<sup>29</sup> *Forestry Master Plan, Government of Bangladesh, Ministry of Environment and Forests: 3<sup>rd</sup> National Forestry Forum Background Paper*, published by the Asian Development Bank, Manila, Philippines, March 1993, p.2.

<sup>30</sup> See, Abul Hasnat Golam Quddus, *Experiences of Betagi-Pomora Project and the Prospects of Chittagong Hill Tracts*; Paper presented at the aforementioned workshop at Rangamati, 23-25 January, 1995.

<sup>31</sup> L. G. Loffler, *Ecology and Human Rights: Two Papers on the Chittagong Hill Tracts, Bangladesh*, Zurich, 1991, pp. 2, 3, 12, 13, 19.

government forest. But surely, it is not fair that private forest-owners should be penalized for the negligence of the Forest Department personnel in protecting the government forests. In any case, whether or not that is the rationale behind the process, the Forest Transit rules of 1973 and other ancillary provisions of the Forest Act of 1927 relating to the extraction and sale of timber from private forests are badly in need of reforms to simplify procedures and to otherwise update them. One remedy that has been suggested was to do away entirely with the outdated system of taxes and licence procedures by taxing the timber at the source, prior to marketing.<sup>32</sup>

One other factor, which has seriously impeded the growth of new private forests, is the lack of lands recorded in the names of prospective plantation owners. Unless the lands are recorded in the names of the farmers, either as freehold settlements or long term leases, the farmers would not get a good price for their produce which they would be forced to sell in the black market. It has been mentioned that in the Betagi-Pomora projects tenurial security was seen to be closely related with high production.<sup>33</sup> Similar results could no doubt be expected in the CHT as well. Thus it is essential that farmers be given opportunities to obtain settlement and leases of lands for private forestry in conjunction with fruit gardens or otherwise. In addition, the government should provide easily available soft-term loans to the plantation owners.

## 2.3 Land and Politics

### 2.3.1 Overview

For many centuries the hill people of the CHT have dependent upon *jum* cultivation for their livelihood. This, however, did not help the British colonial government because the revenue collections from *jum* were not so satisfactory. Therefore, the British were keen to make the hill people take up plough cultivation in lieu of *jum* cultivation.

By the end of the last century, the Government's encouraged plough cultivation among the hill people and were quite successful and almost all the available flat lands in the CHT were under the plough. Even so, the scarcity of such lands, the traditional *jum* cultivation remained indispensable and still played a vital role in the CHT economy. However, even with *jum* cultivation, there were constraints. This is because the same land may not be cultivated twice in succession without a fallow period for the soil to recuperate, which should be at least five years, and ideally, ten years or longer.<sup>34</sup> Thus as early as 1918, when the CHT population was about

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<sup>32</sup> Loffler, op. cit., pp. 16, 17.

<sup>33</sup> See Quddus., op. cit., pp. 13, 14.

<sup>34</sup> F.D. Ascoli, *Report on the Administration of the Chittagong Hill Tracts* (1918), Chakma Raja's Archives, Rangamati, pp. 15, 16. The above report was enclosed in a letter by Ascoli (On Special Duty) to the Chief Secretary of Bengal dated 4 April, 1918. See also,

200,000, it was found necessary to restrict the migration of plains people into the CHT to protect the economy of the region.<sup>35</sup>

### 2.3.2 The Kaptai Dam and Lake of Tears

Bangladesh stands on flood plains that lack the gradient necessary for hydroelectricity generation; only CHT's rivers have this potential.<sup>36</sup> Pakistan's martial rulers, builders of major water control schemes in the West, decided to build a modest hydroelectricity project in East Pakistan in 1959, which went on stream in 1963. Its installed capacity of 80 Mge was utilised to stimulate industrialisation around the port of Chittagong. Although consumers in the plains benefited, the highlanders did not. New navigational facilities expanded opportunities for exploitation of CHT's forest and fishery resources but the scheme had no place for the tribals.

For Pakistan and its US investors, Kaptai represented an example of what co-operation between military allies could do to help develop weaker partners. But the reservoir submerged 250 square miles of prime farming land in Chakma territory, together with its largest town in Rangamati. Twenty thousand hectares of grade-one plots in the Karnaphuli valley ---- 40 percent of the CHT's total arable lands ---- were lost. According to the JSS, the reservoir displaced 96,000 tribesmen, mostly Chakma, a quarter of CHT's population.<sup>37</sup> A Board of Revenue compensation office set aside \$51m for the displaced families. But between 1959 and 1967, only 43 million rupees (£1.1m) was disbursed.

The Government of Bangladesh resumed the compensatory service in the mid-1970s but by 1980 no more than \$2.6m had been paid. Of those affected, 60,000 received no compensation and about 10,000 migrated to India in the hope of some redress. Many Chakma tribesmen who had farmed the lost plots knew very little of plainlander settlement regulations, tenure registration, revenue documentation and compensation procedures. They were unable to fulfil official requirements, and the Government made no provisions to ensure that bureaucratic complexities did not prevent disbursement of allocated funds.

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Amarendra Lal Khisa, *Shifting Cultivation in the Chittagong Hill Tracts* (Unpublished, 1963), p. 49.

<sup>35</sup> Ascoli, op. Cit. , pp. 21, 22. See also, rule 52, CHT Manual.

<sup>36</sup> An account of the area under water varies from 400 to 600 sq miles. Seasonal variations including rainfall fluctuation cause some of the difference. However, the margin is too wide to have been caused by natural factors. A more likely explanation is the lack of data based on a paper survey.

<sup>37</sup> PCJSS Central Committee, 'An Introduction to the Greater Chittagong Hill Tracts and its Present Situation', (location not specified, December 1986).

### 2.3.3 The Plainspeople Settlement Programme

The CHT people were just beginning to economically recover from the effects of Kaptai Dam when another severe blow struck them. In 1979, Government made a drastic and ill-advised change to the land law of the CHT. Through an amendment to rule 34(1) of the CHT Manual the Government maintained most of the provisions of the earlier legislation, but with one important omission, namely, the restrictions with regard to settlement of CHT lands to outsiders. In addition, the hastily drafted amendment also did away with the definition of ‘ non-hillman resident’, the legal term used to identify resident Bengalis of the CHT who were entitled to some of the privileges and safeguards reserved specially for the indigenous hillpeople.

It is a matter of record that the Government sought to provide 5 acres of hilly land, 4 acres of ‘mixed’ (plain and gently sloping) land and 2.5 acres of paddy land to each settling family from the plains in the early eighties.<sup>38</sup> In the first phase of the Government’s resettlement programme, about 25,000 families were reportedly brought into the CHT.<sup>39</sup> For these settlers, the total land requirements would be as follows:

<b>Hilly Land – 25,000 x 5 acres</b>	<b>= 125,000 acres</b>
<b>Mixed Land - 25,000 x 4 acres</b>	<b>= 100,000 acres</b>
<b>Paddy Land - 25,000 x 2.5 acres</b>	<b>= 62,500 acres</b>

#### 2.3.3.1 Abolition of Chittagong Hill Tracts Act 1900

The abolition of special status in 1964 open up the Chittagong Hill Tracts (CHT) to outsiders. Bengali Muslim families started settling there in numbers large enough to alarm the Jummas, who felt that it was official government policy to outnumbered them on their own land. Grounds for this fear could be seen in the industries like Kaptai Hydroelectric power station, Chandraghona paper mill whose founding in the CHT coincided with the influx of Bengali Muslims who were given preferential employment.

#### 2.3.3.2 Secret Meeting

Eight years after the independence of Bangladesh, President Ziaur Rahman presided at a secret, mid 1979 meeting during which it was decided to settle 30,000 Bangladeshi families during the following year. The importance of the meeting was emphasized by the attendance of the Deputy Prime Minister Jamaluddin, Home Minister Mustafizur Rahman, the

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<sup>38</sup> Anti-Slavery, op. Cit., pp. 71-73

<sup>39</sup> Ibid, p. 24

Commissioner of the Chittagong Division and the Deputy Commissioner of the CHT. A sum of Taka 60 million was allocated to the scheme, but the budget heading under which this state money was provided was not disclosed. As a result of the meeting, implementation committees, made up of government officers and leading Bangladeshi settlers, were formed at district and subdivisional levels. The District Commissioner headed the district committee and sub divisional officers the sub divisional committees. The committees appointed agents from among the Bangladeshi settlers and assigned them to contact landless Bangladeshis willing to settle in the CHT. These were not hard to find and from February 1980 truckloads of poor Bangladeshi families poured into the CHT attracted by the government scheme to provide five acres of land, Taka 3,600 to each new settler family. According to USAID in July 1980, the government decided to resettle 100,000 Bangladeshis from the plains in the CHT in the first phase of this scheme.

### **2.3.3.3 Government Sponsored Migration**

From the government's viewpoint the settlement plan was successful from the start. By 1980 the Feni valley, which borders on Tripura contained about 18,000 Bangladeshi families and roughly 1,500 Jumma families. There are now even fewer Jumma people left and those who remain are eager to leave. Myani valley in the northern part of the CHT contains 40,000 indigenous people and about 10,000 Bangladeshis, a large number of whom arrived in the valley in 1980. In Chengi valley the Bangladeshi settlement received 1,500 families between 1978 and 1980. By the same date there were 1,000 Bangladeshi families at Kaptai and 5,000 families in Rangamati sub-division of which 3,500 families alone settle on Kalampati. In the Southern part of the CHT, the Lama thana had about 3,000 Bangladeshi families and even more were settled in Nakyangchari. In Rangamati town, in 1980, the Jummas were accounted for about 30 percent of the population. The Bangladeshi government initially denied its settlement program, however in May 1980 the government confirmed its policy towards the Chittagong Hill Tracts and started actively to encourage settlers to move there. A secret memorandum from the commissioner of the Chittagong Division to government officials in other districts stated that it was *“the desire of the government that the concerned deputy commissioners will give top priority to this work and make the program a success”*. During 1980 some 25,000 Bangladeshi families were settled in the CHT. At the same time thousands of Jumma families, dispossessed by the Kaptai dam project in the early 1960s, were still attempting to get some kind of monetary or land compensation. Under the second phase of the plan each land less settler family received five acres of hill land or four acres of mixed land or 2.5 acres of wet rice land. They also received two initial grants of Taka 700 altogether, followed by Taka 200 per month for five months and 24 lb. of wheat per week for six months. In July 1982 a third phase of Bangladeshi settlement was authorised under which a further 250,000 Bangladeshis were transferred to the area.

#### 2.3.3.4 Dispossession of Jumma Land

The Bangladeshi settlers, with the connivance of the almost totally Bangladeshi administration, have been able to take over lands and even whole villages. There is a severe population pressure on land in Bangladesh generally and Jumma land had been regarded as readily available. One excuse often given for allowing or encouraging this immigration is the relatively low population density in the CHT. The United States Agency for International Development (USAID) had noted that:

*“The Chittagong Hill Tracts are relatively less crowded than the plains of Bangladesh. Because of this difference in population densities, there has for some time been a migration from the crowded plains to the hills.”*

In 1967, a study commissioned by Dhaka, however concluded that:

*“As far as its developed resources are concerned, the hill tracts is as constrained as the most thickly populated district. The emptiness of the hill tracts, therefore is a myth”.*

Only 5 percent of land out side forest reserves is suitable for intensive field cropping. In spite of the shortage of the farming land in the tracts, the government has succeeded in attracting many thousands of land less Bangladeshis. To be land less in Bangladesh is to be absolutely poor and dependent. Jobs are seasonal, insecure and pay is enough for subsistence only. For the overwhelming majority of Bangladesh’s rural population there is little hope to escape from constant poverty. The settlement plans offer an opportunity which no land less or poor Bangladeshi family can ignore. The land however unarable, and the money and food grants, however depleted by corrupt officials, can mean survival for six months or more for poor Bangladeshi peasants. The Bangladeshi peasants who move to the Chittagong Hill Tracts come principally from the plain district of Chittagong, Noakhali, Sylhet and Comilla, and have no experience of hill slope cultivation. When they find they cannot make a living from the land that they have been given they encroached on Jumma owned land. There were various ways in which the Jumma people have been, and still are being dispossessed of their lands. In many cases Bangladeshi settlers move into an area and gradually encroach on the lands of their Jumma neighbours. A Chakma refugee from Panchari describes the initial process as follows:

*“ In 1980- 81 the Bengalis moved in. The government gave them rations of rice etc. and sponsored them. The settlers moved into the hills, then they moved the Jummas by force with the help of the Bangladeshi Army. The Deputy Commissioner would come over and say that this place was suitable for settlers so jumma people must move and would receive money in compensation. But in reality they did not get money or resettlement. In 1980 the Jumma people had to move by order of the government.”*

Attacks on Jumma Peoples' villages are the most common way to evict the inhabitants from their lands. A Tripura refugee in India from Bakmara Taindong Para near Matiranga described what happened to his village in 1981 when the settlers moved into the village:

*“ Bangladeshi authorities brought in Muslims from different parts of Bangladesh. Before that only Chakma, Tripura and Marma populated our village. With the assistance of the government these settlers were rehabilitated in our village and they continued to give us troubles... they finger at the Jummas and the army beats them and rob. They took all the food grain. Whenever we seek any justice from the army we don't get it. All villagers lived under great tension due to various incidents all around. Three days after an incident when six person had been killed, just before getting dark, many settlers came to our village, shouting 'Allah Akbar' (Allah is Great). When they arrived we escaped so the settlers got the opportunity to set fires”.*

A Chakma refugee in Tripura told what happened to his village in 1986:

*“ I lost my land. Settlers came and captured my land. They burnt our houses first. They came with soldiers. This took place on 1<sup>st</sup> May 1986 at Kalanal, Panchari. My house was in a village with a temple. The whole village of 60 houses was burnt. After seeing this we ran through the jungles and eventually reached India, coming to Karbook camp.”*

The following interview refers to events, which took place on 21 November 1990:

*“ Muslim settlers wanted to take us villagers to a cluster village (concentration camp), but we refused to go there. The villagers were beaten up by the Muslim settlers of which three families managed to escape, one of which is mine. These three families came to Kheddarachara for 'jhum' cultivation. We stayed there for one and a half years. The day before yesterday the Muslim settlers came to the same village and rounded up the households. The Bangladeshi soldiers accompanied the settlers. I took shelter in a nearby latrine when the villagers were rounded up. Later I tried to leave the latrine and to go somewhere else. The village had been surrounded. As I was trying to escape, the Muslim settlers shot me. It was a singled barreled shot gun. The incident took place in the early morning around 6 o'clock. After getting the bullet injury I ran away into a safe place. I don't know what happened to the other villagers. I ran away from the place for about half a mile. Then I fainted and lost consciousness. Two refugees went there to collect indigenous vegetables and brought me to the camp about 10 o'clock. I have been twice attacked to be taken to a cluster village, the second time I was shot.”*

Violence, intimidation and arson are the main methods used by the both the Bangladesh Army and the Bangladeshi settlers to force the hill people to leave their villages. Entire villages have been forced to flee from their lands.

#### **2.3.3.5 Settlement is A Political Act**

Landlessness is on the increase in Bangladesh in general. Land ownership has become increasingly concentrated and now 10 percent of the population owns 50 percent of available land. There has been no will on the part of any Bangladeshi government to assist land less labourers or marginal farmers anywhere in the country. Indeed organisations of the land less people are often put down with the utmost brutality by hoodlums hired by local landlords, the police, the army, or by all three. The government's power rests with the middle and upper classes in the urban areas and with rich farmers. The Bangladeshi poor will seize any survival chance they are presented with. Illiterates have limited horizons and they are not fully aware that the government's scheme to settle them in the CHT is not essentially an attempt to improve their lot. It is a political act to nullify the question of Jumma peoples' rights of self-determination by increasing the number of Bangladeshis in the CHT to majority.

#### **2.3.3.6 Settlers Used As Common Fodder**

The Pakistani government instituted a settlement plan in the Feni valley bordering India because it distrusted the Jumma people living there. Bangladeshi governments have similarly used poor Bangladeshis against the Jumma people as cannon fodder. There seems to be a determination to destroy Jumma society and if necessary the Jumma people. Illiterate Bangladeshi peasants who, under this scheme move to the CHT, know nothing of the Jumma situation. All they know is that government has given them land and is prepared to assist or at least to turn blind eye to encroachment on Jumma land.

#### **2.3.3.7 Governments Constitutional Argument**

The government argument is that settlement in the CHT is necessary because much of the land there is uncultivated and therefore in their view wasted. Furthermore Dhaka maintains that "it would be against the constitution to prevent any Bangladeshi from settling or buying land in any part of the country". This argument takes little account of the economic or political realities of the CHT, where little of the land is suitable for farming and where the traditional owners are coerced into giving up their property. As an example India could have used the same argument in the Muslim majority state of Kashmir, where most of the land like the CHT is empty. By settling people from overcrowded part of the country to Kashmir India could have altered the demographic profile of Kashmir from Muslim

majority to Hindu majority state. But Indian constitution forbids settlement in areas like Kashmir, Arunachal Pradesh, Mizoram etc, because of their distinct cultural, religious and ethnic background.

#### **2.3.3.8 Wider Political Object**

A direct result of the settlement scheme works to wider political advantage of Dhaka. The conflict between the poor Bangladeshis and the Jumma people for a tiny proportion of the total land distracts attention from the general situation of landlessness in Bangladesh. In the CHT, this struggle has polarized the Bangladeshis and the Jumma people. The Bangladeshi settlers, in collaboration with the Bangladesh Army and police harass the Jumma people. Civil suits taken out by the Jumma people have increased substantially but, since mainly the Bengali Muslim officials man the judiciary, they have been unsuccessful. Resulting from this, Jumma families have been forced to leave their homesteads and become landless.

### **2.4 Land Rights Under the CHT Manual**

The CHT Manual recognizes, expressly or impliedly, a variety of rights over land. For purposes of convenience, these rights have been divided into two broad categories, namely, private rights and common rights. By private rights are meant the rights of individuals over a clearly demarcated piece of land, whether freehold (with rights in perpetuity) or leasehold (with rights for a specified period), such as are registered in accordance with rules 12 and 34 of the Manual. In the case of such privately held lands there is no distinction between hill people and Bengalis or people of any race or religion except in the case of occupation of unregistered non-urban homestead plots. The right to occupy such lands without formal settlement is specifically reserved for the hill people.<sup>40</sup>

With some categories of privately held lands permanent and heritable rights may be exercised as in the case of lands in the plains districts under the Bengal Tenancy laws. In both cases, the lands are subject to acquisition for public purposes by the Government on payment of monetary compensation. But here the resemblance ends. Lands in the CHT are not freely transferable as in the plains. Moreover, a few categories of privately held lands in the CHT may be subject to resumption by the Government if the concerned lessee violates a vital condition of the lease. The concerned lease deed states whether the land is resumable. In case of resumption, compensation is not paid for the land but only for any standing crops or structures.

Privately held lands in the CHT may also be categorized on the criterion of land use. Plots used for commercial purposes in the urban centers are clearly the most valuable lands but since only a very small area of these lands is

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<sup>40</sup> Rule (50) CHT Manual.

owned by indigenous hillpeople. The next most valuable lands are the scare flat lands that are situated above the high-water marks of the rivers. Most of these lands may be cultivated with the plough to provide one or more crops of rice or other easily marketable produce and are called ploughlands. After the ploughlands, the fringelands are the most prized lands. These lands surface from the shallower beds of the *Karnaphuli* reservoir or “Kaptai Lake” during the dry season and are ideally suited for wet-rice cultivation to produce one crop, if, of course, the water level does not rise or fall too early or too late. No formal settlement is required for the fringelands and usually the cultivators obtain an informal one-year lease from the headman, who is the revenue official at the *mouza* level. In addition to the ploughlands and fringelands, other private lands of value include private forests and plantations of teak (*Tectona Grande Linn.*), *koroi* (*Albizia spp.*), *gamar* (*Gmelina Arborea*) or mixed indigenous spices, which can be marketed as timber or firewood. Lastly, there are the lands used for fruit gardening. Lands used for fruit gardening and forestry are known as ‘grovelands’. The ploughlands and the private forests are usually quite well documented. In the case of the fruit gardens, registered leases are common where the gardens are large. But where the gardens are small and of little value, the gardeners do not usually take the trouble to have them registered in their names because of the effort and expense involved.<sup>41</sup>

In contrast to the private land rights mentioned above, the common rights are more difficult to define. The common rights of the indigenous people to land in the CHT are based upon customs and usages that date back to many centuries. These rights include the rights to *jum*, to use forest resources for domestic purposes, to graze cattle on the common village pastures, to occupy non-urban lands for homesteads, and so on. Some of these rights are partially acknowledged, and regulated, by the CHT Manual but only a very few of them are clearly defined. This should not be surprising because the CHT Manual was not intended to be a declaratory instrument that sought to identify, define and declare various customary rights and privileges but a regulatory law that sought to regulate already existing rights. The difference will be clear when we compare the rights of an American citizen with those of a British citizen in England. For example, under the English Common Law the Englishman is free to say whatever he pleases unless expressly barred by the law and to the extent it is regulated and controlled. On the other hand, the American has the freedom of speech because it is guaranteed by the American Constitution. Similarly, in the case of special land rights of the indigenous people of the CHT, these rights are not theirs because the CHT Manual say so, but because they have been exercising these rights uninterruptedly for so long. The Manual merely contains the provisions relating to the control and regulation of the already existing rights.

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<sup>41</sup> Settlement of the lands in the CHT since the early 70s almost always involved huge bribes to settlement officials. However, after the district councils started functioning in the CHT in 1989, settlements of lands in the CHT, other than in the market areas have stopped, allegedly because of ambiguity regarding the role of the councils in the settlement of lands.

## 2.5 The Violation of Land Rights of the Indigenous People

Historically speaking, the violation of the land rights of the indigenous peoples of this region started as early as the 18<sup>th</sup> century. A good example is the case of the Chakma farmers who were unjustly evicted from their farmlands in and around Rangunia *thana* or sub-district in Chittagong district in the second half of the 18<sup>th</sup> century. These farmers did not receive justice from the British East India Company.<sup>42</sup> The Company's successor, the British Indian Government, proved to be more equitable than its predecessor in meeting out justice to litigants but it certainly was not very generous when it came to the levying of taxes. Nevertheless, in all fairness, it has to be admitted that although the British Government's efforts to encourage the hillpeople to take up plough cultivation were motivated primarily by such considerations as increases in revenue and advantages in administration, it is equally true that the British also sought to protect the hillpeople from exploitation by unscrupulous members of their relatively worldly-wise brethren in the plains. It is an undeniable fact that the British Government introduced various administrative reforms against the wishes of the local people and their leaders. It is also true that it is during British rule that a large number of Bengali share-croppers who were brought to the CHT during the first half of the 19<sup>th</sup> century were given title to ploughlands in the CHT. But when we compare statistics we cannot fail to observe that the indigenous people had far greater control over the CHT lands during the British period than they do now. Even after the departure of British and the birth of Pakistan, the hillpeople controlled most of the prime agricultural lands and accounted for more than 90% of the CHT population.<sup>43</sup>

In the first quarter of this century, with the rapid rise of the CHT population, it was felt necessary to restrict the migration of the outsiders into the region.<sup>44</sup> This restriction was removed in 1930 and non-hillmen were free to enter and reside in the CHT.<sup>45</sup> Between 1930 and 1947, when British rule ended in the sub-continent, more and more plains people entered the CHT but most of them were traders and shopkeepers who lived in the bazar areas and hence had little interest in agricultural lands. After the independence of Pakistan in 1947, a smaller number of Bengali Muslim refugees from India were settled at a number of places in CHT. These settlements were the cause of some disquiet but they were nowhere near as disruptive of the hillpeople's way of life as the havoc caused by Kaptai Dam a decade or so later.

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<sup>42</sup> Van Schendel, op. Cit, p. 101.

<sup>43</sup> According to the Census of 1951, the 'tribal' population of the CHT was more than 91% of the total population of the region.

<sup>44</sup> Ascoli Report, op. Cit.

<sup>45</sup> CHT Gazetteer, p. 256.

Some of the after-effects of Kaptai Dam have already been mentioned earlier. Of the estimated 100,000 displaced people- or DPs, as they came to be known – about 10,000 families were plough cultivators and about 8,000 families were *jumias*.<sup>46</sup> The plough cultivators were at least provided with about one-third of the area of lost ploughlands in the form of alternative inferior-quality ploughlands and some monetary compensation. The *jumias*, however, were not offered any compensation at all because the Government did not consider the *jumias*' right to jum – which was recognized by the CHT Manual – to be a right that was worthy of monetary or other compensation. The jumia DPs' predicament was therefore even worse than that of the plough cultivators. A large number left permanently for India, while others were left with the choice of either continuing as *jumias* in a far smaller area of land or to take up the then new occupation of commercial fruit gardening. A large number of erstwhile plough cultivators too had to choose one of the latter options. The *jumias* suffered the most as the constantly shrinking jum lands proved to be less and less productive due to overcropping. As for the first generation commercial fruit gardeners, they did not fare too badly from the mid-60s to the mid-70s when the near virgin soil, soft-term and readily available credit facilities extended by the government owned Agriculture Bank with the active co-operation of the then East Pakistan Agriculture Development Co-operation (EPADC) and favourable market condition were there for them. Since the 70s, many fruit gardeners suffered due to problems in marketing and deteriorating soil conditions caused by erosion. Thus thousands of DPs of the Kaptai Dam are yet to properly recover from the effects of the dam. It needs hardly be repeated that the Kaptai Dam was one of the first major blows to the private and common land rights of the indigenous people during the 20<sup>th</sup> century.

After the independence of Bangladesh in 1971, a few thousand Bengali migrants settled in the Feni Valley near Ramgarh in Khagrachari district. However, this migration is spontaneous and the disquiet it caused in the region gradually subsided, although the incident was certainly not forgotten. Less than decade later, the Bengali resettlement Programme was to come, which caused a bigger upheaval than even the Kaptai Dam. The numerous disputes over land, specially regarding the scarce ploughlands and fringelands were almost a foregone conclusion because the amount of land required for the new settlers as per the fairly generous Government estimate was not simply over there.<sup>47</sup>

In addition to the non-compliance with the basic elements of the CHT Manual, another major reason why the land crisis deepened because of absence of neutral arbitrators that the wronged parties could turn to for justice. The CHT Judicial system is ultimately controlled and managed by civil servants. During the early days of the Manual, the CHT District

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<sup>46</sup> Ibid, p. 42.

<sup>47</sup> See Anti Slavery, op. cit., pp. 71-73 and Raja Devasish Roy, *Chittagong Hill Tracts: Land Crisis, Economic Drawback, Settlement Programme*, in 'Holiday', Dhaka, 19 August, 1994.

administration acted as the paterfamilias of the local people. Unfortunately, government officials in recent years have either been guilty of bias, or have otherwise lacked the necessary attitude and experience, or been subject to undue pressure from politicians in addition to pressure of time. Therefore, most of the dispossessed landowners that petitioned the authorities or sued the illegal occupants did not receive any redress. Both in inquisitorial procedures – where the deputy commissioner of the district deposes a subordinate official to conduct a quasi-judicial enquiry into the matter – and in the few law suits for declaration of title and recovery of possession, the matters have been known to drag on for years, especially because the government officials conducting the enquires or cases found it difficult to give sufficient time to the judicial and quasi-judicial matters because of their preoccupation with routine administrative duties. Furthermore, the high cost connected with lawyers' fees, bribes to official staff, travel and incidental costs etc. have also deterred many complainants and would-be-complainants. Nevertheless, there were hundreds, perhaps even thousands, of petitions to the authorities praying for return of their lands. It is therefore not surprising that so many dispossessed landowners feel that they are being discriminated against as minorities and as indigenous people. Many have given up hope of ever recovering their lands.

## 2.6 Remedies for Violated Land Rights

The pattern of the violation of the land rights of the indigenous people is not simple, and consequently, one cannot expect that the remedy can be simple either. The Government of Bangladesh has more than once declared its intentions of returning dispossessed lands to their original owners. There have been isolated cases where dispossessed hillpeople have been returned their lands through efforts by local officials, but their number is not large, and many of the concerned hillpeople could not sustain their possession for long. More recently, the government has restored the possession of dispossessed lands of hillpeople in Khagrachari district who returned from exile in refugee camps in Tripura State, India. This effort is certainly praiseworthy and to be encouraged. However, there have also been complaints that the lands of a large number of returnees have not been returned to them. Such a state of affairs highlights the need for a concerted and well-coordinated working plan or programme to return dispossessed lands to these returnees.

One of the responses by the Government to the problem of land dispossession was to declare the start of a cadastral survey.<sup>48</sup> It has been said, unofficially, that the problem of land dispossession was largely brought about because the measurement and other statistics on land were incorrect, leading to errors on the part of surveyors who demarcated the

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<sup>48</sup> *Bhorer Kagoj*, Dhaka, 19 June, 1993.

lands to be allotted to the Bengali settlers who were brought to the CHT. While this may have been one of the many factors that complicated the land-related problems, the evidence seems to suggest that this was certainly not the main reason behind the disputes over land. Most importantly, the fact that the survey officials totally ignored the headmen- who are the only revenue and survey officials at the mouza level. They conducted the settlement programme in secret, goes to show that the then government was not really concerned about the niceties of the land rights question. The land-related data that were available in the offices of the deputy commissioners, or could have been obtained from the mouza headmen, were ignored or misused. In this backdrop, it is not surprising that leaders of the hillpeople have protested vehemently against the conduct of such a survey until after the international refugees and the internally displaced people are rehabilitated in their own homes and lands. Those who are against the start of a cadastral survey at the present time have put forward the following, among other, reasons. In the first place, it has been argued that since the survey is concerned more with the physical properties of the land to be surveyed, and the identification of those in possession of such lands, it would be useless in determining the titles of those lands, which is one of the most important issues in land dispossession cases. Secondly, such a survey, which is expensive and generally held not more than once a decade, would be a useless waste of public funds, especially considering the fact that the findings on the dispossessed lands would be rendered useless after the dispossessed land owners were restored possession. The very fact that a survey is so expensive has led to doubts whether the government seriously intends to restore possession to the dispossessed owners. Thirdly, a survey conducted in the absence of the owners and occupiers of a large area of the lands- would mean that they would be unable to provide first hand evidence of their title and possession regarding their lands. It has been said that the pattern of the dispossession of the indigenous people's lands was complex and therefore a simple solution cannot be expected. Moreover, the administrative and judicial system prevailing in the CHT and the socio-economic circumstances in the region also do not seem to support a purely legalistic remedy.

The most extreme instances of land dispossession concerned cases where the lands are currently occupied by Bengali settlers but are not recorded in their names but in the names of local hill people. Here the obvious legal remedy, at least theoretically, would be to evict the unlawful occupants with an order of permanent injunction against the illegal occupants. The problem, however, is that given the various reasons already mentioned above, most hill people are extremely reluctant to initiate legal or quasi-legal proceedings against the illegal occupants of their lands. Monitoring of the injunction order would also be difficult given the relatively small number of government officials in comparison with the number of such cases.

In some other cases, the dispossessed lands are recorded in the names of the local hill people, but while their settlement was still subsisting, the same land was purported to be settled in the names of new settlers. For those

original owners who were refugees, have been advised by government officials to seek settlement of new lands with a vague assurance of assistance.<sup>49</sup>

In many other cases it has been seen that the concerned hillperson has a valid title but that he had parted possession under duress after a fraudulent or unfair bilateral transaction. Here, theoretically it would be open to the court/ officer dealing with the case to declare the transfer void for violating rules 34(2) (6) and 35(2) (5) of the CHT. According to the above provisions of the Manual, when a landowner purports to transfer the ownership of his recorded land without the previous sanction of the deputy commissioner, the latter can either declare the land *khas* (to revert to the government) or record it in the name of the transferee, or retain the title of the transferor. The main purpose of such restrictions was that the lands of hill persons did not fall into the hand of unscrupulous outsiders. In addition, such a step by the Government would also be in consonance with its responsibilities under Convention 107 of the International Labour Organization (ILO). According to Article 13(2) of this convention, which the government of Bangladesh has ratified, it is the responsibility of the government concerned to ensure that lands of indigenous and tribal persons are not taken over by others due to ignorance of laws or procedure on the part of the indigenous or tribal persons. Thus, as far as the law goes, it is incumbent upon the Government to initiate the proper legal or other steps. However, one cannot certainly expect that more than a small number of the dispossessed landowners will initiate law suits or complaint procedures, so the matter will have to be initiated *suo moto* by the government.

As for the grovelands, there are some cases in which a particular hill family might have occupied a larger area of land than mentioned in the land title register. The occupier would have possessory title based on equitable principles, which could be overridden only with a bona fide procedure involving sufficient notice to him to defend his right. Moreover, as per the CHT Manual, and longstanding customary law of the CHT, indigenous hill people have the right to own and occupy homestead land in the rural areas without obtaining any formal settlement from the government.<sup>50</sup> Law and equity would seem to support the original owner or occupier's priority in the land rights against the present occupants. As for the matter of discrimination, the fact that the dispossessed land owners are members of an ethnic and religious minority group and born in the CHT, whilst the newcomers, and most survey officials and government officers, are members of the ethnic and religious majority group being borne in the plains districts would seem to indicate a clear instance of discrimination of the nature that has been prohibited by Article 28 of the Constitution of Bangladesh and the Convention of All Forms of Racial Discrimination.

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<sup>49</sup> Based on personal interviews by the employees of 'Green View' (A local NGO, situated in Rangamati, Chittagong Hill Tracts).

<sup>50</sup> Rule 50, CHT Manual.

A large percentage of the Bengali migrants who were brought to the CHT were given title deeds to lands, which include hilly land (grove land), a mixture of hilly and gently sloping land (called 'bumpy lands') and paddy lands (usually fringe lands).<sup>51</sup> Now, since the government itself issued these titles, and for the sake of equity and fairness too, it should not be allowed to ignore the rights of these people.

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<sup>51</sup> See Anti Slavery, *op. cit.*, at pp. 71-73.

# 3 Traditional Land Rights

## 3.1 Overview

The traditional land right issues have been studied in Bangladesh in a limited perspective for certain factual and quasi-reasons. In general, the people of the country enjoy certain traditional rights over public properties, e.g., right of fishing, water rights, right of the way etc. Much of the public properties were once vested in private ownership domain and there were not many human habitations within these resources although their rights and legitimate interests of adjacent inmates existed. When these resources were acquired by the State<sup>52</sup> on behalf of the people<sup>53</sup> the rights continued with least visible interference. But with the growth of institutional feudalism in the management by public agencies, public resource management became increasingly devoid of the public<sup>54</sup> in spite of their recognition in various forms in the sectoral laws<sup>55</sup>. Today, people are being displaced from their statutorily owned lands, from their ancestral traditional abode and surroundings in the name of or as a consequence of so-called development in the public interest. Therefore, the conflict between public agencies (which now appears as a distinct vested group) and the public over public property has almost successfully wiped out the remains of the traditional rights and the tradition along with its value and wisdom.<sup>56</sup>

The tradition of conflict between public agencies and the public has unfortunately resulted in a conflict of traditional rights versus statutory rights or management. The extreme scenario exists in the areas of once forests, which are the traditional habitats of certain minority communities in Bangladesh. The traditional land right issues in these areas are classic examples of the conflict. These rights usually come into a complex relationship or conflict with the regime of land laws and the forest laws. However, it is not clear whether all ethnic communities possess the same degree of justifiable demographic chronology in the land rights perspective of a given area.

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<sup>52</sup> This was done by introducing the State Acquisition and Tenancy Act, 1950 (hereafter SAT)

<sup>53</sup> Article 13 of the 1972 Constitution of Bangladesh

<sup>54</sup> Farooque Mohiuddin. "A Strategy for Saving the Modhupur Sal Forest in Bangladesh", in Fox, J (ed), Legal Frameworks for Forest Management in Asia: Case Studies of Community/ State Relations, East-West Center, Hawaii, 1993.

<sup>55</sup> See also, Ministry of Land. Land Management Manual, Dhaka, 1991.

<sup>56</sup> Farooque Mohiuddin. Law and Custom on Forest Land: Issues and Remedies, (A Study of Sal forest), IIESDM-Ford Foundation project, Dhaka, 1992.

## 3.2 Rights to Forest Resources

There are many rights that relate to or grow over forests and coexist with the land rights. These are various forests produces and forest land use rights. Rights of forest users should be dealt in a manner to secure their enjoyment without imperilling the maintenance of the forests, which support them. It should fulfil its highest function when it produces in a permanent fashion, the greatest possible quantity of that material which is most useful for all including the environment and ecology.<sup>57</sup>

Forest rights can be considered form three different perspectives, which are discussed below.

### 3.2.1 Right over Private Forests

First of all, the owner of a private forest is subject to the common law restrictions on the use of private property as not to endanger similar rights of others. In the case of forests, the limitations extend further to conserve the resources as useful for generations. Moderation in the exercise of rights over forests is essential, otherwise, nothing would be left and the right would cease to exist with the extinction of the forest resources. To protect and conserve the private forests nationally, the Forest Act, 1927 and the Private Forest Ordinance, 1959 have prescribed provisions to regulate private forests for greater interest in the society. Therefore, the rules regarding the creation of controlled forest and vested forest have been incorporated to ensure the management of private forest on the basis of a sustainable working plan.<sup>58</sup>

This practice has existed since the creation of the Forest Department (FD) during the *Zamindari* system. The kinds of rights to be exercised, when and how such rights are to be exercised without injuring the forest would depend on the management of the forest. The political changes and the institutional and policy development of the FD had moulded these rights. The forests, which formed part of a *Zamindari* estate, were subject to restraints as were attached by law to the whole estate of a landlord. There had been no specific law to suggest that a *Zaminder* [landlord] could settle a tenant on the private forestlands of his estate, but there was no apparent restriction.

The provisions of the 1959 Ordinance amply recognize the possibility of various private rights in a private forest other than those of the proprietor. These rights may be based on a local customs that the communities in or around a private forest have been holding for generations.

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<sup>57</sup> Farooque Mohiuddin. Traditional Land Rights: Conflict of Traditions. Bangladesh Land Forest and Forest People (ed) Philip Gain. Society for Environment and Human Development (SEHD), Dhaka, 1998.

<sup>58</sup> Ibid.

However, private properties are subject to be acquired, nationalized and requisitioned by the state as per the law of the land.

Theoretically, no private forest can exist because 'land consisting of forest' is non-retainable under private ownership as per section 20 of State Acquisition and Tenancy Act (SAT) of 1950. In the absence of a legal definition of 'forest', according to some, only the lands recorded in the cadastral survey (CS) of early 1900s as forest-land, can become the subject of the above provision. If a private owner grows enough trees on his land, not recorded as forest, then he may have a strong case to argue against acquisition. On the other hand, the question remains whether the generation of a forest on a private land would automatically become vested with the government as 'land consisting of forest.'

### 3.2.2 Rights in Public Forests

If 'forests' are those recorded as 'forest land', then all such lands if vested in the State are public forests. The laws that govern the regime of 'public forests' are pre-constitution, nonetheless, these laws are to be read in the light of the 1972 Constitution.

As stated earlier, article 13 of the Constitution recognizes the principle of state ownership, which means "ownership by the State on behalf of the people through the creation of an efficient and dynamic nationalized public sector embracing the key sectors of the economy". On the other hand, according to article 21, it is the duty of every citizen of Bangladesh to protect public property; every person in the service of the state has a duty to strive at all times to serve the people.

Public forests are, therefore, owned by the state on behalf of the people. The agencies administering or managing such forests have to ensure that they serve the local and national needs, environment, ecology and economy in general, including the special interests of the forest dwellers or defendants in traditional, subsistence and economic parameters.

The specific interest of the local people in relation to forests have never been overlooked since the beginning of codification of regulatory management of public forests. At the initial phase of formation of Reserved Forest (RF) there were expressed official opinion against any FD control that had the effect of inconvenience to the local people's needs. During the process of imposing control, the policy of the British government in India strongly recommended the preservation of local rights.<sup>59</sup>

Out of the total 5.41 million acres of forest lands vesting or claimed to be vested in the Government, the FD under the 1927 Act manages 3.61 million

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<sup>59</sup> See Chief Commissioners (Central province) letter to the Govt. of India, 20 September, 1878; and Dr. Brandis Report, 5 September, 1865.

acres. The remaining 1.80 million acres are under the control of the Ministry of Land/ District Council. Any land resource including forest lands, water bodies or fisheries, when vesting with the state, automatically come under the authority of the Ministry of Land unless the government, by gazette notification, transfers the resources to respective agencies for management and administration, for example, forest lands to Forest Department (FD) or fisheries to the Department of Fisheries (DoF), etc. Therefore, no public forest automatically becomes subject to FD's institutional control. As a result, 1.80 million acres of recorded forest lands of the state are still lying with the Ministry of Land that is administratively called Unclassed State Forest (USF) because in such control, there is no legal provision to classify them and hence, unclassified!

The USF are state *khas* property. It, therefore, comes under the general policy and rules on the management and settlement of *khas* land, administered by the District Revenue Officer, usually, the Deputy Commissioner (DC). In the case of USF in the Chittagong Hill Tracts, they have been placed under the control of District Councils (Zila Parishad).

The DCs not only issue permission for felling trees but also have settled many of entrepreneurs. This has happened in many cases, e.g., the plain and *Sal* forests of the districts of Dhaka, Mymensingh and Tangail in spite of the fact that these forestlands were beyond leasing authority.<sup>60</sup>

The 1979 Forest Policy states that government forests, as National Forests "shall not be used for any purpose other than forestry". Can the FD administer this policy over the USF? Institutionally speaking, the answer is negative unless the ministry of land affirms and adheres to the forest policy.

The right of the people over USF would be same like other *khas* lands. In fact, the practice of settlement and lease of such forestlands had been similar like other non-forest *khas* lands. However, since the 1927 Act is not applicable to these forests, the ordinary law would apply including the criminal laws, and any other locally applicable law.

### **3.2.2.1 Rights in Reserved Forests (RF)**

The rights in forests that are reserved or protected under the 1927 Forest Act and by the FD are broadly specific. The 1927 Act applies to these forests. The rights of ownership by the state is something less than the full enjoyment of its property since the 1927 Act restrains certain activities of the government in such forests.

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<sup>60</sup> For example, see the Case of Kanglee Khasia v. DFO, Bangladesh Case Report, 1986. In this case the DC settled or leased the notified forest land to the plaintiff.

This in fact does not take away the ownership but limits the exercise of certain rights bundled with ownership. Some of the rights of ownership are reduced, altered, detached and vested, by operation of law and fact in other persons. These rights may not create ownership but are limited to enjoyment and may not be injured without compensation or remedy.

### **3.2.2.2 Classification of Public Forest Rights**

Grazing or pasture; grass-cutting; lopping boughs and gathering leaves; wood rights; right to fallen leaves for litter or manure; right to other forest produce; hunting and fishing; temporary and shifting cultivation; right of way; and right to a watercourse.

Broadly, these rights can be summed up in: (1) Right of way, (2) Right to watercourse, (3) Right to pasture, (4) Right to forest produce, (5) Claim to a right in land including interest in or over land.

The extent and nature of these rights in favour of forest dwellers and dependants would differ from those of the others. The 1927 Act takes the special parochial character of the rights into consideration. Therefore, once the existence of these rights have been proved, the Forest Settlement Officer (FSO) has to record them in prescribed manner. A forest right can be conditional (as in consideration of some service) or without consideration.

When the nature and general features of the rights have been admitted and recorded these rights must be provided for. There are specified ways prescribed for these cases<sup>61</sup>.

It is evident that section 15 of the 1927 Act intended to regulate legally admitted rights giving no power to FSO to alter or to extend such rights. If the rights cannot be provided, then the FSO shall commute such rights either by a payment of money to such persons in lieu thereof or by grant of land or in such other manner as he thinks fit (sec.16). But if claims to certain rights are not made in due course, it may be extinguished if the FSO has not acquired any knowledge of its existence by enquiry (sec.9).

The application of the tenancy law has not been specifically mentioned in 1927 Act, but there is no reason why it would not be applied since such matters relates to tenancy, unless acquired, between the government and a private claimant. The claims must be settled on legal merits based on evidence and facts and not with reference to any special objects which were in view when it was proposed to constitute the forest a reserve. All legal rights, which are proved to exist, must be admitted. The rights must be actually existing, vested in an individual or person, or in definite body,

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<sup>61</sup> See GOB, Explanatory Notes, in Compilation of Various Acts, rules and Regulations pertaining to forest Management and Administration, 1984, p.68.

persons like a number of co-owners or a village community. A perspective right must be proved to have been regularly exercised in the past<sup>62</sup>. However, in an RF no new right can be accrued except by succession or through a statutory instrument with government sanction.

### **3.2.2.3 Rights in Protected Forests (PF):**

In case of PF, no notification can be made unless the nature and extent of the rights of the government and of private persons in or over the notified land have been enquired and recorded at a survey or settlement or in such other manner as the government might think sufficient. Every such record would be presumed to be correct until the contrary is proved. In an emergency situation the government may declare the constitution of a PF pending such inquiry but that must not be done to abridge or affect any existing rights of individuals or communities.<sup>63</sup> In a PF, there can be no wholesale automatic authority to control activities. The protective measures and prohibitions have to be specified in the gazette notification including the period and forms of such measures. The alternative is to frame rules for regulating specific activities.<sup>64</sup>

In other words, in an RF, the government assumes all rights except those legally proved to exist and admitted. While in the case of a PF, only those rights are restricted which are specifically mentioned, and the remainder of rights may continue. This has been the objective of the forest law, otherwise there would have been no provision for constituting PF instead of RF. The regulatory regime, originally, manifested the difference.<sup>65</sup>

## **3.3 Legal Aspect of Traditional Land Rights**

### **3.3.1 Legal Background: Custom and Tenancy**

Recognition of customary and traditional land rights and rights through prescription had been one of the undertones of the development of tenancy laws in Bangladesh. Under the Bengal Tenancy Act, 1885, the courts had to take into account local custom while determining whether a tenant is a tenure holder or *raiyat* (right to hold land for the purpose of cultivation)<sup>66</sup>. The Bengal Tenancy (Amendment) Act, 1928 further provided that every *raiyat* who immediately before the commencement of the Act, had, by the

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<sup>62</sup> These rules are provided in the 1960 Forest Manual Article 25.

<sup>63</sup> Sec. 29 of the 1927 Act.

<sup>64</sup> *Ibid.*, secs. 30 and 32

<sup>65</sup> The 1989 Amendment of the 1927 Act has contravened the difference but imposing equal penal provisions.

<sup>66</sup> Sec. 5(4) (a).

operation of any enactment, by custom or otherwise, a right of occupancy in any land would have a right to occupancy in that land<sup>67</sup>. Every person who for a period of twelve years had continuously held a *raiyyat* land situated in any village, whether under lease or otherwise, were deemed to have become a settled *raiyyat* with a right of occupancy<sup>68</sup>. If a *raiyyat* died inter state, the right of occupancy had to be regulated as per custom<sup>69</sup>. Section 183 of the Act clearly stated:

“Nothing in this Act shall affect any custom, usage, or customary rights not inconsistent with, or not expressly or by necessary implication modified or abolished by, its provisions”.

The above provisions clearly demonstrate the fact that in Bengal, customs and customary rights were active in regulating land tenure issues and the law recognized them with some qualifications. As a matter of fact, the origin of many of the rights of present title holders of land was initially based on or developed from customary rights or prescription which were variably endorsed in numerous modalities by the *Zamindars*. The SAT of 1950 did not repeal the 1885 Act but “so much as has not been repealed”, rather further divested the tenurial rights from the landlords to the occupants<sup>70</sup>. The SAT not only recognized titles of various *raiyyats* but also declared any land or building in a *hat* or *bazar* and “any land actually in use for ferry” as non-retainable properties. It becomes apparent that on these properties usufructuary rights of the communities were preserved against individual ownership. Similarly, lands that were used as a place of public prayer or religious worship, a public graveyard or cremation ground were exempted from payment of rent<sup>71</sup>. These, along with rivers, canals and water courses were retained for the use of public by natural or customary right or the right of easement<sup>72</sup>.

### 3.3.2 Traditional Rights and Land Law

An important provision in the SAT recognizing special tenurial status of lands falling within traditional domain of aborigines in section 97. The section empowered the government to declare by notification any aboriginal castes or tribes *aboriginal* for the purpose of the section, but it did not define “aboriginal”. Sub-section 2 provided that:

“No transfer by an aboriginal raiyyat of this right in his holdings or in any portion thereof shall be valid unless it is made to another aboriginal domiciled or permanently residing in Bangladesh....”

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<sup>67</sup> Sec. 19(1).

<sup>68</sup> Secs. 20 and 21.

<sup>69</sup> Sec. 26.

<sup>70</sup> See for example, Secs. 11, 20 etc.

<sup>71</sup> Sec. 151A.

<sup>72</sup> Sec. 39(d) as amended by the SAT amendment Ordinance, 1960.

In cases where the transferee is not an aboriginal a written permission of the revenue officer would be required. The only type of mortgage that an aboriginal can make is 'complete usufructuary mortgage', which must not exceed seven years. No decree or order can be passed by a court for the sale of the right of any aboriginal *raiya*t in his holding. The restriction on mortgage does not apply to a mortgage to government or to a financial institution for obtaining loans for agricultural purposes.

The law limited the rights of an aboriginal to his holdings for transfer purposes than those enjoyed by a non-aboriginal titleholder. This restriction reflects a weaker legal recognition of 'rights', although the restrictions are partly conducive to the maintenance of traditional integrity of the cultural territoriality of the aborigines. It prevents outsiders from coming and settling down in the traditional domain.

However, the explicit mention in the provision that an aboriginal can only transfer his land in favour of another aboriginal "domiciled and permanently residing in Bangladesh" indicate that there is frequent movements of some tribal groups to and from their ancestors' land in the neighbouring countries. The law, in this case, recognized the individual land holding rights of aboriginal but not in the form of 'common property rights'. The law does not restrict the transfer of land to another aboriginal belonging to another tribe or caste coming from other part of Bangladesh as long as the transferee permanently resides or is domiciled in the country.

Tribal chief has restrained the application of SAT to the Chittagong Hill Tracts where a large number of tribal peoples live under a customary system headed by tribal chief<sup>73</sup>.

The Evidence Act of 1872 also recognized custom. In some cases, for example, the courts would consider the statement of a dead person or a person whose attendance cannot be procured if that relates to an opinion relating to the existence of any public right or custom<sup>74</sup>. This exception shows a greater importance of custom and its determination. The evidence of the existence of a general custom or right would be, inter alia, the opinions of persons who would be likely to know about of its existence<sup>75</sup>. The expression "general custom or right" includes customs or rights common to any considerable class of persons. When the court has to form an opinion as to the usages and tenets of any body of men or family, the opinions of persons having special means of knowledge therein are relevant acts<sup>76</sup>.

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<sup>73</sup> In these areas, for acquisition of land a special law had been enacted, called, the Chittagong Hill tracts (Land Acquisition) Regulations, 1958. Under this law compensation for damage sustained due to acquisition of structures, bamboos, trees or standing crops were guaranteed.

<sup>74</sup> Sec. 32 of the Evidence Act, 1872.

<sup>75</sup> Sec. 48, *ibid*.

<sup>76</sup> Sec. 49, *ibid*.

The Evidence Act of 1872 appreciated the unmodified nature of custom and usage, and extended the scope of the Act beyond usual evidence findings criteria to value appropriate opinions. The purpose of the law, therefore, appears more in favour of investing efforts to identify a custom or a usage than its outright rejection.

Besides rights accruing through adverse possession and prescription are recognized by law in Bangladesh, and so the right of easement<sup>77</sup>.

### 3.3.3 Customs and Forest Law

During the period that preceded the first codification of forest laws in 1865, it was practically difficult to identify state forests where various private or community rights were not being exercised. Virtually, that reality becomes crucial in the attempt to apply regulations to reserve forest as public. Therefore, it was almost accepted that the forests on which codified Act would apply “might be defined as waste uncultivated lands, on which Government [had] not ceded the right in the trees, brushwood, timber, and forest produce”<sup>78</sup>. It was intended to compensate or otherwise satisfy the parties concerned if the new regulatory regime had interfered with any “existing rights” even in public forests<sup>79</sup>.

The acceptance of the existence of customary rights in state forests has been indirectly but well recognized in the subsequent enactment of forests. The best examples are the penal provision such as theft and mischief. Many of forest offences would fall under these categories of crimes, which are already heavily dealt with by the Penal Code of 1860 providing imprisonment up to 7 years. But the same offences have been traditionally dealt with very leniently in the forest law, until recently<sup>80</sup>, providing a maximum sentence for 6 months. The reason for such leniency was the appreciation of actual practice of communities, which have been the “custom from time immemorial to do certain acts in forest not as crime but as tradition.”<sup>81</sup>

To enquire and judiciously decide upon the legal merits of every claim made under the 1927 Act, it has been made mandatory to appoint FSO for that purpose to decide on those matters. These claims may be of various

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<sup>77</sup> See the SAT Act, 1950 and the Non-Agricultural Tenancy Act, 1949. See also the Easement Act, 1882.

<sup>78</sup> See Brandis, Dr. (inspector general of Forests). Report to Accompany the proposed Bill to Give Effect to Rules for the Management and preservation of Government Forests, no. 120, Simla, 5 September, 1864.

<sup>79</sup> Ibid., para 4.

<sup>80</sup> The 1989 Amendment which raised imprisonment up to 5 years and “not less than 6 months”.

<sup>81</sup> Brandis, op.cit., paras 10 and 15; see also Chief Commissioner, op.cit., paras 5 and 8.

natures including claims to land or to forest produce.<sup>82</sup> The 1927 Act never lost sight of these rights in forest whether they originated from customary rights or from other operations of law.

When claims are made relating to the practice of shifting cultivation the FSO has to record the local rules or order<sup>83</sup>, i.e., the custom. Although Swidden cultivation was totally prohibited in the 1950s, this section manifests a clear intention of the Act not to outright ban local rules and practices. The Act further requires the protection of right-of-way, right of pasture or rights to forest produce or a water course, which if valid, be admitted and recorded by the FSO or some other forest tracts in a locality reasonably convenient may be allocated for the realization of such rights<sup>84</sup>. If it becomes essential to commute such rights, the government would pay any such aggrieved persons a sum of money in lieu thereof or grant land<sup>85</sup>. If the government stops any public or private way or watercourse in a Reserved Forest (RF), it must provide for a substitute.

In cases of Private Forest, no such notification can be made in the first place unless the nature and extent of the rights of the government and private persons are settled and recorded. No such action can abridge or affect any existing right of an individual.<sup>86</sup>

The above provisions of the 1927 Act expressly stipulate the existence of private or community rights in various forms over public forest. That reality had never been connived by the law.<sup>87</sup> One of the objectives of FSO is ‘‘to enquire and record to what extent the proprietary rights of the State are limited by legally existing adverse rights of private persons or communities’’<sup>88</sup>.

In law, traditional rights emerging from prescription or adverse possession had been legally recognized. Long term possession creates rights by prescription. As stated earlier, originally most of the property rights were acquired by prescription, i.e., founded on occupation ripened by prescription, and occupancy gave right in common law. According to the Limitation Act, 1908, rights exercised or enjoyed uninterrupted for twenty years, or any private property, or Sixty years in case of government property create a legal right<sup>89</sup>. Interruption means actual discontinuance of the possession or enjoyment by reason of an obstruction by someone else, which has been acquiesced in for one year by the former after such

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<sup>82</sup> See the SAT Act, 1950 and the Non-Agricultural Tenancy Act, 1949. See also the Easement Act, 1882.

<sup>83</sup> Sec. 10 of the 1927 Act.

<sup>84</sup> Secs. 12-15, *ibid*. The amount payable as compensation in respect of any such rights shall be recorded in the Record-of Rights, rule 26 of the Tenancy Rules, 1954.

<sup>85</sup> Sec. 16, *ibid*.

<sup>86</sup> Sec. 29, *ibid*.

<sup>87</sup> See also Article 2-5 of the 1960 Forest Manual.

<sup>88</sup> *Ibid.*, Instruction 1.

<sup>89</sup> Sec. 26 of the Limitation Act, 1908.

obstruction being submitted<sup>90</sup>. Each of the said period of twenty or sixty years would be taken to be a period ending within two years next before the institution of claim.

In the light of the provisions of the Limitation Act, one may rightly assert that before the vesting of any forest in the government, if the same was a part of a private estate of a landlord (which in fact was the case in many areas), then a proof of uninterrupted possession or enjoyment for twenty years would be required by law. In cases where forests have been the *khas* property of the state sixty years would be the period for acquiring titles. The principles of common law prevalent in Bangladesh do always respect possession and maintain it till a better right appears. However limited right a person may have, if he is in possession, that is maintained until by due process of law someone else has proved a superior right and obtained an order to dispossess the first holder of the property.

A forest right or a right of way of which possession has been maintained without interruption becomes a prescriptive right after the expiry of the specified period. Such rights cannot be acquired once the forest is declared as reserved under section 20 of the 1927 Act<sup>91</sup>.

The 1960 Forest Manual also explains executive orders relating to the grant of timber or other forest produce free or at concession rates to certain persons or communities<sup>92</sup>. It stated, *inter alia*, the “policy of the Government to give special consideration to communities dwelling on the margin of forest produce free or at concessional rates”. For the normal rates of cultivating classes dwelling in the margins of forest, the rates of royalty on forest produce should be low. In ordinary circumstances there would be “no hardship in insisting of these classes of the population paying for forest produce.” Specially, to face the consequences of calamities, free grants should be made to enhance villager’s capacity to repair the damage.

These grants are to be recorded in a prescribed form (Form 12) for official record. Therefore, they should not be treated as special personal concession or any unofficial gain or charity. Historically, there were many instances where the FD or government had extended such assistance<sup>93</sup>.

### **3.3.4 Tradition and the Constitution**

The Constitution of Bangladesh has prescribed measures to remove inequality between “man and man”. It aims at ensuring “equitable distribution of wealth among citizens” and at providing opportunities to

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<sup>90</sup> See the Explanations, op.cit.

<sup>91</sup> Sec. 23

<sup>92</sup> See Article 53C.

<sup>93</sup> See also Chapter XII, Farooque, 1992, IIESDM-FF, op.cit.

attain a uniform level of economic development<sup>94</sup>. It defined state ownership as ownership by the State on behalf of the people. The purpose of the state policy include the emancipation of peasants, workers and backward sections from “all the forms” of exploitation<sup>95</sup>, be it government or private, and the improvement of material and cultural standard of living of the people<sup>96</sup>. It is a fundamental principle of state policy to “adopt measures to conserve the cultural traditions and heritage of the people.”<sup>97</sup>,

The above principle of state policy explicitly enshrines the protection of private rights and tradition from all forms of exploitation and interference. The principles are fundamental to the governance of Bangladesh and are to be taken as a guide to the interpretation of the Constitution and all other laws of Bangladesh<sup>98</sup>. The forest laws and the laws governing tenancy are mostly pre-constitution laws, but these are to be interpreted and applied within the letters and spirit of the Constitution.

Moreover, it is a fundamental right of every citizen not to be discriminated against on ground of religion, race, caste, sex or place of birth<sup>99</sup> rather the government is empowered to adopt special provision for the advancement of any backward section of citizens<sup>100</sup>. In fact the government has provided special quota for entrance of tribal students in some educational institutions up to the highest level. The government except in accordance with law cannot take property of any citizen<sup>101</sup> and such law must provide for compensation for the land taken up by the government.<sup>102</sup>

The laws recognizing rights through prescription or adverse possession applies to all tribal and non-tribal people living in or around a forest if the nature of their exercise or enjoyment of rights falls within the scope of law. Special legal provisions are also available to protect the cultural integrity and territoriality of tribal population. These rights should not be regarded as inferior to other forms of rights. It is submitted that all regular legal provisions are equally valid for tribal peoples’ rights in or over forests and the special laws are specific addition to other existing provisions.

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<sup>94</sup> Article 19(2).

<sup>95</sup> Article 14.

<sup>96</sup> Article 15.

<sup>97</sup> Article 23.

<sup>98</sup> Article 8(2).

<sup>99</sup> Article 28(3).

<sup>100</sup> Article 28(4).

<sup>101</sup> Article 31.

<sup>102</sup> Article 42.

## 4 Traditional rights in forests

Traditional or customary rights may exist in both private and public forests. These rights may encompass land rights or rights to forest produce, usufructuary and other ancillary rights. During the *Zamindari* system, customary rights could prevail in a private estate. Since the state acquisition, customary rights have not been legally settled in the light of the SAT. These rights had been quite capable of transforming into legal rights under the prevailing statutes if they were considered. Historically, the tenancy laws and some aspects of family laws have developed recognizing customary rules of the time and subjects. On tenancy matters, there had been certain customs and usages having binding force between landlords and tenants.

### 4.1 Origin of Custom

Earlier, in the Indian sub-continent, the rules of conduct were largely based on customary law and traditions. The Indian Regulation IV of 1793 recognized the customs and usages of this country under which all British courts in this sub-continent were required to decide question relating to civil rights and status in accordance with customs and usages (sec. 15). All the legislatures of this country usually had provided a saving clause in their Act, whenever necessary, passed by them guarding the observance of the customs and usages of the country whether of a family, of a tribe, of a locality to give effect to ancient customary or traditional rights of the people<sup>103</sup>.

Custom is older origin than law. It is also a source of modern law. A rule of conduct, by uniform series of acts in its pursuance, turns into a custom which the people observe and follow without any coercion from anybody. It must uniformly exist from time immemorial. Customary and traditional rights grow on the body of unwritten customary or traditional law observed by communities and evidenced by long usages and founded on pre-existing rules sanctioned by the will of the community<sup>104</sup>.

### 4.2 Development at International Level

Customary land rights in traditional domain have been an eloquent topic on national and international planes. Nationally, the land rights of the native Indians<sup>105</sup> in the Americas, the Aborigines in Australia and New Zealand against the European migrators and their conquest have resulted in

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<sup>103</sup> See Roy Sripati. *Customs and Customary Law in British India*, Tagore Law Lecture, 1908 Calcutta, 1911, pp. 22-23.

<sup>104</sup> Farooque, Mohiuddin. (1992), IIESDM –Ford Foundation Study, op.cit., p. 113.

<sup>105</sup> See for example, Berkey, Curtis G. "The US Supreme Court and the Assault on Indian Sovereignty". In *Without Prejudice*, vol. II, No. 2, 1989, pp. 27-40.

prolonged legal and political battles. Indigenous land rights in ancestral domains in the Philippines (upland), Thailand and Indonesia have been the subjects of a major human rights campaign and juristic writings<sup>106</sup>. Consequently, in the Philippines, constitutional and institutional recognitions have been awarded to “rights of indigenous cultural communities to their ancestral lands”<sup>107</sup>. It also includes the provision for the “applicability of customary laws governing property rights or relations in determining ownership and extent of the ancestral domain”<sup>108</sup>. Similarly, community *adapt* rights are gaining legal sanction in the management of forests in Indonesia<sup>109</sup>.

At the international level, multilateral instruments have been adopted, aimed at recognizing traditional rights of indigenous peoples. The most prominent among those in the Universal Declaration on the Rights of Indigenous People drafted by the Economic and Social Council of the United Nations in 1989<sup>110</sup>. The main purpose of the Declaration is to further recognize, protect and restore the rights of indigenous peoples. Another landmark instrument is Convention 107 of the International Labour Organization (ILO), 1957 concerning the Protection and Integration of Indigenous and other Tribal and Semi-tribal Populations in Independent Countries. The Convention 107 has been revised and replaced by Convention 169 of 1989 called Convention Concerning Indigenous and Tribal peoples in Independent Countries<sup>111</sup>. The Convention marks a significant development in international law pertaining to indigenous peoples, their land rights including: (a) recognition of collective land rights; (b) rights of ownership and possession; (c) rights to natural resources pertaining to the lands with provisions relating to cases where state retains the ownership of these resources; and (d) rights in connection with the removal and relocation from lands.

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<sup>106</sup> See, for example, Lynch, Owen, “Indigenous Land Rights in Insular Southeast Asia”, in *southeast Asian Tribal Groups and Ethnic Minorities: prospects of the Eighties*, Cultural Survival, Cambridge, 1987;----- “Wither the people: Demographic, Tenurial and Agricultural Aspects of the Tropical Forestry Action Plan”, WRI, Washington D.C., 1990; McNeil, Kent, *Common Law Aboriginal Titles*, Oxford, 1989.

<sup>107</sup> See Article II, sec.22 of the Declaration of Principles and State Policies, the 1987 constitution of Philippines. See also Article XII. For more, see La Vina, A.G.M., (ed) *Law and Ecology, A Compilation of Philippine Laws & International Documents pertaining to Ecology*, Manila, 1991.

<sup>108</sup> *Ibid.*, Article XII, sec.5. For a discussion of the evolution of ancestral land rights in the Philippines, see Cristobal, A.S.Jr., “The Constitutional Policy on Natural Resources: An Overview”, in *Philippines Natural Resource Law Journal*, Combined Issue on Forest resources, vol.3, Nos. 1 and 2, pp. 46-72.

<sup>109</sup> Moniaga, Sandra. “Towards Community-Based Forestry and Recognitions of Adapt property Rights in the Outer Islands of Indonesia : A Legal and policy Analysis”, in Fox, J, Lynch, O, Zimsky, M and Moore, E. (ed), *Voices From the Field: Fourth Annual Forestry Writing Workshop*, EAPI, EWC, Hawaii, 1991, pp. 55-74.

<sup>110</sup> See UN Doc. E/ cn.4/ Sub.2/ 1988/ 2S and E/ CN.4/ Sub.2/ 1988/ 24.

<sup>111</sup> Bangladesh is a signatory to the Convention 107 but not the Convention 169.

There are other international instruments that relate to indigenous rights<sup>112</sup>. Intrinsically, one would have the impression that indigenous groups are in the position of underdogs who need to be helped.

The term indigenous has emerged in practice over the years without having an accepted definition<sup>113</sup>. "Indigenous" people are "the descendants of a people which has lived in the region prior to the invasion of colonizers or foreign settlers or foreign settlers who, in many cases, have since become the dominant populations"<sup>114</sup>. Article 1(1) (b) of the Convention 169 treats indigenous "on account of their descent from populations which inhabited the country, or a geographical region to which the country belonged, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

### 4.3 Bangladesh Perspective

Considering the above definition of "indigenous", it becomes clear that its scope does not extend to the affairs in Bangladesh because, here, everyone is indigenous in relation to the region of Bengal (including Assam). Most of the peoples in East Bengal (now Bangladesh) are the descendants of the settlers prior to the occupation of modern or earlier colonizers and are the original inhabitants. Some people of the other parts of the region moved in recent times to settle in Bangladesh, for example, from Burma (Myanmar) and Muslims from India during or after the partition of the Indian subcontinent in 1947. However, the migrants who came from other parts to settle in East Pakistan (now Bangladesh) neither considered the host community as indigenous, nor the law regarded the former as foreigner<sup>115</sup>. There are other types of settlers in the country who came and went or stayed in course of traditional shifting cultivation practice, from their primary ancestral hills in India. The Garo living in the *Sal* forest of the Modhupur Tract would fall under this category. In due course every one acquired the citizenship of Bangladesh which is determined and regulated by law.<sup>116</sup> Constitutionally, Bangladesh is a homogenous society where the fundamental state policy aims at creating an exploitation-free society

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<sup>112</sup> For example, the 1948 Universal Declaration on Human Rights and the 1966 Covenants; Draft Declaration on the Rights of the persons Belonging to National or Ethnic, Religious or Linguistic Minorities, Commission on Human Rights, Geneva, 1989; Elimination of Racial Discrimination against Indigenous Peoples: protection of their rights, International NGO Conference for Action to Combat Racism, Geneva, 1988 etc.

<sup>113</sup> Barsh, Russel L. "Indigenous peoples : An Emerging Object of International Law", American Journal of International Law, vol.80 (1986).

<sup>114</sup> Daes, E.A. "on the Relation between Indigenous peoples and States", Without prejudice, vol.II, 1989, p.44.

<sup>115</sup> The migrants were treated as 'displaced' persons in Law enacted to redress their suffering. See for example, Displaced Persons (Compensation and Rehabilitations) Act, 1958; Displaced Persons (Land Settlement) Act, 1958.

<sup>116</sup> Article 6 (1) of the 1972 Constitution.

ensuring respect for the dignity and worth of the human person<sup>117</sup>. But the perspective of backward section of the people is recognized as a special policy objective. In practice, a large number of communities living in the plain land forests and hill forests are termed as 'tribal people' or *Upajati* although the phrase does not appear in the Constitution. Conversely, these communities term the rest of the population (about 98 percent) as Bengali.

According to Article [1(1) (a)], of Convention 169 'tribal peoples' are those "whose social, cultural and economic conditions distinguish them from other sections of the national communities, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations".

This definition explains the status of the tribal people more closely in Bangladesh context. It is distinct from the term *Adivasi* meaning original inhabitant<sup>118</sup> because in many traditional domains, the present tribal occupants may not be treated as original inhabitants but "first settlers" in view of the multidimensional features of the process of settlement, e.g., time and mode of settlement, the origin and ancestral homeland of the settlers, etc.

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<sup>117</sup> See *Ibid.*, part II.

<sup>118</sup> For example, see Timm, R. W. Father. *The Adivasis of Bangladesh*. Report of Minority Rights Group International

# 5 International Standards for the Protection of Land Rights

This Chapter will assess the main international documents or procedures, which refer explicitly to indigenous peoples' rights or that, can be used by these latter even if they are not directly devoted to them. In particular the chapter will try to focus on the instruments that have been or can be used in relation to the protection of the land of indigenous peoples. Therefore, this part will deal first with the UN bodies' procedures and other instruments (pertaining to Charter-based or Treaty-based bodies), and then to the UN system with its Specialised Agencies. The ILO and the World Bank will deserve particular attention since they adopted specific instruments related to indigenous peoples.

## 5.1 The Un Working Group on Indigenous Populations.

The first important undertaking of the UN towards indigenous peoples started in 1970 with the appointment of Jose Martinez-Cobo as a Special Rapporteur with the charge of preparing a *Study on the Problem of Discrimination against Indigenous Populations*. The long preparation of the report- submitted between 1981 and 1984- served to move an increasing attention towards indigenous peoples. First, in 1977 the ECOSOC granted the first observer status to an indigenous organization, The International Indian Treaty Council (as of our days, 15 indigenous organizations have a consultative status with the ECOSOC). Secondly in 1982 the working group on indigenous populations (WGIP) was created. The Sub-Commission established the WGIP as its subsidiary organ. This latter is composed by 5 members and chaired by Mrs Erica-Irene A. Daes, from Greece. The 5 members are independent experts, already members of the Sub-Commission. The WGIP formal tasks, apart from facilitating dialogue between indigenous peoples and governments, are two:

To review national developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous peoples;

To develop international standards concerning the rights of indigenous peoples taking account of both the similarities and the differences in their situation and aspirations throughout the world.

*'At its first session, the Working group took the almost unprecedented step of allowing oral (and written) intervention from all indigenous organizations which wished to participate in its work, not limiting such participation to those with formal consultative status. Approximately, 380 persons took part in its sixth session in 1988, including from 33*

countries. *As a result of this wide participation, the Working Group has provided a meaningful forum for the exchange of proposals regarding indigenous rights and for the exposition of indigenous reality throughout the world. While the Working Group reiterates at each session that it is not a 'chamber of complaints' and has no authority to hear allegations of human rights violations, it has nevertheless permitted very direct criticisms of government practices by NGOs, as a means of gathering data upon which standards will eventually be based*".<sup>119</sup>

In 1985, a Voluntary Fund for Indigenous Populations was established providing financial assistance to representatives of indigenous peoples to attend WGIP sessions. Notwithstanding the low position in the UN hierarchy, the Working Group has served with great energy as a forum for discussion of indigenous questions in the UN system. It has gathered seminars and has facilitated the proclamation of 1993 as *International Year of World's Indigenous People* (UNGA 1990), with the 1992 Nobel Prize Rigoberta Menchu as Goodwill Ambassador. The big work of the Working Group, also demonstrated by the enlargement of WGIP year sessions from 5 to 10 days, had influence on the Vienna World Conference on Human Rights (1993), where recommendations were made for the proclamation of the *International Decade of World' Indigenous People* and for the creation of a *Permanent Forum for Indigenous People*. Most important than all, the WGIP devoted some 7 years to the creation of the *Draft Declaration on Indigenous Peoples*. From 14 principles elaborated in 1987 (5<sup>th</sup> session), the Draft Declaration was completed in 1993 with a preambular introduction of 19 paragraphs and an operational part of 45 articles, divided in 9 sections.

*"The draft Declaration is a unique instrument of the United Nations system because it has been drafted with participation from victims of the human rights violations and the future beneficiaries of its provisions. While the draft Declaration is not an indigenous document, it reflects a broad consensus of an extraordinarily wide range of indigenous experiences. Contributors to the final text have included: traditional leaders; indigenous lawyers and activist; women's and youth organizations; survivors of genocidal State-sponsored policies against indigenous people; and community workers"*.<sup>120</sup>

The previous chapters have looked at different part of the declaration regarding the question of the definition of indigenous peoples, collective rights, self-determination, and right to land, environment issues, principle of free and informed consent. This document, not legally-binding as the name 'declaration' expresses, has been adopted by the Sub-Commission in 1994

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<sup>119</sup> Hannum H.; *Autonomy, sovereignty and self-determination: the accommodation of conflicting rights*, University of Pennsylvania Press, Philadelphia, 1992, p. 88.

<sup>120</sup> Burger J.; *Indigenous Peoples and the United Nations*, in: Cohen C.P. (edited by); *The Human Rights of Indigenous Peoples*, Transnational Publishers, New York, 1998, p. 6.

and submitted to the UN Human Rights Commission for consideration. This latter, with resolution 1995/32 of March '95, has established an open-ended inter-sessional working group to consider the text submitted by the Sub-Commission and to elaborate a definitive draft for consideration and adoption by the General Assembly within the Indigenous Peoples' Decade(1995-2004). Since this working group is open to members of the HR Commission (although with procedures for the participation of indigenous peoples' organisations) and therefore not by independent experts but States representatives, it is not difficult to predict that the final draft will not be so progressive. The WGIP, after the drafting of the declaration for the Sub-Commission, has remained concentrated mainly with research activities on questions of particular interest for indigenous peoples. The most important are: the *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations* (undertaken by Mr Miguel Alfonso Martínez since 1989), the *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* (containing also some draft principles and guidelines for the protection of the heritage of indigenous peoples) and the *Study on the Relationship of Indigenous Peoples with Their Land* , these two latter undertaken by Mrs Daes. These studies are very important because they make recommendations and proposals for guidelines that might serve as a basis for future international instruments for the protection of indigenous' rights. In this sense also important is the *Study on the impact of TNC on the lands, environments and human rights of Indigenous Peoples* , requested by the WGIP to the former UN Centre on Transnational Corporations and concluded in 1994.

## 5.2 Individual Petitions to the Human Rights Committee<sup>121</sup>

Considering that the UN Declaration on Indigenous Peoples is a draft, therefore neither definitive, nor approved yet, the protection of indigenous peoples' rights has been mainly purchased through other ways. The most important one is the individual petition for violation of art. 27 of the ICCPR. Art 27 says: ” *In those States in which ethnic, religious or linguistic minorities exists, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language* ”. In principle it is aimed at the protection of individual members of minorities, but the practice of using it to protect indigenous individuals' rights has been confirmed by the Human Rights Committee (HRC) General Comment n. 23 on art. 27, where it is said: “ *With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life* ”.

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<sup>121</sup> In this assessment of international instruments, the possibility of infra-state complaint is not considered, since it is in fact never applied.

associated with the use of land resources, specially in the case of indigenous peoples”.<sup>122</sup>

The first case under art. 27 related to indigenous peoples was *Sandra Lovelace v. Canada*<sup>123</sup>, where the Committee decided in 1981 that the application of the *Law over Indians* forbidding the petitioner to live in the reserve because she got married with a non-indigenous was a privation of its cultural identity and a violation of art. 27. The Federal Government of Canada changed the law in 1985. In *Kitok v. Sweden*<sup>124</sup>, issued in 1985, the Committee accepted in 1988 that the decision of the village of Mr Kitok of not reintegrating this latter, because of another job that he had out of the community for a while, was a necessary restriction for the *continued viability and welfare of the minority as a whole* (para. 9.8). One of the most important cases regarding indigenous peoples' rights remains *The Lubicon Lake Band decision*.<sup>125</sup> In 1984 the chief B. Ominayak and the Lubicon Lake Band asserted that Canada had violated their right to self-determination, in particular their right to freely dispose of their natural resources, by expropriating part of the Band's territories, in order to grant interests in gas and oil exploration to private corporations. The HRC decided in 1990 that an individual application under art. 2 of the Optional Protocol to the ICCPR could only assert a violation of individual rights and that the communication was therefore inadmissible with regard to the alleged violation of art. 1 (self-determination). However, the HRC found that the application was *admissible insofar it might raise issues under Art. 27 or other articles of the Covenant* (para. 14). The Committee accepted many arguments of the applicant saying that [ *h*] *historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Art. 27 as long as continue* (para. 33), but it decided that a simple indemnisation was a satisfying remedy. The importance of this decision relies more in the question of admissibility, since basically the interpretation of the Committee recognised the right of self-determination as not encompassing individual rights and so as unenforceable under the Covenant, as confirmed by the 1991 *Mikmaq decision*.<sup>126</sup> In the '90s three cases under art. 27 have regarded Sami people and Finland, both three related to projects affecting traditional indigenous land and environment. In *Sara et al. v. Finland*,<sup>127</sup> the authors, reindeer breeders of Sami origin,

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<sup>122</sup> UN Human Rights Committee, General Comment No. 23 (50) on Article 27 (Minority Rights, 6-4-1994), para. 7.

<sup>123</sup> Communication No. R 6/24, UN GAOR, 36<sup>th</sup> Sess., Supp. N. 40, at 166, UN Doc. A/43/40, Annex 18, opinion approved in 1981.

<sup>124</sup> Communication N. 197/1985, UN GAOR, 43<sup>rd</sup> Session., Supp. N. 40, at 207, UN Doc. A/43/40, Annex 7(G), opinion approved in 1988.

<sup>125</sup> Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication N. 167/1984, UN GAOR, 45<sup>th</sup> Sess., Supp. N. 40, vol. 2, at 1, UN Doc. A/45/40, Annex 9(A), opinion approved in 1990.

<sup>126</sup> Mikmaq People v. Canada, Communication N. 205/1986, UN GAOR, 47<sup>th</sup> Sess., Supp. N. 40, at 200, UN Doc. A/47/40, Annex 9(A), opinion approved in 1992.

<sup>127</sup> Communication N. 431/1990, UN GAOR, 50<sup>th</sup> Sess., UN Doc. CCPR/C/50/D/431/1990, opinion approved the 24 March 1994.

asserted that the adoption of a law (the *Wilderness Act*) by the Finnish Parliament in 1990, to regulate logging activities in the north of Finland, would jeopardise the future of reindeer herding and therefore of Sami livelihood through authorising logging in areas used by the applicants for reindeer husbandry. In 1994 the petition was judged inadmissible for failed exhaustion of local remedies. In the case *Länsman et al. v. Finland*<sup>128</sup> the authors were the members of a Sami Herdsmen's Committee that traditionally occupies an area officially administered by the Central Forestry Board. This institution had signed a contract with a private company for the extraction of stone from the flank of a mountain, which used to be a sacred place of the old Sami religion, and also for the transportation of the stone through Sami reindeer herding territory. The applicants affirmed that this operation violates their right to enjoy their own culture, which is strongly based on reindeer husbandry. Therefore it was in breach of art. 27 of the Covenant. The applicant also asked for the adoption of interim measures of protection, under rule 86 of the HRC rules of procedure, so to avoid irreparable damages. In its decision of 1994, the Committee discarded the request of interim measures as premature. It then affirmed that the quarrying of the slopes of Mt. Riutusvaara in the amount that had already taken place had minimised the impact on any reindeer herding activity in the area and on the environment as conceived also in the quarrying permit. The HRC also underscored the importance of the consultation of the authors during the proceeding, as provided in the General Comment n. 23 to art. 27. Therefore it decided that art. 27 had not been violated, but stressed also that *if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by these companies to which exploitation permits have been issued, then this may constitute a violation of the authors' right under article 27* (para. 9.8). Very important for indigenous peoples in general is para. 9.3 of Committee's decision, where it affirms:

*“The right to enjoy one's culture cannot be determined **in abstracto** but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect **traditional** means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with help of modern technology does not prevent them from invoking article 27 of the Covenant”.*<sup>129</sup>

The third case, *Jouni E. Länsman et al. v. Finland*<sup>130</sup>, has been initiated by other members of the same Muotkatunturi Herdsmen's Committee, this time

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<sup>128</sup> Communication N. 511/1992, UN GAOR, 52nd Sess., UN Doc. CCPR/C/52/D/511/1992, opinion approved the 8 November 1994.

<sup>129</sup> Ibid., para. 9.3.

<sup>130</sup> Communication N. 671/1995, UN GAOR, 58th Sess., UN Doc. CCPR/C/58/D/671/1995, opinion approved the 30 October 1996.

to complain against the Central Forestry Board's plans to approve logging activities and the construction of roads in an area covering about 3.000 hectares situated within the traditional Sami winter herding lands. In 1996 the Committee basically replied the decision of the *Länsman et al. v. Finland* case, underscoring the importance of the consultation with the applicants, affirming its inability to find a violation of art. 27 on the basis of the amount of logging approved by the State's forestry authorities and considering that the allowance for logging on a large scale would constitute a violation of art. 27. At the end of the decision the HRC seems to have made a contradictory affirmation:

*"The Committee is aware, on the basis of earlier communications, that other large scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture".*<sup>131</sup>

Also in this case the HRC did not enter in the question of the right of decision over lands traditionally held by indigenous peoples. It did seem to agree rather with the ILO Convention n. 169, according to which the consultation with the people affected is a sufficient measure, than with the UN Draft Declaration that requires the free and informed consent of the people concerned. Another way that has been successfully exploited by indigenous peoples is the right to private life and familial life contained in articles 17 and 23 of the Covenant on Civil and Political Rights. The case is *Hopu et al. v. France*<sup>132</sup>, decided in 1997 by the HRC. Two indigenous Polynesians, residing in Tahiti (French Polynesia), issued a petition against the building of an hotel complex in an area that contained an ancestral cemetery, existing prior to European arrival. They alleged that the building of this complex was a violation of various articles of the Covenant, among which arts. 17.1, 23.1 and 27. The HR Committee was unable to judge over art. 27 since the declaration made by France over this article ("in the light of article 2 of the Constitution of the French Republic, ...article 27 is not applicable as far as the Republic is concerned") at the moment of ratifying the Covenant is considered by the HRC as a reservation (Comm. para. 4.3). It accepted instead the argument of the petitioners in relation to arts. 17.1 and 23.1. Art. 17.1 says: *"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation"*. Art. 23.1 says: *"The family is the natural and fundamental group unit of society and is entitled to*

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<sup>131</sup> Ibid., para. 10.7.

<sup>132</sup> Communication N. 549/1993, UN GAOR, 60th Sess., UN Doc. CCPR/C/60/D/549/1993/Rev.1, opinion approved the 29 December 1997.

*protection by society and the State*". Indeed the HRC in its decision has considered that:

*"...the objectives of the Covenant require that the term 'family' be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term 'family' in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life".*<sup>133</sup>

### 5.3 Other UN Treaties

Other UN treaties contain some provisions directly or indirectly linked with indigenous peoples. The ICESCR contains a list of non-justiciable rights (there's no petition system), within which art. 11, about adequate standard of living, could be related to the question of land and forced relocation. The Convention against Discrimination (CERD) provides in art. 2.2 that *States parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms...* . The CERD disposes of a mechanism of individual petition (submitted to State's recognition of the Committee's competence) not used by indigenous people so far. The Convention on the Rights of the Child (CRC) has many articles that can be referred to indigenous peoples (arts. 5, 17, 20, 29, 30). In particular, art. 30 provides that a child who is indigenous *shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture...* . The CRC does not contain any petition system. The Convention Against Genocide defines this latter as the methodic extermination of an ethnic, national, racial or religious group and considers it as crime against humanity under international law in time of peace or war. This crime is held imprescriptible and of universal jurisdiction. In 1983 the Sub-Commission appointed a Special Rapporteur on Genocide that widely studied the systematic massacre against indigenous Aché (Guayakí) of Paraguay, but its mandate was not prorogued.

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<sup>133</sup> Ibid., para. 10.3.

## 5.4 The ILO

The International Labour Organisation is certainly the UN specialised Agency, if not the international organisation in general, who has devoted more interest to indigenous peoples. In 1930 it adopted a Convention on Forced Labour, with several dispositions connected to indigenous workers, and in 1939 the Convention N° 65 on penal sanctions to indigenous workers. In 1953 the ILO published a study entitled *Indigenous Peoples*, a survey of indigenous peoples' living and working conditions. In 1957 Convention N° 107 on *Indigenous and Tribal Populations* was adopted. The Convention was drafted in the name of the entire UN System and for 30 years was basically the only instrument specifically devoted to indigenous peoples. 27 countries have ratified it. During the '80s many NGOs, indigenous organisations and also the Martinez-Cobo report called for the revision of Convention 107, in particular for its assimilationist approach. This was done with 1989 Convention N° 169 on *Indigenous and Tribal Peoples in Independent Countries*, ratified so far by thirteen States. The Convention consists of a Preamble and an operational part divided in 10 sections, equivalent to 44 articles. The Preamble has underscored the need for new standards, represented also by the use of the term 'peoples' instead of 'populations'. The ILO has clarified that the use of the term 'peoples' is not linked to the question of self-determination, question over which the organisation takes no position and that is left to UN competence. The supervisory system of the Convention is the general one of the ILO: the revision of States' reports and the petition system. The ratifying States have to send periodically a report on the implementation of the Convention. Indigenous workers' organisations can express their comments over these reports that are examined by the ILO Committee of Experts on the Application of Conventions and Recommendations. This Committee can address 'direct request' to the concerned States; these requests are not published and regard minor issues that States should undertake to solve problems. The petition system consists of two procedures. The first procedure allows, under art. 26 of the ILO Constitution, any State-party, any delegate to the International Labour Conference or the ILO governing body, to file a 'complaint' against a State who ratified the Convention for an alleged violation. This procedure leads to the establishment of a Commission of Inquiry. The second procedure, under art. 24 of ILO Constitution, consists of a 'representation' filed by any workers' or employers' organisation alleging violation of a ILO Convention by a State that have ratified it. This results in the appointment of a tripartite Governing Body Committee that examines and decides the case, usually on the basis of exchange of correspondence with the State concerned.

*“Even though indigenous peoples themselves cannot directly file complaints to the ILO, others could do so on their behalf. There is no requirement that a party initiating a complaint under article 24 or 26 of the ILO Constitution, or the party's constituency, be directly affected by the alleged infraction. Labor unions are especially likely surrogates for indigenous peoples, given the demographic overlap*

*and political alliances between indigenous and labor sectors. Additionally, the ILO Government Body itself is authorised to initiate article 26 complaints and could do so upon information provided by indigenous groups or by nongovernmental organisations concerned with indigenous peoples' rights".*<sup>134</sup>

## 5.5 The World Bank

The role of the World Bank in relation to indigenous peoples seems to be strategic, since it has participated in many of the development projects that most have affected indigenous peoples' rights, environment and survival (to stress just two examples, the Narmada dam in India and the Bayano dam in Panama). Awareness about this situation has been growing in the World Bank Group since the '80s. In 1982 an Operational Manual Statement (OMS 2.34) was issued with the title *Tribal People in Bank Financed Projects*. This directive reflected much of the integrationist approach of ILO Convention 107. It enumerated a long list of characteristics defining tribal peoples and it made clear that it was concerned with projects that have a direct or indirect impact on tribal peoples. Its guiding principle was that development projects that affect tribal peoples should provide *adequate time and conditions for acculturation*<sup>135</sup> and that special programmes should be contained in the projects to mitigate the adverse effects of these latter. In 1986 the World Bank started a Five Years Implementation Review and in 1991 it issued a revised Operational Directive (OD 4.20) on Indigenous Peoples. The evolution from the first directive is already clear in the title. Indigenous peoples (or another equivalent terms such as *indigenous ethnic minorities*, *tribal groups* and *scheduled tribes*) refers to *social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process*<sup>136</sup>. But it also states that *because of the varied and changing contexts in which Indigenous Peoples are found, no single definition can capture their diversity*.<sup>137</sup> The directive states that the Bank's objective is both to protect indigenous peoples against the potential harm or damage caused by development projects as well as to provide them (if they so wish) with new opportunities to participate in the benefits of the development process. The basis for that is **the informed participation and recognition of the preferences of indigenous peoples**.<sup>138</sup> Paragraphs 15.c and 15.d are

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<sup>134</sup> Anaya S.J.; *Indigenous peoples in international law*, Oxford University Press, New York, 1996, p. 162.

<sup>135</sup> World Bank OMS 2.34, 1982, para. 6.

<sup>136</sup> World Bank OD 4.20, 1991, para. 3.

<sup>137</sup> *Ibid.*, para. 5.

<sup>138</sup> *Ibid.*, para. 8.

devoted to *Land Tenure and Strategy for Local Participation*. In 1989 the World Bank has also issued an Operational Directive on Environmental Assessment (OD 4.00 then revised in 1991 as OD 4.01) to guide environmental impact assessment of World Bank's financed projects. This directive makes reference to indigenous peoples' practices as well as it does the 1993 New Forestry Policy (OP 4.36). Other important point to underscore is that in 1994 the World Bank established an Inspection Panel to investigate complaints filed by a group affected by a project of the International Bank for Reconstruction and Development (IBRD) or the International Development Association (IDA).<sup>139</sup> The party with a complaint can request an investigation to verify the compliance of these agencies with World Bank's policies and operational directives. The Panel has to inform the Executive Directors of the request and send it to the Bank's President. If the Executive Directors decide that an investigation should be undertaken the Panel has full access to all staff and pertinent Bank's records and delivers a report to the Executive Directors. They verify which initiatives have been taken by the management to respond to the complaint and subsequently inform the affected party. A complaint to the Inspection Panel has been filed in 1995 by the Mapuche-Pehuenche, to ask an investigation on World Bank's involvement in the dam project on the Biobío River. The increasing interest of World Bank for indigenous peoples and environment issues has been also demonstrated by the new division on Social Policy and Resettlement that has been established in the Bank's central Environmental Department and by its participation in the Global Environment Facility (GEF), the group of institutions that finances the implementation of the Bio-Diversity Convention. Because of the important role of the World Bank in stimulating change in other Multilateral Development Banks (as the Inter-American Bank of Development, the African Development Bank or the Asian Development Bank) and the complexity of its structure and policies.

## 5.6 Other UN Specialised Agencies

Other UN Specialised Agencies have dealt with indigenous peoples, although the majority addressed only marginally the issues of this paper. The UNESCO, among various activities, has elaborated several instruments for the protection and promotion of the right to education, the cultural heritage, the scientific progress and the right to cultural identity. The Convention against Discrimination in Education (1960) and the Declaration

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<sup>139</sup> The World Bank comprises four quasi-autonomous institutions that nevertheless share a common President and personnel office. IBRD and IDA comprise the World Bank proper. Together with the Multilateral Investment Guarantee Agency (MIGA) and the International Finance Corporation (IFC), which is legally, financially and operationally separate from the World Bank, they make up the World Bank Group. The former two lend to national governments. The latter two lend to the private sector, with the IFC making direct loans to private corporations, while the MIGA deals with loan guarantees.

on Race and Racial Prejudice (1978), among others, contain provisions related to indigenous peoples. In 1978 UNESCO adopted a procedure for individual petitions about isolated or massive violations of human rights related to its competence (education, science, culture). The procedure is confidential and can regard also rights to intellectual property and cultural rights of minorities. A Committee of Conventions and Recommendations examines the admissibility and merit of the case and submits a report with recommendations to the UNESCO Executive Council who analyses it in private session. In 1981 the UNESCO organised an International Seminar on Ethnocide and Ethnic Development in Latin America. Ethnocide was there defined as the conditions under which an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language.<sup>140</sup> FAO has not elaborated any international juridical instrument but works in the field with activities for agriculture promotion and food programs for vulnerable groups. It participates actively in the implementation of Agenda 21 and CBD. The World Health Organisation (WHO) has participated in the drafting of ILO Conventions 107 and 169 and of the UN Draft Declaration on Indigenous Peoples, making proposals on the articles related to health. The UNDP has undertaken many projects regarding the development of indigenous peoples according to their culture and tradition.

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<sup>140</sup> AAVV; *The rights of indigenous peoples*, UN Fact Sheet n. 9, Geneva, 1997, p. 20.

## **6 Recommendations/ Bangladesh Plan of Action & The Peace Accord**

Fruit gardening and forestry are the mainstay of the of the CHT economy, and given the natural features of the region and recent economic trends, these two occupations will no doubt continue to remain as the most important sector of the local economy. It is therefore necessary that the Government of Bangladesh should prepare a master plan to guide the implementation of forestry and fruit plantation projects in the CHT. The Forestry Master Plan of 1994 was certainly a great improvement on the previous Forestry policy of the Government of Bangladesh but there are various problem areas.

In the first place, the major problem with the Forestry Master Plan is that it is still extraction-oriented, allowing unplanned extraction from the natural forests. Secondly, the process of reforestation of deforested areas seems to emphasize on plantation of a small number of choice species only with hardly any room natural regeneration of heterogeneous species. This is not at all desirable from the point of preserved by village communities for generations --such as in the CHT -- has not received any attention. These forests, which are recognised under Rule 41A of CHT Regulation, should be encouraged and communities successfully maintaining such forests should be granted collective title to such lands and provided extension service as needed. Lastly, the needs of tree planters to have a simpler extraction permit system have not been given sufficient attention. The Forestry Master Plan of 1994 needs to be revised to incorporate provisions such as those identified above.

There is no other trend, which needs to be reserved. For years the Government of Bangladesh has been creating mono-species plantations of teak and rubber which have been seen to lead to severe soil degradation and loss of biodiversity. These are certainly not sustainable methods of land use because future generations will have bare scrublands or grasslands where earlier generations had virgin forests. The above mentioned methods of land use are also contrary to the Convention on Biological Diversity which has been ratified by the Government of Bangladesh and contrary to Agenda 21 which was adopted at the United Nations Conference on Environment and Development (UNCED) at Rio de Janeiro, Brazil in June, 1992.

Neither teak nor rubber is indigenous to the CHT although teak has probably partly acclimatised itself to the local soil to some extent because it was introduced in the CHT a long time ago. Nevertheless, despite assertions to the contrary by government personnel, local farmers are unanimous in their opinion that teak is very exacting on the soil. In the case of teak,

because it has very large leaves, the water droplets from its leaves cause a lot of erosion on sloping lands during the monsoon rains. With rubber, it is at best a very marginal case. Similarly, wherever forest resources and plantations have been severely depleted, the emphasis should be on allowing these lands to regenerate themselves naturally into a forest again instead of turning them – or re-converting them – into planted forest (i.e., plantations), as the case might be.

## **6.1 The Peace Accord Implementation Process**

Four meetings of the accord implementation committee were held on March 21, May 17, August 7 and November 2, 1998, but the tribal authorities complain that steps have not been taken to implement the decisions taken in the meetings. Adding to the confusion, no minutes of the meetings were recorded.

### ***Regional Council:***

The centerpiece of the accord is the establishment of the Chittagong Hill Tracts Regional Council comprising the Local Government Councils of the three Hill Districts. It has 22 elected members and its tenure is five years. The Chairman shall be a tribal with a status of a state minister. Fourteen other members will be tribal, including two women. The objective of having Regional Council is to make the CHT a single political and administrative unit. It has powers of supervision and coordination on subjects such as law and order, general administration, development, traditional laws and social justice and the power of giving licenses for heavy industry.

Although the Regional Council Act has been enacted, there is delay in the formulation of its rules and regulations. Moreover 31 of the 36 subjects, which come under its purview, have yet to be transferred to the HDC. For example, land development tax is still being collected by the Deputy Commissioners of the Hill Districts.

### ***Amnesty & Rehabilitation***

Under the terms of the accord, about 2000 members of *Shanti Bahini*, the armed wing of PCJSS, deposited their arms by March 1998 and returned to normal life. The government has declared a general amnesty and the JSS has submitted lists of cases lodged against its members. But the government has yet to withdraw all these cases. So far 999 cases have been placed before the government for withdrawal or dismissal. Of these 461 cases have been withdrawn by the government. Cases before the military court have neither been withdrawn nor dismissed.

What add to the concern are incidents like the recent arrest of the acting principle of Naniarchar College Santosh Bikash Khisa in connection with the 1993 Naniarchar massacre. According to PCJSS Information Secretary Mangal Chakma, the armed forces and the Bengali settlers were

responsible but blamed the Jumma peoples and lodged a case against them in the police station.

Under the terms of the accord this case should have been in the process of withdrawal. Apparently, because of tension over a local political incident, the police are harassing PCP (Hill Students Union) and JSS workers and the case filed before the CHT accord has been dredged up. S. B. Khisa was picked up on February 29, 2000 and taken to Rangamati jail.

To assist the rehabilitation of the members of JSS, Taka 50,000 has been given to 1,947 returnees. 19 other JSS members who were in jail have been granted Taka 50,000 but 11 are yet to receive the money. Under the accord JSS members who had been in government service were to be reinstated and others were to be given employment according to their qualifications. In all 78 JSS returnee members submitted applications for reinstatement and 62 have been reinstated. But seniority and related allowances have yet to be granted. 677 JSS members have been appointed police constables and 10 traffic sergeants.

***Refugee and IDP Rehabilitation:***

All the 12,222 CHT Jumma refugee families numbering 64,609 persons have returned to CHT from Tripura, India. The state of Bangladesh constitutionally guarantees the safety of life and property of all the returnees and their family members.

The following facilities are being given to the returnees:

- 1. Every family will be paid a cash grant of Taka 15,000.00 (US \$ 335)*
- 2. Every family will be provided free ration at the following rates of entitlement: Adult member/5 kilogram of soybean oil, 4 kg. of lentils, 2kg. of salt*
- 3. Corrugated sheets worth 2 bundles/per family*
- 4. Taka 8,000.00 per family of cash transfers for those families owning arable land and a pair of bullock for tilling the land*
- 5. The landless will be provided with land grant and a cash transfer to Taka 3,000.00 per family*
- 6. Debt. forgiveness of up to Taka 5,000.00 per family in respect of agricultural loans*
- 7. Similar loan forgiveness would be considered, on a case by case basis, for non-agricultural loans*
- 8. Loans taken in the past from the Chittagong Hill Tracts Development Board Would be written off*
- 9. General Amnesty for the insurgents announced earlier shall remain in force. This amnesty shall be applicable in respect of cases registered during the state of emergency (when insurgency was on)*
- 10. Land will be returned to their original owners and they will not be rehabilitated in the cluster villages*

- 11. Reinstatement in government service for those who were employed there prior to becoming internal and external refugees would be considered most sympathetically*
- 12. Arrangements would be made for holding special examinations for High School and College Diplomas for those who had studied in neighboring countries*
- 13. Create opportunities for the returnee students in schools in order that they could complete their courses of studies*
- 14. According priority to the tribal youth in recruitment's for vacant positions in different offices of the districts and elsewhere*
- 15. A general amnesty for those convicted in different criminal cases during insurgency. All returnee 'Headmen' (of village councils) to be reinstated in their previous positions*

Of the 64,609 refugees who returned, nearly 50% of them have been unable to return to their own homesteads and native villages because they are still "occupied" by Bengali settlers. Complicating the problem is the reality that the Bengali settlers have nowhere to go. As regards the writing off of government loans taken by tribal refugees, which could not be utilised because of the conflict situation, instructions have been given to the Deputy Commissioners and the process has yet to be completed. Also, the government has not taken up the process of rehabilitation for Internally Displaced Jumma People. Around 60,000 tribal were internally displaced. A Committee has been formed to facilitate their rehabilitation but no measures have been taken in this regard. In violation of this provision the government is making attempt to rehabilitate the Bengali settlers in CHT.

Under the accord, the rehabilitation of the tribal and internally displaced was to commence, as soon as possible, in consultation with the Regional Council, the land survey of the CHT and finally determine the land ownership of the tribal peoples and settle land disputes on proper verification. Land survey would record their land rights and thus ensure their rights. This programme has yet to be taken up for implementation. Moreover, the government has yet to take up the programme for settling two acres of land per tribal family having no land or less than 2 acres. Where no land was available in the locality, government lands were to be tapped. No progress has been made on this front.

#### ***Withdrawal of Army Camps:***

After the signing of the accord and the depositing of arms by the JSS, the temporary army camps and the Village Defence Camps were to be withdrawn by phases from the CHT. The provision for the withdrawal of the army from certain camps has only been partially implemented. No time limit has been determined for the withdrawal of the camps. So far only 32 temporary camps have been taken back to the permanent cantonments. The order for army's involvement in maintenance of law and order in the CHT has yet to be rescinded as a result the army's involvement in civil administration still exists. During the conflict, in the CHT there were 230 army camps, more than a 100 BDR (paramilitary) and 80 police camps. Army cantonments, which were to have been removed after peace was restored, are still largely there except for six main ones.<sup>141</sup>

Lands and premises abandoned by the cantonments, army and paramilitary camps were to be made over to their real owners by the Hill District Councils. There is no progress on this provision in the accord.

#### ***Withdrawal of Bengali settlers:***

Before signing the accord the National Committee on behalf of the government of Bangladesh gave a commitment to JSS that Bengali settlers would be withdrawn from CHT to other plains districts. Prime Minister, Sheikh Hasina reaffirmed that commitment in a meeting with the JSS delegation on Dec 2, 1997 that Bengali settlers would be transferred to other districts. As part of that process, the government would stop providing rations to the Bengali settlers and dismantle their cluster villages. But till today the government has taken no such steps, on the contrary, the Government authorities are formulating projects and providing more facilities for their rehabilitation in CHT.

The European Parliament, in a resolution, (9(d) B4-0962 and 0989/97) has urged the government of Bangladesh to review its demographic policy, to relocate the Bengali settlers from CHT and rehabilitate them in the plains, with full respect of their rights and with the full use of the financial assistance of the European Union.

#### ***Land Allocation:***

On the issue of cancelling the lease for lands allocated to non tribals and non local persons who have not utilised the lands for rubber and other plantations in the last 10 years, the government has made no move to implement this provision in the accord. On the contrary the Deputy Commissioners of the three Hill Districts have allocated more lands to non tribals and non local persons in the last two years.

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<sup>141</sup> Timm, Father R. W., *The Human Rights of the Adivasis of Bangladesh*. Minority Rights Group International.

Under the accord no land can be leased or sold out or transferred in any way without the permission of the Hill District Council concerned.

***Tribal creed and culture:***

The accord recognises the Chittagong Hill Tracts as an area populated by the tribal people and also the need for preserving the particular characteristics of the region and promoting the overall development of the tribal people and the permanent Bengali residents (as opposed to settlers). The government and the Elected Representatives were to promote the characteristics of the CHT's tribal creed and culture. Not only is there no progress on this commitment but the government has taken no step to patronise the cultural activities of the CHT tribal peoples.

***Development:***

An amount of Tk 2200 crore was approved for the integrated development of the CHT. However serious doubts exist about who will benefit from the development programme. Nearly a fifth is allocated for afforestation programme which could end up harming the tribal peoples as it will deprive tribals of land owned and occupied in reserve forests. In addition, the money allocated for infrastructure development will disproportionately favour the Bengali community as they control the administrative positions and the business economy. The allocation for a digital telephone systems, will also disproportionately favour the Bengali settlers, who are in the large cities where the telephones are concentrated.<sup>142</sup>

Almost six years on, the Accord remains unimplemented in all the key areas such as, Regional Council, rehabilitation of internally displaced Jummas, resettlement of state-sponsored settlers outside the CHT, and withdrawal of the armed forces from the region. But what has emerged, as another complex issue in restoring peace to the CHT is the internecine tension between the JSS and the United Peoples Democratic Front (UPDF). The UPDF was formed by factions of the Hill People's Council (Pahari Gano Parishad), the Hill Student's Council (Pahari Chattra Parishad), and the Hill Women's Federation (HWF) who were opposed to the Accord, which, in their opinion, does not meet the Jummas' demands for full regional autonomy.

Attempts have been made to resolve the differences between the two parties – which are more in terms of approach rather than in aims and objectives – such as the initiative of a group of respected Jumma elders including Upendra Lal Chakma of the Jumma Refugee Welfare Association. So far, the two groups have not yet come to an understanding although they have met on various occasions.

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<sup>142</sup> Ibid. Timm, Father, 2000.

Efforts are ongoing for the JSS and the UPDF to agree on cooperation towards strengthening indigenous self-rule in the CHT, including within the parameters of the Accord, and to terminate their confrontational relationship. It is hoped that the present Government will take initiatives to resolve their differences soon for the sake of the Jummas' collective interest.

In addition, some changes are to be made to the land administration set-up in the CHT, among other things. Some of the important features of the proposed reforms related to land issues are briefly discussed below.

One of the major issues that was raised in the writing, namely with regard to the unfair and illegal dispossession of aboriginal lands has been directly addressed by the accord. The accord provides for the formation of a commission to deal with land-related disputes. Some of the positive features of the proposed commission are as follows.

Firstly, the commission is to be empowered to declare any title or right valid or void as the case might be. Secondly, no appeals are to be entertained against the decisions of the commission. Thirdly, the commission is to take account of the customary laws and practices on ownership and use of land. The negative features include the following. In the first place, the commission is not to be a permanent feature although it is stated that its terms of three years may be extended on the advice of the regional council. Secondly, the commission's mandate is not clear on how it is to deal with thousands of prospective disputes unless it is able to delegate authority to one or more sub-commissions or other sub-ordinate bodies. Thirdly, it is not clear how the commission is to deal with situations where the legalities of the matter are identical for numerous cases. Fourthly, it is also not clear whether the commission can initiate enquires on its own or whether it is to merely act as a passive arbiter.

The District Council Act 1989 provides that no lands in the CHT can be settled with or transferred to non-residents without the prior sanction of the district council. The aforesaid provisions are to be strengthened further by extending the authority of the councils over newer categories of lands and by including compulsory acquisition by the Government within the veto prerogatives of the district councils.

The accord states that it will amend a provision of the HDC Acts which had excluded the authority of the HDCs over the protected forests (PFs). This would suggest that the HDCs are to be involved in the administration of PFs, but it is not clear whether this would mean joint administration by the BFD and the HDCs or administration only by the HDCs. In either case, this may entail an amendment to the Forest Act of 1927. The local people should be directly involved in managing these forests and plantations and allowed a reasonable part of the income that may be derived from the economic utilization of the resources of such forests and plantations.

The accord does not mention about the involvement of the regional or district councils in the administration of the reserved forests or about the involvement of the indigenous people in amending the Forest Act of 1927. However, since the regional and district councils are to have a consultative prerogative with regard to legislation on the CHT, it is to be hoped that the GOB will amend the existing Forest Act – to the extent of its application to the CHT – and other subsidiary laws such as the CHT Forest Transit rules, only after substantive consultations with the district and regional councils. Similarly, the Forestry Master Plan also needs to be reformulated to incorporate safeguards for the indigenous peoples.

One other important matter that has not been adequately addressed by the accord is the issue of traditional land ownership by indigenous people. It is to be noted that the involvement of the HDCs in land administration does not necessarily mean that the land tenure system will be changed. It is true that the accord requires the land commission to take account of local customs and practices but this is not the same as providing full formal recognition to the communal and common ownership of forests, grazing lands and swidden lands. These issues need to be addressed by legislation in the future in consultation with indigenous leaders who are conversant with the traditional rights, customs and practices of their peoples.

At the international level, indigenous peoples' special link with their land and territories has been underscored in the Martinez-Cobo report. ILO Convention 169 has fixed many of the arguments in favour of the protection of the indigenous peoples' lands and territories. It recognises the collective character of the relationship of indigenous peoples with land and it considers the concept of land as covering the total environment of the area they occupy. Nevertheless it seems quite generic in allowing the relocation of indigenous peoples with their consent and without indicating in which special cases it can happen, saying only that a clear procedure where indigenous peoples have to be represented is necessary. Bangladesh should ratify the ILO Convention 169 immediately to cope with these problems and they should take steps to amend the Constitution according to the Convention.

The implementation of the Peace Accord remains a contentious issue. Despite Government claims that 98% of its provisions have been implemented, the implementation process has been criticized both at home and abroad.

In September 2000, a parliamentary delegation of the European Union described the implementation as proceeding “very slowly” and emphasized the urgency for full devolution of powers to the Regional Council and the Hill District Council, the withdrawal of armed forces from the CHT and the resettlement of the Bengali settlers outside the CHT. Government should take further steps according to the suggestions made by the delegation. Otherwise, they will lose the financial assistance from EU in future.

Finally, research on tribals both by tribals and non-tribals is to be encouraged and their findings should be made public through various media. Legal protection and assistance and sympathetic understanding of the tribal problems in our country are also very important. Unlike the present practice of the government, the tribal Welfare Officer (wherever needed) should be taken from among the educated tribal people.

The honest and proper implementation of these steps could raise the hope of *Paharias* and other tribals and non-tribals in their situation for better future. On the local level, efforts should be made to iron out any major problems, and work for greater mutual acceptance between the tribals and non-tribals.

## 7 Conclusion

The erosion of the land rights of indigenous Jummas continues unabated by means of different measures, including non-implementation of the Accord and related agreements.

In April 200, Justice Abdul Karim was appointed to lead the Land Commission, which is to be responsible for the adjudication of land disputes in the CHT. However, the Commission is not yet fully operational and its other members, including the traditional chiefs of the CHT, have not yet been formally appointed. The Commission is to decide all land-related disputes in the CHT, and its decision is to be final. It is essential that the Land Commission is operational soon and that it adopts an objective and unbiased approach to conflictive land disputes.

It is thus even more disturbing to note that the chairperson of the Task Force, set up for the rehabilitation of the returning Jumma refugees and the internally displaced, has decided to include 38,156 settler families as “internally displaced”, much to the outrage of the indigenous peoples, including the JSS. They fear that this will enable the settlers to claim the lands they were illegally allocated by the Government.

Another threat to the land rights of the indigenous Jummas is that caused by mining. United Meridien Company of the USA found large reserve gas in the CHT and there are plans to start drilling in the Baghaichari, Jurochari and Dighinala areas. This will not only result in displacing the indigenous peoples living in these areas; it is also a major threat to their health and well-being, in addition to causing environmental degradation. Since gas (and oil) are highly combustible, it is highly likely that swidden or shifting cultivation – which involves burning of vegetation – will not be allowed in the vicinity of the gas (or oil) drilling sites. This will almost certainly lead to further marginalization of the already impoverished indigenous farmers in the CHT.

What is even more alarming in a Government plan to raise the level of the Kaptai reservoir by 14 feet in order to produce two 50 mega-watt hydro-power units. The project is co-financed by the Japan Bank of Investment Corporation (JBIC). To raise the water level of the lake will have devastating socio-economic and environmental consequences for the indigenous people.

The Government’s Power Development Board is eager to go ahead with the programme despite its adverse impact on the local people. The Board has publicly criticized community-based NGOs that have facilitated dialogue on the human rights dimensions of the proposed programme in an effort to highlight its effects. There are indications that the programme will be

implemented despite the protests of the indigenous people. It should be stopped.

Many of the Jumma refugees have not had their ancestral lands returned to them as was agreed by the Government as a precondition to their return to the CHT (some of these are under occupation by the settlers). In its recent report on Land and Human Rights in the CHT, the CHT Commission estimates that, with the 90,208 Jumma and 38,156 settler refugee families identified by the Task Force, more than half of the CHT population has been displaced by the 25-year long conflict.

The acquisition and leasing of lands in the CHT also continues unabated despite the Accord and existing legislation. The forest department has been acquiring lands in order to create Reserved Forests for afforestation purposes. This will effectively debar the indigenous peoples from using the forest and its resources, and make any contravention a crime.

The purpose of the legal regime in preserving traditional rights in forests must not be construed to create either a super-nation or a sub-nation within a nation<sup>143</sup>. Having law may not ensure social justice that requires broader understanding of the relevant perspective<sup>144</sup>. Political discretion, national development planning, social policy, resource distribution, priority of national needs, implications of global policies all are the constituents of the framework that govern the subject. With the emergence of environmental priorities, the traditional and prevailing management approaches are likely to undergo changes in approach and perceptions and enjoyment.

However, the traditional land right of forest dwelling communities is a crucial issue from human rights as well as environmental perspective. These communities are integral part of the forest like any other species whose natural or traditional habitat is ecology dependent.

In Bangladesh the conflict between traditional right and the statutory regime is primarily originating more from the attitudes than the content of the regime. It seems to be conflict of traditions of the forest-dwellers, the public agencies and partly, of the legal and judicial systems. Good or bad, unfortunately all these traditions are living from time immemorial and would need very strong advocacy to be accommodative and equitable. Neither the 1979 Forest Policy nor the 1992 National Environment Policy dealt with these essential issues not even in the form of participatory forestry. There seems to be a foolish connivance in the regulatory regime of the reality. It has been found that the involvement of traditional forest dwelling communities were insignificant, comparing the percentage of their

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<sup>143</sup> See Farooque, Mohiuddin. "Tenurial Complexity Destroying Forest : A Socio-Legal Reflection on Madhupur Forest in Bangladesh", in Bangladesh Quest, vol.4, 1992; -----, "Community Management or Untenable Tenure: Strategy for Saving the Madhupur Sal Forest in Bangladesh", in Voices from the fields, op.cit.

<sup>144</sup> Muntaborn, Viti. "Realizing Indigenous Social Rights", Without Prejudice, op.cit. p.8.

existence, in the Government – sponsored ADB/UNDP/FAO project called Thana Afforestation and Nursery Development project<sup>145</sup>

It is high time that policies and laws are changed and appropriately enforced to remove all conflicts over traditional land right. The conflict of traditions is costing the total resource where competition over ownership has taken precedence over “right to life” guaranteed by the constitution.

Apart from purely “political” developments, economic developments also have major implications for the land and self-government rights of the indigenous peoples of the CHT. The visibly growing trend of privatization and the introduction of a market economy in the hitherto largely subsistence-oriented CHT economy, with linkage with the world-wide phenomenon of uniform trade and property laws, may well undermine indigenous peoples’ rights. The direct presence and role of multilateral development banks and multilateral corporations have not as yet been very pronounced in the CHT. But things may change, since the region is still rich in forest resources and is said to have the largest reserves of natural gas in the country. The indigenous peoples can attempt to resist such a process, or try to become significant actors in this process. Both will be difficult, given the long history of political and economic marginalization due to colonial and colonialist policies by successive governments.

If the indigenous peoples of the CHT and elsewhere within the country are determined to survive as distinct peoples with their cultural integrity intact, they will have to strive harder to unite among themselves, and in friendship with progressive-minded sections of the Bengali-speaking people of the country. They will also have to realize that the protection of their rights will also depend upon how much attention they give to social, educational and economic progress in today’s technological world. This will call for an effective partnership between the social, civic and political leaders of the CHT and networking with friends elsewhere. But time is not in favour of the indigenous peoples, as past has shown. A *status quo* would gradually reduce the indigenous majority in the region into a significant and marginalized minority, as in Tripura State of India, where the indigenous peoples once ruled over an independent kingdom that extended into Bengal and Arakan (Rakhaing).

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<sup>145</sup> See Farooque Mohiuddin. *Socio-Economic Survey, the Thana Afforestation and Nursery Development Project*, Final Report, 1993, Development Studies Centre, Dhaka.

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