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Study on best practices and examples in respect of resolving land disputes and land claims, including consideration of the National Commission on Indigenous Peoples (Philippines) and the Chittagong Hill Tracts Land Dispute Resolution Commission (Bangladesh) and the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights

Note by the secretariat

At its eleventh session, the Permanent Forum on Indigenous Issues, decided to appoint Raja Devasish Roy and Simon William M'Viboudoulou, members of the Forum, to undertake a study on best practices and examples in respect of resolving land disputes and land claims, including consideration of the National Commission on Indigenous Peoples (Philippines) and the Chittagong Hill Tracts Land Dispute Resolution Commission (Bangladesh) and the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights (E/2012/43 and Corr.1, para. 111). The outcome of the study, undertaken by Mr. Roy, is hereby submitted to the Permanent Forum at its thirteenth session.

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I. Research methodology

1. After his term as a member of the Permanent Forum on Indigenous Issues ended in 2013, Simon William M'Viboudoulou was unavailable for the present study; the study was therefore completed by Raja Devasish Roy. For this reason, the section on the African region was excluded because the author is not familiar with the African situation. The study is based upon both the author's direct participation in events related to the subject matter and research into secondary sources. With regard to the Chittagong Hill Tracts, the author has drawn upon his personal experience as a traditional circle chief, a human rights worker, an advocate at the Supreme Court of Bangladesh (acting as legal counsel in some of the cases mentioned in this report) and a Minister of State in the Caretaker Government of Bangladesh in 2008 (for Environment and Forests and Chittagong Hill Tracts Affairs). With regard to the Philippines, the author has made use of his experience as a member of the Permanent Forum and his participation in international and other meetings and discussions with government officials and indigenous peoples' representatives. The author is grateful for the insights gained in discussions with concerned indigenous individuals and government officials. However, since these were not formal interviews, the views of the individuals concerned are neither referenced nor cited. The views expressed in this report are solely those of the author.[1]

II. Land rights struggles, international human rights law and legal and administrative reforms in Asia

A. Indigenous peoples' land rights struggles and legal and administrative reform concerning land rights, land claims and land dispute resolution

2. Struggles to establish land rights are at the core of indigenous peoples' movements worldwide; as Erica-Irene A. Daes has noted, land and resources are essential to their survival, their identity, their dignity and their social and cultural integrity (see E/CN.4/Sub.2/1997/17 and Corr.1 and E/CN.4/Sub.2/2002/23). It has been said that indigenous peoples' relationship with their lands and territories is of

[1] The author is extremely grateful for the assistance provided by Uchacha-A Chak of the PRO 169 project of the International Labour Organization (ILO) country office in Bangladesh.

"special importance for their cultures and spiritual values and ultimately for their continued existence as distinct peoples".[2]

3. Land is a major source of conflict involving indigenous peoples in several regions of the world. These conflicts, as well as the relationship between dispossession of indigenous peoples from their lands and the circumstances of their marginalization and underdevelopment and of the discrimination against them, have been extensively studied by researchers, including under United Nations auspices.[3] Conversely, adequate State recognition of indigenous land claims and the equitable resolution of land disputes involving indigenous peoples have fostered peace, stability and sustainable development in several parts of the world, including former conflict-ridden areas such as north-eastern India, Myanmar, the Philippines, Bangladesh (to an extent), Nicaragua and the Plurinational State of Bolivia.

4. Asia is home to approximately 70 per cent of the world's 370 million indigenous peoples, with a number of groups denied their customary and other land rights.[4] So-called development projects, including dams and "forestry" projects, mining and other extractive industries, population transfer and militarization are among the major causes of such denial. At the same time, over the last few decades there have been legal and policy initiatives in a number of countries in Asia that have resulted in the formal acknowledgement of indigenous peoples' rights, including custom-based and other land rights.[5] Among these initiatives are the developments in the Chittagong Hill Tracts region of Bangladesh and in the Philippines.

5. In the Philippines, the Indigenous Peoples' Rights Act of 1997 was passed in accordance with the Philippines Constitution of 1987, facilitating the formal recognition of indigenous peoples' rights to cultural identity, integrity and self-government and their right to their ancestral domains and lands. In the Chittagong Hill Tracts region of Bangladesh, after decades of armed conflict, an accord was reached in 1997 to end the conflict that acknowledged the need to provide for the rehabilitation of those affected, to strengthen the self-government systems of the region and to provide for the equitable resolution of land-related disputes.

6. Other relevant examples of substantive legislation on indigenous peoples' roles in self-government, legislation, development and the administration of justice include constitutional stipulations concerning states in north-eastern India and in Sabah and Sarawak States in eastern Malaysia, supplemented with federal and provincial legislative and executive measures. The present study focuses on the assessment of a few selected examples of best practices of resolving land disputes and land claims from Asia, including the Chittagong Hill Tract region of Bangladesh and in the Philippines. In the process, it briefly mentions other similar cases in Asia.

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[2] International Land Coalition (ILC), ILC's Approach to Indigenous Issues (Rome, 2013).

[3] See, for example, the study prepared by José Martínez Cobo in the early 1980s for the Commission on Human Rights Subcommission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations* (United Nations publication, Sales No. E.86.XIV.3) and the reports prepared for the Subcommission by Prof. Daes.

[4] Land Watch Asia, The Prolonged Struggle for Land Rights in Asia: A Regional Overview, 2013.

[5] R. D. Roy, *Traditional Customary Laws and Indigenous Peoples in Asia* (London, Minority Rights Group International, 2005).

B. Indigenous peoples' land rights and international human rights law

7. The concept of indigenous peoples' right to land includes matters of territory and natural resources. This is reflected in the Indigenous and Tribal Populations Convention, 1957 (No. 107) and the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (ILO). Convention No. 107 mentions "habitual territories" (art. 12 (1)), while Convention No. 169 refers to "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories … in particular the collective aspects of this relationship" (art. 13 (1)). Convention No. 169 clarifies that the term lands "shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use" (art. 13 (2)). It gives special emphasis to the participation of indigenous peoples in the "use, management and conservation of these resources", including "mineral or subsurface resources or rights of other resources pertaining to lands" (art. 15).

8. The United Nations Declaration on the Rights of Indigenous Peoples (hereafter "the Declaration") follows the spirit of the ILO conventions. It uses the phrases "lands, territories, waters and coastal seas and other resources" (art. 25), "lands, territories and resources" (arts. 26 and 28), and "lands or territories" (arts. 2 and 30). The Declaration adopts a cultural and intergenerational approach to land rights. Its land-related provisions include recognition of land and territorial rights; safeguards against militarization, resettlement and alienation; and stipulations on inclusive, fair and just redress mechanisms, including restitution and compensation.

9. It has been stated that indigenous peoples' rights are not a special category of rights, and that the Declaration and Convention No. 169 "do not extend or invent any 'new rights'. On the contrary, the two instruments are articulations of universal human rights, as they apply to indigenous peoples. This means that they contextualize universal rights, which states are bound to respect, protect, and fulfil, to the situation of indigenous peoples by taking the collective aspects of these rights into account in order to overcome the historical injustices and current patterns of discrimination that indigenous peoples face."[6]

10. Other international treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change, also contain provisions that are directly relevant to the land rights of indigenous peoples.

[6] B. Feiring, Indigenous Peoples' Rights to Lands, Territories and Resources (Rome, ILC, 2013).

III. Best practices in respect of resolving land disputes and land claims in the Chittagong Hill Tracts, Bangladesh

Discrimination, land alienation, armed conflict, and the Chittagong Hill Tracts Accord of 1997

11. The Chittagong Hill Tracts region in south-eastern Bangladesh shares international boundaries to its north, east and south with India (Tripura and Mizoram States) and Myanmar (Chin and Rakhine States). It is separated from the Bay of Bengal to its west by the coastal district of plains Chittagong (not to be confused with the Chittagong Hill Tracts). The three hill districts of Rangamati, Bandarban and Khagrachari constitute the Chittagong Hill Tracts, covering 13,181 km^2, with a population of 1,598,231, of whom 53 per cent are "tribal", as estimated by the national census of 2011.

12. The Chittagong Hill Tracts are distinct from the rest of the country on account of their hilly and mountainous terrain, forests, their unique constitutional and administrative history, and their indigenous inhabitants. The indigenous peoples include Bawm, Chak, Chakma, Khumi, Khyang, Lushai, Marma, Mro, Pangkhua, Tanchangya and Tripura. These peoples are ethnic, linguistic and religious minorities within Bangladesh. Physically, they are more similar to south-east Asian peoples than most South Asians. They adhere to Buddhist, Hindu and Christian or traditional indigenous faiths, and most of them speak Tibeto-Burman languages. In contrast, the majority of the Bangladeshi population speaks Bengali, an Indo-Aryan or Indo-European language, belongs to the Islamic faith, and is ethnically closer to neighbouring countries to the west of Bangladesh than to its neighbours to the north, east and south-east. The region's semi-autonomous administrative system combines elective, bureaucratic and traditional institutions and functionaries.[7]

13. The traditional occupation of the indigenous peoples of the Chittagong Hill Tracts was shifting cultivation, known locally as *jum*, giving rise to the generic name of the indigenous peoples and population, Jumma or Jummo. Today, non-land-based occupations are also pursued, in addition to shifting cultivation.[8] The Jummas' social, cultural and spiritual existence and identity as distinct peoples are closely intertwined with their ancestral lands and territories.

14. Major political and economic events have shaped the region's history and caused fundamental demographic and ecological changes. In the nineteenth century, the British Governments attached the Chittagong Hill Tracts to Bengal, in violation of the nation-to-nation treaty of 1787 between the Chakma king and the British Governor-General.[9] This was followed by the further erosion of autonomy and

[7] P. Martin, Institutional Capacity Building: A Review of the CHT Institutions of Governance (Rangamati, Bangladesh, United Nations Development Programme, Chittagong Hill Tracts Development Facility, 2004).

[8] R. D. Roy, "Occupations and economy in transition: a case study of the Chittagong Hill Tracts", in ILO, *Traditional Occupations of Indigenous and Tribal Peoples: Emerging Trends* (Geneva, 2000).

[9] A. M. Serajuddin, "The rajas of the Chittagong Hill Tracts and their relations with the Mughals and the East India Company in the eighteenth century", in *Journal of the Pakistan Historical Society*, vol. XIX, part 1 (1968); S. B. Qanungo, *Chakma Resistance to British Domination (1772-1798)* (Qanungopara, Chittagong, 1998); W. Van Schendel, W. Mey and A. K. Dewan, eds., *The Chittagong Hill Tracts: Living in a Borderland* (Bangkok, White Lotus Press, 2000).

large-scale and disruptive development projects, including the commissioning of a hydroelectric dam in 1960, during the period before the independence of Bangladesh (1947-1971), which destroyed ancestral homes, flooded two fifths of the region's prime paddy lands and displaced one third of the region's indigenous population.[10]

15. After Bangladesh became independent from Pakistan in 1971, following a nine-month-long armed struggle, the most disruptive events in the Chittagong Hill Tracts were State discrimination, intense militarization, armed movements for self-rule and a State-sponsored population transfer programme. These events led to gross human rights violations by State security forces, which have been minutely documented by several United Nations mechanisms (see, e.g., E/C.19/2011/6) and international human rights organizations.[11] From 1979 to 1984/85, between 200,000 and 450,000 Bengali Muslim migrants were resettled in the Chittagong Hill Tracts, leading to ethnic conflicts, internal displacement and a mass exodus of about 100,000 indigenous people to neighbouring India; most of them were repatriated in the 1990s, but many still not rehabilitated today.[12] Rehabilitation and fair resolution of land disputes therefore remain among the major causes of frustration and dissatisfaction among the indigenous peoples of the Chittagong Hill Tracts.

16. After negotiations spanning more than a decade, on 2 December 1997, an accord on peace, self-government and rehabilitation was signed between the major regional political party of the indigenous peoples, the Parbatya Chattagram Jana Sanghati Samiti, and the Government of Bangladesh. The post-Accord package led to (a) the formation of the Ministry for Chittagong Hill Tracts Affairs; (b) the establishment of the Chittagong Hill Tracts Regional Council; (c) the strengthening of the three district-level councils; (d) the reiteration and strengthening of the role of State-recognized traditional indigenous institutions; (e) the formation of a commission on land to resolve land-related disputes; and (f) the establishment of civil and criminal courts independent from the regional and district administrations.

17. The constitutionality of the Chittagong Hill Tracts Regional Council Act, 1998 and some provisions of the Hill District Councils (Amendment) Acts of 1998 were challenged in the High Court Division of the Supreme Court and declared illegal, but pending appeal in the Appellate Division, the ruling of the High Court Division has been stayed.[13] The major land-related provisions of the accord include: (a) transfer of land management to district councils; (b) reiteration and reintegration

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[10] D. E. Sopher, "Population dislocation in the Chittagong Hills" in *Geographical Review*, vol. LIII, No. 3 (July 1963).

[11] *Militarization in the Chittagong Hills Tract, Bangladesh: The Slow Demise of the Region's Indigenous Peoples*, International Work Group for Indigenous Affairs (IWGIA) report 14, (Copenhagen, IWGIA, Organising Committee Chittagong Hill Tracts Campaign and Shimin Gaikou Centre, 2012); Amnesty International, "Bangladesh: indigenous peoples engulfed in Chittagong Hill Tracts land conflict", press release, 12 June 2013.

[12] A. Mohsin, The Politics of Nationalism: The Case of Chittagong Hill Tracts, Bangladesh (Dhaka, University Press, 1997); S. Adnan, Migration, Land Alienation and Ethnic Conflict: Causes of Poverty in the Chittagong Hill Tracts of Bangladesh (Dhaka, Research and Advisory Services, 2004); R. D. Roy, "The population transfer programme of 1980s and the land rights of the indigenous peoples of the Chittagong Hill Tracts", in S. Bhaumik and others, eds., Living on the Edge: Essays on the Chittagong Hill Tracts (Kathmandu, South Asia Forum for Human Rights, 1997).

[13] *Mohammad Badiuzzaman and another* v. *Bangladesh and others* (2010), *Bangladesh Law Chronicles*, vol. 15. This author was one of the legal counsels in this case, as well as in other cases mentioned in the study.

of the traditional indigenous institutions; (c) rehabilitation of the international Jumma refugees and the internally displaced indigenous people; (d) cancellation of illegal land leases of non-residents; (e) resolution of land disputes by a Commission on Land; and (f) grants of land titles to landless indigenous people (E/C.19/2011/6).

18. Following several visits to the Chittagong Hill Tracts from 2011 to 2013, Amnesty International made the following observation about land issues: "Almost all those who Amnesty International met while conducting research for this report over two years — whether men or women, Bengali settlers, Pahari villagers or leaders, or army/government officials — felt that addressing the land issue was central to resolving many of the problems in the Chittagong Hill Tracts today."[14]

19. Other crucial elements of the Chittagong Hill Tracts Peace Accord, including on demilitarization, devolution and rehabilitation, have remained largely unimplemented or underimplemented, as attested to by several studies;[15] one such study was conducted by a former member of the Permanent Forum and submitted to its tenth session in 2011. The Permanent Forum made some recommendations at that session, including that the Department of Peacekeeping Operations prevent military personnel and units that are violating human rights from participating in international peacekeeping activities under the auspices of the United Nations; and that the Government of Bangladesh declare a timeline and outline modalities of implementation of the Accord (E/2011/43 and Corr.1, para. 102).

Chittagong Hill Tracts Land Disputes Resolution Commission

20. The Chittagong Hill Tracts Land Disputes Resolution Commission (hereafter "Land Commission" was first established in 1999 on the basis of administrative guidelines, which were later replaced by the Chittagong Hill Tracts Land Disputes Resolution Commission Act (Act 53 of 2001). It was envisaged that the Commission would provide quick, inexpensive, fair and sustainable remedies for land disputes in the Chittagong Hill Tracts. The 2001 Act followed the spirit of the 1997 Accord, but not its letter. Its structure and mandated functions are, however, compatible with both the Accord and the Declaration, particularly articles 25-30.

21. Although central to safeguarding indigenous land rights, the functions of the Land Commission need to be assessed in conjunction with corresponding advances with regard to other land-related measures mentioned in the 1997 Accord and the ability of the specific self-government institutions of the Chittagong Hill Tracts, including traditional institutions, to play the roles envisaged in the region's laws and the Accord. The Commission is comprised of a chair, a retired Supreme Court judge; a senior civil servant; and indigenous persons representing specific councils of the Chittagong Hill Tracts and the traditional chiefs, the latter being regarded as repositories of in-depth knowledge about land use and land rights based upon local laws, customs, conventions and practices. Section 6 (1) (b) of Act 53 of 2001 empowers the Commission to declare land grants illegal and to reinstate possession, in accordance with the "laws and customs" of the Chittagong Hill Tracts. This

[14] Amnesty International, Pushed to the Edge: Indigenous Rights Denied in Bangladesh's Chittagong Hill Tracts (London, 2013).

[15] R. D. Roy, "The discordant accord: challenges in the implementation of the Chittagong Hill Tracts Accord of 1997", in M. Boltjes, ed., *Implementing Negotiated Agreements: The Real Challenge to Intra-State Peace* (The Hague, T. M. C. Asser Press, 2007); and Adnan, Migration, Land Alienation and Ethnic Conflict.

follows the spirit of article 13 (1) of ILO Convention No. 169, which emphasizes respect for the cultural and spiritual values of indigenous peoples in relation to their lands and territories, and article 26 (3) of the Declaration, which underscores that the recognition of indigenous land rights must respect "the customs, traditions and land tenure systems of the indigenous peoples concerned".

22. Act 53 of 2001 vests the Commission with the authority of a civil court of law, with full executive backing of the State, and stipulates that its decisions will be final, with no provisions for appeal. The option of judicial review by the Supreme Court, however, remains open. This law is in conformity with article 27 of the Declaration, which reads:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

23. Despite the positive aspects of the Commission, it has been dysfunctional since its inception in 1999. Disagreements between the last Chair and indigenous members made matters worse.[16] However, the most important factor behind its stagnancy is the inconsistency of Act 53 of 2001 with the 1997 Accord, including vesting excessive authority in its Chair and uncertainties regarding its jurisdiction and decision-making process.[17] Other factors include the lack of adequate human resources. Proposals to amend the law were sent by the Chittagong Hill Tracts Regional Council, which is mandated by law to advise the Government on legislation for the Chittagong Hill Tracts, to successive Governments from the early 2000s up to 2012. After a long and arduous process of negotiation, the Government finally agreed, in July 2013, to amend the 2001 Act.[18] However, despite agreement on most contentious issues and Cabinet approval of a draft bill, by September 2013 it had become reasonably clear that the process of the bill's passage was frozen, hopefully only temporarily.[19] It is widely believed that this was caused by "spoilers" — discriminatory and undemocratic elements within the civil and military bureaucracy of the Government. On 5 January 2014, national parliamentary elections were held, but without the participation of the major opposition party, the Bangladesh Nationalist Party. It is hoped and expected that the post-election Government that was formed on 13 January 2014, and again led by the party that negotiated the accord, the Bangladesh Awami League, will keep its pledge on the matter.

24. Distinct from the functions of the Commission, but nevertheless vital to safeguarding the land rights of the indigenous peoples of the Chittagong Hill Tracts, is the role of the traditional institutions — circle chief, *mauza* headman and village

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[16] "CHT land disputes: Commission chair takes flak about unilateral decision", *Daily Star*, Dhaka, 22 March 2010.

[17] See R. D. Roy, *The ILO Convention on Indigenous and Tribal Populations, 1957 (No 107) and the Laws of Bangladesh: A Comparative Review* (Geneva, ILO, 2009).

[18] "PM pledges full implementation of CHT accord", *Daily Star*, Dhaka, 7 July 2012.

[19] Jagaran Chakma, "Land dispute in CHT may not be resolved", *Independent*, Dhaka, 12 September 2013.

karbari (headman)[20] — in land management and the administration of justice. Although the State judiciary is responsible for dealing with major crimes and commercial civil matters, the functions of the traditional institutions related to the administration of justice, including on civil, customary and minor criminal matters, continue as before, albeit with reduced jurisdiction, in comparison to the period under British colonial rule (1860-1947).[21]

25. Section 8 (4) of the Chittagong Hill Tracts Regulation, 1900, as amended in 2008, declares that all civil cases must be tried in accordance with "existing laws, customs and usages", while barring the State courts from trying cases on "family laws and other customary laws of the tribes … which shall be triable by the Mauza Headmen and Circle Chiefs". The judicial authority of the traditional institutions is also mentioned in several other statutes specific to the Chittagong Hill Tracts from the periods before and after the adoption of the Accord.[22] A number of rulings of the Supreme Court of Bangladesh have unequivocally declared that the customary personal laws of the Chittagong Hill Tracts tribes cannot be arbitrarily interfered with,[23] and that land administration and judicial officers must issue succession certificates in consultation with the circle chiefs and *mauza* headmen.[24] Although the validity of the Chittagong Hill Tracts Regulation was questioned in an earlier case before the Supreme Court, the ruling has been stayed, pending appeal.[25]

26. The land administration authority of the traditional institutions is based upon age-old laws, customs, usage and practices that predate the attachment of the Chittagong Hill Tracts to Bengal by the British colonial Government in 1860.[26] Customs and usages are included in the definition of law in article 152 (1) of the national Constitution and are also recognized, implicitly, by the Chittagong Hill Tracts Regulation, 1900.[27] The law of 2001 on the Land Commission reinforces the role of the traditional institutions by expressly recognizing the validity of customary law, and by including the circle chiefs as members of the Land Commission.

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[20] Circles and *mauza* are administrative units. For an explanation of the traditional administrative system of the Chittagong Hill Tracts, see www.mochta.gov.bd/index.php/index/othercontent/Other-Details__14/11/0/12.

[21] "The system of traditional administration in the Chittagong Hill Tracts", in Sanjeeb Drong, ed., *Solidarity, 2013* (Dhaka, Bangladesh Indigenous Peoples Forum, 2013); Martin, Institutional Capacity Building; Van Schendel, *The Chittagong Hill Tracts: Living in a Borderland*.

[22] Section 8 and rule 40 of the Chittagong Hill Tract Regulation, 1900; section 66 of the Hill District Councils Act, 1989.

[23] *Aung Shwe Prue Chowdhury* v. *Kyaw Sain Prue Chowdhury and others*, *Dhaka Law Report*, vol. 50, 1998; *Rajkumari Unika Devi* v. *Bangladesh and others*, *Bangladesh Law Chronicles*, vol. 12, 2004.

[24] *Abrechai Magh* v. *Joint District Judge and others* (Writ Petition No. 3285 of 2009).

[25] *Rangamati Food Products* v. *Commissioner of Customs and others*, *Bangladesh Law Chronicles*, vol. 10, 2005.

[26] Qanungo, *Chakma Resistance to British Domination (1772-1798)*; Van Schendel, *The Chittagong Hill Tracts: Living in a Borderland*.

[27] Section 8 (4) and rules 34, 35, 38-41, 42, 45, 47, 48 and 50 (1).

IV. Best practices in respect of resolving land disputes and land claims in the Philippines

Indigenous peoples of the Philippines

27. The Philippines is another example of a country where indigenous peoples struggle for land rights and self-determination. It is an archipelago of approximately 7,100 islands. Updated and accurate estimates of the indigenous population are unavailable. However, in the 1995 census, the estimated indigenous population was about 12.8 million, comprising 17 per cent of the total population and representing 110 different ethnolinguistic groups. The majority of the indigenous population is distributed as follows: Mindanao, 61 per cent, Luzon, 36 per cent and the Visayas, 3 per cent.[28] The indigenous population is concentrated in five major areas: the Cordillera Administrative Region on Luzon island, where the indigenous peoples are collectively known as Igorots; on the island of Mindanao, now known as Bangsa Moro, where the indigenous peoples are called Lumads; on the island of Mindoro, inhibited mainly by the Mangyan people; and on the island of Palawan, which is traditionally inhabited by the Palawan community.

Struggle for self-determination and defence of the ancestral domains

28. Indigenous peoples of the Philippines have experienced a long history of discrimination by State authorities, leading to land alienation, involuntary resettlement and acute marginalization. As in the Chittagong Hill Tracts, they have been subjected to what has been termed "development aggression".[29] Mass mobilization in defence of their ancestral realm and land rights ensued, including in the Cordilleras, where the Chico Dam project forced the displacement of 100,000 people in the 1970s.

29. Since the 1930s, the Government of the Philippines has promoted mining, which reached its climax when the Mining Act of 1995 was passed. The Act provided sweeping authority to mining companies and facilitated financial and legal incentives for foreign investment. Consequently, mining operations continued unabated across the country, without any prior consultation, let alone consent, of the communities concerned. They covered approximately 850,000 ha of land, about 2.8 per cent of the total area of the country, a large part of which are the ancestral domains and lands of indigenous peoples.[30] The corporations were held responsible by the indigenous peoples for the destruction of their rich cultures, some elements of which are said to have been replaced by degenerated values and practices, such as alcohol abuse, gambling, and prostitution.[31]

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[28] J. Corpuz, "Legal pluralism: the Philippine experience", in M. Colchester and S. Chao, eds., *Divers Paths to Justice: Legal Pluralism and the Rights of Indigenous Peoples in Southeast Asia* (Chiangmai, Thailand, Forest Peoples Programme and Asia Indigenous Peoples Pact, 2011).

[29] C. Doyle and J. Gilbert, "Indigenous peoples and globalization: from 'development aggression' to 'self-determined development'", in *European Yearbook of Minority Issues*, vol. 8 (2009), edited by the European Centre for Minority Issues and the European Academy Bozen/Bolzano (2011).

[30] R. D. Rovillos, S. Ramo and C. Corpuz, Jr., "When the 'isles of gold' turn to isles of dissent: a case study on the Philippine Mining Act of 1995", Forest Peoples Programme, 2005.

[31] E. Caruso and others, eds., *Extracting Promises: Indigenous Peoples, Extractive Industries, and the World Bank*, 2nd edition (Baguio City, the Philippines, Tebtebba Foundation and Forest Peoples Programme, 2005).

Constitutional dispensations, the Indigenous Peoples' Rights Act of 1997 and the National Commission on Indigenous Peoples

30. The Philippines Constitution of 1987 for the first time expressly recognized the identity and rights of the indigenous peoples, who were called "indigenous cultural communities". It also provided for the formation of autonomous regions in the Cordilleras and in Muslim Mindanao (since renamed Bangsa Moro). In 1997, the same year as the Chittagong Hill Tracts Accord was signed and the Government of India concluded a ceasefire agreement with indigenous Naga fighters, the Indigenous Peoples' Rights Act was passed in the Philippines, leading to the establishment of the National Commission on Indigenous Peoples, which was mandated to protect and promote the well-being of the indigenous peoples. The passage of the Act was met with much jubilation in the Philippines, because of its protective measures on four "bundles" of rights: (a) ancestral domains and lands; (b) self-governance and empowerment; (c) social justice and human rights; and (d) cultural integrity.[32] In fact, the Philippines is among the few countries (Australia and the Plurinational State of Bolivia are the others) that have a written regulation on free, prior and informed consent that is recognized under national law.[33]

National Commission on Indigenous Peoples, free, prior and informed consent and implementation of the Indigenous Peoples' Rights Act

31. The National Commission on Indigenous Peoples Administrative Order of 1998, issued in accordance with the Indigenous Peoples' Rights Act, made it mandatory for free, prior and informed consent to be obtained from all members of an indigenous community for mining activities on its ancestral domains and lands.[34] Clear instructions were prescribed on the procedure for consultation and adherence to customary practices. This is in accordance with article 32 (2) of the Declaration, which states that the free, prior and informed consent process must be followed "for any project affecting [indigenous peoples'] lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources". Despite these legal requirements, there are allegations that free, prior and informed consent has occasionally been reduced to a mere formality, with the consent-seeking process failing to be exhaustive,[35] and occasionally with consent being "engineered".[36] Unlike the case of the Chittagong Hill Tracts Land Commission, the commissioners of the National Commission on Indigenous Peoples are selected by the Office of the President, and there is no guarantee of direct and adequate indigenous representation, complicating the matter further.

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[32] Institute for Autonomy and Governance (IAG), The Struggle Continues: Uphold the Rights of Indigenous Peoples, IAG Policy Brief, April 2011.

[33] A. Buxton, "The spirit of FPIC: lessons from Canada and the Philippines", in International Institute for Environment and Development, *Biodiversity and Culture: Exploring Community Protocols, Rights and Consent* (London, 2012).

[34] W. N. Holden and A. Ingelson, "Disconnect between Philippine mining investment policy and indigenous peoples' rights", *Journal of Energy and Natural Resources Law*, vol. 25, No. 4 (November 2007).

[35] M. Salamat, "Indigenous peoples' groups decry use of IPRA and NCIP for development aggression", 12 August 2011.

[36] M. Colchester and M. F. Ferrari, Making FPIC Work: Challenges and Prospects for Indigenous Peoples (Forest Peoples Programme, 2007).

32. The overall situation improved after 1997, when the Indigenous Peoples' Rights Act was passed, but both legal and operational loopholes remain. Mining companies were seen to regard the law and related legal requirements on free, prior and informed consent as impediments. The constitutionality of the Act was challenged in the Supreme Court, with allegations that the authority of the State over natural resources had been compromised.[37] The judges had divided opinions, but ultimately, the law was upheld. In any case, it is said that such attempts to undermine the Act have led to the weakening of the Commission's stand on free, prior and informed consent, among other things. It is believed that the Commission's administrative guideline, Administrative Order No. 1998-3, was issued at the behest of mining lobbies. The Order states that mining companies that had received approval for mining activities before the Act came into effect would not be required to follow free, prior and informed consent procedures. Critics have therefore demanded that the Mining Code be scrapped and greater autonomy for the Commission, with decreased dependency on the national Government.

33. Issuing certificates of ancestral domain titles and certificates of ancestral land titles is foremost among the mandated functions of the Commission. By 2007, it had reportedly issued certificates of ancestral domain titles for about .95 million ha and certificates of ancestral land titles for a further 4,800 ha out of the 2.9 million ha for which claims had been registered.[38] The Commission has been criticized for its inability to exhaust all the claims for certificates of ancestral land titles and certificates of ancestral domain titles, and it has been alleged that it tends to spend more funds on administrative matters than on field-level activities. However, although its work may not have met the expectations of many, given the budgetary, logistical and manpower constraints that beset it, the Commission's achievements in providing certificates may be regarded as more than modest, if not remarkable.

34. In addition to issuing certificates of ancestral domain titles and certificates of ancestral land titles, there are two other important aspects of the Commission's work, namely: (a) to establish model ancestral domain communities through development and peace; and (b) to enforce human rights and facilitate empowerment of indigenous peoples, including through its quasi-judicial authority.[38] However, some of these functions, along with the titling process, involve undue procedural complexities, requiring documentary and other evidential support, which is a heavy burden for remote communities. In this respect, the Chittagong Hill Tracts system seems to be far more indigenous-friendly.

[37] W. Holden, K. Nadeau and R. D. Jacobson, "Exemplifying accumulation by dispossession: mining and indigenous peoples in the Philippines", *Geografiska Annaler, Series B, Human Geography*, vol. 93, No. 2 (June 2011).

[38] M. Colchester and C. Fay, Land, Forest and People: Facing the Challenges in South-East Asia (Rights and Resources Initiative, 2007).

V. Comparing the indigenous land rights and land claims systems in the Philippines and in the Chittagong Hill Tracts, Bangladesh

35. The discussion in the preceding paragraphs shows that the respective systems concerning indigenous land rights in the Chittagong Hill Tracts and in the Philippines have several strongly positive features. The strengths in the Philippines include: (a) formal recognition of customary land rights and autonomy; (b) entrenchment in the Constitution; (c) grant of formalized titles; and (d) adherence to the principle of free, prior and informed consent. The weaknesses include: (a) inadequate indigenous participation at decision-making levels; (b) bureaucratic and procedural complexities; (c) insufficient adherence to the free, prior and informed consent process; and (d) funding and logistical shortages in the work of the National Commission on Indigenous Peoples.

36. In the system in the Chittagong Hill Tracts, some of the positive features present in the Philippines system are absent or inadequate, including constitutional recognition and free, prior and informed consent. In addition, non-implementation of crucial provisions of the 1997 Accord, including the amendment of laws concerning the Land Commission and devolution on matters concerning land management, has undermined an otherwise sound process of recognition of land claims and settlement of land disputes. Among the strongest features of the Chittagong Hill Tracts system is the generic and undefined recognition of customary land rights accorded by statutes, coupled with the role of traditional and other Chittagong Hill Tracts-based institutions in self-government and land administration. The consent of those institutions is required for all land titling and land transfer cases and, since 1998, also in the case of compulsory acquisition by the State. Additionally, the institutions specific to the Chittagong Hill Tracts may autonomously formalize rights on customarily used commons and homestead plots.[39] Such a system has been described by this author elsewhere as a "shield" for indigenous land rights, if not a "sword".[40] The system also makes the generally asymmetrical relationships between customary law on the one hand and statutes on the other, and between indigenous authorities on the one hand and State officials on the other, more equitable, enabling the indigenous leaders to make the playing field a little more level.[41]

37. Tables 1 and 2 below set out in brief the relative major strengths and weaknesses of the systems in the Philippines and the Chittagong Hill Tracts with regard to land claims and land disputes concerning indigenous peoples.

[39] Section 8 and rules 39-42, 45 and 50 of the Chittagong Hill Tracts Regulation, 1900 and section 64 of the Hill District Councils Act, 1989.

[40] R. D. Roy, "Indigenous peoples and international human rights — plural approaches to securing customary rights", in S. Chao and M. Colchester, eds., Human Rights and Agribusiness: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform (Moreton-in-March, United Kingdom, Forest Peoples Programme, 2012).

[41] R. D. Roy, "Asserting customary land rights in the Chittagong Hill Tracts, Bangladesh: Challenges for Legal and Juridical Pluralism" in Colchester and Chao.

Table 1
Major strengths and weaknesses of the land-related systems concerning indigenous peoples in the Philippines

Strengths	*Weaknesses*
Customary land rights and autonomy recognized in statutes	Inadequate indigenous participation in decision-making, including administration of justice and regional autonomy
Constitutional entrenchment of land rights regime and autonomy	Funding, logistical and manpower shortages in the National Commission on Indigenous Peoples
Grant of formalized titles	Bureaucratic and procedural complexities in land-titling process causing evidential burden
Free, prior and informed consent process generally followed	Free, prior and informed consent process inadequately followed

Table 2
Major strengths and weaknesses of the land-related systems concerning indigenous peoples in the Chittagong Hill Tracts, Bangladesh

Strengths	*Weaknesses*
Indigenous participation in decision-making (ministry, councils, Land Commission, traditional chiefs)	Self-government and land management system not constitutionally entrenched
Traditional indigenous justice system recognized	Indigenous land grant and traditional systems for the administration of justice have insufficient State support in enforcement
Generic recognition of customary law	Free, prior and informed consent not formally acknowledged

38. The following paragraphs compare the land claims and land dispute resolution systems in the Chittagong Hill Tracts and the Philippines with the provisions of the Declaration.

39. Combined, the indigenous land claims and land dispute resolution systems in the Philippines and the Chittagong Hill Tracts contain a number of features that are absent elsewhere. The two systems have the potential to effectively protect and safeguard indigenous peoples' land rights, including through a formal or quasi-formal system of recognition by the State, and through a judicial or quasi-judicial process of resolution of land disputes. They are therefore worthy of replication in other countries, with modification as appropriate. Together, the two systems contain the following important features: (a) formal recognition of customary land rights; (b) safeguards against land alienation; (c) redress mechanisms to address land disputes while accounting for customary law; and (d) inclusion of indigenous peoples in major decision-making processes. Table 3

below sets out these features with reference to specific provisions of the Declaration.

Table 3
Major features of the land-related systems concerning indigenous peoples in the Philippines and the Chittagong Hill Tracts, Bangladesh with reference to specific provisions of the Declaration

Subject matter/article of the Declaration	*Philippines system*	*Chittagong Hill Tracts system*
Self-determination and autonomy (art. 3)	Constitutional provision on regional autonomy	Ministry of Chittagong Hill Tracts Affairs, Chittagong Hill Tracts councils and traditional institutions
Retention of indigenous institutions (arts. 5, 34)	Ancestral domain communities	Traditions institutions of chief, headman and *karbari*
Participation in decision-making affecting indigenous peoples (art. 18)	Constitutional provision on regional autonomy	Indigenous representation at the Ministry, councils and the Land Commission, and in land administration and the administration of justice
Right to be consulted on legislation concerning indigenous peoples (art. 19)	–	Prerogatives of Chittagong Hill Tracts Regional Council and Hill District Councils in legislation concerning indigenous peoples and respective territorial jurisdictions
Recognition of customary law and fair adjudication on indigenous peoples' land rights (arts. 27, 28 and 40)	Constitutional law, Indigenous Peoples Rights Act, role of National Commission on Indigenous Peoples (including certificates of ancestral domain titles and certificates of ancestral land titles) and provisions on regional autonomy	Constitutional and other statutory recognition of customary law and judicial pronouncements, and the role of institutions specific to the Chittagong Hill Tracts in land management, the Land Commission and traditional courts

Lessons from other jurisdictions in Asia for land claims and land dispute resolution

40. In addition to the systems in the Philippines and the Chittagong Hill Tracts mentioned above, there are other sound examples, in Asia and elsewhere, of formal recognition of indigenous land and resource rights and indigenous participation in legislation and policymaking, land management, land administration and the administration of justice. Foremost among them are those in several states in north-eastern India, and in the States of Sabah and Sarawak, Malaysia. These systems are also models that are worthy of replication elsewhere. Some of the most important features of these systems are shown in table 4 below, in brief form. Tables 3 and 4 may be compared to obtain an overview of the land-related systems in the four jurisdictions mentioned above.

Table 4
Major features of the land-related systems concerning indigenous peoples in north-eastern India, and Sabah and Sarawak, Malaysia with reference to specific provisions of the Declaration

Subject matter/article of the Declaration	*North-eastern India*	*Sabah and Sarawak, Malaysia*
Self-determination and autonomy (art. 3)	Special safeguards concerning the States of Nagaland and Mizoram (Constitution of India, arts. 371A and 371G, respectively) Autonomous district and regional councils (Constitution of India, Sixth Schedule, art. 164 (1))	Special safeguards concerning the constitutional status of the States of Sabah and Sarawak and of their natives (Constitution of Malaysia, arts. 161E and 161A, respectively)
Retention of indigenous institutions (arts. 5 and 34)	Appointments of chiefs and headmen by district councils (Constitution of India, Sixth Schedule)	Role of traditional chiefs and headmen in land management and the administration of justice (Constitution of Malaysia, Ninth Schedule, clause 13, list IIA; clause 10, list IIIA)
Participation in decision-making affecting indigenous peoples (art. 18)	Reservation in legislative bodies and government posts (Constitution of India, arts. 330 and 332 and 16 (4A), respectively) Autonomous District and regional councils (Constitution of India, Sixth Schedule)	Special legislative provisions safeguarding the rights of Sabah and Sarawak in policymaking on land (Constitution of Malaysia, arts. 95D and 95E) Role of native courts (Native Courts Enactment, 1952)
Right of consultation on legislation concerning indigenous peoples (art. 19)	Special safeguards for Nagaland and Mizoram States (Constitution of India, arts. 371A and 371G, respectively) Legislative prerogatives of Autonomous District and regional councils (Constitution of India, Sixth Schedule)	Special legislative provisions for Sabah and Sarawak (Constitution of Malaysia, arts. 95D, 95E, 161E (4))
Redress for land rights and land claims (arts. 27, 28 and 40)	Legislative and executive role of state governments Specialized traditional courts in several states Land administration and role of Autonomous District and regional councils in the administration of justice (See constitutional dispensations mentioned above)	High Court of Sabah and Sarawak Role of Native Court of Appeal, Native District Court and courts of native chiefs and headmen Special legislative prerogatives of the States of Sabah and Sarawak (See legal dispensations and institutional processes mentioned above)

VI. Conclusion and recommendations

A. Conclusion

41. The systems in the Philippines and the Chittagong Hill Tracts, Bangladesh discussed above offer effective, or at least potentially effective, systems of land claims and land dispute resolution concerning indigenous peoples, although both have certain shortcomings that need to be addressed. Nevertheless, this study posits that those systems are models that are actually being implemented on the ground; they are not theoretical models devoid of operational realities. The same is the case for the systems in north-eastern India and in the States of Sabah and Sarawak, Malaysia. Detailed studies on these systems can offer practical ideas for implementation elsewhere. Prompt acknowledgment of indigenous land claims and resolution of land disputes will in the long run curtail governmental expenditure and efforts, lead to sustainable peace, improve relations between indigenous peoples and the State, and facilitate inclusive, people-oriented, environmentally sound and culturally sensitive development, with the free, prior and informed consent of the peoples and communities concerned.

B. Recommendations

42. The following recommendations are offered to Governments, the United Nations system, multilateral and bilateral development agencies and financial institutions, research institutions, non-governmental organizations (NGOs), the private sector and indigenous peoples.

Governments

43. The Government of Bangladesh is urged to carry out its pledges, and its political and legal responsibilities, to amend the Chittagong Hill Tracts Land Commission Act, 2001, in accordance with the recommendations of the Chittagong Hill Tracts Regional Council.

44. The Government of Bangladesh is urged to implement the unimplemented provisions of the Chittagong Hill Tracts Accord of 1997, as highlighted in the report of the Permanent Forum on its tenth session (see E/2011/43 and Corr.1, paras. 102-103), including the transfer of full authority for land administration to the Hill District councils, to rehabilitate the unrehabilitated Jumma refugees and the internally displaced indigenous people, and to effectively demilitarize the Chittagong Hill Tracts.

45. The Government of the Philippines is urged to take steps to resolve the legal, procedural, logistical and financial shortcomings faced by the National Commission on Indigenous Peoples, including in the Commission's work on providing certificates of title to ancestral domains and certificates of title to ancestral lands. It should facilitate the autonomous functioning of the Commission, free from adverse political or corporate influences. The exemptions from free, prior and informed consent on mining concessions granted prior to the adoption of the Indigenous Peoples Rights Act need to be revoked.

46. The Government of the Philippines is urged to facilitate the strengthening of local government bodies in regions and areas inhabited by indigenous peoples,

including by framing and implementing organic acts on regional autonomy in the Cordilleras, in partnership with, and with the free, prior and informed consent of, the indigenous peoples concerned.

47. The National Commission on Indigenous Peoples is urged to ensure that the free, prior and informed consent process is scrupulously followed, in accordance with the Indigenous Peoples Rights Act and the customary laws concerned, in granting certificates of title to ancestral domains and certificates of title to ancestral lands and to enhance indigenous participation in all relevant activities and at all levels. It should revise procedural practices that cause an undue evidential burden on communities, including supporting documents, to establish their claims.

48. Governments in Asia and elsewhere are urged to study the land claims and land dispute resolution systems in the Chittagong Hill Tracts, Bangladesh and the Philippines, among others, and to obtain implementable ideas on these matters that are relevant to their situations.

Agencies, funds and programmes of the United Nations system

49. Relevant agencies, funds and programmes, including the World Food Programme, the Food and Agriculture Organization of the United Nations, the International Fund for Agricultural Development, the United Nations Development Programme, the United Nations Entity for Gender Equality and the Empowerment of Women and the World Bank, should recognize the importance of the prompt, fair and inclusive resolution of land claims and land disputes involving indigenous peoples and take account of existing good practices, including those referred to in this study, in their policies, operational guidelines, activities and practices.

Bilateral development institutions, multilateral development banks and other international financial institutions

50. Bilateral development agencies should take account of the best practices offered in this study, along with other relevant experiences, to facilitate fair resolution of indigenous land claims and land disputes through projects and programmes funded by them.

51. Multilateral financial institutions, including the International Finance Corporation, and multilateral development institutions, such as the regional development banks, including the Asian Development Bank, should ensure that projects and programmes financed by them facilitate fair resolution of indigenous land claims and land disputes, and prevent and avoid adverse impacts on indigenous land rights.

52. The World Bank is particularly urged to amend its indigenous peoples policy to include full compliance with the Declaration, with particular importance given to the adoption of the standard of free, prior and informed consent.

Universities and other research institutions

53. Universities and other research institutions are urged, in partnership with indigenous peoples, to conduct in-depth research on the systems referred to in this study, to assist Governments, indigenous peoples, the United Nations system and other relevant actors to promote the relevant models concerning indigenous land claims and land dispute resolution.

54. NGOs are encouraged, in partnership with indigenous peoples, to undertake research on the models referred to in this study; facilitate indigenous peoples' efforts in this regard, such as advocacy and lobbying; and promote best practices and other relevant models on indigenous land claims and land disputes, including in their programmes and projects.

Indigenous peoples

55. Indigenous peoples, their Governments, and other institutions, organizations and networks are urged to study the models referred to in this study, along with other relevant models, to facilitate mobilization, lobbying and advocacy, dialogues with States, further research and other relevant activities in connection with advancing indigenous rights related to land, territory and resources, including recognizing land claims and promptly resolving land disputes involving indigenous peoples.

Private sector

56. Private sector entities, including corporations, banks and other financial institutions, are urged to avoid activities that violate indigenous peoples' land rights and to promote and protect indigenous land claims and the resolution of land disputes.