

Submission of Asia Indigenous Peoples Pact (AIPP) and its member organizations for the report of the Expert Mechanism on the Rights of Indigenous Peoples on Recognition, reparations and reconciliation

AIPP, together with its member and partner organizations, makes the following submission for the Expert Mechanism's report on Recognition, Reparations and Reconciliation. This submission is based on the information provided to AIPP, particularly from Binota Moy Dhamai, AIPP's Executive Council member from Bangladesh (*see Annex 1*), Promotion of Indigenous and Nature Together (POINT), Myanmar and the Association for Taiwan Indigenous Peoples' Policies (ATIPP) and LIMA Taiwan Indigenous Youth Working Group (LIMA Youth) (*see Annex 2*) and as well as online review of relevant existing literature. A full account of recognition, reparation and reconciliation initiatives related to indigenous peoples in Asian countries where AIPP has membership and engagement in is beyond the scope of this submission, which only covers certain initiatives that can be representative of the achievements and challenges of such initiatives.

1. Measures/processes related to recognition, reparation and reconciliation initiatives in Asia

Some recent examples of recognition, reparation and reconciliation initiatives that specifically dealt/dealt with the rights of indigenous peoples in Asia include the following:

- a) Chittagong Hill Tracts (CHT) Accord (1997) and following legislative processes in Bangladesh,
- b) Naga Peace Accord (2015) and ongoing peace talks with Naga and other groups in Northeast India
- c) National Ceasefire Agreement (2015), Union Peace Conference – 21st Century Panglong (2016) and ongoing peace process in Myanmar
- d) Apology of Taiwan's President to indigenous peoples (2016) and subsequent measures in Taiwan

Other relevant measures/processes include the promulgation of the Constitution of Nepal (2015) after more than a 7-year long constitution writing process, the recent bill approved by Japan's cabinet recognizing the Ainu people for the first time as "an indigenous group", and the ongoing federalism discourse in the Philippines.

2. Participation of indigenous peoples in the adoption of these measures/processes and subsequent policies/programmes and implementation thereof

Some of the above measures/processes present strong and unique initiatives for recognition, reparation and reconciliation of the rights of indigenous peoples in Asia. Many of the measures/processes were undertaken following continued historical armed conflicts in the countries with political organizations of indigenous peoples or ethnic armed groups. As a result, those initiatives involved long negotiations or talks for peace with the organization/groups, which have failed in implementation such as in the case of the CHT Accord in Bangladesh, are continuing for example in Myanmar despite many challenges, or could be considered 'stuck'¹ as with the peace talks with Naga groups in India.

In Bangladesh, even after 21 years of the CHT Accord, the laws adopted for CHT Regional Council and Hill District Councils as per the Accord for self-governance of indigenous peoples of their local affairs have not been implemented fully and properly but violated in various ways. At the same time, election has

¹ <https://www.livemint.com/Opinion/0miGze5839NIAEfpnlgy0M/Opinion--The-stuck-Naga-peace-talks-need-a-reimagining.html>

² See Annex 1

³ See, for example, KHRG <http://khr.org/2018/05/18-1-nb1/attacks-villagers-ongoing-fighting-and-displacement->

not been held in the Hill District Councils, which has deprived the indigenous peoples of their political rights. On the other hand, the government has backtracked on the recognition of indigenous peoples and their rights while continuing with gross violations of their rights through State-supported in-migration of non-indigenous people in the CHT region which have resulted in communal attacks, arsons, massacres against indigenous peoples as well as violence against indigenous women, arbitrary detentions and arrests and extrajudicial killings, among other human rights violations.²

In Myanmar – home to the world’s longest running conflicts, the government called for a National Ceasefire Agreement (NCA) with fifteen ethnic armed groups in 2015 and ten of those groups have joined the ceasefire by 2018. After the election of Aung San Suu Kyi as State Counselor of Myanmar in 2016, the political negotiation of 21st century peace conference was initiated. The ethnic armed groups that are non-signatory to NCA were also allowed as observers. Three conferences have been held since in August 2016, May 2017 and July 2018. However, the peace negotiations have been marred with allegations of violations, particularly from the State armed forces, and renewed conflicts.³ A CSOs forum is also held during the conferences, whereby CSOs including ethnic CSOs, individuals and academics can participate and give recommendations to the discussions of the conference. However, the role of CSO is not strong enough in the current peace processes.

At the same time, there are signals the ongoing Indo-Naga peace process, which began in 2015 with a “framework agreement” announced between the Government of India and a Naga rebel group and has brought in six smaller groups into a parallel negotiating platform in September 2017, has reached a dead-end. While the Forum for Naga Reconciliation (FNR) has asserted pessimism about any breakthrough in the peace process and called for a complete overhaul of the process, the government has denied such claim and argued that there has been lack of progress due to position taken by Naga groups on ‘symbolic’ issues such as a separate flag while ‘substantive’ issues have been resolved.⁴

Nonetheless, Taiwan offers some good practice of participation of indigenous peoples in the measures following the President Tsai Ing-wen’s apology on behalf of the government to the indigenous peoples. The Presidential Office for Indigenous Historical Justice and Transitional Justice Committee (hereafter referred to as Indigenous Justice Committee) formed after the apology includes one representative for each of the 16 indigenous peoples and three representatives for all plain (Pingpu) indigenous peoples, along with two representatives from relevant government agencies, and seven scholars and experts. However, there have been questions raised about the selection of indigenous representatives to the Committee and criticisms regarding adequate consultation with and participation of the indigenous peoples in the process of the Committee. The lack of strong mandate of the Committee itself has also been a point of contention as witnessed in the case of the Committee’s investigation of disposal of nuclear waste in Orchid Island (Lanyu) of Tao people, whereby the Committee established wrongdoing but failed to address the demand of the people to remove the waste.⁵

In another relevant measure, Taiwan’s Executive Yuan has established a Transitional Justice Commission

² See Annex 1

³ See, for example, KHRG <http://khr.org/2018/05/18-1-nb1/attacks-villagers-ongoing-fighting-and-displacement-hpapun-and-toungoo-districts> and ICG, <https://www.crisisgroup.org/asia/south-east-asia/myanmar/b154-new-dimension-violence-myanmars-rakhine-state>

⁴ <https://indianexpress.com/article/north-east-india/nagaland/peace-talks-key-naga-group-says-no-headway-5538546/>

⁵ See Annex 2

(TJC) for investigation of actions taken by Kuamintang between 15 August 1945 and 6 November 1992 to rectify injustices committed by the authoritarian Kuomintang government of the Republic of China on Taiwan. The TJC has so far identified 38 political victims who were of Indigenous status. On December 9, 2018, all of the 38 Indigenous political victims were publicly and officially revoked their criminal charges.⁶

On the other hand, some relevant initiatives in some Asian countries have completely failed to incorporate full and effective participation of indigenous peoples, for example in the constitution drafting process of Nepal. There, the Government did not comply with the Supreme Court directive order to amend laws and regulations to allow for direct representation of indigenous peoples in the constitution-making process, in accordance with their own customary practices. The order followed official communications from the UN Committee on the Elimination of Racial Discrimination (CERD) and the UN Special Rapporteur on the Rights of Indigenous Peoples recommending the government to take special measures to ensure meaningful participation of indigenous peoples in the constitutional process.⁷

3. Substantive rights of indigenous peoples covered by the measures/processes and subsequent policies programmes

Some of the measures/processes discussed above have significantly covered the substantive rights of indigenous peoples. For example, the CHT Accord recognizes self-government, a separate administrative structure and refers to several measures on substantive legislation in the region, including the enactment of new laws and the amendment of existing laws, regulations and practices to comply with the Accord based on advice and recommendations of the CHT Regional Council.⁸

Further, the Accord recognizes the CHT as a tribal inhabited region, acknowledges its traditional governance system and the role of its chiefs and provides building blocks for regional autonomy, withdrawal of all temporary camps for demilitarization, resolution of land disputes in accordance with existing laws, customs and practices, rehabilitation of returnee Jumma (how indigenous peoples are also referred to in Bangladesh) refugees and internally displaced families among other key issues. However, as mentioned above, the following legal developments have denied recognition of indigenous peoples and their rights and the government has undertaken a number of negative actions, including unfavourable laws and policies such as constitutional amendment (2011) to deny recognition of indigenous peoples, military operations such as “Operation Uttoron” (Operation Upliftment) and migration programs, resulting in violations of indigenous rights.⁹

Similarly, the Presidential apology in Taiwan has been overshadowed by the continued disputes regarding delineation and announcement of indigenous traditional lands and territories as per the “Regulations for Demarcating Indigenous Traditional Territories and Lands, 2016” formulated after the apology for implementation of the Indigenous Peoples Basic Law, 2005. Demarcation as per the regulations cover merely public lands, the procedures thereof are very time-consuming and even lands of Thau people in central Taiwan demarcated after the regulations entered into force in 2017 have been

⁶ Ibid

⁷ See IWGIA, Page 6-7

https://www.iwgia.org/images/publications//0686_Constitutional_Politics_and_Indigenous_Peoples_in_Nepal.pdf

⁸ Supra note 2

⁹ Ibid

contested by local authorities. There are many cases whereby indigenous peoples are facing disputes with businesses for claiming indigenous lands as private that they bought such as the Golden Sea Project and Baosheng Aquarium Ecological Recreation Area project within the territories of Amis peoples. Further, the announcement of the Executive Yuan to add plain (Pingpu) indigenous peoples as the third kind of indigenous status besides the lowland and highland indigenous peoples following the apology has also caused disputes for lack of political, social and cultural rights associated with such differentiation.¹⁰

In Myanmar, the ethnic armed groups have been urging the government for meaningful federalism with equity and respectful power sharing, including for the natural resources in their areas. However, the peace process has not yet covered any of those issues related to substantive rights of indigenous peoples. Although the peace process has not covered indigenous rights, Myanmar has undertaken some legal and policy reforms which have opened opportunities for the recognition of indigenous peoples' rights. For example, in the new National Land Use Policy and Biodiversity and Protected Areas Law, there are sections that support the recognition of customary land use tenure, and the reflection of the term "indigenous peoples and local communities" as well as the establishment and consideration of Indigenous and Community Conserved Areas under the category of protected areas, including promotion of Free Prior and Informed Consent (FPIC) and co-management system between government. Similarly, promotion of FPIC and recognition of customary land tenure are also provided in Environmental Impact Assessment Policy, Ethnic Protection Law and Forest Law Amendment (2018).¹¹

On the other hand, in Nepal, the new constitution and subsequent processes have resulted in the undue special recognition of the dominant Hindu caste groups for their proportional representation in State structures and outright denial of the rights of indigenous peoples, including to self-determination through local self-governance and autonomy – guaranteed earlier in the Interim Constitution.¹² At the same time, Japanese government's bill to recognize Ainu as indigenous group has also been deplored by rights groups and Ainu representatives saying that the group's voices and rights have been ignored. The bill is criticized for lack of protection of Ainu's rights to self-determination, lands, etc. and measures to reverse the historical discrimination they have suffered and merely treating them as tourist attraction.¹³

4. Conclusion and Recommendations

As provided above, the recognition, reparations and reconciliation initiatives related to indigenous peoples in Asia are vastly different among countries and even indigenous groups within or across the countries. While there are few recent positive initiatives to specifically recognize the rights of indigenous peoples for example in Japan and Taiwan and while the latter can also be considered to have made some efforts for reconciliation, those are not fully adequate or in line with the international human rights standards, particularly the UN Declaration on the Rights of Indigenous Peoples. There are other limited recognition measures such as in Myanmar. Further, while the political peace processes in various Asian countries provide opportunities to recognize the rights of indigenous peoples, those processes are in various stages and challenges. In lack of recognition, reparation and reconciliation measures to

¹⁰ Supra note 5

¹¹ POINT submission to AIPP

¹² See LAHURNIP,

https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NPL/INT_CERD_NGO_NPL_30811_E.pdf

¹³ <https://www.japantimes.co.jp/news/2019/03/02/national/empty-words-rights-groups-say-japans-bill-recognizing-ainu-indigenous-group-falls-short/#.XISsPCgzZEY>

address the historical wrongdoings against indigenous peoples are all but missing and not effectively possible. Conversely, countries are even backtracking on earlier gains made to redress the abuses against indigenous peoples.

Various initiatives for recognition, reparations and reconciliation need further study to examine good and bad practices. However, the initial analysis under this submission demonstrates, in general, the need for full and effective participation of concerned indigenous peoples and their representative institutions in those initiatives, for those initiatives to be aligned with international standards of the rights of indigenous peoples, particularly the UN Declaration and for the States to effectively implement those initiatives as so far agreed with the concerned indigenous peoples.

AIPP urges the Expert Mechanism to recommend the States, through the Human Rights Council, to undertake a consultative process, in conjunction with the concerned indigenous peoples and their representative institutions, for examination of the ongoing or recent recognition, reparation and reconciliation initiatives to build on the achievements made and undertake further measures to recognize and remedy historical wrongdoings against indigenous peoples in line with the UN Declaration.