

Revisiting the Rights of the *Adivasis* in Bangladesh:
A Critical Analysis

Alida Binte Saqi

Institute of Comparative Law

Faculty of Law

McGill University, Montreal

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ABSTRACT

The indigenous peoples (*Adivasis* in case of Bangladesh) of Bangladesh have been facing non-recognition under the legal framework of the country, i.e. the Constitution of Bangladesh. The hegemonic approach- *Bangalee* nationalism- introduced by the 15th amendment of the Constitution has added up to the historical struggle for recognition of the *Adivasis*. The thesis focuses on some practical issues and finds out the existence of the *Adivasis* rights in Bangladesh. The assimilation and integration process of the *Adivasis* exists in many ways, among them denial of recognition is main that leads to injustice. The rights of the *Adivasis* are assessed based on the rights of the ‘ethnic minorities’ and the ‘backward section’ as they are termed so in the State legislations. The thesis, taking a practical approach compares the indigenous peoples’ situation with Botswana. It also, provides for some measures that can be taken by the State, the *Adivasis*, and the international community to ensure justice.

Résumé

Les peuples indigènes (*Adivasis* en cas de Bangladesh) du Bangladesh ont été confrontés à une non-reconnaissance dans le cadre juridique du pays, à savoir, la Constitution du Bangladesh. Une approche hégémonique du nationalisme *Bangalee* introduite par le 15^{eme} amendement de la Constitution a contribué au combat historique pour la reconnaissance des *Adivasis*. La thèse se concentre sur quelques problèmes pratiques et découvre l'existence des droits des *Adivasis* au Bangladesh. Le processus d'assimilation et d'intégration des *Adivasis* existe de nombreuses manières, parmi lesquelles le déni de reconnaissance mène à d'injustice. Les droits des *Adivasis* sont évalués sur la base des droits des minorités ethniques et de la section en arrière, ainsi nommée dans la législation de l'État. La thèse, qui adopte une approche pratique, compare la situation des peuples indigènes à celle du Botswana. Il prévoit également certaines mesures que l'État, les *Adivasis* et la communauté internationale peuvent prendre pour assurer la justice.

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CHAPTER ONE

INTRODUCTION

The indigenous peoples (IPs) all over the world having distinct tradition and cultures of their own have faced their struggle for recognition from international to the national level. The struggle of the IPs changed during the 1960s and 1970s because of the expansion of indigenous organizations and the network of communication between them.¹ Indigenous peoples are the descendants of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived at those regions. The new arrivals later became dominant through conquest, occupation, settlement or other means.² Bangladesh, along with the *Bangalees*, is also the traditional home of indigenous peoples who are distinctly different from the mainstream population in their culture, religion, tradition, customs, ethnic origin etc. and have been living in the land from time immemorial. The largest concentration of indigenous peoples in Bangladesh is found in the southeastern border region of the Chittagong Hill Tracts (CHT). My thesis focuses on the indigenous peoples of the CHT.

In Bangladesh, the struggle of the indigenous peoples (known as *Adivasis*) began long before the birth of the country and precedes the time of independent Bangladesh; and the struggle for recognition continues even under the liberal democratic era of Bangladesh. The reason for this perpetual struggle is that the legal system of Bangladesh is highly influenced by the British colonial laws. The British colonial legislations and policies were more anachronistic to IP's interest, so Bangladesh being ruled under the British colony and Pakistan has adopted many of the draconian

¹Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press, 2003) at 30. [Niezen]

²United Nations Permanent Forum on Indigenous Issues, Indigenous peoples, Indigenous Voices: Factsheet, online <http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> [UNPFII]

policies from them to deny the rights of the IPs. It is even a matter of more concern that the indigenous organizations in Bangladesh are lagging behind in protecting the IPs rights. The state inaction and lack of robust role of indigenous organizations make the Bangladesh's IPs' struggle for recognition more complicated.

The Constitution of Bangladesh reflects its peoples' aspiration for a country "in which the rule of law, fundamental human rights and freedom, equality, and justice, political, economic and social will be secured for all citizens".³ However, it fails to ensure justice for the IPs. Also, the law does not allow legitimate discrimination required to protect the interest of the IPs.

Bangladesh gained its independence from Pakistan in 1971, before that, the first Constitution of Pakistan of 1956, recognized the Chittagong Hill Tracts as an exclusive homeland for indigenous peoples with restrictions on the settlement of non-indigenous peoples. This status was subsequently upheld in the Constitution of 1962 and the CHT was named as a Tribal Area, However, in 1964, the list of tribal areas was amended and the CHT was removed from the list.⁴ The first State sponsored violence started in the CHT in the homeland of the IPs with the construction of the *Kaptai* dam.

Bangladesh has ratified the ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957 (Indigenous and Tribal Populations Convention) (ILO Convention No. 107) on 22 June 1972. However, the Constitution of Bangladesh does not include any provisions recognizing the distinct identity of the IPs or accord the Hill Tracts any special status. The predicament of the IPs reached

³The Constitution of the Peoples' Republic of Bangladesh, 1972, Preamble [Constitution]

⁴Rajkumari Chandra Kalindi Roy *Land Rights of the Indigenous peoples of the Chittagong Hill Tracts, Bangladesh*, IWGIA and Rajkumari Chandra Kalindi Roy, Copenhagen, 2000, p.46. [Rajkumari]

an extreme level when the Government of Bangladesh (GoB) (the Parliament) inserted the 15th Amendment of the Constitution and denied the recognition of indigenous peoples. The States non-recognition of the existence of indigenous peoples (the amendment termed them as tribes, minor races, ethnic sects.) has gained constitutional basis through the insertion of Article-23A of the Constitution.⁵ Also, the amendment introduced the *Bangalee* nationalism and Bangladeshi citizenship for all its people that left only two options open for the indigenous peoples, a) obtain and be ruled under *Bangalee* nationalism; or b) remain unrecognized by the State with no national identity and contribution to national independence. The assimilation and integration process of the IPs starts from here. The provision states that the people of Bangladesh are known as *Bangalee* and the *Bangalee* nationalism is based on the language ‘Bangla’ and the culture of *Bangalees*.⁶ Also, it states that the sovereignty and independence of Bangladesh are derived from the unity and solidarity of the *Bangalee* nation.⁷ The provision completely ignores the IPs existence and their contribution to the liberation war by defining nationalism in light of *Bangalee*.

After the amendment of the Constitution, the indigenous peoples were identified as the “backward section” (GoB used term) of the population. The State may possibly protect their cultural, religious rights by recognizing them as the backward section. However, the State will fail to ensure the IPs political, social, economic and land rights as the IPs have their own practices regarding these. The IPs have communal land ownership that represents a vital element of their life pattern. The major problem of so-called ‘land grabbing’ by the *Bangalees* remains unnoticed by the Government by way of non-recognition.

⁵The Constitution (Fifteenth Amendment) Act, 2011 (Act No. XIV of 2011). [Amendment]

⁶[Constitution] *supra* note 3 art 9. Further discussed in Chapter 4.

⁷*Ibid.*

The Constitution has incorporated the provision aiming for the protection of Ethnic minorities' cultural rights but it falls short to enforce these rights because it falls within the Fundamental Principles of the State Policy which are judicially unenforceable.⁸ Moreover, Bangladesh has signed the ILO Convention No. 107 which provides for integration and assimilation of the indigenous peoples and not self-determination/distinctive recognition. However, Bangladesh has not signed two major instruments, namely- the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169) and the United Nations Declaration on the Rights of Indigenous Peoples, 2007. These two international legal instruments address the issue of self-determination/recognition and elaborately enunciate the rights of indigenous peoples. The mindset of the political leaders of the country is clearly to avoid the rights of the indigenous peoples through the selective application of the Constitutional law as well as international law. Against the abovementioned background, in this whole thesis, I took a practical approach. The thesis is based on practical issues faced by the IPs of Bangladesh also the solution is practical. Moreover, I showed that there is an existence of legal pluralism in Bangladesh which is evidently being denied. As Griffith states legal pluralism is “the presence in a social field of more than one legal order”. In CHT both State provided laws and IPs' laws are operating at the same time. This indicates the presence of legal pluralism.

In this thesis, I have focused on two main research questions. The first research question is: Whether or not the rights of indigenous peoples are recognized in Bangladesh or not? I answered the question in negative. I, later on, established the reason behind the GoB's concern for not using the term *Adivasis*/IPs. To find out the answer I considered the *Cobo* definition for indigenous peoples. The special rapporteur on Discrimination against Indigenous Peoples *Jose R Martínez*

⁸*Ibid*, art 8. The Fundamental Principles of State Policy and enforceability is further discussed in Chapter 4.

Cobo proposed a definition of indigenous peoples for international actions which is as follows: “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present *non-dominant sectors* of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal system.....On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).”⁹ The definition given by the *Cobo* Study has been accepted by the Working Group on Indigenous Populations.¹⁰

The *Cobo* definition has four main characteristics: a) historical continuity, b) experiencing colonization, c) social and cultural divergence with the majority population; and d) economic and political marginality, i.e. lack of adequate control of economic and political institutions deciding on their living conditions.¹¹ Based on these criteria I established my contention that there are IPs living in Bangladesh from time immemorial and their rights are not recognized by the Government of Bangladesh (GoB).

⁹Jose R Martínez Cobo, *Study of the Problem of Discriminations against Indigenous Populations*, paras 379-381, U.N. ESCOR, U.N. Sub Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN. 4/Sub. 2/1986/7/Add. 4 online:

<http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_introduction.pdf> [Cobo]

¹⁰The Working Group on Indigenous Populations, which was established pursuant to Economic and Social Council resolution 1982/34 is a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights. online: <<http://www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx>>

¹¹Henry Minde, “The Destination and the Journey: Indigenous peoples and the United Nations from the 1960s through 1985” in Henry Minde, ed, *Indigenous peoples: Self-Determination Knowledge Indigeneity* (The Netherlands: Eburon Academic Publishers, 2008) 49 at 56 [Minde]

The Constitution of Bangladesh has termed the IPs as the ‘backward section’ of the society. While focusing on the *Cobo* definition to establish the existence of the IPs my second research question is: Whether or not the rights given to the ‘backward section’ (as the IPs are termed by the GoB) are adequate to address the IPs rights? I answered this question in negative as well. This research question is answered based on three major themes. Firstly, I focused on the IPs rights given in the international and national legal frameworks and the lacunae of those frameworks. While doing so I established the necessity of recognition for the IPs of Bangladesh. Secondly, I compared their situation with another country (Botswana) having the same stand regarding the recognition of rights of the IPs. I have compared the nature of human rights violations by both the States. I have found that although being in a quite similar situation Botswana is a step ahead in realizing the IPs rights than Bangladesh. Thirdly, I have come up with a practical solution for the IPs of Bangladesh in respect to their human rights violations by the State.

In this paper, I have used the term “*Adivasis*” synonymously with indigenous peoples. More precisely it has been used as a Bangla translation of indigenous peoples. The significance of the term has been discussed in the thesis as well.

I have used a number of international instruments in order to analyze the responsibility of the Government regarding the protection of the *Adivasis*. I have also used domestic and foreign jurisprudence to compare and establish the human rights violations. Further, I have used a number of laws, books, articles in the thesis in order to establish the historical background of the *Adivasis* in Bangladesh and their human rights violations. However, the sources used to establish the human rights violations are mainly based on the *Adivasi* groups based print and electronic media. Surprisingly, this area has been avoided by the mainstream scholars, researchers, policy makers, and Government. One of the many difficulties I have faced regarding the availability of the sources

is that, I requested a book on IPs by a renowned author of Bangladesh that could help me in establishing my points, but, the book was not available in the library, nor was it available at the publishers (as they have stopped the printing and no copy was left !). Moreover, after e-mailing the author I got no response regarding this matter.

There are very few Government addressed reports used in this thesis as the numbers of such reports are nominal. The thesis has used almost every Government based report in the case studies discussed. The main reason behind this is that there are very few works (scholarly or Government reports) on the recent human rights violations of the *Adivasis* of Bangladesh. The Government and the mainstream media also addresses the issue deviously. At some point this may lead to the impression that the thesis is an advocacy piece, but, this is simply because there are no resources that address such issues except for the ones mentioned. However, the thesis has drawn possible balances among the available sources. It is to be noted, the alternative perspective of the Government was extremely difficult to extract but I have mentioned the instances wherever the Government has addressed the issue. This has been extremely difficult because there are hardly any addresses made by the Government. Hence, a limitation of this research is, although it may make a case for the *Adivasis* of Bangladesh, the conclusions are not corroborated with sufficient evidence from the State. The concerned persons/authorities should therefore exercise caution when applying these conclusions in any mechanisms (judicial or State). While reaching the conclusions I used the comparative method where I drew a comparison between the State of Botswana and Bangladesh by case analysis. Also, I used the qualitative method where I discussed by way of defining, interpreting, using metaphors, etc. in order to establish the research questions.

Being a Masters level thesis time constraint was a reason that caused the lack of empirical data. It could be gained by extensive field work that needs a substantial amount of time.

The thesis is divided into five main chapters besides this introductory chapter. The first chapter of the five main chapters is Chapter 2 that highlights the history of the *Adivasis* of Bangladesh. It also deals with the functions and acceptance of the Non-Government Organizations (NGO) in the CHT. Later on, the chapter has a brief discussion on the existence of legal pluralism in Bangladesh.

The second chapter (Chapter 3) deals with one of the most important issues of *Adivasis* that is recognition. The chapter at first discusses the importance of the word *Adivasi*. It shows that how the *Adivasis* are being denied their right to recognition by the supreme law of the country. Also, there is a brief discussion on the importance of recognition of *Adivasis*. A broad discussion on the international community's dilemma to recognize *Adivasis* and the effect of it follows. I have shown that this dilemma of the international community has resulted in Bangladesh's excuse to not recognizing the *Adivasis*.

The third chapter (Chapter 4) is based on the analysis of legal frameworks that denies the rights of the *Adivasis*. I have discussed the rights that are not given or falls short to realize the *Adivasis* rights rather than discussing the given rights. The legal frameworks are from both international and national arenas. The chapter includes a discussion of judicial unenforceability of the 'fundamental principles of State policy' as 'fundamental principles of State policy' discusses the State's responsibility to protect the *Adivasis* (under the terms of 'backward section' and 'tribes, minor races, ethnic sects and communities') from exploitation and to protect and develop their unique local culture and tradition. Also, a discussion on equality clause follows.

The fourth chapter (Chapter 5) is based on practical scenario completely. I have discussed three recent case studies in the chapter. Following that, I have shown how the State is violating the *Adivasis* human rights in the name of development. However, the chapter lacks information from the GoBs' part as there has been no opposite claim/answer. The last part of the chapter argues that

the GoB may be walking on the path of Genocide by killing of the *Adivasis* of Bangladesh. The case may fall short on the test of intention on part of the GoB. However, I have found it to be important for discussion as the State should be careful in exercising its power and ought to stop the human rights violations that may lead to the most heinous crime of all times.

The fifth chapter (Chapter 6) is the comparative analysis chapter. In this chapter, I have shown that Botswana an African country has taken the same approach as Bangladesh by denying the existence of indigenous peoples. I have discussed their historical background and a case study of Central Kalahari Game Reserve (CKGR) showing the existence of indigenous peoples and the denial of their rights respectively. Following that, I have compared this situation with Bangladesh. I have discussed both similarities and dissimilarities between the two States. Then I have provided some solutions for Bangladesh through these comparisons.

The last chapter of the thesis gives concluding remarks. It gives some probable solutions that Bangladesh could take to ensure the rights of the *Adivasis*. By and large, the thesis concludes that it is the *Adivasis* who have to speak up for their own rights and the GoB has to recognize the *Adivasi* for being a prototype in the international community in ensuring human rights of the *Adivasis*.

CHAPTER TWO

THE POLITICS OF NON-RECOGNITION: PRE AND POST BANGLADESH

ERA

A. Introduction

The indigenous peoples have always been the sufferers of disparities when they have been ruled over by the outsiders throughout centuries. One of the reasons behind this is that history has always been interpreted by and in favor of the mainstream rulers. This claim has been established throughout this thesis. The aim of this chapter is to find out and establish the existence of indigenous peoples in Bangladesh from ancient time. The term *Adivasi* is used in the Indian subcontinent to refer to the *Adim* (from the earliest times) who have been nurturing their lives in the mountains and forests for hundreds and thousands of years. Moreover, it has much wider scope than the term ‘tribal’ or ‘ethnic minority’ that the GoB is using to deny them the *Adivasi* status. This issue has been elaborated in the next chapter.

This chapter deals with the history of the *Adivasis* particularly the CHT *Adivasis* in Bangladesh including geographical and political history and the establishment of Non-Government Organizations (NGOs) and their functions. In the end, I have discussed the existence of legal pluralism in the context of Bangladesh.

While writing this chapter it has been observed that Government reports are very reluctant to address the *Adivasis* issues, i.e.: their population, languages, culture, history etc. Also, the figures vary in several Government reports. At the international level, the official data collection and disaggregation on indigenous peoples tend to be inadequate and sometimes non-existent.¹² It is

¹²Data and Indicators, Division for Social Policy and Development: Indigenous peoples, United Nations, online: <<https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/data-and-indicators.html>> [Data]

true for national level as well. The United Nations Permanent Forum on Indigenous Issues (UNPFII) has considered this as a “topic of primary importance”.¹³ However, there was much information available from international and national scholars and NGO reports which helped to develop the chapter.

I. Part-I: Geographical History/Regional History

It is very hard to determine the actual number of *Adivasi* population or the number of *Adivasi* groups in Bangladesh because of unreliable data. Different research suggests different demographics about this. One of the reasons is the minorities in the country are based on mostly religion rather than ethnicity.¹⁴ The majority of Bangladesh’s 142.3 million people are *Bangalee* but approximately 3 million are indigenous peoples belonging to at least 54 different ethnic groups speaking at least 35 different languages.¹⁵ These languages, cultures and their way of life are identified and are distinguished within themselves as well as within the State. It can be said that these peoples are self-identifying themselves as *Adivasis*. These ethnic groups have distinct culture, legal traditions, land distribution system and livelihood (*Jhum*/plain land cultivation system, *taant*/handloom etc.). They identify themselves as different from the majority *Bangalee* population and from each other as well. According to the 2011 Census, the country’s indigenous population is approximately 1,586,141, which represents 1.8% of the total population of Bangladesh.¹⁶ They are fundamentally different in culture and tradition from the *Bangalee* majority population.

¹³*Ibid.*

¹⁴Tone Bleie, *Tribal Peoples, Nationalism and the Human Rights Challenge the Adivasis of Bangladesh*, (Dhaka: The University Press Limited, 2006), at 13 [Bleie]

¹⁵International Work Group for Indigenous Affairs, *Indigenous peoples in Bangladesh*, online: <www.iwgia.org/regions/asia/bangladesh>

¹⁶International Work Group for Indigenous Affairs, “South Asia-Bangladesh”, (2017) YB 396 at 396. <www.iwgia.org/iwgia_files_publications_files/0760_THE_INDIGENOUS_ORLD_2017_eb.pdf> [IWGIA YB]

The Chittagong Hill Tracts (CHT) contain the majority *Adivasi* population of the country and is a region of the *Adivasi* majority. It has a semi-autonomous structure of administration unlike any other part of the country.¹⁷ The other *Adivasis* mostly considered as the *Adivasis* of the plains can be found mainly in north, northwest, northeast, south, and southeast part of the country. This paper has focused on the *Adivasis* of CHT, hence the history of the CHT *Adivasis* has been discussed extensively.

a. Chittagong Hill Tracts (CHT)

The Chittagong Hill Tracts (CHT) is comprised of three districts namely: Bandarban, Rangamati and Khagrachari and lies in the southeastern part of the country (21°25'N to 23°45'N latitude and 91°54'E to 92°50'E longitude) bordering Myanmar on the southeast, the Indian state of Tripura on the north, Mizoram to the east and Chittagong district to the west.¹⁸ The area of the Chittagong Hill Tracts is about 13,184 sq. km, which is approximately one-tenth of the total area of Bangladesh.¹⁹ The indigenous communities of the CHT are known as the *Jumma* peoples which include: Bawm, Chak, Chakmas, Khami, Khyang, Pangko, Lushai, Marma, Mru, Mrung/Riang, Tripura, Tonchangya.²⁰ The name *Jumma* came from the traditional method of swidden agriculture by indigenous of hill areas- *Jhum/Juming* (slash and burn or shifting cultivation).²¹

The Chittagong Hill Tracts was named after the port city of Chittagong in 1860 where it was made a district of British India, but it appeared in the first known map of Bengal in about 1550.²² It was

¹⁷ See Appendix D

¹⁸Banglapedia Naional Encyclopedia of Bangladesh, *Chittagong Hill Tracts*, online: <en.banglapedia.org/index.php?title=Chittagong_Hill_Tracts> See: Appendix-A, [Banglapedia]

¹⁹[Banglapedia] *Ibid Chittagong Hill Tracts*, <en.banglapedia.org/index.php?title=Chittagong_Hill_Tracts>

²⁰ [Bleie] *supra* note 14 at 11.

²¹[Rajkumari] *supra* note 4 at 28.

²²Willem van Schendel, Wolfgang Mey & Aditya Kumar Dewan, *The Chittagong Hill Tracts Living in a Borderland*, (Dhaka: The University Press Limited, 2001), at 19. See Appendix B. [Schendel]

administered under the Province of Bengal and remained as such in the area of Pakistan after the British colonial era in 1947.²³ The geographical map changed due to the construction of Kaptai dam in Rangamati district from 1957 to 1962 on the land of the *Adivasis*. The Kaptai Dam, is an earth-fill embankment Dam with a reservoir (known as Kaptai Lake), left thousands of inhabitants homeless.²⁴ It is to be noted that the project was financed by the then Government, and by the international organizations such as ICA, DLF loan, and USAID.²⁵ After the Liberation War in 1971, the CHT region became a part of the new State: Bangladesh.

II. Part II: Political History

The political history of the CHT region is a complex one because the CHT has always been considered as an autonomous region and ruled by the indigenous peoples. There were several attempts to take the CHT under the control of the British Crown or of the State completely but history states that the CHT has always maintained its distinctive autonomous status regarding administration. This unique administration system is now quite different. Moreover, the militarization of the CHT has also changed the actual administrative system of the region. The phases of this evolution has been discussed under the following headings.

a. Pre-Colonial to Colonial Regime

The Sultan of Bengal Fakhruddin Mubarak Shah invaded Tripura earlier in 1340 AD and defeated the Tripura king, Raja Pratap Manikya. Chittagong, a part of the Tripura Kingdom was conquered

²³*Ibid* at 20.

²⁴ See Appendix C

²⁵[Banglapedia] *supra* note 18 *Dam*, online:
<en.banglapedia.org/index.php?title=Dam>

by him in 1340 AD. After the conquest of Chittagong the Sultan appointed one Sufi saint named Shayda as his deputy (naib) to rule over Chittagong which was annexed to his Sultanate as a province (*mulk*).²⁶ Bengal came under Mughal rule in 1576.²⁷ However, as Bengal was a distant region it was never truly dominated by the Mughals.

The CHT had always been an independent region and remained out of State administrative control until late 19th century. The region was considered as sovereign and there was trade between the *Jumma* peoples and people from the plains. They used to pay in kind. There was a number of agreements and treaties which were entered in the sovereign capacity of the *Jumma* traders with the rulers. In 1713, the Chakma Raja Fateh Khan obtained permission from the Mughal Emperors to allow the *beparies* (Bengali merchants) to trade with the *Jummas* on the payment of a one-time tribute of 11 maunds of cotton.²⁸ *Bangalees* and *Jumma Adivasis* were already holding distinct characteristics at that time.

Later on, it was noted by the colonial Administrators that an increasing number of traders from the plain were moving into the hills and the British rulers foresaw the negative sides of the trade for the British Empire.²⁹ In 1777, under the British regime the *Jumma* peoples were denied access to the markets of neighboring British District of Chittagong due to their resistance against the planning of East India Company to take control over the hill tracts.³⁰

²⁶[Banglapedia] *supra* note 18, *Fakhruddin Mubarak Shah*, <en.banglapedia.org/index.php?title=Fakhruddin_Mubarak_Shah>

²⁷[Banglapedia] *supra* note 20, *History* <en.banglapedia.org/index.php?title=History>

²⁸[Rajkumari] *supra* note 4 at 39-40.

²⁹Storyofcht, "Life is Still Not Ours (Full Film)" (August 08, 2014) online: YouTube <<https://www.youtube.com/watch?v=JmIIRBv-LQw>> at 00h:10m:48s.

³⁰R H Sneyd Hutchinson, *Eastern Bengal and Assam District Gazetteers: Chittagong Hill Tracts*, (Allahabad: Pioneer Press, Allahabad, 1909) at 8 online: <space.gipe.ac.in/xmlui/bitstream/handle/10973/33518/GIPE-017769.pdf>

Following that, in 1787, Raja Jan Bux Khan was compelled to enter into a peace treaty with the British Governor General Lord Cornwallis and the terms of the treaty stated that the Chakma had to pay about 20 maunds of cotton to the British Government for regaining the right to trade. This cotton tribute was later extended to the Marmas and eventually, the entire area came to be known as the *Kapas Mahal* (Cotton Area).³¹

In 1860, the British occupied the hills to the east of Chittagong. They annexed the CHT to their colonial empire and it was administered from Bengal. Before that time, political power was exercised by the *Adivasi* chiefs over groups of peoples rather than territories.³² The CHT region was only under the administration of the British rule for collecting cotton tax without interfering in their internal administrative structure.³³ However, this eventually made way for the British successors to control the *Adivasis* internal administration after 1947.³⁴

b. The Pakistan Era

In 1947, the British Raj divided the Indian Subcontinent in India and Pakistan; and the CHT was awarded to Pakistan. It is to be noted that the separation was based on religion and the CHT was not a Muslim majority region as the idea of whole Pakistan was. With the consultation of the Viceroy, the Governor of Bengal stated the reason behind this was that the CHT was dependent on East Pakistan for trade and there was very rare communication system with Assam (India)

³¹[Rajkumari] *supra* note 4 at 40

³²[Schendel] *supra* note 22 at 23

³³The Chittagong Hill Tracts Regulation Act of 1900 introduced a local tax collection system with chief as the head. The chief presided over the headmen who collected tax from locally and passed it on yearly to the Chief and they used to pass it to the British Government. Both Headman and Chief got commission from the taxes and were entitled to extra lands. The CHT was given a special status by the CHT Regulation Act of 1900 (Act No. I of 1900) by declaring it as an excluded area.

³⁴[Schendel] *supra* note 22 at 24

through the forest. Also, the tribesman of CHT was not Hindu therefore, there was no reason to attach it to India or make it a separate State.³⁵

The Kaptai hydro-electric project from 1957 to 1962 was the beginning of the massive displacement and state-sponsored atrocities over the *Adivasis*. The Kaptai Lake was created in Rangamati district where 400 sq. miles of ground which consisted the 40% of the total districts' area and 54,000 acres of cultivable land including Chakma *Raj Bari* (royal palace) were flooded with lake water. This left more than 100,000 people homeless who fled to India as refugees and are still living there as stateless persons.³⁶ They were not reimbursed for their land nor were they rehabilitated. Neither India nor Bangladesh recognizes those peoples as their citizens.³⁷ The Kaptai Lake an attractive tourist spot in Bangladesh is still referred to as the teardrops of the peoples. There is no evidence which shows that the home of the *Adivasis* were taken from them with their free, prior and informed consent.

c. Bangladesh Era: The 1997 Peace Accord

After the Liberation war in 1971 CHT became the part of the newborn Bangladesh. The *Adivasis* got aspirations to regain their autonomous character. But the 1972 Constitution did not recognize the *Adivasis*. Their rights are protected under the Constitution as a backward section of the society.³⁸ Mainly three provisions of the Constitution which give this protection are as follows: Article 14 of the Constitution states that:

³⁵H.V. Hodson, *The Great Divide: Britain-India-Pakistan*, (London: Hutchinson & CO. (Publishers) Ltd., 1969) at 350 online: <sanskritdocuments.org/marathi/ebooks/TheGreatDivideHVVHodson1969.pdf>

³⁶Amena Mohsin, *The Chittagong Hill Tracts of Bangladesh: On the Difficult Road to Peace*, (Boulder, London: Lynne Rienner Publishers, 2003), at 24. [Mohsin]

³⁷Minority Rights Group International, *World Directory of Minorities and Indigenous peoples - Bangladesh: Adivasis* (Minority Rights Group International, 2008) online: <www.refworld.org/docid/49749d5841.html> [Minority]

³⁸[Constitution] *supra* note 3 arts. 14, 28 & 29. See: The Lawyers and Jurists, *Different Terms are Used throughout Bangladesh to Refer to its Indigenous peoples. Exemplify* (14 October 2012) online: <www.lawyersjurists.com/article/29407/terms-bangladesh-refer-indigenous-peoples-exemplify.html>

“It shall be a fundamental responsibility of the State to emancipate the toiling masses the peasants and workers and backward sections of the people from all forms of exploitation.”³⁹

Article 28 of the Constitution states that:

- “(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.
- (2) Women shall have equal rights with men in all spheres of the State and of public life.
- (3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.
- (4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.”⁴⁰

Article 29 states that:

- “(1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic. (2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic. (3) Nothing in this article shall prevent the State from –
- (a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic; (b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination; (c) reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.”⁴¹

These provisions are further elaborated in Chapter 4.⁴²

The representative of the CHT peoples refused to endorse the Constitution.⁴³ They demanded an autonomous region and also recognition of their distinctive cultures. The Government of Sheikh Mujibur Rahman considered the *Adivasis* demand to be autonomist and launched raids into the CHT in 1972.⁴⁴ In 1973, Mujib urged the hill peoples to become *Bangalees*.⁴⁵ To get

³⁹[Constitution] *supra* note 3 art 14” “Emancipation of peasants and workers”.

⁴⁰ [Constitution] *supra* note 3 art 28: “Discrimination on grounds of religion, etc”

⁴¹ [Constitution] *supra* note 3 art 29: “Equality of Opportunity in Public Employment”

⁴² See: Chapter 4

⁴³[Rajkumari] *supra* note 4 at. 47.

⁴⁴[Minority] *supra* note 37.

⁴⁵ Amina Mohsin, ‘Identity, Politics and Hegemony: The Chittagong Hill Tracts, Bangladesh’, (2000), 1, Identity, Culture and Politics, 78 at 79 online:

<<http://calternatives.org/resource/pdf/IDENTITY,%20POLITICS%20AND%20HEGEMONY-The%20Chittagong%20Hill%20Tracts,%20Bangladesh.pdf>> [Mohsin Identity]

the desired outcomes the *Parbatya Chattagram Jana Samhati Samiti* (PCJSS, in English: CHT United Peoples' Party) the first political organization of the *Jumma* peoples was formed consisting of a 60 member central committee on 15 February 1972 under the leadership of Manabendra Narayan Larma who was also a member of Parliament at that time.⁴⁶ PCJSS had a military wing named *Shanti Bahini* with almost 15,000 members.⁴⁷ The *Shanti Bahini* or the Peace Force was given training by the Indian Military when M.N. Larma fled to India and established the headquarters of PCJSS in Tripura, India, with the help of the Indian Government.⁴⁸ It is to be noted that M.N. Larma was assassinated by the Government in 1983 (while Bangladesh was under military rule) and his dead body is still missing.⁴⁹

Bangladesh came under the Military rule by the heinous killing of the then President of Bangladesh the Father of the Nation Sheikh Mujibur Rahman and his whole family in 1975. Under the Military regime (1975-1990) the Constitution faced another paradigm shift regarding nationalism where 'Bangladeshi' was recognized to be the nationalism for the peoples of Bangladesh. The Military Government of Bangladesh employed army camps in order to prevent the insurgency by the *Shanti Bahini* who were protesting for self-determination as an *Adivasi*. In 1979, the situation changed more drastically and Government sponsored *Bangalee* settlers started setting up their home in the CHT.⁵⁰ This process continued till 1984. Finally, the insurgency came to an end when the Chittagong Hill Tracts Peace Accord (CHTPA) was signed between the PCJSS and the Awami League Government on December 02, 1997. Afterward, in accordance with the Peace Accord, the

⁴⁶Parbatya Chattagram Jana Samhati Samiti, *About PCJSS*, online: <www.pcjss-cht.org/about-pcjss>

⁴⁷[Minority] *supra* note 37

⁴⁸[Mohsin] *supra* note 36 at 13.

⁴⁹[Banglapedia] *supra* note 18 Larma, Manabendra Narayan, <en.banglapedia.org/index.php?title=Larma,_Manabendra_Narayan>

⁵⁰[Banglapedia] *supra* note 18, *Chittagong Hill Tracts Peace Accord, 1997*, <en.banglapedia.org/index.php?title=Chittagong_Hill_Tracts_Peace_Accord,_1997>

Chittagong Hill Tracts Regional Council was formed which functions under the Chittagong Hill Tracts Regional Council Act, 1998 (Act No. XII of 1998). Also, there are three separate Hill District Councils for Bandarban, Rangamati and Khagrachhari districts.

d. Rise of NGO's

NGO meaning Non-Government Organization does not have a hard and fast definition rather it operates within certain characteristics such as: formal, private, non-profit distributing, self-governing, voluntary, non-religious and non-political.⁵¹ After the Liberation war, it was mostly foreign NGO's which operated in Bangladesh.⁵² Gradually within the time, the country observed the establishment of national and international NGO's. The NGO's started developing in Bangladesh from the time of President Ershad's regime (around late 1980's).⁵³ To be noted the NGO's at first did not gain popularity in the democratic era of Bangladesh as they were established in the military regime. NGO's in Bangladesh generally working for human rights/humanitarian issues have seen the human rights struggle as being initially against the prevailing authoritarian political regime.⁵⁴

NGO's play an important part in providing service in the rural areas of Bangladesh. They work hand in hand with the government. NGO's in Bangladesh are working either autonomously or in collaboration with the Government development plans in health, education, micro-credit, women

⁵¹ Gerard Clarke, *The Politics of NGOs in South-East Asia: Participation and Protest in the Philippines*, (London; New York: Routledge, 1998), at 2

⁵² Sajjad Zohir, *NGO Sector in Bangladesh: An Overview* online:

<http://sajjadz.net/document_library/admin/upload/epw%20ngo-20140206-131909.pdf> [Zohir]

⁵³ Sarah C. White, 'NGOs, Civil Society, and the State in Bangladesh: The Politics of Representing the Poor' (1999) 30 Development and Change 307 at 310 online:

<https://www.researchgate.net/profile/Sarah_White24/publication/227632135_NGOs_Civil_Society_and_the_State_in_Bangladesh_The_Politics_of_Representing_the_Poor/links/550de28b0cf2ac2905aa715b.pdf>

⁵⁴ Clarence J. Dias, 'The Role of NGOs in the Protection and Promotion of Human Rights in Asia', (1993), 2:2, Asian and Pacific Migration Journal 199 at 201 online:

<<http://journals.sagepub.com/doi/pdf/10.1177/011719689300200206>>

empowerment sectors.⁵⁵ The NGO's of Bangladesh have to be registered with the NGO Affairs Bureau to operate and to get foreign aids.⁵⁶ The NGOs are active in the CHT as well. It is to be noted that there is no NGO that works only for the CHT *Adivasis* rights.

A large number of NGO conduct their work in the CHT region but it is quite a challenge to work in the remote areas of the hill tracts. Before the CHT Peace Accord the NGOs were reluctant to work in the region but eventually, after 1997, the number of NGO activities increased. The GoB has opposed the establishment of any type of autonomous bodies in the CHT. The Hill Tracts NGO Forum was an elected body of around 60 NGOs composed of and run by people who live in the CHT.⁵⁷ It has ceased to function allegedly because of discriminatory pressure from government oversight agencies.⁵⁸

The CHT local NGOs work in partnership with national and international organizations. Among them: the Association for Land Reforms and Development (ALRD), Bangladesh Nari Progati Sangha (BNPS), Bangladesh Rural Advancement Committee (BRAC), Manusher Jonno Foundation (MJF), The Society for Environment and Human Development (SEHD), Evangelischer Entwicklungsdienst-EED/Church Development Service, Christian Aid, the International Work Group for Indigenous Affairs (IWGIA) and Tebtebba Foundation are working together with local NGOs'. Moreover, the United Nations Development Programme (UNDP), the

⁵⁵Richard Batley and Pauline Rose, 'Collaboration in delivering education: relations between governments and NGO's in South Asia', (2010), 20:4-5, *Development in Practice*, 579 at 581 online: <<http://www.jstor.org/stable/pdf/20750154.pdf?refreqid=excelsior:25c857df20755139f5b1ef9dc5faccb0> P 581>

⁵⁶ [Zohir] *supra* note 52

⁵⁷Supras Limited, *Chittagong Hill Tracts, Bangladesh*, online: <www.supras.biz/links/cht.html>

⁵⁸Raja Devasish Roy, *Country Technical Notes on Indigenous peoples' Issues: People's Republic of Bangladesh* (International Fund for Agricultural Development & The Asia Indigenous Peoples Pact, 2012) at 9 online: <<https://www.ifad.org/documents/10180/d532dbcc-5a31-4a3f-b24e-abd6d9aac9a5>> [Roy]

United Nations Children's Fund (UNICEF), the Food and Agriculture Organization of the United Nations (FAO) and Asian Development Bank (ADB) have been working in the region.⁵⁹

Most of the larger NGOs based in the plains regions also operate in the CHT. This includes Bangladesh Rural Advancement Committee (BRAC: credit, primary education), ASHA (especially microcredit), Manusher Jonno Foundation (MJF: human rights, primary education), Podokkhep (especially micro-credit), Community Development Center (CODEC: human development), Al-Rabita (especially health), Bangladesh Nari Progati Sangha (BNPS: women's rights), Association for Land Reform and Development (ALRD: land rights), Bangladesh Environmental Lawyers Association (BELA: environment), Society for Environment and Human Development (SEHD: environment and indigenous rights) the Movement for the Protection of Forest and Land Rights in the CHT among others. In addition, the micro-credit institutions, Grameen Bank and Integrated Development Foundation (IDF), also operate in the region. From all these NGO's only Manusher Jonno Foundation (MJF) has activities in more remote areas but indirectly.⁶⁰

There are 44 NGO's currently working in Bandarban Hill District.⁶¹ Also, Maleya Foundation, KAPAEENG Foundation and Ain O Shalish Kendro (ASK) have been working to secure indigenous peoples rights in Bangladesh. The *Adivasis* of the CHT have accepted the NGO and NGO workers as they believe NGOs work for their development.⁶² In the CHT there are people's organizations, community-based organizations and mass organizations of indigenous peoples that

⁵⁹*Ibid.*

⁶⁰*Ibid* at 8-9

⁶¹Bandarban Hill District Council, *NGO List*, online:
<<http://bhdcbd.org/en/ngo-partner.php?cat=NGO%20List>>

⁶² This idea is persuaded by the author from a conversation with the *Adivasis* of the CHT's.

work for the forest and land rights of indigenous peoples at the regional and national levels.⁶³ The IWGIA and the Tebtebba foundation are the only NGOs that work for the *Adivasis* rights.⁶⁴

Previously after signing the CHTPA, the *Adivasis* were not satisfied with the NGOs. The prime reason is that the micro-credit policy of NGOs has worked as a monetarization of the region whereas, the *Adivasis* depend less on the monetary schemes and live more on the natural resources. Also, most of the NGOs were based on the plains and were established by the *Bangalees*. “Due to ethnic conflict and their struggle for recognition the CHT peoples were suspicious of “everything that comes from the plains””.⁶⁵ At first the CHT *Adivasis* were hostile towards the NGOs. Now a number of *Adivasis* work with the NGO’s and are earning their living both in the CHT and in the plains. The NGO reports and the rhetoric of the GoB vary widely regarding the *Adivasis* and human rights issues. However, the GoB, while reporting less number of human rights violations of *Adivasis* and sometimes suppressing the facts, allows the NGO’s to report the actual scenario to a certain extent. On the other, it is also true that *Adivasis* of Asia do not welcome NGO activities in general. In Bangladesh the NGO’s play a key role in addressing the human rights violations of *Adivasis* both in national and international level. However, the NGOs of Bangladesh are far behind in advocating in the matter of CHT *Adivasis* recognition and rights relating thereto. Whether it is inherently accepted by the *Adivasis* of Bangladesh or not- needs extensive field research which is outside the scope of this thesis.

⁶³[Roy] *supra* note 58 at 2.

⁶⁴[Roy] *supra* note 58 at 13.

⁶⁵Eva Gerharz, ‘Dilemmas in Planning Crisis Prevention: NGOs in the Chittagong Hill Tracts of Bangladesh’ (2002) 97 Journal of Social Studies, University of Dhaka, 19 at 27 online:
<<http://condesan.org/mtnforum/sites/default/files/publication/files/555.pdf>>

III. Part III: Present Situation

At present, the *Adivasis* are not recognized in Bangladesh. The GoB's stand regarding the Indigenous peoples is very clear. The then (2011) Foreign Minister of Bangladesh stated that "the tribal people most certainly did not reside or exist in the CHT before the 16th century and were not considered "indigenous peoples" in any historical reference books, memoirs or legal documents."⁶⁶ Even if this assertion is true it is to be noted that the Small Ethnic Group Cultural Institutions Act, 2010 states that the small ethnic group will mean the scheduled *Adivasis*.⁶⁷ All these controversies arose after the 15th amendment of the Constitution of Bangladesh.

The 2nd cycle UPR submitted by the GoB states that out of more than 500 camps 238 army camps have been withdrawn from the CHT region. However, the PCJSS estimates that only 74 military camps were actually withdrawn, and the process stopped in 2009. New camps have allegedly been set up in some other places following the withdrawal of old ones.⁶⁸ Also, there have been continuous concerns by the INGO's and media that state-sponsored atrocities have been going on over the *Adivasis* of the CHT and of plains as well.

Bangladesh is a signatory of the Core Human Rights documents (UDHR, ICCPR, and ICESCR). Also, it has ratified the ILO Convention No. 107 but it has not ratified the ILO Convention No. 169. The GoB abstained from voting for the United Nations Declaration on the Rights of Indigenous peoples, 2007 (UNDRIP). All these frameworks provide for the recognition of the IPs and protect their civil, political, economic, social and cultural rights most importantly the land

⁶⁶Diplomatic Correspondent, "Ethnic Minority, Not Indigenous peoples, FM Tells Diplomats, Editors", *The Daily Star* (27 July, 2011) online: <www.thedailystar.net/news-detail-195963> [Diplomatic]

⁶⁷The Small Ethnic Group Cultural Institutions Act, 2010 s 2. [Ethnic]

⁶⁸IWGIA, *Militarization in the Chittagong Hill Tracts, Bangladesh, the Slow Demise of the Region's Indigenous peoples, Report 14* (Copenhagen, Denmark: Eks-Skolens Trykkeri, 2012) at 12 online: <www.iwgia.org/iwgia_files_publications_files/0577_Igia_report_14_optimized.pdf>

rights of the IPs. The ulterior motive of the GoB behind not signing these instruments is not to recognize the *Adivasis* in Bangladesh. If the *Adivasis* are recognized it will lead to the recognition of their communal land distribution system and establish their rights on the lands which the State considers as *Khas* (public land) land. Even if the State has an obligation under the ICCPR for equal treatment and non-discrimination regarding civil and political rights there are a number of national legislations that curtail them and prevail over the international framework. The legal aspects of *Adivasis* rights in Bangladesh are further discussed in Chapter 4.

a. Legal Pluralism in the CHT

Legal pluralism refers to the existence of two different legal systems in the same geographical area. It is often been noted that the community as an object of study and a locus of normativity (tradition) has been largely left out of human rights studies.⁶⁹ Legal pluralism complements this notion and ensures human rights for the concern communities. It analyses anthropologically the traditional community's way of life prior to and following the colonization and highlights the existence of norms and customary laws parallel to the State laws.⁷⁰

In the later chapters, it has been established that only ratifying international documents and enacting laws is not adequate to ensure the rights of the *Adivasis*. To overcome this shortcoming legal pluralism works as an expedient tool. It interprets the abstract and broad human rights standards so that human rights can operate in the everyday life of the communities.⁷¹ By recognizing legal pluralism among the CHT *Adivasis* human rights can be ensured for them. Human rights itself has a pluralistic nature and it is woven into the fabric of community

⁶⁹*Ibid* at 2.

⁷⁰*Ibid*.

⁷¹*Ibid* at 1.

relationships, duties and obligations.⁷² Legal pluralism lays down the process that enables the communities (*Adivasis*) to go beyond the State laws and transform the human rights norms to reflect their specific identities and aspirations.⁷³ “Human rights are thus pluralised and given meaning outside of the formal apparatus of state law, woven into the fabric of community relationships, duties and obligations.”⁷⁴ It is to be pointed out that the *Adivasi* concern is a human rights issue in Bangladesh. Legal pluralism is needed to ensure the human rights for the *Adivasis* of Bangladesh.

In this thesis, legal pluralism in the CHT has been discussed by focusing on the *Adivasi* community’s lifestyle and traditional legal systems. “Legal pluralism is a way of characterizing an interpretive choice for citizens about how they wish to conceive law, themselves and the relationship they have to law.”⁷⁵ Therefore, the existence of legal pluralism will be proven if it is established that the *Adivasis* of the CHT have their own legal traditions by which they understand their relationship with each other and States recognition of their customs (their relation to the natural resources: land, forest etc.). I have shown that the *Adivasis* of Bangladesh have been practicing their own legal traditions for a long time and it establishes the existence of legal pluralism in the CHT.

The *Adivasis* of the CHT region have their own custom based law regarding family matters and the right to natural resources.⁷⁶ The Chittagong Hill Tracts was composed of largely decentralized

⁷² *Ibid* at 3.

⁷³ *Ibid* at 2-3.

⁷⁴ *Ibid* at 3.

⁷⁵ René Provost & Colleen Sheppard, “Introduction: Human Rights Through Legal Pluralism” in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (New York London: Springer, 2013) 1 at 3 online: <<https://link.springer.com/content/pdf/10.1007%2F978-94-007-4710-4.pdf>> [Provost]

⁷⁶ Raja Devasish Roy, “Challenges For Juridical Pluralism And Customary Laws Of Indigenous peoples: The Case Of The Chittagong Hill Tracts, Bangladesh” (2004) 21:1 *Arizona Journal of International & Comparative Law* 113 at 113-14. [Raja]

and only partly formalized self-governing chiefdoms and chieftaincies until its colonization.⁷⁷ The *Adivasis* economy, cultural norms, and political structure were similar to the indigenous societies of the sub-Himalayan frontier tracts in nearby India and Burma when it was annexed under the British colony.⁷⁸

The CHT has a semi-autonomous self-government system.⁷⁹ The administrative authority in the CHT region is supervised by the Ministry of Chittagong Hill Tracts Affairs. Under the Ministry, there are chiefs (*Rajas*), headmen, *karbaries* and elected councils at the district and regional level. However, the officials of the districts and sub-district level are almost exclusively *Bangalees* whereas, the members of the regional and district councils come from the *Adivasi* communities. Therefore, it is pluralistic in nature as there is a combination of traditional, bureaucratic, and elective regional authorities with separated and sometimes concurrent responsibilities.⁸⁰

In the three regions of the CHT judicial and administrative system for the *Adivasis* operates under three posts namely Circle Chief or *Raja*, Headman, and *Karbari*. All three of these posts are hereditary and generally, the male successor obtains the office for the lifetime. The *Karbari* comes from a certain *Adivasi* group and heads over that group while administering traditional justice system according to customary law. The jurisdiction of a *Karbari* mainly covers family matters and civil matters. On the other hand, the headman is appointed from a number of villages (consisting a *mauza*) and does not necessarily belong to the majority *Adivasi* group. He is responsible for resource management, land and revenue administration, maintenance of law and order, the administration of "tribal" justice, and has an appellate authority over the *Karbari's*

⁷⁷*Ibid* at 117.

⁷⁸*Ibid* at 118

⁷⁹See Appendix D

⁸⁰ [Raja] *supra* note 76 at 124

judicial functions.⁸¹ There are three administrative and revenue circles in the CHT consisting of the *mauzas* headed by the three *Rajas* in the region. All the inhabitants of the region both *Adivasis* and the *Bangalees* are subject to the jurisdiction of the *Rajas* except the government officials.⁸² The *Rajas* have supervisory jurisdiction over the headmen. Also, they can advise the Deputy Commissioners, the Hill District Councils, the CHT Development Board (a statutory institution) and the Ministry of CHT Affairs.⁸³

The Civil legislations vary in the CHT regions in the matter of applicability. Some of the laws are exclusively for the CHT regions and some of the laws are not applicable or partially applicable in the CHT regions (discussed in Chapter 4). A trivial number of State laws recognizes the CHT *Adivasis* way of life. In criminal matters previously the Divisional Commissioner had the highest jurisdiction over CHT region but now a session court operates there.

The *Rajas* have partial jurisdiction in petty criminal matters and can exercise appellate jurisdiction. However, in the British period and also at present the review and appeal against the *Rajas* decision to the State (Deputy Commissioner/Court) has been introduced. It is evident that the *Adivasis* prefer their own legal system as no appeal has been sought from the *Rajas* decision till now, although, there is express provision for appeal in the State laws.⁸⁴ In addition to these the traditional courts resolve the customary disputes over wild game, customarily held forests, and swidden common.⁸⁵

⁸¹*Ibid* at 125.

⁸²*Ibid*.

⁸³*Ibid*.

⁸⁴*Ibid* at 130.

⁸⁵Raja Devasish Roy, Minority Rights Group International, Traditional Customary Laws and Indigeneous Peoples in Asia, 'What is Customary Law?' at 8

In the CHT customary, regional and national laws are applied simultaneously. But their criminal justice system is not recognized by the State. Also, the introduction of the appellate authority of the State organ infers that the pluralistic system is slowly getting into the integration process. Further, the customary laws of the CHT region are recognized by the State enacted legislation. Here, the GoB completely ignores the unwritten practices of the *Adivasis*. Legal pluralism is normative in its essence consisting of a number of rights that are most fundamental to any human being.⁸⁶ Therefore, by denying the normative practices of the *Adivasis* the State is denying the existence of legal pluralism in the CHT region.

B. Conclusion

Bangladesh has a diverse culture and tradition of *Adivasis*. They belong to the critically disadvantaged people. Government's unwillingness to recognize them as *Adivasis* is also reflected in the Constitution of the People's Republic of Bangladesh which is also the supreme law of the country. The identity of the *Adivasis* has been constrained under the hegemony of *Bangalee* nationalism. History suggests that Bangladesh has been the home for *Adivasis* for centuries and who have had independent administrative control. Having different languages and culture the *Adivasis* are being forced to function under the rules of the mainstream majority *Bangalee* population. Placing the *Adivasis* under the *Bangalee* nationalism takes away their identity as *Adivasis* along with their rights as such. The muddle of the term and its impacts on the *Adivasi* identity has been discussed in the next chapter.

⁸⁶[Provost] *supra* note 75 at 1.

CHAPTER THREE

EFFECT OF NON-RECOGNITION: THE HEGEMONY OF NATIONALISM AND THE TERM “ADIVASI” OR INDIGENOUS PEOPLES

“Indigenous peoples are those who feel themselves to be indigenous and are accepted as such by members of the group...”⁸⁷

A. Introduction

Bangladesh has no legal definition of indigenous peoples as the GoB has termed the *Adivasis* as ethnic minorities by amending the Constitution of Bangladesh. The Amendment states that a new Article 23A will be inserted after Article 23 of the Constitution which is as follows: “The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities”. There is no mention of indigenous peoples or *Adivasis* in the Constitution. The supreme law of the country has stated that every person will be governed under the *Bangalee* nationalism. Imposing *Bangalee* nationalism on the *Adivasis* infringes their right to self-determination which is ensured by the core human rights documents.

It is also to be noted that the international Conventions and Treaties regarding indigenous peoples or human rights do not provide any specific definition of indigenous peoples. The GoB is using this as a defense of non-recognition of *Adivasis*. However, the special rapporteur on Discrimination against Indigenous peoples Jose R Martínez Cobo proposed a definition of indigenous peoples for international actions that has already been discussed in the first chapter.

In this chapter, the paradox of definition and terminological development of indigenous and *Adivasis* has been further discussed. At first, I have highlighted on the unresolved dilemma of

⁸⁷*Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous peoples*, UNECOSOCOR, 14th Session, Item 4 of the Provisional Agenda, E/CN.4/Sub.2/AC.4/1996/2 (1996) at para 36, online: <http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/Sub.2/%20AC.4/1996/2> [Standard]

defining the IPs and its impact. Also, the significance of using the term *Adivasis* instead of ethnic minorities has been discussed. In the end how the *Bangalee* nationalism creates a hegemony on the recognition of *Adivasis* has been shown.

I. Part-I: Effects of the International Communities' Dilemma on the Definition of *Adivasis* (Indigenous)

Recognition holds utmost importance for the *Adivasis* to be counted as a part of the community or as a part of the State to ensure justice. Recognition of the *Adivasis* rights is an essential element of democratic and pluralistic society and is not an exception.⁸⁸ Fraser argues the theory of justice is three dimensional: the political dimension of representation, the economic dimension of distribution and the cultural dimension of recognition.⁸⁹ She also states that these three dimensions are interwoven but there can be maldistribution of economy and misrecognition of cultures which may lead to political injustice.⁹⁰ If people are prevented from participating on terms of parity then it is status inequality or misrecognition.⁹¹ Therefore, non-recognition of the *Adivasis* is expressing political injustice from the State. Bangladesh based on the principles of democracy and socialism fails to ensure equality for the *Adivasis* of the country by denying them recognition. The *Adivasis* having a moral standing as a subject to justice have right to recognition from the GoB in order to ensure justice for all (in this case equality for all). If the *Adivasis* are denied their right to recognition (right to self-identification) they face a political death and the *Adivasis* may become a non-person with respect to justice along with an object of charity or benevolence.⁹² Hence, to deracinate injustice it is the duty of GoB to recognize the *Adivasis* of Bangladesh. Otherwise,

⁸⁸Dr. Abdullah Al Faruque, "Constitutional Recognition of Indigenous peoples", The Daily Star (17 March 2011) online: <archive.thedailystar.net/suppliments/2011/anniversary/section2/pg10.htm>

⁸⁹Nancy Fraser, "Re-framing Justice in a Globalizing World" in Terry Lovell, ed, *(Mis)recognition, Social Inequality and Social Justice* (London; New York : Routledge, 2007) 17 at 19. [Fraser]

⁹⁰*Ibid* at 21.

⁹¹*Ibid* at 20.

⁹²*Ibid* at 22.

Bangladesh will fail to achieve her goal of an ideal country as has been aspired in the Constitution. The international community by *trying* to define the term IPs took the first step in order to recognize them. However, it was a difficult task that the advocates for the IPs' rights have completed. The United Nations Declaration on the Rights of Indigenous peoples (UNDRIP) was adopted by the United Nations (UN) on 2007 after 12 years in open-ended Working Group on the Draft Declaration and 8 years of negotiations in the UN Working Group on Indigenous Populations (UNWGIP).⁹³ Although, the international community realized the importance of indigenous peoples rights earlier, it took a long time for them to reach a consensus to adopt the Declaration. The Declaration was adopted by a majority of 144 votes where Bangladesh abstained from voting. There is no uniform definition for the indigenous peoples in the Declaration.

a. The Definition Crisis

The reason behind not adopting a uniform definition was that the dimensions and characteristics of the *Adivasis* are continuously evolving and developing.⁹⁴ Although there are some common factors still they differ from each other in cultures. Moreover, there is no definition for the term 'minority' in any UN documents. Hence, giving a hard and fast definition for the indigenous peoples will only keep the way of exclusion broadly open.⁹⁵ The ILO Convention No. 107 based on the rights of indigenous peoples and other tribal and semi-tribal populations implies that indigenous peoples are tribal people.⁹⁶ The Convention no. 169 emphasizes on indigenous and tribal people drawing a distinction between them. This was made on demand of indigenous representatives who were working in UNWGIP on the drafting of UNDRIP.

⁹³Christian Erni, *Tribes, States and Colonialism in Asia: the Evolution of the Concept of Indigenous peoples and Its Application in Asia, Discussion Paper 2014* (Copenhagen, Denmark: International Work Group for Indigenous Affairs) at 4 online: <www.iwgia.org/iwgia_files_publications_files/0680_IP_CONCEPT_2014NE.pdf> [Erni].

⁹⁴*Ibid* at 5.

⁹⁵*Ibid*.

⁹⁶*Ibid* at 9.

Therefore, the UNDRIP did not include a definition for the *Adivasis*/IPs. Instead, the special rapporteur on Discrimination against Indigenous peoples Jose R Martínez Cobo proposed a definition of indigenous peoples for international actions.⁹⁷ This definition is not absolute. It will be an exaggeration if I argue that the United Nations' has failed or succeeded in defining the indigenous peoples, because, the characteristics of IPs are changing all the time and tying them up in a hard and fast definition will only exclude them from protecting their rights. However, a definition stating some common characteristics is necessary to identify the IPs and hence to protect their rights as indigenous. The UN Secretariat being preoccupied with decolonization and racism avoided criticizing the individual States for violating human rights of minorities and started carrying out studies under the cloak of Special Rapporteurs.⁹⁸ However, this scenario has changed now following the Universal Periodic Report (UPR) process where State parties are required to submit reports on human rights including IPs rights. The States are also given comments and criticized by the international community based on the UPR they submit. Even with all these conscious reporting the IPs received a special attention much later. In 1970, the Special Rapporteur Santa Cruz recommended that the IPs needs a separate report solely on themselves focusing on their individual and equal rights along with the discriminations they face.⁹⁹ Although the suggestion seems very well established but carrying out a special report completely based on

⁹⁷“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.....On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).” Jose R Martínez Cobo, *Study of the Problem of Discriminations against Indigenous Populations*, paras 379-381, U.N. ESCOR, U.N. Sub Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN. 4/Sub. 2/1986/7/Add. 4

⁹⁸[Minde] *supra* note 11 at 53

⁹⁹*Ibid* at 54.

indigenous study faced its struggle in the Human Rights Commission. This struggle was overcome by the honest involvement of Willemsen Diaz. In 1971, Jose R Martínez Cobo was given the responsibility to study and prepare the report. Diaz provided the preliminary reports to the Sub-Commission. He had also foreseen that there would be difficulty in obtaining information from the States by sending those lists of questions.¹⁰⁰ He then suggested that the indigenous peoples of the world should come under one special working group for indigenous peoples¹⁰¹ He realized it would open the door for various indigenous peoples and restrain the UN from being paternalistic towards them.¹⁰² The *Cobo* report was published in 1986 and has been much criticized later. But, the *Cobo* report has always argued against a strict definition and emphasized the aspects of positions, relations, and identity.¹⁰³

b. Effects of the Dilemma on Definition

The representative of the indigenous peoples opposed a global definition in the UNDRIP because of the diverse characteristics of indigenous peoples. Instead, they wanted an explicit right of self-identification. It is to be noted that the IPs of India also oppose the term *Adivasi* as it has a controversial meaning and often used as a political underpinning of exclusion.¹⁰⁴ Hence, defining *Adivasis* (indigenous) have always been opposed on the ground of exclusion. It was also argued that there should be a proper distinction between indigenous and ethnic minorities which needs to be dealt in another forum rather than UNWGIP.¹⁰⁵

Taking the advantage of the absence of a definition some Asian countries are denying the *Adivasis* their status. Their contention is that the UNDRIP does not make it clear to whom the Declaration

¹⁰⁰*Ibid* at 55.

¹⁰¹*Ibid*.

¹⁰²*Ibid* at 56.

¹⁰³*Ibid* at 58.

¹⁰⁴J.J. Roy Burman, "Adivasi: A Contentious Term to denote Tribes as Indigenous peoples of India", *Mainstream Weekly*, 32 (25 July, 2009) online: <www.mainstreamweekly.net/article1537.html> [Burman].

¹⁰⁵[Erni] *supra* note 93 at 6.

is applicable. The concept of the indigenous population was associated with colonialism and aggression by foreign nations and powers.¹⁰⁶ In Bangladesh, existence of people living in the CHT zone who have a distinctive culture, legal system, and self-identifying traits can be traced back to the Mughal period.¹⁰⁷ Therefore, coming back to the colonial regime it was indeed the time when settlers had already started to settle down in the CHT region alongside the *Adivasis*.

However, the GoB by taking this particular dilemma advantageously violating the human rights of the *Adivasis* of Bangladesh. The UN human rights committee gave its concluding remarks on ICCPR stating that there is: “A lack of legal recognition of indigenous peoples, reported discrimination and restrictions on the civil and political rights of indigenous peoples, particularly in relation to land rights and participation in political and decision-making processes” and also states its particular concern on sexual violence against indigenous women related to land grabbing in the Chittagong Hill Tracts.¹⁰⁸ The GoB argues that no ethnic group can claim to be “indigenous” in Bangladesh in the sense that the term has been employed to the Aborigines in Australia or pre-settlers before the invaders in Latin, Central, and North America.¹⁰⁹ The dilemma of the international community leads the GoB to exploit the lacunae of the definition and deny the recognition of the *Adivasis*. The *Adivasis* of Bangladesh remain unrecognized by the state to date.

II. Part-II: Defining *Adivasi*

The term indigenous peoples was first used to distinguish between the colonial power and people living/governed under the colonial power in the 19th century.¹¹⁰ It was first officially used in the Covenant of the League of Nations. The term ‘indigenous’ is derived from Latin word *indigena*

¹⁰⁶*Ibid.*

¹⁰⁷ See Chapter 2

¹⁰⁸ *Concluding observations on the initial report of Bangladesh*, UNHRCOR, 3363rd meeting, CCPR/C/BGD/CO/1, (2017) 1 at 3 & 4.

¹⁰⁹ Barrister Harun ur Rashid, *Do Indigenous peoples live in Bangladesh? Arguments For and Against*, online: <http://www.sydnevbashi-bangla.com/Articles/HarunRashid_Indigenous%20People--Bangla.pdf>

¹¹⁰ [Standard] *supra* note 87 at para 12.

meaning a person who was born in a particular place (a native).¹¹¹ It refers broadly to the descendants of the inhabitants who had been living on the land before any invasion and is now dominated by others.¹¹² Thus the original meaning implies the concept of priority in time.¹¹³ Also, the traits of indigenous peoples include culturally distinct groups who are ruled by other settler societies born of forces of empire and conquest.¹¹⁴ The ILO Convention No. 107 of 1951 put the indigenous and tribal people in the same class (by saying ‘indigenous and other tribal’ the Convention 107 included indigenous peoples as tribal). Now, the term “tribal peoples” has become inclusive in “indigenous peoples” and the two terms are used synonymously.¹¹⁵ However, it is often argued that the definition of indigenous peoples given by the IWGIA is European biased because it states that people who are living in colonized countries before colonization but at present do not belong to the dominant class of the society are the indigenous peoples.¹¹⁶

On the other hand, the word *Adivasi* is a Hindi term that literally means (descendants of the) ‘original inhabitants’ of a given place.¹¹⁷ The term is also commonly used in Bangla as a translation of indigenous peoples.

a. What the word ‘*Adivasi*’ Echoes?

The word *Adivasi* comes from modern Sanskrit ādivāsī where ādi means ‘the beginning’ and vāsin means ‘inhabitant’.¹¹⁸ Thus prioritizing the time, and not the origin, it refers to the earliest

¹¹¹ English Oxford Living Dictionaries, *sub verbo* “indigenous” online: <https://en.oxforddictionaries.com/definition/indigenous>

¹¹² S. James Anaya, *Indigenous peoples’ in International Law*, 2nd ed (Oxford; New York: Oxford University Press, 2004) at 3. [Anaya]

¹¹³ [Erni] *supra* note 93 at 8.

¹¹⁴ [Anaya] *supra* note 112 at 3.

¹¹⁵ [Erni] *supra* note 93 at 11.

¹¹⁶ [Burman] *supra* note 104.

¹¹⁷ Daniel J. Rycroft & Sangeeta Dasgupta, “Indigenous Pasts and the Politics of Belonging” in Daniel J. Rycroft & Sangeeta Dasgupta, eds, *The Politics of Belongingness of Becoming Adivasi* (OXON; New York: Routledge, 2011) 1 at 1.

¹¹⁸ *The New Shorter Oxford English Dictionary on Historical Principles*, 4th ed, *sub verbo* “adivasi”.

inhabitants of a place. The term came from Chhotanagpur, India in the 1930's and is usually used to refer to the indigenous peoples of India but not limited to any geographical or political boundaries.¹¹⁹ For some scholars, it is, in fact Christian missionaries who produced the term *Adivasi*.¹²⁰ Bangladesh also has its *Adivasis*.¹²¹ The plain lands, as well as the Chittagong Hill Tracts, bears the *Adivasis* of Bangladesh.¹²² The term has never been officially used in any of the legislations of Bangladesh and the Government of Bangladesh (GoB) has refused to use it after the 15th amendment of the Constitution in 2011. It is to be noted that the *Adivasis* of Bangladesh are not cosmopolitically oriented with the majority Bengali population rather they have their own distinct culture, legal system, and tradition. Scrutinizing the history of *Adivasis* in Bangladesh it has been established that it is the *Adivasis* who are living there from the beginning that connotes the term *Adivasi*.

b. Significance of the Term

The right to self-determination is regarded as *jus cogens* under the international law. However, for indigenous peoples, it does not necessarily mean secession from the State. Rather it is self-identification of an individual and acceptance by a group. The indigenous peoples of Bangladesh identify themselves as *Adivasis* instead of ethnic minorities. This term should be taken into account because it is they who identifies themselves as *Adivasis* which denotes to the peremptory norm of international law. Moreover, they fulfill all the criteria of being an *Adivasi* as per the working group definition.

¹¹⁹ David Hardiman, *The Coming of the Devi: Adivasi Assertion in Western India* (Delhi; Oxford: Oxford University Press, 1987), at 13.

¹²⁰ Alpa Shah, *In the Shadows of the State: Indigenous Politics, Environmentalism, and Insurgency in Jharkhand, India*, (Durham, NC: Duke University Press, 2010) at 15. [Shah]

¹²¹[Minority] *supra* note 37.

¹²² See Chapter 2.

The GoB specifically denies the existence of *Adivasis* in Bangladesh. The Foreign Ministry is rather vehement in using the term *Khudro Nritattik Jonogoshthi* (Ethnic Minority) instead of *Adivasis* for CHT inhabitants.¹²³ It is argued if they get the recognition as indigenous peoples, they will get various safeguards by various international laws which will go against the interest of Bangladesh.¹²⁴ Bangladesh is also bound by the peremptory norms of the international law. By imposing the term ethnic minority, the GoB is taking away the right to self-determination of the people if not the *Adivasis*. Giving them the right to identify themselves as *Adivasis* will also uphold their right to self-determination which is ensured by all the core human rights document.¹²⁵ If they are denoted as *Adivasis* their cultural rights will be protected. The General Comment No. 21 of the UN Committee on Economic, Social and Cultural Rights also provided for free, prior and informed consent for the IPs in all matters covered by their specific rights, precisely land rights.¹²⁶

III. Part-III: Non-recognition of the ‘*Adivasis*’

The GoB has always been referring to the *Adivasis* as tribal, *upajatis* (sub-nation) and ethnic minorities. Although, there was no mention of the term *Adivasi* in any of the legal documents but there was no exclusion of the term either. The explicit denial from the Government came in 2011. The 15th amendment of the Constitution of Bangladesh has laid down the legal foundation of Government’s non-recognition of *Adivasis*. This part has dealt with the non-recognition of *Adivasis* and the imposition of *Bangalee* nationalism on the *Adivasis* by the GoB.

a. Constitutional Non-recognition

¹²³[Diplomatic] *supra* note 66.

¹²⁴CHT News Update, *The term ‘Adivasi’ (“indigenous”) to be removed from all the governmental documents*, 21 August 2011, online: <<http://chtnewsupdate.blogspot.ca/2011/08/term-adivasi-to-be-removed-from-all.html>>

¹²⁵See UN Charter, ICCPR and ICESCR, Common Article 1: Right to self-determination.

¹²⁶ *General Comment No. 21*, CESCR 43rd Session E/C.12/GC/21 (2009) E/C.12/GC/21, 9 & 10

The Constitution of the People's Republic of Bangladesh is the highest authority of the country. It states that the Constitution is the supreme law of the country and any law inconsistent with it shall be void to the extent of its inconsistency.¹²⁷ Therefore, any provision inscribed in the Constitution is the highest authority regardless of any contradictory provisions existing in any other law. The Parliament of Bangladesh has the authority to amend the provisions of the Constitution. Exercising this power the Parliament amended the Constitution in 2011 and inserted the following provision:

“The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities.”¹²⁸

By this, the GoB gave official recognition to the minor races, ethnic sect, and communities instead of the *Adivasis*. It is to be noted in 2014 the Press Information Department (PID) of Bangladesh issued a press release stating “University teachers, experts, newspaper editors and members of the civil society are hereby requested to remain careful in avoiding the term “*Adivasi*” (Indigenous) at discussions and talk-shows on International Day of the World's Indigenous peoples.”¹²⁹ Previously Bangladesh's Ministry of Local Government and Rural Development (MoLGRD) had initiated a campaign through electronic and print media of establishing the non-existence of *Adivasis* by issuing a directive to the deputy commissioner.¹³⁰ Therefore, the GoB is actively denying the existence of the *Adivasis* and non-inclusion of the term in the Constitution appears to be the first step. Since the birth of Bangladesh, the hue and cry of the *Adivasis* to get recognition as an *Adivasi* were cut off under the hegemonic terminology used by the supreme law of the country.

b. Bangalee Nationalism and the ‘*Adivasis*’

¹²⁷[Constitution] *supra* note 3 art 7.

¹²⁸*Ibid* at art 23A: “The culture of tribes, minor races, ethnic sects and communities”.

¹²⁹Rokeya Chowdhury, “Adivasi’ Denialism in Bangladesh”, *Dhaka Tribune* (21 August 2014) online: <archive.dhakatribune.com/juris/2014/aug/21/%E2%80%98adivasi%E2%80%99-denialism-bangladesh>.

¹³⁰ Asia Indigenous Peoples's Pact, *BANGLADESH: Local Government Ministry launches “no adivasi” campaign* (17 April 2012) online: <<https://aippnet.org/bangladesh-local-government-ministry-launches-qno-adivasiq-campaign/>>.

The *Adivasis* of Bangladesh have been the part of the country since ancient time. But, the 15th Amendment of the Constitution has failed to ensure the equality for the *Adivasis* of Bangladesh. They are not identified as an *Adivasi*. Rather they are ruled under the *Bangalee* nationalism. The Constitution states:

“The unity and solidarity of the Bangalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of Bangalee nationalism.”¹³¹

The principle of nationalism is imposed upon the *Adivasis* because it is one of the Fundamental Principles of State Policy and is fundamental in the governance of the State.¹³² The Constitution further states that:

“The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens...”¹³³

Therefore, the imposition of the *Bangalee* nationalism takes away the right of self-identification of the *Adivasis* of Bangladesh. Considering the CHT *Adivasis*- the *Jumma* people- it is more crucial as they have a separate sense of nationalism of their own. Their self-identification is based on their name ‘*Jumma*’ which comes from the land cultivation system *Jhum*. They identify and differentiate themselves from the *Bangalees* and the *Adivasis* of the plains with a separate culture, their relation to the land, their distinctive characteristics and the shared history of oppression.¹³⁴ Although, the *Jumma* nationalism having its own hegemonic notions (i.e.: *Jumma* being a Chakma word excludes other *Adivasis*: Marma, Tripura etc.) it brings all the CHT *Adivasis* under one umbrella term. This could be the first step towards realizing the rights of the *Adivasis* if they are recognized under one term. Under the *Bangalee* nationalism the *Adivasis* distinct culture, legal

¹³¹[Constitution] *supra* note 3, art 9: “Nationalism”.

¹³²*Ibid* at art 8(1).

¹³³*Ibid* at, art 8(2).

¹³⁴ [Mohsin Identity] *supra* note 45 at 80-82

system, and heritage lose protection which is less probable if they are recognized under the term *Jumma*.

c. Ethnic Minorities and the ‘*Adivasis*’

The GoB has termed the *Adivasis* as ethnic minorities. The Constitution states that the State will take steps to protect their unique local culture and tradition.¹³⁵ The definition of minority needs to be explored to determine if ‘ethnic minority’ is an appropriate term to use for the *Adivasis* of Bangladesh. The Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities *Francesco Capotorti* offered a definition for the minority which is as follows:

“A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”¹³⁶

The definition implies that ethnicity consists of language, culture, religion, and tradition, precisely of culture. As per Article 27 of the International Covenant on Civil and Political Rights the minorities are protected to enjoy cultural, religious and linguistic rights.¹³⁷ The *Adivasis* of Bangladesh have a distinct culture, religion, and language. Therefore, they are protected under the minority provision of the ICCPR only regarding these rights (has been further discussed in the next chapter). But according to this provision and according to Article 23A of the Constitution, the GoB fails to protect the civil, political, and land rights and to ensure equality and justice for the *Adivasis*

¹³⁵ [Constitution] *supra* note 3 art 23A.

¹³⁶The Office of the United Nations High Commissioner for Human Rights (OHCHR), *Minorities under International Law: Who Are Minorities under International Law?* online: <www.ohchr.org/EN/Issues/Minorities/Pages/internationalaw.aspx>

¹³⁷International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 art 27 (entered into force 23 March 1976, accession by Bangladesh 6 September 2000) [ICCPR]: “In those States in which ethnic, religious or linguistic minorities exist, 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 practise their own religion, or to use their own language.” [ICCPR].

because *Adivasis* have their own legal, administrative and land governing system which the GoB does not recognize. However, if the *Adivasis* are considered as ethnic minorities the State again fails to protect and promote their cultural and traditional rights. This particular protection is enshrined in Part-II of the Constitution which are not judicially enforceable (further discussed in Chapter 4).¹³⁸

B. Conclusion

It is evident that there are *Adivasis* in Bangladesh with their distinctive traits. But the hegemony of the terms used both internationally and nationally has created a wide scope to deny their existence and thus is denied. The *Adivasis* belonging to the minority groups face oppression under the name of development by the State to which they belong. The lack of definition for the *Adivasis* has made the way easier to foster issue of non-recognition which results to injustice. Hence, it is indispensable to come up with a legal definition of *Adivasis* from a global perspective in the national frameworks. The next chapter deals with Bangladesh's national and international obligation for ensuring the rights of the *Adivasis* both as indigenous and as the backward society. Also, it analyzes whether the rights given to the backward society are adequate for the *Adivasis* or not.

¹³⁸[Constitution] *supra* note 3 art 8(2): "The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall *not be judicially enforceable*." Has been emphasized on Chapter 4.

CHAPTER FOUR

TESTING THE RIGHTS OF THE ETHNIC MINORITIES/BACKWARD SOCIETY IN BANGLADESH IN ADDRESSING THE RIGHTS OF INDIGENOUS PEOPLES: WHERE DO THE RIGHTS FAIL?

“Joli no udhim kittei?” (Why shall I not resist! Can they do as they please-)¹³⁹

A. Introduction

The story of oppression on the *Adivasis* in Bangladesh continues in State legislations. The Government of Bangladesh (GoB) has enacted and ratified a number of national legislations and international instruments regarding the protection of the rights of indigenous peoples i.e.: *Adivasis*. Still, it falls short to protect the *Adivasis*.

This chapter deals with Bangladesh’s international obligation to realize the rights of the *Adivasis*. Also, the rights of the *Adivasis* under the national frameworks have been discussed. I have also analyzed whether the rights that are given to the backward section and ethnic minorities in Bangladesh are adequate for the *Adivasis* or not, as they are termed as ethnic minorities by the GoB.

The first two parts of this chapter is about the protections given to the *Adivasis* under legal frameworks both nationally and internationally. The last part analyzes where Bangladesh fails to

¹³⁹Poem written by Kabita Chakma and translated by Meghna Guhuthakurta, CHT-jummaland, “Joli No Udhim Kittei! (Why Shall I not Resist!)” (11 June 2016), posted on *CHT-jummaland*, online:
<https://www.facebook.com/permalink.php?id=327524104096965&story_fbid=542996799216360>

ensure the rights of the *Adivasis*. My focus is on the rights that are not given and not protected under these frameworks rather than the rights ensured.

I. Part-I: Rights Ensured under the National Frameworks

Bangladesh has safeguarded minorities under various national frameworks including Constitutional protections. In this part I have discussed the rights given to the minorities, ethnic minorities, backward sections and the *Adivasis* (if any) provided under these frameworks. I have discussed where these frameworks fail to protect the *Adivasis* right.

a. Constitutional Rights

The Constitution of the People's Republic of Bangladesh protects the rights of the minorities, ethnic minorities, and the backward sections.¹⁴⁰ The *Adivasis* also enjoy these rights under the generic term of "Backward Section".¹⁴¹ Article 14 of the Constitution states that:

"It shall be a fundamental responsibility of the State to emancipate the toiling masses the peasants and workers and backward sections of the people from all forms of exploitation."¹⁴²

As per this provision, the State has a fundamental responsibility towards the toiling masses of the backward section to free them from any kinds of exploitation. Again, the irony is that this provision belongs to the second part of the Constitution which is not judicially enforceable. Article 19 of the Constitution of the People's Republic of Bangladesh, that ensures equality of opportunity for all citizens is also enshrined in Part-II of the Constitution.¹⁴³ It is to be noted that there is no distinction

¹⁴⁰[Constitution] *supra* note 3 art Article 14, 19, 23A, 27, 28 & 29 most significantly.

¹⁴¹Raja Devasish Roy, *The ILO Convention on Indigenous and Tribal Populations, 1957 (No. 107) and the Laws of Bangladesh: A comparative Review*, (Bangladesh: International Labour Organization, 2009) at 33 online: <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.628.9026&rep=rep1&type=pdf>> [Roy Comparative]

¹⁴²[Constitution] *supra* note 3 art 14" "Emancipation of peasants and workers".

¹⁴³*Ibid* at art 19: "Equality of Opportunity: "(1) The State shall endeavour to ensure equality of opportunity to all citizens.

(2) The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.

(3)The State Shall endeavour to ensure equality of opportunity and participation of women in all spheres of national life."

made between race and religion in these two provisions. The protection given to the tribes, minor races, ethnic sects, and communities are enshrined in Article 23A of the Constitution which belongs to the second part as well.¹⁴⁴ In this provision, no distinction has been made based on religion. The *Adivasis* suffer the most on the basis of discrimination on race and religion.¹⁴⁵ The GoB has failed to protect the *Adivasis* right as a fundamental principle of State policy (Part-II of the Constitution of the People's Republic of Bangladesh). Although it is judicially unenforceable the Constitution states that the principles set out in this part will be fundamental to the governance of Bangladesh.¹⁴⁶ The effect of this has been elaborated in the latter part of this chapter.

The third part of the Constitution of the People's Republic of Bangladesh contains the fundamental rights of the citizens which are judicially enforceable. Among them, Article 27, 28 and 29 are the rights given to the backward sections of the society. Article 27 of the Constitution enumerates equality before the law which states:

“All citizens are equal before law and are entitled to equal protection of law.”¹⁴⁷

This equality clause refers to equal protection of the law that protects people belonging to the same group. It refers to the equality among the equals and equal protection of law means people in similar circumstances to be treated equally.¹⁴⁸ Hence, the *Adivasis* are protected or treated equally among the backward section of the society not among all other citizens (the majority *Bangalee* population) of the country.

¹⁴⁴ [Constitution] *supra* note 3 art 23A: “The culture of tribes, minor races, ethnic sects and communities: The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities.”

¹⁴⁵ [Roy Comparative] *supra* note 141 at 33

¹⁴⁶ [Constitution] *supra* note 3 art 8(2): “Fundamental Principles: The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable.”

¹⁴⁷ *Ibid* at art 27: “Equality Before Law”

¹⁴⁸ Faizunnessa Taru, “Application of Fundamental Rights of Bangladesh Constitution: An Analysis on the Light of International Human Rights Instruments” (2016) 46 Journal of Law, Policy and Globalization 40 at 41, online: <<http://www.iiste.org/Journals/index.php/JLPG/article/viewFile/29003/29767>>

Article 28 of the Constitution provides protection against discrimination on the ground of religion.¹⁴⁹ It states affirmative actions or positive discrimination to be taken for women, children or the ‘backward section’ of citizens. Some people have strongly argued that Article 28(4) of the Constitution of Bangladesh actually protects the rights of the *Adivasis*.¹⁵⁰ Again, this affirmative action is for the ‘backward section’ of the country not for the *Adivasis* and not as an equal right given to all citizens.

Finally, Article 29 of the Constitution provides for equality of opportunity for public employment.¹⁵¹ The provision ensures affirmative action for the backward section and non-discrimination based on religion, race, caste, sex or place of birth in case of public employment. It again falls short to protect the rights of the *Adivasis*. The provision provides for positive discrimination for the ‘backward society’ and even after considering the *Adivasis* as a part of backward society this provision does not pass the acid test of non-discrimination. In the policy making process of Bangladesh, there is no specific provision reserving the seats in the Parliament for the *Adivasis*. And in the civil service of Bangladesh, only 5% Quota is reserved for the Tribal

¹⁴⁹[Constitution] *supra* note 3 art 28: “Discrimination on grounds of religion, etc: (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and of public life.

(3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.

(4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.”

¹⁵⁰ Muhammad Rezaur Rahman, “How Long the Dream of Equality Will Remain in Abeyance”, *The Daily Star* (19 January 2013) online: <www.thedailystar.net/law/2013/01/03/equality.htm>.

¹⁵¹ [Constitution] *supra* note 3 art 29: “Equality of Opportunity in Public Employment: (1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

(2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.

(3) Nothing in this article shall prevent the State from –

(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;

(b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination;

(c) reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.”

people of Bangladesh.¹⁵² There is no official comprehensive list provided by the GoB stating who belongs to the tribal community in Bangladesh.

b. Statutory Rights

Bangladesh has enacted a significant number of laws regarding the *Adivasis* administration both for CHT and plain land *Adivasis*. The number of laws for the CHT *Adivasis* is bigger than the plain land *Adivasis*. Few of these laws recognize the *Adivasis* customs regarding the ownership and use of lands and natural resources. Among the laws for the CHT region the most significant are:

1. The Chittagong Hill Tracts Frontier Police Regulation, 1881 (Regulation No. III of 1881);
2. The Chittagong Hill Tracts Regulation, 1900 (Act No. I of 1900);
3. The Chittagong Hill Tracts Headman Manual, 1936;
4. The Chittagong Hill Tracts Bazar Fund Manual, 1937;
5. The Chittagong Hill Tracts (Land Acquisition) Regulation, 1958 (Regulation No. 1 of 1958) ;
6. The Chittagong Hill Tracts Forest Transit Rules, 1973;
7. The Chittagong Hill Tracts Development Board Ordinance, 1976 (Ordinance No. LXXVII of 1976);
8. The Hill District Local Government Council Acts, 1989 (now Hill District Council Acts);
9. The Rangamati Hill District Council Act, 1989 (Act No. XIX of 1989);
10. The Bandarban Hill District Council Act, 1989 (Act No. XXI of 1989);
11. The Khagrachari Hill District Council Act, 1989 (Act No. XX of 1989);
12. The Chittagong Hill Tracts Regional Council Act, 1998 (Act No. XII of 1998);
13. The Chittagong Hill Tracts Peace Accord, 1997;
14. The Chittagong Hill Tracts Land Dispute Resolution Commission Act, 2001 (Act No. LIII of 2001);
15. The Chittagong Hill Tracts Regulation (Amendment) Act, 2003 (Act No. XXXVIII of 2003); and
16. The Chittagong Hill Districts (Laws Repeal and Special Provision) Act 1989 (Act No XVI of 1989)

The irony of these Statutes is, all of these were specifically enacted for the *Adivasis* since British colonial period, but, none of the Statutes recognize *Adivasi* or has the word indigenous inscribed in it. All these Acts were meant for the *Adivasis* residing in the CHT region. The CHT Regional Council Acts specifically state that CHT regions (Bandarban, Khagrachhari, and Rangamti) are

¹⁵² UNB, “PSC for Quotas throughout BCS Exams”, *Prothom Alo*, (8 March 2016) online: <en.prothom-alo.com/bangladesh/news/97419/PSC-for-quotas-throughout-BCS-exam>

inhabited by backward tribal (*Upajati* meaning sub-nation) people. The CHT Regulation, 1900 scrutinizes and determines the limit and nature of the application of other laws in the CHT region. The following legal frameworks are applicable for all the *Adivasis* either from plain land or from the CHT:

1. The State Acquisition & Tenancy Act, 1950 (Act No. XXVIII of 1950)
2. The Forest Act, 1927 (Act No. XVI of 1927)
3. The Narcotics Control Act, 1990; (Act No. XX of 1990)
4. Social Forestry Rules, 2004;
5. The National Human Rights Commission Act, 2009 (Act No. LIII of 2009)
6. The Small Ethnic Minority Cultural Institution Act, 2010 (Act No. XXIII of 2010); and
7. The Wildlife (Conservation and Security) Act, 2012(Act No. XXX of 2012)

It is to be noted that none of these Statutes give recognition to the *Adivasis* and rights related to the recognition as well. The Statutes neither provide an exhaustive list of tribal people (the GoB prefers to address *Adivasis* as such) nor there are any indication regarding the identification of the *Adivasis*.

c. The Chittagong Hill Tracts (CHT) Peace Accord, 1997

The CHT Peace Accord was signed between the GoB and the Parbattya Chattagram Jana Samhati Samiti (PCJSS) on December 02, 1997. The Accord is one of the most non-discussed and non-participatory Agreement, as, it was not discussed or debated by *Bangalees* or *Adivasis* before signature. Consequently, there remains a number of lacunae which actually infringes the rights of the *Adivasis*. Many of the weaknesses of this Accord could have been avoided if the process of signing the Accord had been participatory.¹⁵³

The CHTPA has four main parts namely: General, Chittagong Hill Tracts Local Government Council/Hill District Council, Chittagong Hill Tracts Regional Council and Rehabilitation,

¹⁵³ [Mohsin] *supra* note 36 at 15.

General Amnesty and Other Matters, consisting of total 72 clauses.¹⁵⁴ The first part recognizes the CHT as a tribal inhabited area and provides for legal framework and composition of a committee to supervise the implementation of the Accord. Again, the failure to think ahead and using the term ‘tribal’ created the scope of non-recognition of *Adivasis*. As a matter of fact, as the Peace Accord was signed by the *Adivasi* representatives there is a wide scope for the GoB to argue that it reflects their concern to be identified as ‘tribal’, not *Adivasis*.

The second part provides for legal amendments to strengthen the existing powers of the district councils and to extend their jurisdiction to include new subject along with the settlement of land disputes.¹⁵⁵ In this part, it was agreed that the term *upajati* (sub-nation) will be in force.¹⁵⁶ Again, the plights of the *Adivasis* for recognition remains unaddressed by the leaders of PCJSS.

The third part provides for a regional council including the three CHT areas and further provides for the chairperson and two-third council members to be indigenous both in regional and districts councils.¹⁵⁷

The fourth part provides for repatriation of international refugees, rehabilitation of *Adivasi* refugees, survey of lands and record ownership, forming land commission, providing quota for tribals, surrender of arms by the PCJSS members, withdrawal of temporary camps of military, Ansar and Village Defence Party, establishment of the Ministry of the Chittagong Hill Tracts Affairs.¹⁵⁸

¹⁵⁴ The Chittagong Hill Tracts Peace Accord, 1997, signed between PCJSS and the GoB on 02 December 1997.

¹⁵⁵ *Study on the status of implementation of the Chittagong Hill Tracts Accord of 1997*, UNECOSOCOR, 10th Session, Item 7 of the Provisional Agenda E/C.19/2011/6 (2011) at para 18, online: <www.iwgia.org/iwgia_files_news_files/0307_CHT_Accord_Study_Final.pdf> [Study]

¹⁵⁶ The CHT Peace Accord, 1997, Part B, Clause 1. [CHTPA]

¹⁵⁷ *Ibid* Part C.

¹⁵⁸ *Ibid* Part D.

It is to be noted that no time frame was agreed upon to implement these clauses. Although, the Accord states a time limit to be determined regarding the withdrawal of military camps from the CHT but it has still not been agreed upon.¹⁵⁹

The initial State Party Report on ICCPR submitted by Bangladesh states that 48 out of the 72 clauses of the Accord have been implemented, while 15 have been partially implemented and 9 remain under the process of implementation.¹⁶⁰ The UN human rights committee has raised its concern in the concluding remarks on ICCPR.¹⁶¹

It has been reported that there is a continued migration of non-indigenous peoples going on from the plains to the CHT region. The land grabbing is still in existence. Even the voter list includes the *Bangalee* settler community as an inhabitant of the CHT region. State sponsored violation and militarization are going on more than ever.¹⁶² The practical scenario on the CHT regions has been discussed in the next chapter.

II. Part-II: Rights Given to the *Adivasis* under International Instruments

Bangladesh among other countries has signed a substantial number of international instruments. The human rights instruments among the United Nation's Conventions that are signed by Bangladesh play a key role to protect the rights of *Adivasis*. Although the rights are protected in

¹⁵⁹*Ibid* Part D, Clause 17: "After signing the agreement between the government and the Jana Samhati Samiti and immediately after the return of the JSS members to normal life all the temporary camps of military, Ansar and Village Defence Party shall be taken back to permanent installations except the Border Security Force (BDR) and permanent cantonments (3 at the 3 District Hqs. and Alikadam, Ruma and Dighinala) by phases and with this in view, time limit shall be determined. In case of deterioration of law and order situation, natural calamity and such other works the army can be deployed under the civil administration like all other parts in the country as per necessary laws and rules. In this case, Regional Council may, according to necessity or time, request the proper authority for the purpose of getting assistance."

¹⁶⁰*Consideration of reports submitted by States parties under Article 40 of the Covenant Initial reports of States parties due in 2001, Bangladesh*, UNHRCOR, 2015, CCPR/C/BGD/1 (2015) 1 at 52, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/198/21/PDF/G1519821.pdf?OpenElement>>

¹⁶¹*Supra note 109: Concluding observations on the initial report of Bangladesh*, UNHRCOR, 3363rd meeting, CCPR/C/BGD/CO/1, (2017) 1 at 3 & 4.

¹⁶²[Study] *supra note* 155 at para 46.

the international instrument Bangladesh is unwilling and sometimes unable to protect and preserve the rights of the *Adivasis*. In this part, at first, I have shown the number of instruments that are related to the *Adivasis* rights ratified by the GoB. Then the lacunae in those instruments which also imply the reasons behind the GoB's failure to implement these instruments for the *Adivasis* has been discussed.

a. Ratified International Instruments

Bangladesh is a signatory to the core human rights documents. Also, Bangladesh has signed a number of instruments provided by different UN agencies and organizations. The following are the international human rights instruments that are ratified by the GoB:

1. The Universal Declaration of Human Rights, 1948, (UDHR);
2. The Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, 1957 (ILO Convention No. 107 on Indigenous and Tribal Populations);
3. The International Convention on the Elimination of All Forms of Racial Discrimination, 1965, (ICERD);
4. The International Covenant on Civil & Political Rights, 1966, (ICCPR);
5. The International Covenant on Economic, Social and Cultural Rights, 1966, (ICESCR);
6. The Convention on the Elimination of All Forms of Discrimination against Women, 1979, (CEDAW);
7. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, (UNCAT/CAT);
8. The Convention on the Rights of the Child, 1989 (CRC); and
9. The Convention on Biological Diversity, 1992, (CBD).

b. The Lacunae of the Instruments

The ILO Convention No. 107 is still valid for the countries which did not ratify the ILO Convention No.169 but ratified the former one.¹⁶³ The ILO Convention No. 107 does not make any distinction between the indigenous, tribal and semi-tribal people. Moreover, it provides a strong integrational concept of indigenous peoples and termed them as the tribal and semi tribal who are at 'a less

¹⁶³ [Roy Comparative] *supra* note 141 at 1

advanced stage'.¹⁶⁴ Again the less advanced stage refers to the *backward section of the society*. The way that ILO Convention No. 107 adopted to bring the *Adivasis* along the mainstream population was integration and assimilation.¹⁶⁵ The exact same hegemonic approach we can observe in the Constitution of Bangladesh. The Constitution provides for one nationalism and includes the integration and assimilation policy under *Bangalee* nationalism. In this regard, GoB has a strong contention that the national legislations are in conformity with the international frameworks.

The GoB has enacted a number of laws protecting the rights of the *Adivasis* (tribal or Upajati-sub-nation) in conformity with the ILO Convention No. 107.¹⁶⁶ The main purpose of the Convention was to integrate the backward tribal society with the mainstream population and it was a hugely debated topic in the international arena resulting in the enactment of the ILO Convention No. 169.

¹⁶⁴The ILO Convention No. 107, art.1:" This Convention applies to--

(a)members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a **less advanced stage** than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b)members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

2.For the purposes of this Convention, the term semi-tribal includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.

3. The indigenous and other tribal or semi-tribal populations mentioned in paragraphs 1 and 2 of this Article are referred to hereinafter as "the populations concerned".

¹⁶⁵*Ibid* art 2: "1. Governments shall have the primary responsibility for developing coordinated and systematic action for the protection of the populations concerned and their **progressive integration** into the life of their respective countries.

2. Such action shall include measures for--

(a) enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population;

(b) promoting the social, economic and cultural development of these populations and raising their standard of living;

(c) creating possibilities of **national integration** to the exclusion of measures tending towards the artificial assimilation of these populations.

3. The primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative.

4. Recourse to force or coercion as a means of promoting the integration of these populations into the national community shall be excluded."

¹⁶⁶[Roy Comparative] *supra* note 141.

Moreover, the enactment of the UNDRIP shows the international communities concern regarding the *Adivasi* issues.

Considering all these it can be implied that the ILO Convention No. 107 was a temporary solution to the less advantageous position of the *Adivasis*. This was not accepted by the indigenous community as integration is not desired rather self-determination is the main criterion for the indigenous community. Bangladesh is still following the temporary solution that dates back to 60 years from now. In the era of globalization, Bangladesh is falling short to keep up the pace with the international community in respect of the *Adivasis*.

Bangladesh is a party to the ICERD which also provides protection against racial discrimination until the object of the Convention is fulfilled. It clearly states that the special measures for the equal enjoyment and exercise of human rights and fundamental freedoms will not be enforced after the purposes are achieved.¹⁶⁷ The question still remains whether determining human rights and fundamental freedom for ethnic minorities are same as all other citizens or not. If it is same then the *Adivasis* lose their land rights, cultural rights, and traditional justice system rights (some plain land *Adivasis* insignificant in numbers cannot exercise these rights in contrast with the *Bangalees*).¹⁶⁸ By exercising same land rights, cultural rights, and traditional justice system rights the *Adivasis* have to practice like the *Bangalees*. They cannot follow their own distinctive nature of practice. If the human rights and fundamental freedom for ethnic minorities are not the same as *Bangalees* it indirectly gives the *Adivasis* a separate footing to realize their rights. This could be

¹⁶⁷*The International Convention on the Elimination of All Forms of Racial Discrimination*, 1 December 1965, 660 U.N.T.S. 195 art. 1(4) (entered into force 4 January, 1969, accession by Bangladesh 11 June 1979) [CERD]: “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”

¹⁶⁸[Roy Comparative] *supra* note 141 at 26.

as *Adivasis* and provide them more protection, or, they may get lesser protection than the *Bangalees*. However, it all depends on how the GoB wants to deal with the matter.

Article 27 of the ICCPR states that the ethnic minorities will not be denied to practice their culture “in community with the other members of their group”.¹⁶⁹ The expression in community with the other members of the group indicates individual rights whereas, the *Adivasis* rights are collective. It has been addressed by the General Comment No. 23 where it recognizes that Article 27 protects the individual rights but they depend in turn on the ability of the minority group to maintain its culture, language or religion.¹⁷⁰ Moreover, the first part of the provision provides for a State choice stating “In those States in which ethnic, religious or linguistic minorities exist” and creates scope for State denial of *Adivasis* that GoB is expressly taking advantage of. The General Comment No. 23 differs and states that the existences of ethnic, religious or linguistic minority does not depend on the choice of the States but requires to be established by objective criteria.¹⁷¹ Further, the wording of the provision states the minorities of such kind “shall not be denied the right” not expressly recognizing their rights but setting the traces of rights. The General Comment No. 23 again states “Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a “right” and requires that it shall not be denied.”¹⁷² It also states that the State parties contention that they have no minorities solely based on discrimination on grounds of ethnicity, language or religion is wrong.¹⁷³ The Human Rights Committee, has strongly opposed these suggestions and denials and stated that there are rights of minorities which the State has to

¹⁶⁹[ICCPR] supra note 137 art 27: “In those States in which ethnic, religious or linguistic minorities exist, 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 practise their own religion, or to use their own language.”

¹⁷⁰ *General Comment No. 23*, CCPR, 50th Session CCPR/C/21/Rev.1/Add.5, at para 6.2 online: <<http://www.refworld.org/docid/453883fc0.html>>

¹⁷¹ *Ibid* at para 5.2.

¹⁷² *Ibid* at para 6.1.

¹⁷³ *Ibid* at para 4.

recognize.¹⁷⁴ The General Comment No. 23 was adopted at the Fiftieth Session of the Human Rights Committee, on 8 April 1994 and raised these issues. It is evident that the State parties have been using these legal anomalies in order to deny the rights of minorities hence the General Comment No. 23 addressed such issues after 28 years from the adoption of the ICCPR. However, these anomalies are still in existence and the States are interpreting these at their own will, exercising State sovereignty inside its territory. The question still remains can the States do so? If the States cannot do so is there any strong recourse for the international community to make the States bound to follow the Conventions as it was intended to be followed and question the sovereign exercise of power within its own territory? Bangladesh is no different in exercising its sovereign power within the State and the GoB is not protecting the *Adivasis* rights as it should have been protected.

All these debates on the international instruments infer that the rights of the *Adivasis* are facing denial even from the international community from the beginning. The confused idea of international community regarding *Adivasis* (ILO Convention 107), the long-term lobbying for UNDRIP, lack of international pressures on the parties to the United Nations' Permanent Forum on Indigenous Issues (UNPFII) shows the continuous struggle of the *Adivasis* for recognition and protection of their rights. Their plights are more visible in the national legal frameworks which are discussed below.

III. Part-III: Where do the Given Rights in National Legislations Fail?

The GoB has ensured the rights of the Ethnic minorities under the Constitutional framework. The promotion and protection of the backward section's rights are also protected by the Constitution. The rights of the inhabitant of the CHT and the *Adivasis* (*Upajati*'s-sub-nation: Government used

¹⁷⁴*Ibid.*

term) are protected under various legal frameworks of the country. This part has shown that despite having a number of protective frameworks why the *Adivasis* rights are not protected in Bangladesh mostly by discussing the lacunae of the laws.

a. Constitutional Lacunae

The first and foremost lacunae in the Constitution of the People's Republic of Bangladesh is that it does not recognize the *Adivasis* of Bangladesh. Secondly, their rights are protected as ethnic minorities under the Fundamental Principles of State Policy which are judicially non-enforceable.¹⁷⁵ Although judicially non-enforceable the principles set out in the second part of the Constitution are fundamental in the governance of the country. As stated in Article 8 of the Constitution the principles will be the basis of interpreting the Constitution and other laws and will be applied while making laws. Therefore, even though this part is not judicially enforceable it carries more weight as the provisions enshrined in this part are fundamental to the basic governance of the State. However, Article 8(1) lays down the four fundamental principles of State Policies and the first one of those is nationalism.¹⁷⁶ Hence, the predominant nationalism principle takes away the rights of ethnic minorities to self-determination, to exercise their rights among the majority *Bangalee* community.

The fundamental principles place the government under an obligation to achieve and maximize social welfare and the basic values of life.¹⁷⁷ These principles cast an obligation upon the Government to act on them.¹⁷⁸ Although the fundamental principles of State policy are judicially non-enforceable the High Court Division of the Supreme Court of Bangladesh has sometimes

¹⁷⁵ [Constitution] *supra* note 3 Part-II.

¹⁷⁶ *Ibid* at art 8(1): "The principles of nationalism, socialism, democracy and secularism, together with the principles derived from those as set out in this Part, shall constitute the fundamental principles of state policy."

¹⁷⁷ Mahmudul Islam, *Constitutional Law of Bangladesh*, 3rd ed (Dhaka, Bangladesh: Mullick Brothers, 2012), at 74 [Islam]

¹⁷⁸ *Wahab v. Secretary, Ministry of Land*, (1996) 1 MLR 338

ignored the mandate of Article 8(2) of the Constitution by issuing directives in consonance with Article 24 of the Constitution which is a part of the fundamental principles of State policy.¹⁷⁹ This was submitted by Islam that the High Court Division while ignoring the mandate has violated Article 111 of the Constitution which states that the Laws declared by the Appellate Division of the Supreme Court are binding on the High Court Division.¹⁸⁰ In the case of *Kudrat-E-Elahi v. Bangladesh*, the Appellate Division of the Supreme Court of Bangladesh stated that “these principles are for socio-economic development of the country in a peaceful manner, not to be achieved overnight, but gradually”.¹⁸¹ Also, if the Government enacts any law to give effect to the fundamental principles of State policy it shall be immune even if it conflicts with the fundamental rights (Article 47 (1) of the Constitution of Bangladesh).¹⁸² This was enshrined fearing the conflicts between Part-II (Fundamental Principles of State Policy) and Part III (Fundamental Rights) of the Constitution. However, the Indian jurisdiction recognizes fundamental rights and the principles of State policy as supplementary and complementary to each other.¹⁸³ In Bangladesh, this is not so and the fundamental principles of State policy remain judicially unenforceable. Therefore, the only option left for the *Adivasis* to realize their rights is to take the citizenship as Bangladeshi and the nationality as *Bangalee*.¹⁸⁴

Finally, the rights given to the *Adivasis* are given as the backward section of the country. They are treated as the backward society, and so they are not treated as equal to the *Bangalee* majority population. Moreover, the criteria of being backward are not defined anywhere in the Constitution

¹⁷⁹ Human Rights for Peace for Bangladesh v. Bangladesh, (2011) 19 BLT 107, Major-General K M Saifullah v. Bangladesh, (2010) 18 BLT (Special Issue-01) 1.

¹⁸⁰[Islam] *supra* note 177 at 75.

¹⁸¹ (1992) 44 DLR (AD) 319.

¹⁸²[Islam] *supra* note 177 at 77.

¹⁸³ Unni Krisnan v. A. P., AIR 1993 SC 2178, Para 141.

¹⁸⁴[Constitution] *supra* note 3 art 6 (2): “The people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as Bangladeshies”.

nor is it defined in any other legal framework of the country. This again leaves the *Adivasis* in the hegemonic interpretation of the terms that are used to oppress them.

The *Adivasis* are advanced in the case of agriculture, in the case of education they are advanced within their community's teaching, and in the case of medicines, they are advanced using the nature provided treatments.¹⁸⁵ When it comes to participation in the mainstream legislation classifies them as a 'backward society' and does not provide any benchmarks that would allow them to be a part of the forward society. In my view, being a *Bangalee* in an *Adivasi* community is actually backward as they are advanced in their own way.

If we look into the equality clause that protects the rights of the backward section, another debate on the affirmative action can be initiated. The Chittagong Hill Tracts Regional Council Act, 1998 and the three Hill Districts Local Government Council Act as amended in 1998 was amended to provide affirmative action on the basis of positive discrimination for the *Adivasis*. In the case of *Badiuzzaman v. Bangladesh*, the High Court Division of the Supreme Court of Bangladesh held that this notion of preferential treatment contravenes Article 27, 28 (1), 29 (1) and (2) and 31 of the Constitution and endorses discrimination on ground of race (further discussed in the next section).¹⁸⁶ The Court decided that "any piece of legislation in providing for affirmative action on the basis of positive discrimination must at the same time be based on the active discrimination targeting other groups."¹⁸⁷ The Court emphasized the purpose of affirmative action stating that in absence of the benefit of any objective basis or standard the distinction of groups should be avoided.¹⁸⁸ Here, the Judiciary differed based on equality not based on the backward section of the

¹⁸⁵ This is from my personal experience here where I have witnessed their education system, agricultural advancement and applied their medicines whenever it was needed during my time to time visit in the CHT's.

¹⁸⁶ (2010) 15 BLC 531 at 537.

¹⁸⁷ *Badiuzzaman v. Bangladesh* (2010) 15 BLC 531 at 537 [Badiuzzaman].

¹⁸⁸ *Ibid.*

society. Also, the Judiciary has stated that there is a constitutional vacuum for the lack of prescribed procedure, method or mechanism of identification of backward sections of citizens in the Constitution.¹⁸⁹ Article 28 (4) of the Constitution protects the privileges of women, children or backward sections that are not given to others by stating that the GoB can enact legislations regarding this issue. That special law does not violate Article 28 of the Constitution which states non-discrimination on the grounds of religion, race, caste, sex or place of birth.¹⁹⁰ The paradox is that the law can be challenged and struck down under Article 27 of the Constitution on the ground of classification that bears no nexus to the object of the legislation.¹⁹¹ As has been observed in the case of *Badiuzzaman v. Bangladesh* the State cannot take affirmative actions for the *Adivasis* under the backward section of the society in absence of process, method or mechanism of identifying the backward section.¹⁹²

b. Statutory Lacunae

Bangladesh has enacted a number of laws for the protection and promotion of the rights of *Adivasis* both in CHT and in plains. As for the frameworks for the CHT *Adivasis*, there are a number of laws which has incorporated a number of vague provisions. The Chittagong Hill Tracts (Land Acquisition) Regulation, 1958 does not provide any definition of the *Adivasis* and includes all persons who have a claim in the compensation as an interested person.¹⁹³ This is a drawback for the *Adivasis* as it also implies to the non-*Adivasi* settlers.

The Chittagong Hill Tracts Development Board Ordinance, 1976 gives no provision for the *Adivasis* to be a part of the Board members or the Chairman of the Board. The legislation was

¹⁸⁹ *Ibid* at para 49 (c).

¹⁹⁰ [Constitution] *supra* note 3 art 28.

¹⁹¹ [Islam] *supra* note 177 at 211.

¹⁹² [Badiuzzaman] *supra* note 187 at para 49 (c).

¹⁹³ The Chittagong Hill Tracts (Land Acquisition) Regulation, 1958 art 2 (c): ““Person interested” includes all persons claiming an interest in the compensation to be paid on account of the acquisition of land under this Regulation.”

particularly enacted for the development of the CHT region but the participation of the CHT *Adivasis* in the Board is nil. Moreover, all the Board members, Chairman and Vice-Chairman are appointed by the GoB.¹⁹⁴ Also, the provision includes that the acts or proceedings of the Board will not be invalid only on the ground that the Constitution of the Board was defective.¹⁹⁵ The autocracy of the GoB over the CHT region is noticeably reflected by this provision.

The Rangamati, Bandarban and Khagrachhori Hill District Council Acts of 1989 do not define the terms '*Adivasis*' or 'tribal' but state them as "backward tribal people". Also, there is no list provided to determine whom to consider as tribal. The Chittagong Hill Tracts Regional Council Act of 1998 states the Act applies to the backward *upajati* (sub-nation) of the CHT region.

The validity of the Chittagong Hill Tracts Regional Council Act, 1998 (Act of 1998) was challenged by two separate writ petitions. The High Court Division (HCD) of the Supreme Court of Bangladesh declared in the case of *Badiuzzaman v. Bangladesh* the Act of 1998 as unconstitutional and illegal. The reason given for the decision was that the Act of 1998 hampers the basic feature of the Constitution that provides for a unitary character of the State.¹⁹⁶ In the same case the Court held that the Circle Chiefs authority to decide whether a person is tribal or non-tribal contravenes the provisions of Articles 27, 28(1), 29(1) and 31 of the Constitution of

¹⁹⁴The Chittagong Hill Tracts Development Board Ordinance, 1976, s.4: "(1) The Board shall consist of the following members, namely:-

- (a) a Chairman and a Vice-Chairman to be appointed by the Government;
- (b) the Deputy Commissioners of the districts of Chittagong Hill Tracts (Bandarban and Khagrachari), ex-officio;
- (c) four full-time members to be appointed by the Government.

(2) One of the full-time members, to be specified by the Government, shall act as the Secretary of the Board.
(3) Full-time members shall hold office on such terms and conditions as the Government may determine.
(4) The Chairman shall be the Chief executive of the Board.
(5) The Chairman and other members shall perform such functions as the Board may assign to them from time to time or as may be prescribed.
(6) No act or proceedings of the Board shall be invalid merely on the ground of the existence of a vacancy in, or any defect in the constitution of, the Board."

¹⁹⁵*Ibid.*

¹⁹⁶[Badiuzzaman] *supra* note 187 at 535. See: Unrepresented Nations and Peoples Organization, *Chittagong Hill Tracts: Uncertainty Remains About Legality Of Regional Council*, 19 May 2013 online: <unpo.org/article/17153> [Uncertainty]

Bangladesh.¹⁹⁷ The reason given for this was that the Act of 1998 requires a person to be an owner and a permanent resident of the CHT to vote in the local government council election. Denying the right to vote in the CHT by determining his status as a non-tribal (permanent resident) is actually in contravention with the right to vote anywhere in Bangladesh secured to him by the Constitution.¹⁹⁸ Also, some of the provisions of the amended Hill District Councils Acts were challenged and have been declared illegal and unconstitutional.¹⁹⁹ One of the provisions requires *Bangalee* settlers to obtain permanent residency certificates from the relevant traditional indigenous chief in the region. Moreover, the provision restricting a non-*Adivasi* to vote in the council election without having access to a legally entitled land and the provision that reserves class III and class IV positions in the Council for *Adivasis* were declared illegal and unconstitutional.²⁰⁰ It is to be noted, the *Adivasis* were not considered backward and the equality clause (Article 29 of the Constitution of the People's Republic of Bangladesh) came to operate in the matter and was upheld by the HCD without considering the backward section of the society. However, the decision has been stayed by the Appellate Division of the Supreme Court of Bangladesh and the Regional Council is still operating.²⁰¹ The Appellate Division of the Supreme Court of Bangladesh in the Leave to Appeal filed before it from the decision of the High Court Division in the case of *Badiuzzaman v. Bangladesh* ordered to stay the decision. On the issue of right to vote in the local government council the Appellate Division states that the determination of a person's ownership and permanent resident qualifies as the 'property qualification' and

¹⁹⁷ [Badiuzzaman] *supra* note 187 at para 36. *See*: [Islam] *supra* note 177 at 210.

¹⁹⁸ *Ibid* at 567 para 46

¹⁹⁹ [Badiuzzaman] *supra* note 187.

²⁰⁰ [Study] *supra* note 155 at para 32.

²⁰¹ *Bangladesh v. Md. Badiuzzaman and Others*, Civil Petition for Leave to Appeal No. 1847 of 2010, 3 March 2011. [Badiuzzaman Appeal] *See*: [Uncertainty] *supra* note 196.

‘residency qualification’ that is a common practice across democracies and is considered as a legitimate requirement and does not circumscribe a person’s right to franchise.²⁰²

As for the backward section issue the Appellate Division allowed the appeal considering the point that “the High Court Division failed to consider the spirit of the Preamble, articles 9, 11, 14, 28(4) and 29(3) of the Constitution which provides to promote local government, to guarantee the fundamental human rights and freedom and respect for dignity and worth of the human person, to emancipate the toiling masses-the peasants, workers and backward sections of people from all forms of exploitation in the CHT and nothing shall prevent the state from making special provisions in favour of women, children and for advancement of the backward sections of citizens.”²⁰³ The Appeal is still pending before the Appellate Division of the Supreme Court of Bangladesh.

The Wildlife (Protection and Safety) Act, 2012 was enacted without any consultation with the *Adivasi* community and takes away the rights of the *Adivasis* who depend on the forest and wildlife for their living.²⁰⁴ The said Act defines hunting as killing and capturing of animals and collecting eggs of wild birds or reptiles.²⁰⁵ Moreover, the hunting of any wild animals without obtaining a license or permit under the said Act is prohibited.²⁰⁶ By enacting such provisions the GoB has taken away the rights of the *Adivasis* who widely depend on the wildlife and forests for hunting

²⁰² [Badiuzzaman Appeal] *supra* note 201 at para 13 (IV)

²⁰³ *Ibid.*

²⁰⁴ Dr. Dalem Chandra Barman & Mong Sing Neo, eds, *Human Rights Report 2012 on Indigenous peoples in Bangladesh*, (Dhaka: Kapaeeng Foundation, 2012), at 21 online:

<<http://www.indiaenvironmentportal.org.in/files/file/Human%20Rights%20Report%202012%20on%20Indigenous%20Peoples%20in%20Bangladesh.pdf>>

²⁰⁵ The Wildlife (Protection and Safety) Act, 2012, s 2(37): “hunting” means-(a) killing, capturing, poisoning of any wild animal or any attempt to do so; or (b) driving any wildlife for the purpose of sub-clause (a); or (c) injuring or damaging and taking any part of the body of a wild animal or collecting or destroying of nests or eggs of wild birds or reptiles;”

²⁰⁶ *Ibid* at s 6: “Prohibition related to wild animals and plants. (1) No person shall hunt any wild animal without a license or, as the case may be, obtaining a permit under this Act, or willfully pick, uproot, destroy or collect any plant mentioned in Schedule IV. (2) The Government may, by notification in the official Gazette, prohibit hunting of any specified or all wild animals in a specific forest area or throughout Bangladesh for a specific period.”

and *Jhum* cultivation. No distinction has been made under these provisions regarding the *Adivasis* age old lifestyle not even for the tribal, *upajati* or ethnic minorities (as the Government prefers to say so).

However, the Small Ethnic Group Cultural Institutions Act, 2010 states that the small ethnic groups mean *Adivasis* (Indigenous).²⁰⁷ The GoB's vehement denial of the *Adivasis* recognition faces another political interest in this provision. As a citizen of Bangladesh and as an observer of Bangladeshi political party's approaches my view is that this provision keeps the way open for debate on both sides and can be used by the political party as another vain hope for the *Adivasis* when it is needed (maybe at the time of election). The political approach has been emphasized in the next chapter.

B. Conclusion

It becomes easier on part of the State to oppress *Adivasis* when there is legal framework having scopes for violating the *Adivasis* rights. The legislations providing protection to the *Adivasis* give false hopes to the *Adivasis* and carries on violating their rights. This chapter discussed how the national legal frameworks are violating and legalizing the violation of the rights of the *Adivasis*. Also, it showed that the lacunae of the international instruments creating a way for the GoB to abuse the rights of the *Adivasis* under the shadow of those lacunae. The next chapter discusses how the rights are being violated in the CHT regions legally and also Bangladesh's political approach towards the State sponsored violence in the CHT regions.

²⁰⁷[Ethnic] *supra* note 67 s 2(2).

CHAPTER FIVE

BANGLADESH WALKING ON THE WAY OF GENOCIDE: VIOLATION OF HUMAN RIGHTS OF THE ‘ADIVASIS’ OF BANGLADESH

A. Prologue: Context for Analysis

“I am Kalpana Chakma a 23 year old graduate student living in Rangamati. I belong to the *Jumma Adivasi* people. We have been living here for ages. There is a thousand years old tree in front of our house planted by my Great Great Great Great Grandfather. We are very lucky to be nature’s child. At present, it is getting difficult for us to live peacefully in our own land. It is because of the army atrocities that we are facing as a part of their land grabbing plan.

A few days ago a Lieutenant (Lt.) and his troops came to our village and burnt down some of the houses without any reason. Thankfully there was no one inside. There should be an end to this. And I think it will only stop if we speak up.

Today the Lt. came to our village. I demanded answers for their repression on *Jumma* people. Also, I told him that in the name of counter-insurgency they were killing and burning down innocent *Jumma* peoples’ houses. The Lieutenant was dumbstruck and couldn’t give any answer. Maybe, he was not expecting a girl from the *Jumma*’s to be so outspoken and protesting !

I believe in women empowerment. I dream of a society where there will be no discrimination between men and women and no oppression over one class to another. But at first, every oppressed class should be liberated. Only then women can have freedom. I felt that raising my voice in front of the Lieutenant took me a step ahead in my cause.

Two months have passed after the meeting with the Lieutenant. I am feeling very anxious about tomorrow as it is the national Parliamentary election. Maybe this Government will be considerate towards our demands. I hope everything goes well tomorrow. Suddenly I hear someone’s knocking on the door. Some people talking in Bangla ask ‘Who’s inside?’ Before we can open the door they break in. Some army personnel along with some government official in civil clothing are standing there. They are aiming strong flash lights at our faces. They want to talk to my younger brother. After a while, they take me and my elder brother out. We are blind folded and our hands are tied behind. Where are they taking us? –To the Lt.. He wants to talk to us. I am a bit nervous but I realize this is the moment when I have to hold the utmost courage.

They haven’t shown us any arrest warrant. It is clear that they are abducting us ! I hear the army personnel ordered my younger brother to jump into the lake. I hear a splash of water and then hear a gunshot. They are aiming shots at my younger brother. I untied my hands and removed the blindfold as fast as I can. I saw my elder brother also did the same and he started to run. Lucky-both of my brothers were able to escape. I was the only one left with them. What will they do with me? Maybe they will release me after my brothers reach for the law enforcing authority. Or maybe they will rape me or maybe they will kill me. What is my fate? Where do I belong from now on? Am I dead? Or am I a spirit now?

I am Kalpana Chakma a 23-year-old woman activist. I am a fire of hope living in every *Jumma* People’s heart showing them the way to freedom. I know one day we will be free. We will be free as a woman, as an *Adivasi*, as a human being.”²⁰⁸

²⁰⁸ Kalpana Chakma, Organizing Secretary of the Hill Women’s Federation, was a *Jumma* women and *Adivasis* rights activist allegedly abducted by the Military and law enforcing agencies on June 12, 1996. Her whereabouts are still unknown and no one is arrested even after 21 years of her abduction, online: <kapaeeng.org/22-march-2017-rehearing-on-final-investigation-report-of-kalpana-chakma-abduction-case/>

Kalpana Chakma, like many other *Adivasis* of Bangladesh, has faced the extreme level of State atrocity. Even though there were two eye witnesses to her abduction, Kalpana's brothers, no one has yet been arrested. It is claimed that the authority is trying to save the people instead of bringing them to justice. The *Adivasis* of Bangladesh have been facing the State sponsored violence for a long time. In this chapter, I have started with discussing some recent case studies regarding the State sponsored violence on the *Adivasis* of Bangladesh. The second part dealt with the development process that is actually violating the human rights of the *Adivasis*. The third part dealt with a very sensitive issue regarding Genocide. As per the international laws, I have tried to analyze whether the atrocities on the *Adivasis* amounts to Genocide or not.

I. Part-I: State Sponsored Violence on *Adivasis*: Case Study

The Government of Bangladesh (GoB) has been consistently silent regarding the atrocities on *Adivasis*. The *Adivasis* have faced State sponsored violence in the form of arson, killing, rape, abduction, torture and many more. It is to be noted the State sponsored violence is happening both on the Chittagong Hill Tracts (CHT) and on the plain land *Adivasis*. In this part, I have discussed three recent phenomena regarding the violences faced by the *Adivasis*.

a. Case Study 1: Romel Chakma

Romel Chakma, a 19-year-old Higher Secondary Certificate (HSC) examination candidate, was from Hatimara village under Burighat union of Naniarchar upazila in Rangamati district. He belongs to the Chakma *Adivasi* group of Bangladesh. He was also a leader of Pahari Chhatra Parishad (Hill Students' Council-PCP). He was detained on April 5, 2017, at 10:00 am by a group of soldiers consisting of 7 *Bangalee* members led by a Major of Naniarchar zone from Naniarchar bazar.²⁰⁹ It has been reported that the United People's Democratic Front (UPDF) and the PCP

²⁰⁹Unrepresented Nations and Peoples Organization, *Chittagong Hill Tracts: Student Dies Following Brutal Torture by Bangladeshi Army* (21 April 2017) online: <unpo.org/article/20047>

alleged that Romel was severely tortured by the army personnel but the claim was refuted by the force.²¹⁰ On the same day, when Romel Chakma's condition got worse the Army tried to hand him over to the Naniarchar Police but the Police Authority refused to take him due to his serious physical condition. He was admitted to Naniarchar Upazilla hospital and moved to the Chittagong Medical College Hospital under the custody of Panchlais Police Station of Chittagong Metropolitan Police on April 06, 2017. None of his family members were allowed to see him. His father wrote an application to the National Human Rights Commission (NHRC) for taking steps against the atrocities on April 06, 2017.²¹¹ Later on April 19, 2017, Romel Chakma died in the Chittagong Medical College Hospital under police custody. His dead body was handed over to his family on the morning on April 20, 2017, by the Naniarchar Police authority. However, a strong allegation has been made that the army, police and local authority seized the dead body of Romel Chakma and cremated it in a nearby jungle, pouring petrol and kerosene on it without any religious and traditional rites and rituals.²¹²

The army personnel said that Romel Chakma was arrested because there were two cases filed against him. The Officer-In-Charge of Naniarchar Police Station, Abdul Latif, said that there were no cases filed against Romel Chakma with the Police Station and Police were not involved in the case. The Army personnel arrested Romel Chakma and even admitted him to the hospital after beating him up. The Inter Service Public Relations Directorate (ISPR) official of army denied the allegation and stated that they only arrested Romel Chakma and later handed him over to the Police where he died after 15 days of undergoing treatment.²¹³

²¹⁰“Romel Chakma cremated, blockade called in Rangamati”, *Dhaka Tribune* (21 April 2017) online: <<https://www.dhakatribune.com/bangladesh/2017/04/21/romel-chakma-death-pcp-declares-blockade-rangamati>>

²¹¹ See Appendix E.

²¹² “Cruel killing of Romel Chakma: Media coverage, Statement of Army & Police, and Propaganda”, *CHT News Services* (24 April 2017) online: <chtnewsservices.wordpress.com/2017/04/24/cruel-killing-of-romel-chakma-media-coverage-statement-of-army-police-and-propaganda/>

²¹³*Ibid.*

Based on Romel Chakma's father's complaint the NHRC formed a 3 member probed committee and the NHRC has sent their observation to the Government for further disciplinary action after the report was submitted by the committee.²¹⁴ It is noteworthy that, the committee did not get any response from the army personnel, hence, the NHRC wrote to the Defence Ministry for further explanation from the army.²¹⁵ Also, the committee believed the deterioration of Romel Chakma's health was caused by torture.²¹⁶ On 10 May 2017 the IWGIA and Asia Indigenous Peoples Pact (AIPP) submitted a letter calling for judicial investigation on Romel Chakma's death.²¹⁷ The GoB remained silent and there was no follow-up of the explanations sought by the NHRC. The media also played a stealthy role in this matter. Until April 21, 2017, none of the online portals, print media, and electronic media published any news regarding the matter.²¹⁸ The question remains regarding the case reference (the case number) under which Romel Chakma was arrested. It is hard to determine the certainty of the information provided by the police and the Army. The cremation of Romel Chakma's body also needs reasoning. In this regard, the GoB's silent role is controversial.

b. Case Study 2: Longadu Attack

On June 02, 2017, a procession of Bangalee Muslim settlers started from Battya Para of Longadu Upazilla of Rangamati after recovering a dead body of a local Jubo League (Youth wing of the

²¹⁴"Newsletter", *National Human Rights Commission, Bangladesh* (May-Dec 2017) at 6 online (pdf): <http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/b11dd26f_7dee_4651_a76e_5d553bac126b/NHRC%20newsletter%20%20issue%20-%207%281%29.pdf>

²¹⁵Muktadir Rashid, "Death Of Romel Chakma: NHRC seeks Army's explanation" *The New Age Bangladesh* (24 June 2017) online: <<http://www.newagebd.net/article/18460/nhrc-seeks-armys-explanation>>

²¹⁶ *Ibid.*

²¹⁷ "Calling for Judicial Investigation on Romel Chakma's Death" (10 May 2017) online (PDF): <<http://iphrdefenders.net/wp-content/uploads/2017/05/10.05.2017-letter-Romel-Chakma.pdf>>

²¹⁸"Bangladesh: Cruel killing of Romel Chakma: Media coverage, Statement of Army & Police, and Propaganda", Indigenous peoples Human Rights Defenders Network (24 April 2017) online: <iphrdefenders.net/bangladesh-cruel-killing-romel-chakma-media-coverage-statement-army-police-propaganda/>

ruling party) leader.²¹⁹ After reaching the Longadu Upazilla Headquarters the Muslim Bangalee settlers started looting and burning the houses of the *Jumma* peoples. More than 300 *Jumma* houses were burnt down in Tintila, Manikjorchara, Battya Para and Baradom. Before the procession, the local *Jumma* public representatives and leader went to the Longadu army zone and Longadu police station, fearing the communal violence, but they were assured of safety and security by the 2nd-in-Command (2IC) Major of Longadu army zone.²²⁰ The 2IC particularly stated that “staging a procession is the democratic rights of the settlers”.²²¹ Also, a curfew under Section 144 of the Code of Criminal Procedure, 1898 was given.²²² It is claimed that the *Bangalee* Muslim settlers broke the curfew in the presence of the Longadu Zone Commander, the 2IC and the Officer-In-Charge (OC) of Longadu police station.²²³ The *Jumma* peoples fled to the forest to save their lives and after coming back they only found the remaining of their households all burnt down to ashes.²²⁴ This incident attracted the notice of the international community. In the neighboring country, India processions were held and a deputation was submitted to the Assistant High Commissioner of Bangladesh by Chakma National Council of India (CNIC) and other *Adivasi* organizations. They presented a six-point demand to the Assistant High Commissioner. It stated: taking immediate action for the safety and security of minority, Buddhist, Chakma, and Hindus, taking action against

²¹⁹“Massive Arson Attacks on Indigenous peoples in Longadu: Over 300 Houses Guttled, 1 Woman Killed, 3 Missing”, *Kapaeeng Foundation: A Human Rights Organisation for Indigenous peoples of Bangladesh* (3 June 2017) online: <kapaeeng.org/massive-arson-attacks-on-indigenous-peoples-in-longadu/>

²²⁰“Arson Attack on Jumma Villages by Bengali Settlers in Longadu, 300 Houses Torched”, *Cultural Survival* (2 June 2017) online:

<www.culturalsurvival.org/news/arson-attack-jumma-villages-bengali-settlers-longadu-300-houses-torched>

[Arson]

²²¹*Ibid.*

²²²Star Online Report, “Probe Rangamati arson attacks, Amnesty urges Bangladesh government”, *The Daily Star* (6 June 2017) online: <www.thedailystar.net/politics/probe-rangamati-arson-attacks-indigenous-people-amnesty-urges-bangladesh-government-1416292>

²²³“Bangladesh: Follow-Up: Massive Arson Attack on Indigenous peoples in Longadu”, *Indigenous peoples Human Rights Defenders Network* (12 June 2017) online: <iphndefenders.net/bangladesh-follow-up-massive-arson-attack-indigenous-peoples-longadu/> [Follow-up]

²²⁴The Daily Star, “Longadu Indigenous Families Still in Fear”, (11 June 2017) online: YouTube <www.youtube.com/watch?v=Jrr3ryqOmN4> at 00h:00m:08s.

the alleged army and law enforcing agency members, immediate investigation of the incident, compensation to the victims, removal of the army camps from the CHT and implementation of CHT Peace Accord fully and effectively.²²⁵ The human rights watchdog Amnesty International in its public statement demanded an independent and impartial investigation by the GoB in this regard.²²⁶

The victims stated with grief that they did not want relief, they wanted justice.²²⁷ At present, they are living under the open sky without access to basic necessities.²²⁸ Bangladesh being a democratic country free from exploitation and based on equality again fails to ensure security, safety, and justice for the *Adivasis*.

The CHT area consists of the one-tenth of the total territory of Bangladesh. It is one of the most militarized areas in the world. It is excessive by any standard to deploy one-third of the army in the CHT region as there is no insurgency situation prevailing.²²⁹ The reported acts of the armies confirm that the armed forces are taking an active part in the atrocities against the *Adivasis* of Bangladesh. However, all these atrocities are “alleged” and no cases have been filed against these “alleged” acts. Hence, these acts have gone unaddressed by the GoB or by any law enforcing agency.

²²⁵Chakma Nation, “Recently it was reported...” (11 June 2017), posted on *Chakma Nation*, online: <www.facebook.com/ChakmaNationPage/posts/1428808633847129>

²²⁶Amnesty International, *Amnesty International Public Statement: Bangladesh: Investigate Vicious Mob Violence against Indigenous peoples* (5 June 2017) Index number: ASA 13/6423/2017 online: <www.amnesty.org/en/documents/asa13/6423/2017/en/>

²²⁷Minhaj Uddin & Anvil Chakma, “Want Justice, Not Relief: Say Affected Indigenous Families of Rangamati, Refuse Government Aid”, *The Daily Star* (06 June 2017) online: <www.thedailystar.net/backpage/want-justice-not-relief-1416127>

²²⁸ [Follow-up] *supra* note 223.

²²⁹Chris Chapman, “Kalpana Chakma – information, disinformation, non-information”, *Amnesty International* (24 June 2014) online: <www.amnesty.org/en/latest/campaigns/2014/06/kalpana-chakma-information-disinformation-non-information/>

c. Case Study 3: Atrocities on the Plain Land Adivasis: Violence against the Santals

Santals are one of the major *Adivasi* groups in Bangladesh mostly living in the Northern part of Bangladesh. According to the census of 1991, the Santal population was over two hundred thousand in contrast to a survey conducted in 1941 which shows the number of Santals were 829,025.²³⁰ The following case study shows that there are reported State sponsored violences on the Santals. This State sponsored violence may be playing a role in the decreasing number of the Santals.

On November 06, 2016 three Santal men were killed in a clash between the Santals and the police, Rangpur Sugar Mill workers, Jubo League (youth wing of the ruling party) and Chhatra League (student wing of the ruling party) in Gobindaganj upazila under Gaibandha district of Rangpur.²³¹ The Santals fled from their home to save their lives against firings. There are reports that the Santals houses were looted and burnt by the Police and muscle man of the said groups.²³² It is claimed that, the police used rubber bullets and fire arms on the Santals.²³³ Moreover, two of the victims died because they were prevented from going to the hospital by the attackers.²³⁴

²³⁰[Banglapedia] *supra* note 18, *Santals*, *The*

<en.banglapedia.org/index.php?title=Santals,_The>

²³¹“Joint NGO Alternative Report to the UN Human Rights Committee on Bangladesh”, 119th Session (6-29 March 2017) at 20 online: <www.forum-asia.org/uploads/wp/2017/03/Bangladesh_Joint-Report-to-UN-CCPR.pdf>

For more information see: KF Report, “Attack on Indigenous and Bengali Farmers by Police-RAB-Local Goons of Sugar Mill in Rangpur: 2 Santal Shot Dead, 30 Including 8 Law Enforcers Injured, 3 Arrested, 1200 Families Flee”, *Kapaeeng Foundation: A Human Rights Organisation for Indigenous peoples of Bangladesh* (9 November 2016) online: <kapaeeng.org/attack-on-indigenous-and-bengali-farmers-by-police-rab-local-goons-of-sugar-mill-in-rangpur-2-santal-shot-dead-30-including-8-law-enforcers-injured-3-arrested-1200-families-flee/>

²³²S M Nazmus Sakib, “Attacks On Santal Community: ‘A crime against humanity’”, *Dhaka Tribune* (14 November 2016) online: <<https://www.dhakatribune.com/bangladesh/2016/11/14/attacks-santal-community-crime-humanity/>>; Al Jazeera English, “Exclusive: Bangladesh Santal tribe fighting government authorities in a land dispute” (11 December 2016) at 00h:00m:37s, online (video): YouTube

<<https://www.youtube.com/watch?v=OOdAiKLIK24>>

²³³Golam Rabbani, “Killing Santal by Bangladesh Police” (16 November 2016) at 00h:01m:25s, online (video): YouTube <<https://www.youtube.com/watch?v=Wv2x3yQmsFE>>

²³⁴ Staff Correspondent, “Police Attack Killed 4 Santals: Ethnic Minority Leaders Claim”, *New Age Bangladesh* (12 November 2016) online: <www.newagebd.net/article/2618/index.php>

It was reported that after 10 days of the incident, more than 1,200 Santal *Adivasi* families were living under the sky as their houses and all belongings were burnt down.²³⁵ Following the incident the police filed a case against 442 Santal *Adivasis*.²³⁶ Moreover, the police had tied up two of the suspected Santal *Adivasis* while they were still in the hospital undergoing treatment for the bullets in their knees which were shot by the police themselves.²³⁷ The children are unable to attend the schools for the fear of assault and all their school materials are burnt down as well.²³⁸

The NHRC formed a 10 member team to investigate the matter and found that there was clear indication of abuse during the eviction.²³⁹ The GoB has not taken any steps to find out the actual perpetrators even after all the reporting and evidences. Until date, there is a writ petition filed by a Supreme Court Lawyer where the High Court Division ordered for untying the hands of the victims and to file a compliance report of the order by the police authority.²⁴⁰ Till the end of the year, the Police were reviewing the evidence.²⁴¹ No progress has been made on this issue.

d. Remarks

The *Adivasis* of Bangladesh are denied the basic human rights, fundamental rights and the self-identification rights by the State. Self-identification is now a far-fetched dream for them as they are still struggling only to get the basic human rights. The State organ has failed to protect the

²³⁵KF Report, "Follow up: Attack on Santal People in Gobindagonj", *Kapaeeng Foundation: A Human Rights Organisation for Indigenous peoples of Bangladesh* (16 November 2016) online: <kapaeeng.org/follow-up-attack-on-santal-people-in-gobindagonj/> [KF]

²³⁶*Ibid.*

²³⁷Liakat Ali Badal, "Injured Gaibandha Santals Being Treated In Handcuffs", *Dhaka Tribune* (11 November 2016) online: <www.dhakatribune.com/bangladesh/2016/11/11/injured-gaibandha-santals-treated-handcuffs/>

²³⁸Nure Alam Durjoy & Md Tazul Islam, "Gaibandha Violence Aftermath: No Home, and Now No Education", *Dhaka Tribune* (10 November 2016) online: <www.dhakatribune.com/bangladesh/nation/2016/11/10/gaibandha-violence-aftermath-no-home-now-no-education/>

²³⁹Reazul Hoque, "NHRC: Gobindaganj Santals evicted illegally", *Dhaka Tribune* (13 December 2016) online: <<https://www.dhakatribune.com/bangladesh/2016/12/13/nhrc-gobindaganj-santals-evicted-illegally/>>

²⁴⁰[KF] *supra* note 235.

²⁴¹United States of America, Bureau of Democracy, Human Rights and Labor, *Bangladesh 2016 Human Rights Report* (U.S: The Under Secretary for Civilian Security, Democracy, and Human Rights, Department of State. 2016) at 45 <www.state.gov/documents/organization/265744.pdf>

Adivasis from forced eviction from their own lands. Moreover, the land grabbing is going on under the name of protest and development in an organized way. The next part depicts how development is playing a major role on the land grabbing of *Adivasis*.

II. Part II: Marginalization in the Name of Development

The Chittagong Hill Tracts is situated in the southeastern part of Bangladesh with its hidden beauty of waterfalls, forest, mountains, lakes, and rivers. The tourists and adventurers of Bangladesh travel to the CHT to quench their thirst for adventure. The rather innocent approach of *Bangalee* tourists turn out to be a curse for the *Adivasis* of CHT. This part has discussed how the GoB is oppressing the *Adivasis* for development's sake.

a. Atrocities in Disguise of Development: The Case of Sajek Valley

Sajek Valley is situated between the hills of Kasalong mountains range in Sajek union of Baghaichhari Upazila in Rangamati District. It is now a famous tourist spot of the CHT. For its' height (2000 Ft. above sea level) it is called 'the roof of Rangamati'. The *Jumma Adivasis* of the Sajek valley have also faced forced eviction, killings, and arson from the State authorities.

In 2005, it was reported about 28,000 Muslims from the plains had been resettled in the Rangamati-Sajek range of the CHT.²⁴² On February 19, 2010, there was a shot of open fire on the *Adivasis* from the army in Sajek Union of Rangamati district which killed 4 *Jumma Adivasis*.²⁴³ At least 200 *Adivasis* home, a Buddhist temple, and a church were burnt down into ashes by the army.²⁴⁴ Again the *Adivasis* fled to the forest to save their lives from the atrocities.²⁴⁵ None of these

²⁴²Unrepresented Nations and Peoples Organization, *Chittagong Hill Tracts: Chakmas Complain of Bangla Muslim Settlements* (19 July 2005) online:<unpo.org/article/2799>

²⁴³ Jummo CHT, "Sajek Attack Leaves 4 Dead, Scores Wounded", (20 February 2010) *Blog of Jumma People* (blog), online: <jummonet.blogspot.ca/2010/02/sajek-attack-leaves-4-dead-scores.html>

²⁴⁴Tazreena Sajjad, "The Tragedy of the Majority: Sajek Once More", *The Daily Star* (02 March 2010) online: <www.thedailystar.net/news-detail-128242> [Sajek]

²⁴⁵Survival, *Bangladesh: Tribal people killed and villages burnt in army and settler attack* (22 February 2010) online: <www.survivalinternational.org/news/5581>

incidents were taken into accounts or went under proceedings. It is also feared that the dead bodies usually were burnt by the oppressors to destroy evidence.²⁴⁶ Now Sajek Valley is a picturesque tourist spot under the military control where there are two resorts on the Valley autonomously controlled by the armies.

To be noted all the violence started by bringing *Bangalee* settlers into the CHT region. The strategy has always been the same: some sort of victimization of *Bangalees* by themselves and followed by the accusation of the *Adivasis*. That leads to the protests of *Bangalees* and in the name of protest looting, arson and killing of *Jumma* peoples follow. Eventually, the *Adivasis* are forced to leave their lands and take refuge in more remote areas.

The GoB has enacted *the Bangladesh Restricted Tourism Areas and Special Tourism Zones Act* in 2010. It states that the GoB can declare any area that has tourism or which has the possibility of the tourism industry as a restricted tourism area. Also, GoB can impose any restrictions on the activities in the restricted tourism area by regulations.²⁴⁷ Further, the GoB can declare special tourism zone inside a restricted tourism zone. Also, the Government can *suo motu* or through private bodies, autonomous organization, and statutory organization or through any individuals can control and regulate the activities in special tourism zone.²⁴⁸ These all can be done by a simple notification in the official gazette. It gives the GoB an exclusive right to take away the lands of the *Adivasis* and declare it as a restricted tourism zone. There is no remedy for the *Adivasis* as the law itself permits the GoB to promote and develop any areas for tourism.

²⁴⁶[Sajek] *supra* note 244.

²⁴⁷The Bangladesh Restricted Tourism Areas and Special Tourism Zones Act, 2010 s 4.

²⁴⁸*Ibid* at s 5.

b. Other Development Projects

The CHT has always undergone the development process by the GoB that led to the forced eviction of the *Adivasis*. Among those development projects the Bandarban district has been the most affected district. It was reported that a total of more than 65,000 acres of land were assigned for the construction of military training centers and the extension of existing facilities.²⁴⁹ Moreover, the road construction projects under the army supervision have been highly criticized.

The GoB is constructing roads without the approval or consultation of the Chittagong Hill Tracts Regional Council which is the autonomous body that looks upon the administration of the CHT.²⁵⁰ It is highly possible that infiltration of the settlers will take place again on the CHT's along with the negative impact on the environment caused by deforestation in order to build the road.²⁵¹

Further, the Bangladesh Forest Department has earmarked a total of 218,000 acres of new reserve forests in the three hill districts which caused forced eviction in the late 1990's.²⁵² The evicted *Adivasis* were later on forbidden to practice *jhum* cultivation in the reserved forests that is a part of their livelihood as well as their culture.²⁵³ In 2016 the *Adivasis* in Lama, Bandarban were obstructed from continuing *Jhum* cultivation by the rubber garden workers as they demanded that the *jhum* cultivation area was given as lease to the Lama Rubber Industries Ltd. by the GoB.²⁵⁴ To be noted, those lands also belong to the *Adivasis*.

²⁴⁹The Internal Displacement Monitoring Centre, *Bangladesh: Minorities Increasingly at Risk of Displacement: A Profile of the Internal Displacement Situation* (28 March, 2006) at 16 online: <www.internal-displacement.org/assets/library/Asia/Bangladesh/pdf/Bangladesh-March-2006.pdf> [Displacement]

²⁵⁰Unrepresented Nations and Peoples Organization, *Chittagong Hill Tracts: PCJSS Responds to PM's Evasion of Questions on CHT Accord* (22 February 2016) online: <unpo.org/article/18939>

²⁵¹ KF Report, "World Bank funded-project kicks off in CHT without meaningful consultation with the CHT institutions and indigenous peoples", *Kapaeeng Foundation: A Human Rights Organisation for Indigenous peoples of Bangladesh* (8 February 2016) online: <kapaeeng.org/world-bank-funded-project-kicks-off-in-cht-without-meaningful-consultation-with-the-cht-institutions-and-indigenous-peoples/>

²⁵²[Displacement] *supra* note 249.

²⁵³[Displacement] *supra* note 249.

²⁵⁴ KF Report, "Obstruction in jum cultivation threatens livelihood of 80 indigenous families in Lama", *Kapaeeng Foundation: A Human Rights Organisation for Indigenous peoples of Bangladesh* (8 February 2016) online: <kapaeeng.org/obstruction-in-jum-cultivation-threatens-livelihood-of-80-indigenous-families-in-lama/>

c. Remarks

It is an irony that being the citizen of the same country the *Adivasis* are way behind in exercising their rights from the majority *Bangalee* populations. Their culture, tradition, and lands are being taken away from them by the State itself. The GoB is declaring reserve forests and initiating development projects in the CHT's. It may be argued that Bangladesh is justifying violence on the *Adivasis* under the name of these developments. It is to be noted that the conservation ideology can be used by developing States to justify coercion and violence in the name of conservation.²⁵⁵ In case of Bangladesh, it is true for the reserve forests and development projects in the CHT's if not for any conservations. Moreover, nothing can be questioned when it comes to the State security and peace. As CHT is situated in the border areas of Bangladesh the GoB has a valid ground to employ army camps in the name of security. By all means, it is the *Adivasis* whose rights and regular lives are being desecrated. These practices of the State leads to the violation of fundamental rights of the *Adivasis* protected under the Constitution as a citizen of the country. Article 43 of the Constitution of Bangladesh provides the right to privacy and safeguard of home and correspondence.²⁵⁶ The *Adivasis* are facing gross violations of their fundamental rights although having the same rights under the enforceable part of the Constitution as the citizen of Bangladesh.. The Bangladesh Legal Aid and Services Trust a pro bono legal aid organization have initiated a number of writs for the protection of the *Adivasis* rights in the CHT.²⁵⁷ But the writs are nominal in number and are filed for public interest litigation. It denotes that the representation of the

²⁵⁵[Shah] *supra* note 120 at 104

²⁵⁶ [Constitution] *supra* note 3 art 43: "Protection of home and correspondence: Every citizen shall have the right, subject to any reasonable restrictions imposed by law in the interests of the security of the State, public order, public morality or public health-

(a) to be secured in his home against entry, search and seizure; and

(b) to the privacy of his correspondence and other means of communication."

²⁵⁷BLAST: Bangladesh Legal Aid and Services Trust, *Adivasi Rights*, online: <<https://www.blast.org.bd/issues/adivasi>>

Adivasis in policy making process is almost nil which results in injustice. By imposing State enacted legislations on the *Adivasis* the GoB is forcing them to leave behind their traditional rules and practices and comply with the *Bangalee* rules and regulations. They are being forced to choose the State legislations otherwise their land rights, cultural rights, economic rights, civil rights and political rights are infringed as State only recognizes their laws in papers, not in practice. Also, the *Adivasis* have less faith on the State mechanisms as they believe that they are facing human rights violations from part of the State.²⁵⁸

III. Part III: Genocide within the State

From the above discussion, my inference is that the GoB is taking an active part in the systematic killing of the *Adivasis* from time to time. It is evident that the Government is planning to destroy the *Adivasis* to remove them from their lands. Moreover, almost all the incidents were dramatically the same, such as arson, victimization of *Bangalee* settlers and killing of *Adivasis* for that reason, forced eviction. Based on these facts and on the Genocide Convention I came up with the following questions: a) Did Bangladesh kill one or more persons belonging to a particular ethnical group? b) Is it the intention of Bangladesh to destroy in whole or in part those ethnical groups (*Adivasis*)? c) Did the conduct take place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction?

If these questions are answered in positive, then it can be argued that Bangladesh is walking on the way of ethnic cleansing that leads to the crime of Genocide. Genocide, without any doubt is the ultimate crime labelled in international law. The Convention on the Prevention and Punishment of the Crime of Genocide, 1948 states that killing members of a national, ethnical, racial, or

²⁵⁸ From the personal experience of the author while staying in CHT in September 2013.

religious group with the intent to destroy means Genocide.²⁵⁹ On the plain reading of Article 6(a) of the Elements of Crime, Bangladesh seems to fulfill the elements of Crime of Genocide by Killing.²⁶⁰

However, to constitute the crime of genocide the most significant element is the intention of the accused person. It is in fact the *mens rea* which gives genocide its specialty and distinguishes it from an ordinary crime and other crimes against international humanitarian law.²⁶¹ It is distinct from other crimes as Genocide embodies a special intent or *dolus specialis*. Genocide requires the special intention as a constitutive element of the crime which demand that the perpetrator clearly seeks to produce the act charged.²⁶²

In the *Akayesu* case the mass killing of 800,000 Tutsis' easily attracted the crime of Genocide. The undeniable scale, systematic nature and atrociousness massacre which aimed at exterminating the Tutsi group that was targeted were considered as the proven factors of the elements of Genocide.²⁶³

The Genocidal intent against the Tutsi group was proved by the statements given from the then authority time to time to spare no Tutsi that reflected their intention by killing, and cutting of their Achilles' tendons so that they can't flee from the scene.²⁶⁴

²⁵⁹ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 at art II (a) (entered into force 12 January 1951, accession by Bangladesh 5 October 1998) online: <<https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>> [Genocide]

²⁶⁰ The Elements of Crime, art. 6 (a): "Genocide by killing: Elements: 1. The perpetrator killed 2 or more persons. 2. Such person or persons belonged to a particular national, ethnical, racial or religious group. 3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such. 4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."

²⁶¹ *The Prosecutor v Goran Jelusic*, case no.: IT-95-10-T (ICTY) "Trial Judgement" 14 December 1999 at para. 66 online: <<http://www.icty.org/x/cases/jelusic/tjug/en/jel-tj991214e.pdf>>

²⁶² *The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T (ICTR) "Sentencing Judgment" 2 September 1998 at para 498 online: <http://www.worldcourts.com/icttr/eng/decisions/1998.09.02_Prosecutor_v_Akayesu.pdf> [Akayesu]

²⁶³ *Ibid* at para 118

²⁶⁴ *Ibid* at paras 118-9 521

The factor of particular intent to destroy a group characterizes Genocide and in the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide.²⁶⁵

There are a number of indigenous groups in Bangladesh, and the victims of atrocities are from different *Adivasis* community. It may be argued that the killings were directed against the *Adivasis* but on the other it is not evident to be directed against a particular *Adivasi* group. The *dolus specialis* or the special intent to kill a particular indigenous group here in this cases may not pass the test. The specific objective to kill or wipe out a *particular* indigenous group or the *Adivasis* does not meet the threshold of intention. Also to be noted, the victims of the crime have to belong to a particular group and the crime has to be committed against them because of their membership of the group, not because of their individual identity.²⁶⁶ In this regard, the events that have occurred in Bangladesh can be termed as conflicts/crimes that may be resolved by the State laws.

The events may indicate the intention of removing the *Adivasis* from their lands but not to destroy them by and large as a particular group. However, in these allegations and controversies it is necessary for the GoB to rethink the protection measures in the CHT area to secure the human rights of the *Adivasis*.

It is not relevant if the Genocide is committed at the time of war or at time of peace, the State has responsibility to prevent the Crime of Genocide.²⁶⁷ Bangladesh being a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 has the same responsibility to prevent and to protect. In this regard the silence of the international community

²⁶⁵*Ibid* at para 519.

²⁶⁶*Ibid* at para 521.

²⁶⁷[Genocide] *supra* note 259 at art I.

and the civil society of Bangladesh is dubious. On the one hand, the international community and the civil society of the country are active against any act of atrocities by the State, but on the other, the *Adivasis* killing remains unnoticed by them. Again, the international community's soft normative approach proves to be ineffective.

A list of persons may be blamed for not being able to address the human rights violations starting from the military, law enforcing agencies to the highest authority of the State. Bangladesh now is in dire need to address and resolve this issue as soon as possible because even though there is no *Adivasis* (as per the Government records) there are ethnic groups in the country. The ethnic groups are getting cleansed by the State which may lead to a gross violation of the international humanitarian law as well as international human rights law. Therefore, for the sake of a decent international reputation as a developing country and to ensure human rights and justice for the *Adivasis* it is a crucial time for the GoB to revisit their strategy and address these issues instantaneously.

B. Conclusion

In this chapter, I portrayed the State sponsored atrocities on the *Adivasis* of Bangladesh from a practical perspective. The violence is taking place in the name of development mostly. Later on, I showed that Bangladesh is not on the right track and may be walking towards the heinous Crime of Genocide by the Killing of *Adivasis*. In the next chapter, I have made a comparison of Bangladesh's situation with an African country Botswana which is walking on the similar way. I have also tried to see if there is any passage for Bangladesh for a peaceful harmonious solution.

CHAPTER SIX

PLIGHT OF THE *ADIVASIS* AROUND THE WORLD: A BRIEF COMPARISON BETWEEN BOTSWANA AND BANGLADESH

A. Introduction

The last two and a half decades were remarkable in addressing the indigenous rights globally. In 1991, the non-governmental Commonwealth Human Rights Initiative identified indigenous rights as one of eight priorities for the human rights policies of the Commonwealth of Nations.²⁶⁸ However, it was noticeable that the number of *indigenous peoples* all around the world had decreased at an unprecedented rate in the nineteenth and twentieth century.²⁶⁹ The reason behind this is the State sponsored violence and assimilation policies.²⁷⁰ The IPs all over the world faces oppression and violation by the State and it is no different in the Continent of Africa. Botswana is the country which I have taken as an example and compared the situation of the indigenous peoples with Bangladesh. Bangladesh and Botswana are the members of Commonwealth of Nations. Also, Bangladesh being a party to a number of international human rights Conventions fails to protect the rights of the IPs. The Government of Bangladesh (GoB) and Botswana have the same position regarding the non-recognition of *indigenous peoples*., The human rights violations of IPs have similar unjustifiable rationalities. However, Botswana Court has addressed some of the human

²⁶⁸ Maria Sapignoli & Robert K. Hitchcock, "Indigenous peoples in Southern Africa" (2013) 102:4 The Round Table: The Commonwealth Journal of International Affairs 355 at 355 [Sapignoli]

²⁶⁹Robert K. Hitchcock, Maria Sapignoli & Wayne A. Babchuk (2015) "Settler Colonialism, Conflicts, and Genocide: Interactions between Hunter-Gatherers and Settlers in Kenya, and Zimbabwe and Northern Botswana", *Settler Colonial Studies*, 5:1, 40 at 41 online:
<<http://www.tandfonline.com/doi/pdf/10.1080/2201473X.2014.899549>>

²⁷⁰David Maybury-Lewis, "Genocide Against Indigenous peoples", in Alexander Labhan Hinton, ed, *Annihilating Difference: The Anthropology of Genocide* (Berkeley, Cal. : University of California Press, 2002) 43
<california.universitypressscholarship.com/view/10.1525/california/9780520230286.001.0001/upso-9780520230286-chapter-2?print=pdf>

rights violations in a ‘pro’ indigenous peoples’ way that are significant. Therefore, Botswana is a potential country to compare the IPs situation with Bangladesh.

In the first part, I have discussed the struggle of Botswana IPs from the historical to the present perspective. The second part has compared the situation of Botswana with Bangladesh and look for a way out for Bangladesh.

I. Part I: Botswana and Bangladesh: Are They Walking on the Same Way?

Botswana is situated in Southern Africa. Being a part of a continent that is rich with cultural ethnicity Botswana has a number of indigenous peoples. Ironically, the IPs of Botswana (mainly *San* peoples) are dominated by another majority IPs group (the *Tswana* people). To understand the existence of indigenous peoples of Botswana it has to be kept in mind that “the legal approach to indigenous peoples has also developed the presupposition of their coexistence with another ethnic group, dominant either within a present-day state or within the area traditionally inhabited by the indigenous peoples.”²⁷¹ This presupposition is profoundly true in the case of Botswana. The *San* has faced marginalization since the colonial period. They are facing genocide, exclusion, non-recognition, violation of basic human rights by the State which is same as Bangladesh.

The following sections have discussed briefly Botswana’s approach to the IPs (similar to GoBs stand on nationalism concept). It is followed by a brief history of the IPs of Botswana. The history has shown that the IPs of Botswana are facing atrocities from the State or from the majority Tribe for a long period of time. It has mostly covered the violation of IPs rights from the pre-colonial era till date. Following that, I have made a small yet strong contention that the IPs rights are not being properly realized in Botswana as the leaders of the country have been under the influence of

²⁷¹[Niezen] supra note 1 at 20.

British colonialists' ideas (through education, birth etc.) from the beginning. Also, I have justified why the term '*San*' has been used while referring to the IPs of Botswana.

a. Nationalism and Botswana

Botswana is a country much appreciated in the African Continent for its stable democratic government, good governance, non-violence and fastest growing economy. Botswana has successfully combated against HIV/AIDS epidemic in spite of facing many obstacles in ensuring health service facilities for all the citizens. Botswana was the first country in the African continent to provide universal free antiretroviral treatment to people living with HIV.²⁷² The official language of Botswana is English but Setswana is mostly spoken throughout the country. Setswana is the language of Batswana (People of Botswana) people mainly belonging to *Tswana* tribe. In Setswana language, Botswana means 'Tswana country' (Bo meaning country and *Tswana* indicating people of Tswana tribe). The citizens of Botswana are known as Batswana and the citizenship derives by birth and by descent.

Botswana is a member of the United Nations, the Commonwealth, the African Union (AU), and the Southern African Development Community (SADC). Also, it is signatory to a number of regional and international human rights instruments such as: African Charter on Human and Peoples' Rights, International Covenant on Civil and Political Rights (ICCPR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). But Botswana has not ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and

²⁷²AVERT, *HIV and AIDS in Botswana* (22 December 2016) online:<www.avert.org/professionals/hiv-around-world/sub-saharan-africa/botswana>

the Indigenous and Tribal Peoples Convention, 1989 (No. 169). However, they voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

After independence Botswana did not differentiate between ethnic groups in the development policies of the country. The strong contention behind this is Botswana sought to avoid these discriminatory policies as it resulted in Apartheid for the neighboring country South-Africa.²⁷³ The Government refers to all its' citizen as Batswana (People belonging to majority *Tswana* tribe). It can be inferred that Botswana is maintaining a strong ethno-nationalist approach for its citizens where everyone is treated under the same ethnic umbrella. To be noted that in Botswana the provision of citizenship by descent has also opened the way for anyone (unfamiliar with the indigenous culture) to gain citizenship and become the President of the country (and rule over the IPs). Therefore, the nationalistic approach towards the IPs of Botswana has always been promoted by the leaders. The ruling and assimilation of the influential *Tswana* tribe are similar as *Bangalee* nationalism. It has been further elaborated in the later part of this chapter.

b. Using the Term '*San*'

In this chapter, I have used the term *San* to refer to the IPs of Botswana. These terms were used to refer to the hunter-gatherer (foragers) groups of southern Africa. Traditionally they lived in small groups of 5-6 families of 25-50 persons.²⁷⁴ They were tied with other groups by kinship, marriage, friendship, and trade.²⁷⁵ They used to move based on the seasons, resource availabilities and distribution of other groups. Many of the *San* have adapted to the modern livelihood system such

²⁷³Robert K. Hitchcock, Maria Sapignoli & Wayne A. Babchuk, "What about our rights? Settlements, subsistence and livelihood security among Central Kalahari: San and Bakgalagadi" (2011) 15:1 Intl JHR 62 at 63. [Hitchcock]

²⁷⁴Robert K. Hitchcock & Megan Bieselee, "San, Khwe, Basarwa, Or Bushmen?:Terminology, Identity, and Empowerment in Southern Africa", www.khoisanpeoples.org *In Defence of the First People of the Kalahari*, online: <www.khoisanpeoples.org/indepth/ind-identity.htm> [Bieselee]

²⁷⁵Robert K. Hitchcock. & J. D. Holm, "Bureaucratic Domination of Hunter-Gatherer Societies: A Study of the San in Botswana" (1993) 24:2 Development and Change, 305 at 322 [Holm]

as agriculture, livestock raising, small-scale industries and wage labors. They are the peoples who live below the poverty line and have the least access to social services and economic facilities.

The *San* peoples had to face a long term struggle to be identified as ‘*San*’. They are known by many other names such as *Khwe* (*Khoe*), *Basarwa*, or Bushmen usually residing in and around the Kalahari Desert region of Southern Africa. All these terms- *San*, *Khwe*, Bushmen, and *Basarwa*- are highly criticized by the peoples belonging to these groups. However, now ‘*San*’ is an acceptable term to address all the IPs in Botswana having similar ethnic cultures such as hunting, living in the Kalahari Desert of southern Africa, speaking the same language and so on. But to be noted all these people’s representatives at first denied being termed as such as they were familiar with Bushmen as an over-arching term.²⁷⁶

Previously in Botswana, the term *Basarwa* was used which refers to the “people of the south”. In their policy, the Botswana Government always avoided using any ethnic terms to identify the IPs which resulted to use of some pejorative terms. These terms were ‘Remote Area Dweller’, ‘People from Deep within the Deep’ and covered all the peoples living outside of villages in rural areas. The term *Khwe* meaning ‘people’ is sometimes used in central, eastern and northern Botswana by the people who identify themselves as members of the overarching Group *Basarwa*.²⁷⁷

Moreover, some *San* people Non-government Organizations term themselves as ‘First People’ or ‘First Nation’. However, the Republic of Botswana does not recognize the ‘First People’ as all the citizen of Botswana are indigenous and it provides assistance to the poor people not to the indigenous (the remote area dwellers).²⁷⁸ However, there are some criteria based on which the

²⁷⁶[Biese] *supra* note 274.

²⁷⁷*Ibid.*

²⁷⁸IWGIA, “Southern Africa-Botswana”, (2016) YB 439 at 439, online:
<www.iwgia.org/iwgia_files_publications_files/0740_THE_INDIGENOUS_ORLD_2016_final_eb.pdf>
[Botswana]

target group of 'Remote Area Dweller' is defined. The criteria are (1) spatial location (remote areas outside villages), (2) sociopolitical status (marginalized), and (3) socioeconomic status (impoverished and subject to discrimination).²⁷⁹

In late 1996, the representatives of the IPs of Kalahari and adjacent area decided to call themselves as 'San' externally. In this regard, one point must be addressed. The IPs of Botswana have successfully exercised and established self-appellant right. This can be anticipated as the first step to their right to self-determination i.e. self-identification. Although, it did not change their status of being oppressed by the majority *Tswana* group, it has positively added up to their struggle of being indigenous peoples in Botswana.

c. Botswana: A Brief History

Botswana is a landlocked country situated in Southern-Africa. It is surrounded by South-Africa, Namibia, Zimbabwe, and Zambia. The territory of the country mostly consists of the Kalahari Desert. The total area of the country is 581,730 sq. km including 15,000 sq. km of water territory.²⁸⁰ The name Botswana was adopted after it gained the independence from the British territory of Bechuanaland in 1966. The climate of Botswana is warm winters and hot summers resulting in a less access to water. The total population of Botswana is 2,209,208 and the ethnic groups are *Tswana* (or *Batswana*) 79%, *Kalanga* 11%, *Basarwa* (*San*) 3%, other, including *Kgalagadi* and white 7%.²⁸¹ The *Tswana* group politically and numerically dominant in Botswana migrated to the region around 1200 A.D. and displaced the IPs of Botswana mainly the *Basarwa*

²⁷⁹[Biese] *supra* note 271.

²⁸⁰Central Intelligence Agency, *The World Factbook, Africa: Botswana 2014* online: <<https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html>>

²⁸¹*Ibid.*

(*San*/Bushmen) peoples.²⁸² The *Tswana* chiefdom was already well established in 1885 when Botswana was declared as a Protectorate.²⁸³ Also, it was reported that the British colonial power initially dealt with the *Tswana* tribes at that time.²⁸⁴

The *San* peoples of Botswana belongs to the most ancient race of humans that is also evident from the artifacts and ritual found in the Tsodilo hill cave within the Kalahari Desert of Botswana.²⁸⁵ The population of *San* in Botswana is currently 50,000.²⁸⁶ They had been displaced by the British and the *Tswana* people before and at the time when the civilization started to develop.

i. Journey from Pre-Protectorate of Bechuanaland to Botswana

The pre-colonial history of Botswana IPs suggests that there was an existence of principal tribes and components of the principal tribe. At first, the *Tswana* group came to Botswana from the north and intermingled with the *San* peoples.²⁸⁷ The *Barolong* tribe being the biggest at that time was divided for intertribal disputes. They scattered all over Botswana and assimilated with other tribes. All the tribes maintained their distinct ethnic characteristics and were called as the principal tribes

²⁸²*Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous peoples, James Anaya, Addendum: The situation of Indigenous peoples in Botswana*, UNHRCOR, 15th Sess, Annex, Agenda Item 3, UN Doc A/HRC/15/37/Add.2 (2010) at 5, online:

<unsr.jamesanaya.org/docs/countries/2010_report_botswana_en.pdf> [J.Anaya]

²⁸³ Sidsel Saugestad, *The Inconvenient Indigenous: Remote Area Development in Botswana, Donor Assistance, and the First People of the Kalahari*, (Uppsala: Nordic Africa Institute; London: Global, 2001) at 69. [Saugestad]

²⁸⁴[J.Anaya] *supra* note 282.

²⁸⁵Yngve Vogt. "World's Oldest Ritual Discovered. Worshipped the python 70,000 Years Ago", translated by Alan Louis Belardinelli, *Apollon Research Magazine* (1 February 2012) <www.apollon.uio.no/english/articles/2006/python-english.html>

²⁸⁶[Sapignoli] *supra* note 268 at 357.

²⁸⁷International Labour Organization, *Country Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of The Rights of Indigenous peoples: Botswana*, at 7, ISBN: 978-92-2-122795-3 (web pdf) online: <www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Botswana.pdf> [ILO Botswana]

although they were assimilated.²⁸⁸ The other tribes which were smaller in numbers were considered as the components of the principal tribes.²⁸⁹

Incorporating with other component tribes has expanded the principal *Tswana* tribe. The tribes were allowed to have their own headman as a part of distinct ethnicity and were protected under some *Tswana* laws. But the *San* peoples who were not foragers had distinctively less number of rights such as land rights.²⁹⁰ The *San* peoples were not allowed to marry *Tswana* females and were taken forcefully to serve as slaves. Moreover, they did not have a right to choose their employer and were passed down as a property from one generation to the next.²⁹¹ When the British arrived, this principal and component tribes got institutionalized.

The British came to rule Botswana around 1884 to guard against German and Boer expansions from the west and south respectively.²⁹² They gave freehold lease to a number of Boer families in the Ghanzi area where the forager *San* peoples lived. It was a part of British indirect ruling policy where they ruled the natives through the traditional political institutions. As a result, the powerholder *Tswana* people got recognized and the country was divided into eight administrative tribal territories all of which were ruled by the *Tswana* people. The Tribal Territories Act re-enacted in 1933 demarcated the tribal territories, Crown Lands, and freehold lands. The *San* peoples living in the Crown Lands were automatically regarded as a political subject of *Tswana* tribes.²⁹³

²⁸⁸*Ibid* at 7.

²⁸⁹*Ibid*.

²⁹⁰[Holm] *supra* note 275 at 309.

²⁹¹*Ibid* at 310.

²⁹²[ILO Botswana] *supra* note 287 at 7-8.

²⁹³*Ibid* at 51.

In 1919 the Native (Africa) Advisory Council was established and only *Tswana* Chiefs were admitted in the council.²⁹⁴ Later on, in 1940 the non-*Tswana* tribes got admission in the Council as sub-chiefs and were treated as subordinate to the principal *Tswana* tribe chief. After independence, the Council was renamed as *Ntlo ya Dikgosi* (House of Chief) and have permanent members all from the eight *Tswana* tribes.²⁹⁵

It is to be noted that, the IPs of Botswana have been ruled over by the majority ethnic population the *Tswana* people. In the colonial era, this ruling got institutionalized and the IPs got their recognition comparing themselves with the British rulers. For the British colonialists, it was all native Africans who were first comers, non-dominant and culturally different from the white intruders and therefore triggered the notion of all native Africans were ‘indigenous’.²⁹⁶ The British drew the line between themselves and the natives but not among the existing native indigenous groups who were distinct in culture, language, lifestyle, and ethnicity inter alia.

ii. Plight of Indigenous Peoples in Post-Protectorate Botswana

Botswana gained its independence from the colonial rule on September 30, 1966. It is remarkable that the Botswana Democratic Party (BDP) (previously known as Bechuanaland Democratic Party) founded by Sereste Khama have won all of the 11 parliamentary elections since independence. The Constitution of Botswana does not recognize the IPs. The Government is strict in their position that all the citizens of Botswana are indigenous as all of them have been living there from time immemorial.²⁹⁷

²⁹⁴*Ibid* at 8

²⁹⁵Encyclopedia Britannica, Botswana Government and Society, online:
<www.britannica.com/place/Botswana/Government-and-society> [Britannica]

²⁹⁶[Saugestad] *supra* note 283 at 166.

²⁹⁷ Tapela Morapedi, “Botswana has no indigenous peoples – Tsogwane”, *Weekend Post Insightful* (22 May 2017) online:<www.weekendpost.co.bw/wp-news-details.php?nid=3808>

The IPs of Botswana (the Bushmen-the *San*, the *Bakgalagadi*) have faced a number of strategic and policy related exclusions by the Government. The Government of Botswana by enacting the Wildlife Conservation and National Parks Act, 1992 has taken away the traditional rights of the IPs for hunting. As per this Legislation, no one can hunt in the declared park areas without having a license.²⁹⁸ In the Game Reserve areas hunting is only allowed if someone has the permit issued by the Government.²⁹⁹ This hunting prohibition often applies even to those who have obtained the game license.

Moreover, the Government of Botswana has taken a strong stance against poaching and has a “shoot to kill” policy exercised by the Border Defence Force (BDF). Further, the representation of the IPs in the policy making process is almost nil. It was also reported that the Commission set up for determining the future of the Central Kalahari Game Reserve (CKGR) did not include the IPs

²⁹⁸The Wildlife Conservation and National Parks Act, 1992, S. 8 (1): “Certain acts in a park prohibited (1) Except as provided in subsection (2), no person other than a wildlife officer or a gate attendant acting in the exercise of his official duties or any other employee of the Government with the written permission of the Director and acting in the exercise of his official duties as such employee, shall- (a) convey into or be in possession of any weapon, explosive, trap or poison within a national park; (b) without lawful excuse, be in possession of, or kill, hunt, injure, capture or disturb any animal, or take or destroy any egg or nest, in a national park; (c) cause any damage to or disturb any object of geological, ethnological, historical, archaeological or other scientific interest within a national park, or remove any such object from a national park; (d) introduce any wild or domestic animal or any fish or any vegetation into a national park, or permit any domestic animal to stray into a national park; (e) remove from a national park any animal or part of an animal or any vegetation, whether alive or dead, other than an animal he has lawfully introduced into the park; (f) cut, damage or destroy any tree or other vegetation in a national park; (g) erect any structure, whether permanent or otherwise, or make any road or airstrip, or otherwise alter the natural environment, except as may be expressly permitted by the Minister or by a wildlife officer authorized to give such permission; (h) destroy or deface any object, whether animate or inanimate, in a national park; or (i) wilfully or negligently cause any veld fire in a national park.”

²⁹⁹The Wildlife Conservation and National Parks Act, 1992, s. 12: “Game reserves and sanctuaries: (1) Each of the areas defined in the Second Schedule is hereby declared to be a game reserve or a sanctuary in respect of the animals, species, or variety, specimen or sex of animal specified in relation thereto. (2) The President may, from time to time, by order published in the Gazette declare any other area of land to be a game reserve or a sanctuary, or alter the boundaries of, or abolish, any game reserve or sanctuary: Provided that in respect of any particular game reserve or sanctuary, the President may declare that it shall be a game reserve or a sanctuary only in respect of animals of such species, variety, specimen or sex of animal or animals as may be specified, and may amend any such declaration. (3) In any game reserve or sanctuary, no person shall hunt or capture any animal, or species or variety, specimen or sex of any animal specified in relation to such game reserve or sanctuary, except only under and in accordance with the terms and conditions of a permit issued under section 39, and any person who contravenes the provisions of this section shall be guilty of an offence and, without derogation from his liability under any other provision of this Act, shall be liable to a fine of P5 000 and to imprisonment for 5 years.”

of the land.³⁰⁰ Although, the IPs brought legal action against the decision and won but till now the Government did not provide them with water and sanitation and the IPs are prohibited to hunt for their living. As a result, they are forced to leave their ancestral land to realize their basic human rights. The oppression on the CKGR IPs have been further discussed in the next section.

Furthermore, the indigenous children are facing assimilation process in the schools. They are being taught in Setswana (the *Tswana* tribes language in Botswana) or in English. Consequently the children are dropping out from the school or are forgetting their mother tongue languages and among those languages some are considered critically endangered.³⁰¹

iii. The Central Kalahari Game Reserve

The Central Kalahari Game Reserve covering an area of 52,347 square kilometers is one of the biggest Game Reserve in the world. It was established in 1961 by the Protectorate of Bechuanaland in order to protect the wildlife and resources of the Kalahari Desert. In the mid 1980's the Botswana Government decided to set up a commission to investigate the situation inside the Game Reserve. The Commission did not include any of the local residents of the Game Reserve and was maintaining least communication with the local residents in this regard.³⁰² The Commission in 1986 gave the opinion that the Reserve should be kept without human inhabitants and the residents should be removed from the Reserve. Also, they argued that the tourism industry would be more developed in the CKGR as the tourists will want to see the unspoiled wilderness of the CKGR.³⁰³

³⁰⁰[Hitchcock] *supra* note 273 at 68

<<http://www-tandfonline-com.proxy3.library.mcgill.ca/doi/pdf/10.1080/13642987.2011.529689?needAccess=true>>

³⁰¹[Botswana] *supra* note 278 at 445

³⁰²[Hitchcock] *supra* note 273 at 68.

³⁰³*Ibid* at 69.

From 1986 to 1997 the Government tried to move the peoples from the Game Reserve by ‘Freezing’ development. The Game Reserve had less access to water, less developed transport system resulting to delay in providing services by the Government. This was the reason given by the Government to remove the inhabitants of the CKGR. The residents of CKGR were promised to be given land rights if they moved from the Reserve to another settlement (New Xade).³⁰⁴ In 1997 and in 2002 the CKGR faced a massive number of resettlement of the IPs by the Government. After the relocation the population reduced from 1239 to 17 in CKGR. The remaining population started staying far from their previous settlement in CKGR in order to avoid arrest.

Hunting is the way of livelihood for *San* peoples of Kalahari. But as per the hunting restriction law only the persons who have obtained a special game license could hunt. After 2001, the Government stopped providing special game license as well.³⁰⁵ Therefore, the IPs of CKGR could not hunt and had to leave the reserve for livelihood. It was reported that the law enforcing agency was arresting and torturing the IPs for hunting in the region.

Water is a basic need for every human being. In the CKGR, surface water is very hard to obtain because of the dry climate. There is only one borehole inside the CKGR which was sealed with cement by the Botswana Government. The rest of the CKGR inhabitants were prohibited to open or dig any boreholes inside the CKGR giving the reason that it will have an adverse impact on the environment. However, “General Comment No. 15 on the Right to Water of the Committee on Economic, Social, and Cultural Rights requires that access to traditional water sources be protected from unlawful encroachment, something that applies to indigenous peoples on their traditional

³⁰⁴*Ibid.*

³⁰⁵*Ibid* at 72.

lands.”³⁰⁶ Ironically Botswana did not ratify the ICESCR, hence has a strong contention of not complying with the provision.

Facing all these adversities the CKGR residents sought legal action in 2002 against the Botswana Government stating that they have right to access their ancestral lands and also to the services. However, the suit was dismissed on a technicality but they appealed to the High Court on 2004. In 2006, the High Court ruled that the CKGR inhabitants have right to access their ancestral lands but they cannot obtain the services provided by the Government (water access).³⁰⁷ In 2010, they applied to the High Court for a declaratory relief to recommission the borehole at their own expense and asked for the following four reliefs: “1. The refusal or failure of the respondent to permit the applicants to re-commission at their own expense the borehole at Mothomelo in the CKGR formerly used to provide water to the residents of the CKGR so that the applicants may abstract and use water therefrom for domestic purposes is unlawful and unconstitutional. 2. The refusal or failure of the respondent to confirm that on the payment of the specified fees it will issue permits to any reputable contractors appointed by or on behalf of the applicants to enter the CKGR to re-commission the borehole for the aforesaid purposes is unlawful and unconstitutional. 3. The refusal or failure of the respondent to confirm that the applicants have the right at their own expense to sink one or more wells or other boreholes on land in the CKGR and to abstract and use water therefrom for domestic purposes in accordance with section 6 of the Water Act is unlawful and unconstitutional. 4. The refusal or failure of the respondent to confirm that on the payment of the specified fees it will issue permits to any reputable surveyors or contractors appointed by or on

³⁰⁶*Ibid* at 70.

³⁰⁷*Roy Sesana, Keiwa Setlhobogwa and Others v. The Attorney-General* in the High Court of Botswana, Misc. No. 52 of 2002, Lobatse, 13 December 2006 online: <<https://www.elaw.org/system/files/Roy%20Sesana%2C%20Keiwa%20Setlhobogwa%20and%20Others%20v%20the%20Attorney-General.pdf>> [Sesana].

behalf of the applicants to enter the CKGR to identify suitable sites for and to sink one or more wells or other boreholes for the aforesaid purposes is unlawful and unconstitutional.”³⁰⁸

The High Court dismissed the application considering the four issues and Judge Walia stated that the Government is not bound to provide water to the people of the CKGR and affirmed that: “The *Basarwa* have chosen to settle in areas far from those facilities. They have become victims of their own decision to settle an inconveniently long distance from the services and facilities provided by the government.”³⁰⁹

However, the decision was challenged in an appeal in the Court of Appeal of Botswana by the applicants.³¹⁰ In the appeal decision Justices of Appeal showed more sympathy towards the IPs of the CKGR and quashed the High Court decision. All of the five judges unanimously decided that the appellants have a right to dig a borehole on their own expense inside the CKGR of which they are the lawful occupiers.³¹¹ The fine reasoning that the Justices of Appeal gave was that “there is a constitutional requirement based on international consensus for Government to refrain from inflicting degrading treatment.”³¹²

By this judgement the Justices of Appeal has upheld the indigenous peoples rights to land and natural resources that includes water as the standards enshrined in the UNDRIP in Articles 25, 26 and 27.³¹³ Also, it was pointed out that the deprivation of water rights lead to a life that is

³⁰⁸*Mosetlhanyane and Another v The Attorney General* (2010) 3 BLR 372 HC at para 1 online: <<http://www.elaws.gov.bw/displaylrpage.php?id=4403&dsp=2&words=central%20kalahari%20game%20reserve#ct>> and <https://www.escri-net.org/sites/default/files/CKGR_judgment_0.pdf> [Mosetlhanyane].

³⁰⁹*Ibid* at 70-71, and para 48.

³¹⁰ *Matsipane Mosetlhanyane and Gakenyatsiwe Matsipane v the Attorney General*, in the Court of Appeal of the Republic of Botswana, Civil Appeal No. CACLB-074-10, Lobatse, 27 January 2011 online: <<https://www.escri-net.org/sites/default/files/bushmen-water-appeal-judgement-jan-2011.pdf>> [Matsipane].

³¹¹ *Ibid* at paras 16 & 25.

³¹² *Ibid* at para 22.

³¹³ United Nations Declaration on the Rights of Indigenous peoples, 2007 (UNDRIP) art 25: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to

“extremely difficult” where from children to adults suffers from a number of diseases.³¹⁴ The Court affirmed that such deprivation amount to degrading treatment by mentioning two international documents apart from UNDRIP. The one being the Report on Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights submitted by the United Nations Committee on Economic, Social and Cultural Rights and the other mentioned was the report on the 15th Session of the Human Rights Council on Human rights and access to safe drinking water and sanitation (UN Doc. No. A/HRC/15/L.14).³¹⁵ The Court reminds that the State has responsibility to ensure that no person shall be subjected to inhuman or degrading treatment.³¹⁶

The Courts in all the cases admitted that the IPs of CKGR are the lawful occupiers of the land as mentioned in Sesana case.³¹⁷ However, in none of the cases was it recognized that they were the owners as the IPs in Sesana case have claimed their right to occupy but not to the ownership.³¹⁸ Also, the Judgements stick with the State ownership of the CKGR land.

Although in the Sesana case the High Court ruling was partly in favor of the IPs by acknowledging their ancestral land, however, they were forced to the assimilation and integration policy of the

future generations in this regard.” art 26: “1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.” art 27: “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.”

³¹⁴ [Matsipane] *supra* note 310 at para 8.

³¹⁵ *Ibid* at para 19.

³¹⁶ *Ibid* at paras 20 & 22.

³¹⁷ [Sesana] *supra* note 307 at paras 40 and 168.

³¹⁸ *Ibid* at paras 37C and 39.

Government. They had to give up hunting as there is a nation-wide hunting ban which allows foreign tourists and game hunters to hunt but restricts hunting for the IPs of Botswana.³¹⁹ In 2014, the Gem Diamond Company opened the Ghaghoo mine inside the CKGR. The Ghaghoo mine is situated in the southeast portion of the CKGR.³²⁰

The Judiciary in the CKGR case has adjudicated in favour of the IPs but in reality, the land rights, the water rights and the hunting rights of the IPs were never acknowledged by the Government of Botswana. The inhabitant *San* peoples of the CKGR had to leave their ancestral land in order to survive from dehydration, scarcity, and arrests made by the Government. The Central Kalahari Game Reserve which was established to protect the environment and wildlife now facing the deterioration of both. The diamond mining company drilled and degraded the environment. The tourism industry is hunting wildlife for their amusement. On the other hand, the basic human needs of the IPs of CKGR were denied and now there are only 260 peoples remaining in the CKGR as per the 2011 Census date.³²¹ The Government actually worked to ensure its obscured gains in the name of developing, protecting and providing services to the IPs of CKGR. However, establishing the self-identifying right remains as an important victory for the CKGR IPs. “They sought to re-assert their rights, using the concept of indigeneity as a means of defining themselves as a group that: (1) was different from the majority population; (2) that historically had been mistreated and discriminated against; and (3) that this treatment occurred in part because of their lifestyles and

³¹⁹ Robyn Dixon, “In Botswana Reserve, Bushmen Still Being Deprived of Rights”, *Los Angeles Times* (28 February 2015) online: <www.latimes.com/world/africa/la-fg-bushmen-hunting-ban-20150228-story.html> [Dixon]

³²⁰ Jeff Miller, “Gem Diamonds Opens Its Underground Ghaghoo Mine”, *Rapaport, Diamonds.net*, (5 September 2014) online: <www.diamonds.net/News/NewsItem.aspx?ArticleID=47921>

³²¹ Statistics of Botswana: Data Portal, *Population & Housing Census of Botswana, Census Data, Population*, online: <<http://botswana.opendataforafrica.org/PHCDB2016/population-housing-census-of-botswana?indicator=1000740-population®ion=1000160-central-kgalagadi-game-reserve-ckgr>>

distinct cultural attributes”.³²² Their right to self-identify themselves as indigenous was not questioned in the High court of Botswana. It is a remarkable achievement for the IPs of CKGR.

iv. The Plight Unseen

The CKGR case was internationally prominent. But the struggle of the IPs of Botswana has always been unnoticed by the Government. It is also evident from the CKGR case that the Botswana Government is reluctant to address the *San* people’s right. A strong reason behind it is that they have never got the chance to represent themselves in the policy making process. Also, all the political leaders till now represent the majority *Tswana* tribe. Sereste Khama the first President of Botswana was born in the *Bamangwato* tribe which belongs to one of the principal *Tswana* Chieftaincy tribe. He was educated in South Africa and in the United Kingdom. He was sent to exile by the British rulers after his marriage to an English lady. This was influenced by South Africa who was then participating in Apartheid and exercising racial segregation.³²³ However, in 1956 the exile order was curtailed against Sereste Khama and he returned to Botswana after renouncing the tribal throne. Later on, in 1961 he founded the BDP and successfully led Botswana towards independence. In this regard, it is to be noted the leader of the nation has spent most of his youth away from his tribe. Inference can be made that a person although belonging to the IPs can rarely understand their plight unless he lives that life. The seed that the British Government sowed to oppress the IPs of Botswana has grown into a tree in the regime of Sereste Khama and the successive Presidents of Botswana. The present President of Botswana also was born and educated in England. His citizenship derives by descent as he is the son of the first President of Botswana. The struggle and the present human rights violation of the IPs remain unnoticed again

³²²[Hitchcock] *supra* note 273 at 63.

³²³[Britannica] *supra* note 295.

as being indigenous in Botswana is considered as savage.³²⁴ My inference is that one of the main reason for infringing the basic human rights as well as indigenous rights of the *San* is taking place as the rulers being almost an outsider to the indigenous situation of Botswana

II. Part II: Comparative Analysis with Bangladesh

Bangladesh and Botswana, although situated in different Continents, have inflicted the similar type of human rights violation of the indigenous peoples. In this part, I have discussed the similarities between the two countries regarding the human rights violation of the IPs. Further, I have focused if there is any way out for Bangladesh compared to Botswana to ensure the rights of the *Adivasis* of Bangladesh.

a. Comparisons between Botswana and Bangladesh

The comparative approach has been mainly focused on the human rights violations. It starts from legal frameworks to practical field. On the following grounds, the human rights violation of the IPs appears to be the same.

i. Legal Framework

The Botswana IPs are ruled by the majority ethnic groups *Tswana*. Here, the slight distinctive feature of Botswana is both *Tswana* and *San* (Bushman) belongs to ethnic groups. Whereas, in Bangladesh, the *Adivasis* are ruled over by the majority *Bangalee* population who in fact do not belong to any ethnic minority groups. The Constitution of Botswana does not recognize the IPs. The reason has a concrete argument that derives from the history of Apartheid. As for Bangladesh,

³²⁴[Dixon] *supra* note 319.

there is no such argument. In reality, Bangladesh argues that all the people of the country are indigenous as all of them are living there from time immemorial.

The laws of Botswana are enacted in a way that apparently protects the wildlife and environment of the country. While doing so the legislations curtails the customary and traditional rights of the IPs of Botswana. In Bangladesh, the laws curtail the *Adivasis* rights simply by not recognizing them as *Adivasi*. Firstly, the land right of the *Adivasis* in Bangladesh is infringed by the virtue of the land laws of Bangladesh. Further, the non-inclusion of the *Adivasis* in policy making is legalized in Bangladesh by the Chittagong Hill Tracts Development Board Ordinance, 1976 (See Chapter 5). Also, in Bangladesh, there is no Quota given for the *Adivasis* in the House of Nations to bring them along with the majority population. On the other hand, Botswana has political leader only from *Tswana* chieftaincy. The eight major *Tswana* tribe rules the country as was set by the British Protectorate.

ii. Practical Human Rights Violation

The *San* peoples of Botswana have faced human rights violation in their day-to-day life. The Government of Botswana did not recognize the IPs in order to protect them from racial segregation. However, in reality, the Government itself is abusing the non-recognition of indigenous peoples. By not recognizing them at first, the Botswana government denied the traditional practices of the *San* peoples. They have been forced to stop hunting in their ancestral land in order to protect the wildlife and environment. The Botswana Government has set up diamond mines and allowing tourists to hunt in the same area, whereas, being the first nation peoples it is the right of the *San* peoples to go on with their traditional livelihood. In Bangladesh, the *Adivasis* face a different type of oppression as they are mainly dependent on *Jhum* cultivation. The *Adivasis* of Bangladesh are denied the right to *Jhum* cultivation on their ancestral lands (see Chapter 5).

The tourism industry plays the same role both in Bangladesh and in Botswana. The IPs were removed from their lands in order to promote tourism. Tourism enhances the economy of a State. However, it has to be taken into consideration that to what extent tourism should be promoted keeping in mind the protection of the IPs. The economic development cannot sustain by killing and taking away the lands of its own citizen. In Bangladesh the forced eviction is precisely open and violent whereas in Botswana it is quite devious. The Botswana Government stopped providing services to the IPs residing on the targeted tourist lands. They were arrested and also were forced to evacuate the land. But, there was no arson, killings or enforced disappearance reported in Botswana. In this regard the Botswana Government has ensured the human rights of the IPs in front of the international community although being very swindling. The land ownership rights for both *Adivasis* of Bangladesh and the IPs of Botswana are not recognized.

b. Way-out for Bangladesh

Bangladesh and Botswana are walking on the same path regarding the IPs issues. Botswana has voted in favor of the UNDRIP whereas Bangladesh abstained from doing so. Having the similarities in their situations Bangladesh has something to acquire from Botswana in order to protect the *Adivasis*. The *Adivasis* of Bangladesh have to speak up for their human rights violation and not rely on the outsiders to speak for them. Although there are a number of organizations established by the *Adivasis* but the fear of atrocities and regulations have kept them silent. The case of Kalpana Chakma is one of the examples among many. Both the *Adivasis* and the GoB have to work to realize and protect the *Adivasis* rights. However, one of the reasons for Botswana IPs to be able to get a decision in their favour is that the Tsawa/San are widely recognized among the IPs advocates around the world. Also, they have NGOs working for their rights inside Botswana. In this regard, the *Adivasis* of Bangladesh may have to make themselves known to the international

community. Also, the NGOs of Bangladesh have to take a proactive role in order to get recognition for the *Adivasis* from the GoB. Alongside, the following could be a way out to protect *Adivasis* rights in Bangladesh.

i. Legal Action

The IPs of Botswana have gained recognition of their land occupation rights by one of the State organs in the CKGR case. It was the first step towards protecting their rights by themselves. In Bangladesh there have been investigation committees set up by the Government whenever a human rights violation occurred on *Adivasis* (See Chapter 5). It is now time for the *Adivasis* of Bangladesh to bring legal actions by themselves instead of relying on the actions taken by the Government. Until now it is evident that the GoB has failed to reach any decisions or give any protection to the *Adivasis*. However, it is the *Adivasis* who need to speak up for their rights as the IPs of Botswana did in the CKGR case. The *Adivasis* of Bangladesh can learn from the mistakes of the IPs of Botswana regarding the express recognition of land ownership. It is indeed the *Adivasis* plight that they have to move to the court in order to get the land ownership and sought for such declaration regarding land title. In Bangladesh, the main challenge in realizing this suggestion is that, the GoB does not recognize the land ownership system of the *Adivasis* nor does the State legislation. However, the Court can give directives to recognize the land ownership of the *Adivasis* if there is any legal action regarding this matter.

ii. Define Self-identifying Traits

The IPs of Botswana have defined their trait in the CKGR case and identified themselves as indigenous peoples. They relied on the indigeneity concept as well as defined themselves on the criteria set out by them. The *Adivasis* of Bangladesh have to take a step forward and set out some

criteria to self-identify themselves. Because the right to self-determination of the IPs is the principle idea of indigeneity which the *Adivasis* of Bangladesh are not being able to utilize. It is true that the representatives of the *Adivasis* of Bangladesh have participated in various local, regional and international forum submitting their concerns, but, their self-identifying traits are still not established in Bangladesh.

To come up with self-identifying traits it is not necessary to bring a legal action. It can be done by the representatives of the IPs in various public meetings they attend both in the national and international sphere. Also, there is a fair opportunity for the *Adivasis* of Bangladesh as there are plain land and Hill Tracts *Adivasis* existing with their own distinct traits. Their traits although in existence but yet to be systematically identified and presented in the forums. To be noted, the traits that Botswana *San* set to identify themselves was based on their livelihood and oppressions they faced from the State. These traits are similar with the *Adivasis* of Bangladesh. Therefore, this common ground of oppression can be taken by the *Adivasis* of Bangladesh as well.

iii. Recognizing UNDRIP

The GoB also has a role to play in protecting the rights of the *Adivasis* as the position of Botswana and Bangladesh is similar regarding the recognition of *Adivasis*. The UNDRIP being a Declaration has a mere binding effect on the States recognizing it. The Declaration merely clarifies the state's position regarding the issue.³²⁵ Botswana has voted in favor of the UNDRIP but Bangladesh has abstained. Botswana established its position regarding the IPs and that is they recognize the struggle of the IPs all around the world and their rights. However, Botswana does not recognize

³²⁵Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 arts 2 (1) (b), 14 (1) and 16 (entered into force 27 January 1980) [VCLT], online: <<https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>>

IPs in the country but by voting in favor of the UNDRIP Botswana has shown its sincerity to protect the indigenous peoples. On the other hand, it is evident that Bangladesh is unwilling to recognize the struggles of the indigenous peoples by abstaining from voting in favor of the UNDRIP. Further non- recognition of UNDRIP by Bangladesh implies that the GoB is not even ready to recognize the IPs rights be it *San* or be it *Jumma*. Botswana ensured a way ahead of Bangladesh by recognizing the UNDRIP although having the same stand regarding the recognition of indigenous peoples of their own State. Moreover, the CKGR judgement has echoed some of the provisions of the UNDRIP. The Judiciary reminded that the Government of Botswana to value the international norms. The GoB can reflect such by simply recognizing the UNDRIP and the Judiciary can help by crystalizing the international laws in national jurisprudence.

iv. Binding Agreement

The Judiciary of Botswana has recognized the land occupation rights of the IPs in the CKGR case. The High Court has reinstituted the *San* peoples land occupation rights in Sesana case. In this regard, Bangladesh can take initiative to recognize the land occupation rights of the *Adivasis*. Although there is a peace treaty between the GoB and the PCJSS, but, it is highly flawed. The *Adivasis* of Bangladesh can propose for a new binding agreement to be signed between the *Adivasis* and the GoB and make sure that the participation from Government, *Adivasis* and from the Non-State actors in the process of the Agreement. By doing so the customary rights of the *Adivasis* can be ensured. The challenges regarding this point is that, the democratic process has to be ensured by the State. In this regard, the *Adivasis* as well as the non-State actors ought to be aware of the necessity of their right to participation. In Bangladesh, this cannot be guaranteed by protest but through a series of dialogues. However, the State needs to show its sincerity towards the *Adivasis* first.

v. Culturally Reflexive Judiciary

Botswana has recognized the customary laws in their Constitution. Article 10, 15 and 88 of the Constitution of Botswana recognizes customary laws including their jurisdiction on criminal matters. Botswana has taken and upheld the legal pluralism in their judicial system. Bangladesh can take the advantage of the existing legal pluralism in the country and protect the *Adivasis* rights. Moreover, the cultures of *Adivasis* can be upheld by the judges of the State Courts to recognize legal pluralism. In this matter, the Judges have to be culturally reflexive. A culturally reflexive judiciary is interdependence of culture and law instead of considering “culturally neutral” legal standard, which places the law above culture.³²⁶ The “monocultural paradigm” has the effect of alienating rather than incorporating minorities into the dominant society, and denies them their “right to culture” in addition to interfering with other fundamental rights, such as equal protection, freedom of association, or freedom of religion.³²⁷ A culturally reflexive judiciary requires for three pong tests namely: the community where the person being adjudicated belong, the practice and traditions of the community, and the influence of these practices and traditions on the accused person.³²⁸ The Botswana Judiciary has taken into account the culture of the *San* peoples while deciding the cases.³²⁹ In Bangladesh by taking these into account the Judiciary can reaffirm the existence of legal pluralism and can identify the *Adivasis* of Bangladesh.

It is to be noted that in the matter of culturally reflexive judiciary Bangladesh may need more time. Also, there could be challenges regarding lack of resources as the judges are needed to be trained up accordingly. However, it is not at all impossible for Bangladesh to follow Botswana’s footsteps.

³²⁶ David Howes, “Introduction: Culture in the Domains of Law” (2005) 20:1 Canadian Journal of Law and Society at 9.

³²⁷ *Ibid* at 22.

³²⁸ *Ibid* at 25.

³²⁹ [Matsipane] *supra* note 310 at paras 4, 5, 6, 7, 8 & 10.

B. Conclusion

The IPs all over the world have faced oppression by the majority population. It is their lifestyle that has always been targeted and undermined by the so called civilized nation-States. The key findings of this chapter after comparing Botswana and Bangladesh is that the IPs face same atrocities all over the world.

Another finding of this chapter is there can be some preferential treatment given to the IPs even if they are not recognized as such. Botswana government has recognized the self-identifying criteria of the IPs as well as their land rights. Bangladesh can follow this pattern instead of not recognizing the *Adivasis* and stating all citizens are *Adivasis*.

The situations of the IPs are the same in Asia (Bangladesh) and in Africa (Botswana). The basic human rights are denied to them whereas they are entitled to human rights and indigenous rights from the State. For me, the reason behind it is mainly the technicalities of the international instruments which enables a State to decide on the ratification procedure. In order to respect the State sovereignty, the international community is also failing to protect the indigenous peoples' rights. It is to be noted that to develop this situation both the State and the indigenous peoples have to take part actively. There is a scope of improvement in the part of the international community, the State and also in part of the indigenous peoples.

CHAPTER SEVEN

CONCLUDING REMARKS

This thesis answers both the research questions: whether or not the rights of the *Adivasis* are recognized in Bangladesh; and whether or not the rights given to the backward section of the society are adequate; in the negative. The thesis started with a brief introduction of the *Adivasis* in Bangladesh. Also, I have discussed the *Cobo* definition for indigenous peoples.

In chapter two, I have shown that there are *Adivasis* in Bangladesh living on the land from ancient time. It is to be noted that, although some of the plain land *Bangalees* migrated to the Chittagong Hill Tracts area, they do not count as *Adivasis*. The Government's position regarding everyone being *Adivasi* is not valid as the record for *Bangalees* can be traced into the region whereas, the *Adivasis* history is much longer than the *Bangalees*. The time is not the only criterion, and the *Adivasis* of Bangladesh also fulfill the other conditions of the *Cobo* definition for being indigenous. Moreover, the chapter goes on to discuss that from pre-colonial to Pakistani era all the rulers recognized CHT as an autonomous region and the inhabitants as *Adivasis* (although not stating *Adivasi* anywhere in the official documents). From the mid-Pakistani era the non-recognition and the state sponsored violences on the *Adivasis* started to take place.

Moreover, in the same chapter the establishment of NGOs have been discussed where I showed that the NGO's are well accepted in the CHT area by the *Adivasis* although it is different in other parts of Asia.

Further, the chapter explained the theoretical framework applied in this thesis, that is "legal pluralism". I have shown that there is an existence of legal pluralism in Bangladesh where two different legal traditions work simultaneously (*Adivasis* legal system and *Bangalee/State* recognized legal system). However, Bangladesh does not recognize the *Adivasis* legal system in reality.

In chapter three, I have discussed the international community's dilemma on recognizing and defining the *Adivasis*/indigenous. The reason is based on the concern shown by the indigenous peoples' representatives in the international meetings stating that it will lead to a path for an exclusion of the IPs. Although the concern is valid, the GoB has taken advantage of it. The GoB

is arguing on the ground that in absence of any international definition of the IPs the GoB is not bound to define and identify the IPs. Recognition of the *Adivasis* is one of the main elements for ensuring justice in the society. Without recognition, it is impossible for a State to ensure proper distribution of wealth and participation in the democratic process of the State Administration. In this regard, Bangladesh is a democratic country that fails severely to ensure justice for its citizens precisely the *Adivasis*.

Later on, I have discussed the importance of the term *Adivasi*. I have shown that the *Adivasis* of Bangladesh have self-identifying traits which is the core idea of self-determination of the IPs in international documents. Moreover, the hegemony of *Bangalee* nationalism and the terms used by the *Adivasis* for themselves are discussed. It has been shown that the *Bangalee* nationalism infringes the civil, political and land rights of the *Adivasis*. On the other, I showed that being an ethnic minority the economic, social and cultural rights of the *Adivasis* are also curtailed as these are protected under the non-enforceable part of the Constitution.

In chapter four, I have shown that the rights given to the ethnic minority or to the backward section are not adequate to realize the rights of the *Adivasis*. It can be argued that the rights given in the Constitution for the ethnic minorities and the backward section fail to ensure protection for the *Adivasis* for the technical issue (enshrined in the non-enforceable part of the Constitution) but even then the rights given to the backward society is not adequate for the *Adivasis* of Bangladesh. There are a number of laws that recognize the rights of the ethnic minorities and the semi-autonomous structure of the CHT but none of the laws have the word *Adivasi* enshrined in it.

The Chittagong Hill Tracts Peace Accord was the agreement signed between the PCJSS and the GoB in order to settle the insurgency of the *Shanti Bahini*. It was a non-participatory agreement which created the scope to deny the recognition of the *Adivasis* by the GoB. Moreover, the international community has also shown its concern regarding the militarization and State sponsored violence in the CHT region.

Further, I have discussed the rights given to the *Adivasis* under the international instrument of which Bangladesh is a party. I have found that the international instruments fall short to recognize the *Adivasis* rights in many aspects. The dilemma of protecting the rights of the *Adivasis* either as *Bangalee* (based on nationalism/equal rights) or as ethnic minority is present in the international

instruments as well. The core human rights document also contains lacunae that pave the way for the GoB to curtail the rights of the *Adivasis*.

The national legislations have also failed to protect the *Adivasis* rights in various dimensions. The laws do not provide participatory provision for the *Adivasis*. It denies the autonomous system of the CHT and states that *Bangalees* to be part of the administration. None of the legal frameworks defines *Adivasi* or provides a definition for being Tribal. The backward section and the equality clauses are used against the *Adivasis* by the State organs whenever it is needed.

Chapter five has discussed the practical scenario in the CHT. I have discussed three recent case studies about the State sponsored violence both on the CHT and on the plain land *Adivasis*. The GoB is blatantly sponsoring violence on the *Adivasis* and till date, these have not undergone any judicial hearing. The alleged perpetrators of the atrocities are still roaming around among the innocent people.

The GoB has initiated a number of development projects in the CHT. The chapter finds out that these projects are playing a key role in dislocating the *Adivasis* from their own land. Tourism is a big part of this development and it is infringing the *Adivasis* right to privacy and protection of their home and correspondence. Also, it shows the lack of faith of the *Adivasis* on the State mechanisms as they are facing State sponsored violence.

The Chapter further explores the issue of Genocide of the *Adivasis*. It establishes that there may not be any genocide at this moment but there are grave human rights violations. The GoB ought to be cautious regarding the isolated/sporadic events occurring within its territory.

In chapter six, I have made a brief comparison between Africa and Asia taking Botswana and Bangladesh into consideration. Botswana has its IPs and just like Bangladesh, the Government of Botswana has stated that all the citizens of the country are indigenous. Moreover, the nature of human rights violation is quite similar to Bangladesh.

However, Botswana is a signatory to the UNDRIP and has a culturally reflexive judiciary. Although it is constituted with the majority ethnic population, still it ensures the participation of the ethnic groups. The chapter concluded with some probable solutions that Bangladesh could take following Botswana.

Bangladesh having legal pluralism in existence can take the advantage of it. There is wide scope present for Bangladesh to recognize the *Adivasis* right and protect and govern the *Adivasis* harmoniously. By recognizing the *Adivasis* Bangladesh could utilize its resources and the anthropological knowledge of the *Adivasis* effectively.

a. Scope for Further Research

There is further scope to do research on this issue. Firstly, the comparison part can be made with Australia which made remarkable progress in protecting indigenous rights. Secondly, the research can be done from an empirical point of view. Moreover, the research backed by empirical data and evidence will operate as an authentic document showing the human rights violation of the *Adivasis* in Bangladesh.

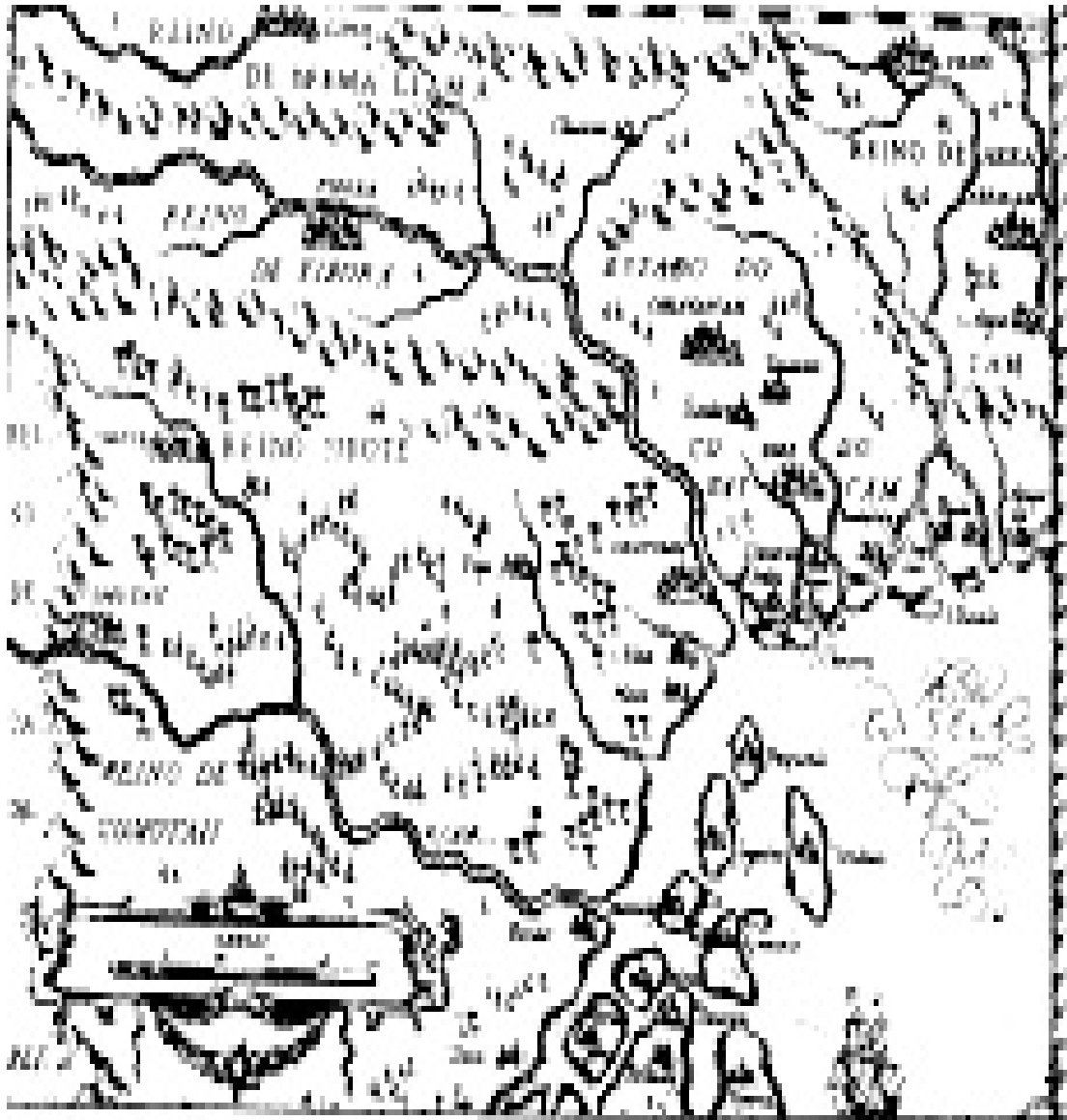
Appendix-A



The Chittagong Hill Tracts, Bangladesh

Source: Life is not ours: Land and Human Rights in the Chittagong Hill Tracts Bangladesh, the Report of the Chittagong Hill Tracts Commission (OCCHTC and IWGIA: 1991) at 160.

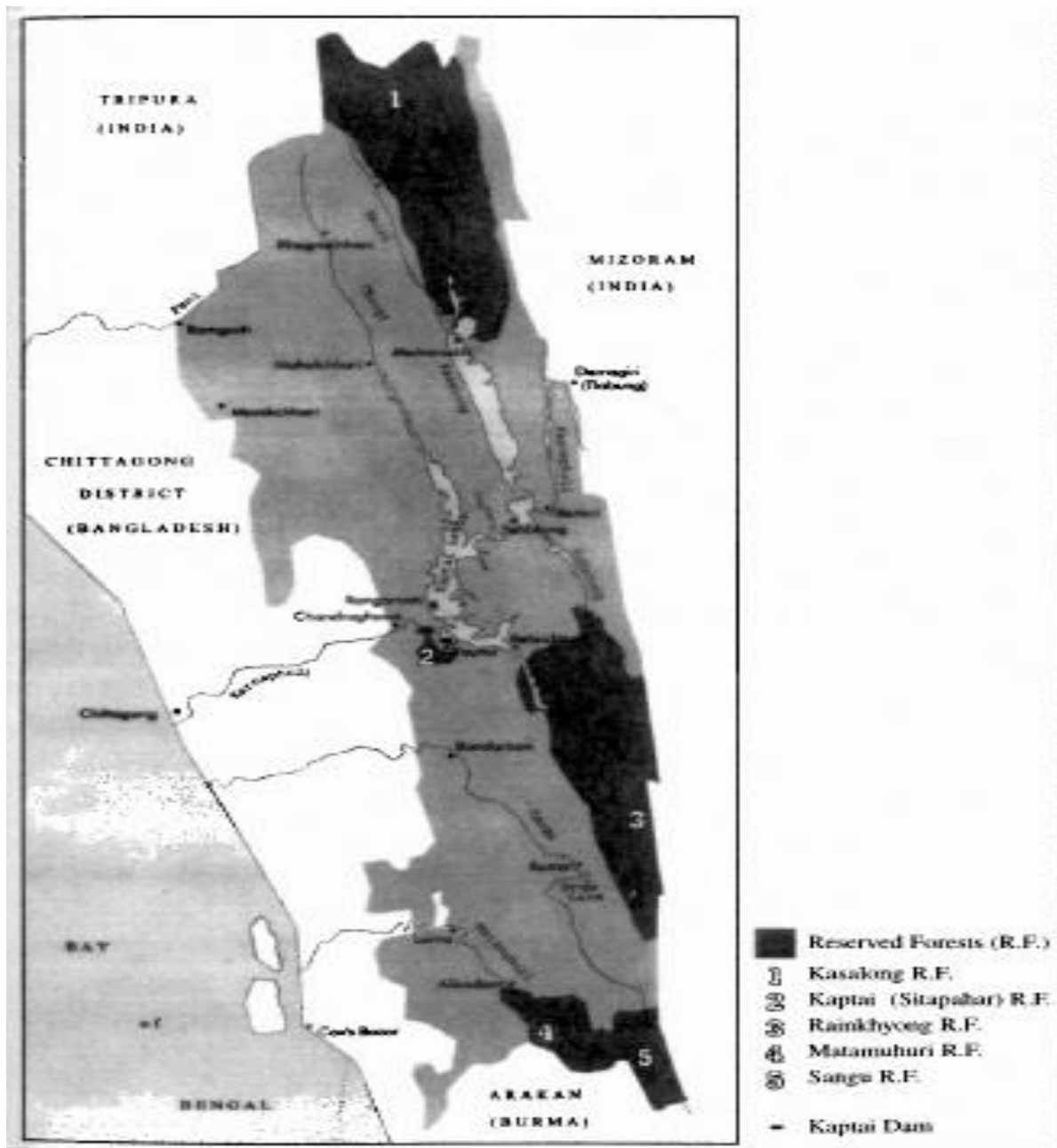
Appendix B



The Chittgong Hill Tracts (1550)

Source: Willem van Schendel, Wolfgang Mey & Aditya Kumar Dewan, *The Chittagong Hill Tracts Living in a Borderland*, (Dhaka: The University Press Limited, 2001) at 18

Appendix C



The Kaptai Dam

Source: Willem van Schendel, Wolfgang Mey & Aditya Kumar Dewan, *The Chittagong Hill*

Tracts Living in a Borderland, (Dhaka: The University Press Limited, 2001) at 21

Appendix D

Central	
Ministry of the Chittagong Hill Tracts Affair	
Regional	
Chittagong Hill Tracts Regional Councils	Civil Service Headed by Deputy Commissioner
Hill District Councils	-
District and Sub-District	
Circle Chiefs (Rajas)	
Headmen	
<i>Karbaries</i>	

The Chittagong Hill Tracts Semi-Autonomous Government Structure

Appendix E

মাননীয়,
প্রচারমান,
জাতীয় মানবাধিকার কমিশন,
সিটিএমসি ভবন (৯ম তলা),
কারণারান বাজার, ঢাকা- ১২১৫।

খতিব-২
০৬.০৪.১৭

বিষয়:- এইচ,এস,সি পরীক্ষার্থী রমেল চাকমাকে অন্যায়ভাবে বিনা দোষে শারীরিক নির্যাতনের
শ্রেণিতে দৃষ্টান্তমূলক আইনানুগ ব্যবস্থা গ্রহণ সম্পর্কে।

মহাশয়,


অতি দুরত্বের সহিত জানানো যাচ্ছে যে, আমি রাঙ্গামাটি পার্বত্য জেলাধীন নানিয়ারচর
উপজেলার ৩ নং বুড়িঘাট ইউনিয়নের অন্তর্গত পূর্ব হাতিমারা এলাকার একজন মীরিহ পাহাড়ী
অধিবাসী হই। আমার পুত্র রমেল চাকমা (২০) চলতি শিক্ষা বর্ষের এইচ,এস,সি পরীক্ষার্থী তার
পরীক্ষার রোল নং- ৩২৬১৭৯। সে নানিয়ারচর কলেজ থেকে এবারে পরীক্ষায় অংশগ্রহণ করছে।
গতকাল ০৫/০৪/২০১৭ খ্রিঃ রোজ বুধবার নানিয়ারচর বাজারে হাটবার ছিল। ঐ দিন পরীক্ষা না
পাকায় সে বাজারে বাজার করতে গিয়েছিল। তথ্য অনুযায়ী জানা গেছে যে, সে নানিয়ারচর উপজেলা
কার্যালয়ের দিকে যাবার পথে পার্শ্বত সেনা ক্যাম্পের সদস্যগণ আনুমানিক সকাল ১০:০০ ঘটিকায়
তাকে ধরে ক্যাম্পে নিয়ে যান। সেখানে কোন প্রকার বাদ-বিচার না করে নির্বিচারে বেপরোয়াভাবে
মারধর করেন। তাদের আঘাতে রমেল চাকমা অজ্ঞান হয়ে পড়লে নিকটস্থ থানায় সৈন্যরা হস্তান্তর
করার চেষ্টা করেন। কিন্তু রমেলের অবস্থা বেপতক দেখে থানা হস্তান্তর গ্রহণে অস্বীকার জানান। পরে
নিকটস্থ হাসপাতালে চিকিৎসা দেয়ার জন্য সৈন্যরা নিয়ে গেলে হাসপাতাল কর্তৃপক্ষ তাকে তাদের
হাসপাতালে ভর্তি করেন নাই।

ভাগ্যের নির্মম পরিহাস যে, আমার বাড়ী নানিয়ারচর উপজেলা সদর থেকে প্রায় ১২:০০
কিলোমিটার ব্যবধান হওয়ায় তাৎক্ষণিকভাবে এই দুঃসংবাদ পৌঁছতে আমার দেয়ী হয়ে যায়। বিলম্বে
পাওয়া তথ্য মতে জানতে পারি যে, আমার পুত্র রমেল চাকমাকে বর্তমানে চট্টগ্রাম মেডিকেল কলেজ
হাসপাতালে সেনাবাহিনীর দ্বারা চিকিৎসা দেয়া হচ্ছে। জানিনা এখন সে কি অবস্থায় আছে।

উক্ত রূপে বিনা দোষে একজন পরীক্ষার্থী ছাত্রকে বেপরোয়া শারীরিক নির্যাতনে আমি একজন
অভিভাবক হিসেবে অসহায় ও বিপদগ্রস্থ। অমনিভাবে পার্বত্য চট্টগ্রামের আনাচে-কানাচে প্রায়ই
সৈন্যরা ঘটনা ঘটছেন বলে খবরনা করা যেতে পারে। সুতরাং, পার্শ্বত সেনা ক্যাম্পের সৈন্যরা বিনা
কারণে এমন অমানুষিক নির্যাতন করায় আমার পুত্রের অবস্থা সংকটাপন্ন হয়েছে তাতে কোন সন্দেহ
নেই। তাছাড়া তার শিক্ষা জীবনে দীর্ঘ মেয়াদী নেতিবাচক প্রভাব পড়বে। অবশেষে তার অপূরণীয়
ক্ষতি হলো।

অতএব, মহাশয় উপরোক্ত অন্যায় বিবরণী সদয় আমলে নিয়ে আপনার কমিশনের
আইনানুযায়ী পদক্ষেপ গ্রহণের মাধ্যমে দোষী সৈন্যদের বিরুদ্ধে দৃষ্টান্তমূলক ব্যবস্থা গ্রহণ সহ যাবতীয়
ক্ষতি পূরণের নিমিত্তে ন্যায়তঃ প্রতিকার বিধানের মহোদয়ের একান্ত মর্জি হোক।

তারিখ:- ০৬/০৪/২০১৭ খ্রিঃ

বিনীত নিবেদক

(কাকি চাকমা)
পিতা: জ্ঞান রঞ্জন চাকমা
স্বাঃ পূর্ব হাতিমারা
৩ নং বুড়িঘাট ইউনিয়ন
নানিয়ারচর, রাঙ্গামাটি পার্বত্য জেলা।

Application of Romel Chakma's father to the National Human Rights Commission

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