

# Indigenous

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# Rights at stake!

**India's Forest Rights Act of 2006:**  
Illusion or solution?

**Africa:**  
Botswana ordered - rights of the  
Basarwas in CKGR recognised

**United States:**  
Eggs on its face again



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## EDITORIAL

## Indigenous rights are at stake!

So near, yet so far. On 29 June 2006, the United Nations Human Rights Council adopted the Draft United Nations Declaration on the Rights of Indigenous Peoples. There was euphoria. The Human Rights Council vindicated its establishment. Asian Indigenous and Tribal Peoples Network (AITPN) too was cautiously optimistic.

Exactly five months later, on 28 November 2006, Namibia opposed the draft resolution (A/C.3/61/L.18/Rev.1) sponsored by Peru for the adoption of the Draft United Nations Declaration on the Rights of Indigenous Peoples by the Third Committee of the UN General Assembly. Namibia put a spanner by introducing an amendment to Peru sponsored resolution seeking to defer consideration and action on the United Nations Declaration on the Rights of Indigenous Peoples and to allow time for further consultations thereon. With Australia, Canada, New Zealand and the United States of America having already rejected adoption of the Draft Declaration by the Human Rights Council, Namibia had a cake walk - 85 votes in favour, 67 against and 25 abstentions.

Namibia's amendments also urged to conclude consideration of the Declaration before the end of the sixty-first session of the UN General Assembly i.e. by 2007.

As we go to the print, the African Union in a decision on the United Nations Declaration on the Rights of Indigenous Peoples (DOC. ASSEMBLY/AU/9 (VIII) ADD.6) affirmed "to maintain a united position in the negotiations on amending the Declaration" and decided to re-draft five cardinal issues of the Draft Declaration: definition of indigenous peoples; right of self-determination; ownership of land and resources; establishment of distinct political and economic institutions; and national and territorial integrity.

The assertion of the African Union in its decision that "the vast majority of the peoples of Africa are indigenous to the African Continent" has been heard umpteen times during the drafting of the Declaration by the Working Group on the Draft Declaration of the UN Commission on Human Rights. Since the creation of the Working Group on Indigenous Populations under the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1982, Asian governments repeatedly and unsuccessfully raised the issue of definition of "indigenous peoples". They are all set to join the "spoil party" being

hosted by the African Union.

Asian indigenous peoples played a critical role to dismiss the lies of their governmental representatives by digging out historical records, court judgements, national laws etc to show "who are the indigenous peoples" of Asia. But, drafting at the Third Committee level will be held without the participation of the stakeholders i.e. indigenous peoples.

The United Nations was created with lofty goals and ideals, among others, not to repeat the mistakes of the League of Nations and not to see repetition of the holocaust of the Second World War. But those who were instrumental for the creation of the UN in 1945 did not include "indigenous peoples" under the notion "WE THE PEOPLES OF THE UNITED NATIONS" as given in the Charter of the United Nations.

Some historical mistakes have been repeated time and again. From Rwanda to Darfur, member States of the United Nations remained mute witness to genocides. A Declaration for those excluded from the Charter of the United Nations has been drafted and placed for proclamation by the UN General Assembly. But a resurgent Africa, which is determined to destroy UN human rights mechanisms to stop so-called interference by the Western countries with regard to indefensible situations like Darfur construed the Draft Declaration as another instrument to interfere in its internal affairs. The judgement of the High Court of Botswana of 13 December 2006 which recognised the rights of the Basarwas to live in the Central Kalahari Game Reserve would have further ensured confluence of the positions of the African Union in one hand and Australia, Canada, New Zealand and the United States of America, on the other. Many European indigenous support groups supported the rights of the Basarwas.

"Indigenous" in the context of "Draft Declaration" must neither be construed in literal sense as understood in common parlance in English nor in the context of European colonisation alone. If "indigenous" is to be construed in literal sense, Englishmen would be indigenous to England, Germans would be indigenous to Germany, Asians would be indigenous to Asia etc. If identification of "indigenous peoples" is to be construed only in European colonisation context, it would be a case of "inverse racism".

During the drafting of the Declaration at the Commission on Human Rights, most African governments were absent. They must not dilute the Draft Declaration now! ■

## Energy kills: Phulbari coal mine project of Bangladesh

“Coal under the ground is worth more than growing rice on the surface” - Gary Lye, chief executive, Asia Energy<sup>1</sup>

On 26 August 2006, five persons identified as Tariqul Islam (24), Ahsan Habib (35), Osman (24), Raju (8) and Chunnu were killed and about 50 others were reportedly injured after the police and the Bangladesh Rifles personnel opened fire on those who were protesting against UK-based Asia Energy Corporation's proposed open pit coal mine project at Phulbari in Dinajpur district of Bangladesh. Several eye-witnesses stated that BDR personnel threatened Magistrate Abdul Aziz at gunpoint to sign the paper empowering the security forces to open fire at the crowd.<sup>2</sup> But neither the government nor the Asia Energy Corporation is ready to accept responsibility for the cold blooded murder of the civilians.

The opposition including the Awami League called a bandh. On 27 August 2006, the Bangladesh Home Ministry ordered an inquiry into the firing. On 31 August 2006, Junior Minister for food and relief, Asadul Habib Dulu stated that the government has cancelled all existing agreements with Asia Energy and declared a moratorium on open-pit mining in Bangladesh. On the same day, Asia Energy Corporation (AEC) clarified that “The Company had not received any communication from the Government to this effect. .... The Company is seeking to clarify the reported remarks of that minister and to determine the Government's position towards the Phulbari Project.”

### **The Phulbari project:**

Coal was first discovered at Phulbari during surveying and drilling

between 1994 -1997 by the Australian mining company BHP, which entered into licensing and investment agreements with the Government of Bangladesh. These agreements were assigned to Asia Energy Corporation (Bangladesh) Pvt Ltd in 1998. The project is estimated to generate more than US\$ 21 billion in economic benefits to Bangladesh over its 30 year

According to National Committee to Protect Oil, Gas, Mineral Resources, Electricity and Port, about 4,70,000 people, including 50,000 indigenous people belonging to Santhal, Munda and Mahali tribes will be potential victims of the project. But AEC claims that only approximately 40,000 persons, including 2,500 indigenous people will be affected by the project. The discrepancy is palpable.

life and add one per cent to Gross Domestic Product (GDP). The increase in GDP is supported by none other than Asian Development Bank.<sup>3</sup>

Asia Energy Corporation also estimates that Phulbari reserve has 572 million tonnes of high quality coal located at varying depths between 140 metres and 300 metres. The company targets annual production of 15 million tones of coal for 30 years.

All the successive governments in Bangladesh dealt with Asia Energy Corporation on the Phulbari project. On

11 September 2005, the Department of Environment of the Government of Bangladesh approved the Asia Energy's Environmental Impact Assessment report and granted Environmental Clearance for mining. In less than a month on 2 October 2005, the 600 page “Feasibility Study and Scheme of Development for the Phulbari Coal Project” was submitted to the Government of Bangladesh. According to Asia Energy “The contract stipulates that the Government of Bangladesh has three months in which to approve the Project.”

However, due to the controversies, the project could not be approved. Asia Energy Corporation has recently awarded a contract of US\$ 50 million water management programme at its Phulbari coal mine to a Bangladeshi company, Falgu Sandhani, signalling its readiness to start full operation from 2008. This led to increased protests by the project affected persons.

Disputes about the number of project affected persons:

According to National Committee to Protect Oil, Gas, Mineral Resources, Electricity and Port, about 4,70,000 people, including 50,000 indigenous people belonging to Santhal, Munda and Mahali tribes, of 100 villages in Phulbari, Nababganj, Birampur and Parbatipur upzilas will be potential victims of the project. Besides houses and government offices, the project will uproot fifty educational institutions, including six colleges and 18 madrasas and 171 mosques, 13 temples and other religious establishments in Phulbari and its adjacent areas.<sup>4</sup>

But AEC claims that only approximately 40,000 persons,

including 2,500 indigenous people will be affected by the project.<sup>5</sup> The discrepancy is palpable.

#### **Compensation package under the Burqa:**

"Asia Energy intends to request specially drafted legislation to be enacted in a relatively short period of time (emphasis ours) to enable land acquisition and for payment of compensation. It is intended to acquire land (privately and through GOB legislation) and make appropriate compensation in one process." – states Asia Energy in the executive summary of 600 page "Feasibility Study and Scheme of Development for the Phulbari Coal Project".

In Bangladesh, land is acquired by the government under the Land Acquisition Act of 1894, which has been held as a draconian instrument. But, Asia Energy does not even want the land to be acquired under the Land Acquisition Act. Therefore, it demands adoption of special laws. There is no concept of free, prior and informed consent of the project affected persons. The victims are not being given any right but being asked to accept unknown package of compensation. It has been alleged that Asia Energy Corporation (AEC) has been carrying out an appeasement policy to garner support for its project by distributing colour television, cash, cloths and blankets among the locals.<sup>6</sup>

Asia Energy claims that "A Resettlement Plan and an Indigenous People's Development Plan, incorporating the findings and recommendations of the Environmental Impact Assessment and Environmental and Social Impact Assessment, were prepared in June 2006 in accordance with international best practice, including the Equator Principles and World Bank and Asian Development Bank (ADB) guidelines."

Asia Energy also claims that

"Everybody affected will receive fair compensation and they are being consulted on their preferences. The compensation will ensure that those affected are at least as well off after the move. People directly and indirectly impacted by the mine will be looked after in accordance with national and international standards, above all the Equator Principles."

The question is whether compensation "at prevailing market rates" is adequate when the victims do not want to sell their lands. It also refers to a resettlement plan which "will include provision of sustainable alternative means of livelihood" in the new villages and new town. However, the entire rehabilitation package has been kept under the *Burqa*. What kind of alternate means of livelihood are proposed to be created for taking away 5,933 hectares of fertile agricultural lands has not been spelt out.

Phulbari: a reflection of what ails extractive industries

Across the world the extractive industries – oil, gas and mining - have been responsible for gross violations of human rights and fundamental freedoms. The Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises in his latest report (E/CN.4/2006/97) of 22 February 2006 states that out of the 65 instances recently reported by NGOs - the extractive sector - oil, gas and mining - utterly dominates this sample of reported abuses with two thirds of the total. "The extractive industries also account for most allegations of the worst abuses, up to and including complicity in crimes against humanity. These are typically for acts committed by public and private security forces protecting company assets and property; large-scale corruption; violations of labour rights; and a broad array of abuses in relation to

local communities, especially indigenous people."

However, there is no international law to address corporate complicity in human rights violations. As the UN Secretary General's Special Representative states, "Much of the relevant jurisprudence to date has come from United States of America's Alien Tort Claims Act (ATCA) cases, which in turn has drawn on evolving international standards of individual criminal liability for such offences". It is worth noting, therefore, that of the 36 ATCA cases to date involving companies, 20 have been dismissed, 3 settled and none decided in favour of the plaintiffs; the rest are ongoing. The ATCA's influence has been mainly existential: the mere fact of providing the possibility of a remedy.

Both the government of Bangladesh and Asia Energy have been maintaining silence as to whether the Phulbari project has been cancelled or not. It is unlikely that the Phulbari project will be given clearance given the forthcoming general elections slated for March 2007. Irrespective of whether the project goes ahead or not, it is essential that the judicial inquiry commission identifies the guilty police and Bangladesh Rifles personnel for the violations of the right to life and do justice with the victims. ■

#### **Endnotes:**

1. BBC, 12 July 2006, <http://news.bbc.co.uk/2/hi/business/5080386.stm>
2. Magistrate forced to give firing order, say witnesses, The Daily Star, Bangladesh, 30 August 2006
3. Phulbari coalmine to boost GDP by 0.7-1.0pc a year, says ADB, Financial Times, Bangladesh, 20 August 2006
4. Rehabilitation issue makes it a tough task, The Daily Star, 29 August 2006
5. [http://www.asia-energy.com/project\\_environment.php](http://www.asia-energy.com/project_environment.php)
6. Cancellation of Phulbari Coal Project demanded, The Daily Star, 24 August 2006

## Cambodia:

### A case for moratorium on the sale of indigenous lands

On 20 December 2006, at a meeting in Ratanakiri province's Banlung town between the Ministry of Land Management of the Royal Cambodian Government and representatives of more than 100 ethnic minority groups from five provinces of Kratie, Mondolkiri, Preah Vihear, Ratanakiri and Stung Treng, the government unveiled plans to register and protect land belonging to Cambodia's ethnic minority communities. According to the draft policy paper distributed at the meeting, private state land includes land for home construction and farmland. Public state land also includes spirit forests and forest cemeteries, which will be managed by minority communities and cannot be sold. The draft policy paper stated that each minority village will be allowed to set aside two hectares for spirit forests and five hectares for forest cemeteries and the amount of land for farmland and house construction will depend on the number of villagers living in a particular area.<sup>1</sup>

In July 2001, the National Assembly (Parliament) of Cambodia passed the Land Law of 2001. Among others, the Land Law provided for indigenous communities to gain title to their lands, either in their individual capacity or collectively as a community. Article 25 of the Land Law defined indigenous communities' rights where they (i) have established their residences; (ii) carry out traditional agriculture; and (iii) other areas reserved for shifting cultivation as required by the agricultural methods they currently practice and are recognized by the administrative authorities.<sup>2</sup>

However, the government had little seriousness. The apathy of the

authorities can be best judged from the fact that a pilot project for registration of land of indigenous communities is supposed to start in Ratanakiri province from January 2007,<sup>3</sup> 6 years after the adoption of the Land Law of 2001.

#### UN reports on the issue:

Complaints of human rights violations affecting Cambodia's indigenous peoples were reported by the UN Special Representatives of the Secretary-General on the situation of human rights in Cambodia. Special Representative, Thomas Hammarberg in his 1999 report to the Commission on Human Rights stated, "the rights of indigenous communities to land and the natural resources on which their livelihoods depend is under threat not only because of logging and plantations, but also from land grabbing, which takes several forms: bribes to the weakest members of a community, false promises, enticement, or simply intimidation and violence".<sup>4</sup>

Thomas Hammarberg's successor Peter Leuprecht also called for no more economic land concessions to be awarded, and for the registration of individual titles to be prohibited on state land eligible for indigenous collective title until the sub-decrees are in effect. All the Special Representatives on Cambodia have warned that Cambodia's indigenous peoples are becoming more and more vulnerable to land confiscation and alienation of their lands. There is now growing concern that there will be little land left to title by the time these sub-decrees and other legislation are put in place.<sup>5</sup>

The key concerns relating to indigenous peoples' land rights are the following:

#### I. Slow development of legal instruments

Legal instruments to recognize the indigenous communities as legal entities remain the prerequisite in Cambodia. Of late, the Ministry of Interior of the Royal Government of Cambodia has reportedly been active and supportive in developing model statutes which indigenous communities can adopt or adapt for use in the legal registration process. A sub-decree on indigenous communal title which is being drafted by a team for an Inter-Ministerial Task Force to lay down the requirements for legal recognition of communal land ownership is yet to be completed. A pilot project of the Ministry of Land Management for registration of the lands of indigenous communities is being implemented by the national task force. Unfortunately, this process has been exceedingly slow and a large amount of indigenous community land is being lost in the meantime. Land alienation has been taking place at an exceedingly alarming rate.<sup>6</sup>

#### II. Land concessions or alienation?

Of particular concern is the proliferation of "land concessions" issued by the Royal Government of Cambodia to companies in provinces like Kompong Thom, Stung Treng and Kratie,<sup>7</sup> Ratanakiri and Mondulkiri. These included 70,000 hectare concession given to private companies over Suy indigenous peoples' land in Kompong Thom, 1,400 hectare gem mining concession over indigenous peoples' land in Lumphat district, another 2,000 hectare gem mining concession over indigenous peoples land in Borkeo district in Ratanakiri province.

In Mondulkiri, the authorities proposed a concession of 200,000-hectare land.<sup>8</sup> These land concessions are given to establish industrial agricultural plantations like rubber and cashew nut or for mining and industrial operations. Once the concessions are granted, the companies clear the forest and reduce indigenous minority people into positions of subservience and poverty, their natural resources being removed from their management and use.<sup>9</sup>

In 2005, Wuzhishan LS Group, a company controlled by the Chinese government was given a land concession of 199,000 hectares at Phnong village in Cambodia's eastern province of Mondolkiri. The Phnong, a highland people numbering 35,000, accused the company of encroaching on traditional burial land and a holy spirit forest, as well as using chemicals affecting the health of people and animals. The concession also reportedly encroached land planned for inclusion in a large Japanese development project.<sup>10</sup> The Phnong villagers mounted unprecedented protest against the concession and the Representative of the Japanese Government has also reportedly asked Cambodia's Senior Minister Sok An, who is said to have negotiated the concession deal, for an explanation and threatened to suspend their own project commitment.<sup>11</sup>

### III. Illegal sales of indigenous land

There has been continuing growth of land "sales" that involve misinformation, coercion, threats, bribes to officials and other illegal mechanisms. The local officials, often in collaboration or under threat and intimidation from higher level officials or business people, start the process of illegal sale of land. The companies often induce the indigenous peoples.<sup>12</sup>

According to a human rights group from Cambodia, it received 356 land grabbing complaints in 2004 against 148

such complaints in 2003. Many such cases were reported in 2006 also. In one case, vast tracts of indigenous community land in Ratanakiri province that was told to have been reserved for development, has been clandestinely conceded to a rich and powerful businessman by the local authorities. In January 2006, the said businessman without securing a title deed of ownership began to clear the lands and destroyed the crops. While protesting the grabbing of their lands and the destruction of their crops, two of the villagers were arrested and charged with causing damage to other people's property.<sup>13</sup>

Threat and intimidation form a part of such land grabbing. At 11:20pm on 15 November 2006, Mr. Pen Bonnar, 44-year-old provincial coordinator for local rights group ADHOC in Ratanakiri province received a death threat message to his mobile phone from an anonymous person. Mr. Bonnar suspected that this was a well planned threat upon him by government officials or businessmen who might be annoyed by his work against illegal land grabbing in the province.<sup>14</sup> While proceeding in a case filed by Pen Bonnar, on 23 November 2006, a Cambodian court sentenced eight people, including a former provincial governor, to up to 17 years in jail for taking bribes to allow a Vietnamese company to log in a national park. While former Ratanakiri governor Kham Khoeun, who was sentenced in absentia after going into hiding, received 17 years, the others, military officers, police chiefs and forest rangers, got between 13 and 15 years. Judge Ke Sakhan also ordered them to pay \$15 million for the destruction of the forest.<sup>15</sup>

### IV. Recommendations

Land being central to the survival of indigenous communities, the loss of land destroys the cohesion of the community and leads to social disintegration. However, despite repeated assurances, the Royal

Government of Cambodia has failed put in place the legislations to protect the lands and resources of the indigenous communities. Nor has it paid any heed to recommendations of the Special Representatives of the UN Secretary General on the situation of human rights in Cambodia to place a moratorium on further land sales or alienation pending such legislation. Indigenous community leaders and indigenous rights workers believe that unless there are real reforms in the legal systems are undertaken and the perpetrators of all the illegal sales are brought to justice, there will be no improvement in the situation.

In the light of the foregoing challenges and problems, Asian Indigenous and Tribal Peoples Network (AITPN) recommend the following: -

1. The drafting of the legal instruments which are the prerequisite for recognizing the indigenous communities as legal entities must be expedited;
2. Adoption of the National Policy on Indigenous People Development submitted to the Council of Ministers in 2006 be expedited;
3. Drafting of the Sub-Decree and other enabling legislations required for issue/grant of communal/collective title of indigenous community lands be expedited and completed in a time bound manner;
4. Implement the recommendations of all the Special Representatives of the Secretary General and place a moratorium on further land sales or alienation and issuance of land concessions.

### Endnotes:

1. Govt.'s Plans Pilot Indigenous Land Registration, The Cambodia Daily, 24 December 2006
2. <http://www.ngoforum.org.kh/Land/Docs/Indigenous/Rethinking/Part%20I.htm#Part%20I>
3. Govt.'s Plans Pilot Indigenous Land Registration, The Cambodia Daily, 24 December 2006

# India's Forest Rights Act of 2006: Illusion or solution?

After acrimonious public debate for more than a year since tabling in the parliament on 13 December 2005, the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 which was re-christened as "The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006" was passed in the parliament, lower house of Indian parliament, on 13 December 2006. President of India assented to the Bill on 29 December 2006 and the Act came into force. However, the debate since the tabling of the initial bill in December 2005 to the passage of the Act in the Lok Sabha have brought the age-old prejudices against the tribal peoples to the fore and further eroded their rights.

The Draft Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 faced stiff opposition from two quarters. First, a few environmentalists advocated management of forest, wildlife and other bio-diversity with complete exclusion of tribal people, local communities or forest dwellers contrary to the Rio Declaration, decisions of the Conference of Parties of the Convention on Biological Diversity and recommendations of the United Nations Forum on Forest. The poaching of the tigers in the Sariska sanctuary provided much needed excuse. Second, the Ministry of Environment and Forest had opposed the Bill on the ground that implementation of the bill will result in the depletion of the country's forest cover by 16 per cent. This is despite the fact that over 60% of the country's forest cover is found in 187 tribal districts where less than 8% of national population lives. This reflects the culture

of the tribal peoples to conserve forest. On the other hand, the Ministry of Environment and Forest has diverted 73% (9.81 lakh hectares of forestland) of the total encroached areas for non-forest activities such as industrial and development projects.<sup>1</sup>

Following objections to the 2005 Draft Bill, it was referred to the Joint Parliamentary Committee (JPC) headed by V Kishore Chandra S Deo of the Congress party. On 23 May 2006, the JPC submitted its recommendations on the issue of cut-off date, inclusion of all forest dwellers under its purview, increase in the ceiling on land occupation and the empowering of Gram Sabhas.

Many of the recommendations were against the intended beneficiaries i.e. tribals. The Ministry of Tribal Affairs objected to some of these recommendations of the JPC. A Group of Ministers (GoM), headed by External Affairs Minister Pranab Mukherjee was established to evolve a consensus. On 15 November 2005, the GoM managed to reach consensus.

The Act would not have seen the light of the day had the 'Other Traditional Forest Dwellers' not included in the revised draft.

A critical examination of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 reveals that the rights of the tribals were further compromised.

## I. Dilution of aims, objectives and spirit of the initial bill

The nomenclature of the original bill "Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 as tabled in the parliament on 13 December 2005

recognised the symbiotic relationships of the tribals with forest. The same was stressed in the National Forest Policy of 1988. In its preambular paragraph, the original bill provided that it is "A Bill to recognize and vest the forest rights and occupation in the forest land of forest dwelling Scheduled Tribes who have been residing in such forest for generations but whose rights could not be recorded ....." .

However, the recently passed Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 states, "An Act to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded...."

The present law has only diluted the interests of the forest dwelling Scheduled Tribes with that of the "Other Traditional Forest Dwellers". The forest dwelling Scheduled Tribes no longer remain the focus of the law contrary to what it originally envisaged. With such dilution, the law has lost its aims, objectives, essence and spirit that the Ministry of Tribal Affairs initiated with so much fan fare to undo what it calls "historic injustice" that the forest dwelling Scheduled Tribes have been facing.

## II. Mixing oranges with apples

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 sought to mix oranges with apples. While tribals and forest are synonymous and one cannot be separated from the

other, same is not the case with the “other traditional forest dwellers” i.e. non tribals.

Tribals have emotional, psychological and cultural attachments with the forest and they always lived in the forest. On the other hand, for non tribal forest dwellers, forest and forest related livelihood activities are the last resort when no other options of livelihood were left. Non-tribals usually do not take livelihood activities in forest by choice. However, by legitimising their occupation of the forest lands under the guise of “Other Traditional Forest Dwellers”, the Act negated the spirit of the various safeguards available to the members of the Scheduled Tribes under the Constitution and other relevant laws of the country.

Rather than improving the lot of the tribals, the Act will lead to conflict of interest between the forest dwelling Scheduled Tribes and other traditional forest dwellers.

### III. Extension of cut-off date

Another conspicuous feature of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 is the extension of the cut-off date to qualify for holding of rights from 25 October 1980 to 13 December 2005. At the ground level, the cut off date is quite immaterial to the majority of the forest dwelling Scheduled Tribes as they have been living in the forest for generations and as such they would have been covered even under the 25 October 1980 cut off date. This extension of the cut off date is basically to benefit the other traditional forest dwellers who are required to prove that they have been occupying the forest land for three generations under clause (o) of Section 2 of the Act. By extending the date from 25 October 1980 to 13 December 2005, one generation has already been covered!

### IV. Increase in the ceiling on land occupation

Sub-section (6) of Section 4 states, “Where the forest rights recognized and vested by sub-section (1) are in respect of land mentioned in clause (a) of sub-section (1) of section 3 such land shall be under the occupation of an individual or family or community on the date of commencement of this Act and shall be restricted to the area under actual occupation and shall in no case exceed an area of four hectares.”

This provision hardly benefits the Scheduled Tribes. Rather than empowering, this law seeks to dispossess the forest dwelling Scheduled Tribes of their ancestral lands that they have in possession in excess of 4 hectares as provided in Sub-section (6) of Section 4. Nor the Bill provides for compensation to those who will be forced to share their lands in excess of 4 hectares.

A large number of forest dwelling Scheduled Tribes would have to mandatorily part with large chunks of ancestral lands that they have been actually occupying before the enactment of this Act. The provision is also inapplicable in the northeast India.

### V. Criminals under the Forest Conservation Act of 1980

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 has not taken into account the fact that hundreds of forest dwelling scheduled tribes face charges under different provisions of the draconian Forest Conservation Act of 1980 for accessing minor produce. Although the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ensures tenurial security and legitimizes the scheduled tribes’ ownership over the minor forest produce and their role in the conservation of forest, it failed to address charges/prosecution pending

against the tribals under the Forest Conservation Act of 1980 and Indian Forest Act of 1927 with retrospective effect.

There is no provision in the Forest Dwelling Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Rights) Act, 2006 providing that cases under the Forest Conservation Act of 1980 against the forest dwelling scheduled tribes for accessing minor forest produce would be dropped or closed.

There were 2,57,226 forest cases pending against 1,62,692 tribals between 1953 to 30 June 2004 under Sections 26, 33 and 41 of the Indian Forest Act 1927 pertaining primarily to illegal felling of trees for domestic use and ferrying of wood by bullock carts in Chhattisgarh as on 8 November 2005,<sup>2</sup> and 2,531 such cases in Orissa as on 10 March 2005.<sup>3</sup>

The bias of the police and the forest department against the tribals is well-known. In Jharkhand, a criminal case was registered against 4 minor tribal boys of Matrukha village in Giridih district of Jharkhand. The minors have been accused of destroying over 541 plants in the Purnanagar forestation area by bringing their cattle to the forest area for grazing. When the First Information Report was registered on 18 September 2002, one of the accused Sone Lal, son of Gushaw Kishku of Matrukha village was just over 14 months old. On 18 December 2006, the minor boy, along with his father, appeared before the court of Judicial Magistrate A.K. Pandey applied for bail and filed a discharge petition. By the end of the 2006, the case was pending.<sup>4</sup>

The Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 rechristened as “The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006” was brought essentially to circumvent the Supreme Court’s order

in the case of Godavarman Thirumalpad vs Union of India which banned regularization of tribal revenue villages. When the government of India passed the Forest Conservation Act on the midnight of 25 October 1980, hundreds of thousands of indigenous/tribal peoples became illegal residents on land over which they have been living for generations. Yet, thousands of others also had legal rights under the Forest Conservation Act. For two and half decades, the state governments failed to record and recognize even limited those ancestral rights of tribal communities permitted by the Forest Conservation Act and the subsequent 1990 Guidelines issued by the Ministry of Environment and Forest. After the Supreme Court stayed the regularisation of revenue villages on 23 November 2001 in the aftermath of Godavarman Thirumalpad vs Union of India, all the tribals living in the forest irrespective of whether their rights were recognized under the 1980 Forest Conservation Act or not were effectively extinguished.

The government essentially sought to address the denial of rights to the tribals. "The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006" did not address the concerns of the environmentalists but certainly they were successful to further erode the rights of the tribals. ■

#### Endnotes:

1. Report of the National Consultation on the Draft Forest Rights Bill, 205, AITPN, October 2005
2. Over two lakh forest cases against Chhattisgarh tribals to be withdrawn, The Hitavada, 11 November 2005
3. Naxalite bodies demand probe into police firing, The Statesman, 14 March 2005
4. Criminal case against 5-year-old, The Hindustan Times, 21 December 2006

## Recommendations of the Committee to Review the Armed Forces Special Powers Act, 1958

The Armed Forces Special Powers Act was adopted in 1958 with wide powers to search and arrest suspects without a warrant or to use force against persons including causing of death. Because of the special powers given to the security forces to act as judge and jury to award enhanced punishment without defining crimes, the AFSPA came to be viewed as an instrument of repression across the North East India. Following a massive democratic uprising in Manipur after the killing of Manomarama Devi in July 2004, the Union Home Ministry set up the Committee to Review the Armed Forces Special Powers Act of 1958 under the chairmanship of Justice Jeevan Reddy.

The report was submitted to the government of India in June 2005 and the Committee made the following recommendations:

#### PART-IV

#### Recommendations

1. The Committee has carefully considered the various views, opinions and suggestions put forward by the representatives of organisations and individuals who appeared before it as also the presentations and representations made by the concerned departments of the governments, security agencies and other organisations and individuals.

2. While devising a solution to the problem referred to the Committee, it has to bear in mind the following three basic conditions viz.,

**ONE-** The security of the nation, which is of paramount importance. Security of the nation involves security

of the States as well. The very first entry in the Union List in the Seventh Schedule to the Constitution speaks of defence of India and every part thereof which means and implies that it is the power and obligation of the President, the Parliament and the Union Government to ensure the defence of India and of every part thereof. Though purporting to be a division of legislative powers between the Union and the States, the Seventh Schedule to the Constitution, it is well accepted, does represent the division of powers between the Union and the States. Even if a law is not made under and with reference to a particular entry / legislative head, the executive power would still be available under that entry. Lists-I and II set out the legislative heads / powers of the Union and the States respectively while List-III sets out the legislative heads, with reference to which both the Parliament and the State Legislatures can make laws, subject, of course, to the rule of parliamentary predominance recognised by Article 254. For ensuring the defence of India and of its every part, the Parliament can make such law and / or the Union government can take such executive action, as may be found necessary or proper. Some of the ways in which the Union government performs the said obligation are mentioned in Articles 352 to 356, (as pointed out in Chapter II of Part II of this Report. Article 355, which places an obligation upon the Union to protect every State against external aggression and internal disturbance and also to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution, has also been referred to

at some length in the said part of this Report).

It is necessary to clarify that the Constitution does not contemplate that the obligation to protect the States in the Union shall be carried out by the Union Government only by invoking Article 352 (external aggression or internal rebellion) or Article 356 (to ensure that the government of every State is carried on in accordance with the provisions of the Constitution); the said obligation can be performed in such manner as may be found appropriate, without of course violating the spirit and letter of the Constitution. Now, coming to Article 355, it may be reiterated that the obligation created by Article 355 includes the duty to protect every State against internal disturbance as well. "Internal disturbance", as pointed in Part II of this Report, represents a very serious, large scale and sustained chaotic conditions spread over a large area of the State. It is no doubt the power and obligation of the State Government to maintain public order as is evident from Entry 1 of State List in the Seventh Schedule to the Constitution. However, the said entry read with Entry 2A of the Union List means that (a) where the State Government finds that it is not able to maintain public order and it is of the opinion that the aid of the armed forces / forces under the control of the Union is necessary for maintaining or restoring the public order, it can request the Union Government to send the armed forces to maintain and restore the public order; (b) even where the State Government does not so request but the Union Government is satisfied that for protecting the State from "internal disturbance" i.e. to save it from domestic chaos or internal commotion, it is necessary' to deploy armed forces of the Union, it can do so under Art. 355.

**TWO-** It is equally the duty of the Union and the States to not only respect the fundamental rights conferred upon

the citizens of India by Part III and other provisions of the Constitution; they are also under an obligation to ensure the conditions wherein the citizens can enjoy and avail of the fundamental and other rights available to the citizens. In particular, Article 21 of the Constitution expressly declares that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Article 14 in Part III of the Constitution ensures to its citizens equality before law and equal protection of laws within the territory of India which means that no citizen or group of citizens shall be discriminated vis-a-vis any other citizen or group of citizens.

Article 19 confers upon the citizens six valuable freedoms viz., freedom of speech and expression; freedom to assemble peacefully and without arms; freedom to form associations or unions; freedom to move freely throughout the territory of India; freedom to reside and settle in any part of the territory of India and the freedom to practise any profession or to carry on any occupation, trade or business - subject of course to such reasonable restrictions thereon as may be placed by a law made by the Parliament or State Legislatures under clauses (2) to (6) of the said article. Clauses (1) and (2) of Article 22 confer equally valuable rights upon the citizens of India. Clause (1) declares that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to "consult, and to be defended, by the legal practitioner of his choice. Clause (2) declares that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours excluding the time taken for journey from the place of arrest to the nearest court of the Magistrate. Inasmuch as no law has been made by Parliament under Article 33 of the

Constitution (as pointed out in Part II of this Report), the above mentioned rights remain sacrosanct and effective even where the armed forces of the Union are deployed to restore public order and/or peace or to protect a State against internal disturbance. Articles 25 to 30 ensure the freedom of religion and ensure to every religious denomination or any section thereof to manage its religious affairs; they ensure freedom of worship, right to conserve one's own culture and also confer a right upon the minorities to establish educational institutions of their choice.

**THREE-** The armed forces of the Union viz., the army, navy and the air force are meant to ensure the defence of the Union and all its parts. In other words, the armed forces are meant to guard our borders against any aggression by any foreign power or foreign agency, irrespective of the manner in which such aggression is perpetrated. The armed forces are trained and are equipped for this purpose. May be that in an emergency like a flood or other natural calamity, armed forces are also called in to provide relief and help the people but that is only a temporary phenomenon. The Union Government has also been creating and indeed expanding various para military forces under various enactments like the Border Security Force Act, Assam Rifles Act, Indo-Tibetan Border Police Act, CRPF Act, CISF Act and so on. The Union Government has also created what is known as "India Reserve Battalions". Though these para military forces have been created for certain specific purposes, yet, on account of the disturbed situation in certain parts of the country, the Union Government has been obliged to deploy, from time to time, these forces as well as its armed forces to redress these situations. It must be recognised, at the same time, that the deployment of armed forces or para military forces of the Union to restore

public order in any part of the territory of India, or to protect a State from internal disturbance is, and ought to be, an exception and not the rule. The deployment of armed forces for the said purposes should be undertaken with great care and circumspection. Unless it is absolutely essential for the aforesaid purposes, the armed forces of the Union should not be so deployed, since too frequent a deployment, and that too for long periods of time, carries with it the danger of such forces losing their moorings and becoming, in effect, another police force, a prey to all the temptations and weaknesses such exposures involve. Such exposure for long periods of time may well lead to the brutalisation of such forces - which is a danger to be particularly guarded against. This concern applies no less in the case of other armed forces of the Union as well. All this means that as soon as the public order is restored or the internal disturbance is quelled, the forces have to be withdrawn to their barracks or to their regular duties, as the case may be. This very concern and consideration underlies Sections 130 and 131 of the Code of Criminal Procedure, which have been referred to and dealt with in Chapter IV of Part II of this Report. These sections of the Code of Criminal Procedure make it repeatedly clear that where it is necessary to call in the army to disperse an unlawful assembly endangering public security, the armed forces so called in shall act according to the directions of the Magistrate though the manner in which the armed forces perform the task entrusted to them lies within their discretion. Even where the armed forces are called in for meeting a more serious threat to public order or public security, or where the deployment of the armed forces is required on a fairly long-term basis, this concern remains equally valid. It has also to be ensured that the legal mechanism under which they function is

sufficiently clear and specific and accords with the spirit and provisions of the Constitution as adumbrated herein above. While providing protection against civil or criminal proceedings in respect of the acts and deeds done by such forces while carrying out the duties entrusted to them, it is equally necessary to ensure that where they knowingly abuse or misuse their powers, they must be held accountable therefore and must be dealt with according to law applicable to them. It is not unusual that there will be some indisciplined individuals in these forces as well, but their wrong actions should not be allowed to sully the fair name of the armed forces and the para military forces. While our armed forces are one of the most disciplined in the world, situations may arise when they are deployed outside their regular duties, i.e., when they are deployed for maintaining public order or for quelling internal disturbance in a part of the territory of India, when certain members thereof may seek to take advantage of their power and position to harass or otherwise trample upon the rights of the citizens of this country.

The legal mechanism should ensure that such incidents do not take place and should also ensure that adequate remedial measures do exist where such incidents do take place.

3. Bearing the above considerations in mind, we have to proceed ahead. At this juncture it would be appropriate to recall the terms of reference given to this- Committee. They read as follows: .

“Keeping in view the legitimate concerns of the people of the North Eastern Region, the need to foster Human Rights, keeping in perspective the imperatives of security and maintenance of public order to review the provisions of the Armed Forces (Special Powers) Act, 1958 as amended in 1972 and to advise the Government of India whether:

(a) To amend the provisions of the Act to bring them in consonance with the obligations of the Govt. towards protection of Human Rights; or

(b) To replace the Act by a more humane Act.

The Committee may interact with representatives of social groups, State Governments and concerned agencies of Central Govt./State Govt. legal experts and individuals, as deemed necessary by the Committee in connection with the review of the Armed Forces (Special Powers) Act, 1958 as amended in 1972.

The Committee will meet as often as required and visit the North Eastern Region, if felt necessary.”

4. The Committee finds that there are four options available for it to adopt viz.,

- (a) to recommend the repeal of the Armed Forces (Special Powers) Act, 1958;
- (b) to recommend that the present Act should continue as it obtains today or with such amendments as may be found appropriate;
- (c) in case the repeal of the Armed Forces (Special Powers) Act, 1958 is recommended, to recommend that it should be replaced by an appropriate legislation;
- (d) in case of recommendation for repeal of the Act, to recommend insertion of appropriate provisions in an existing /cognate enactment

5. Keeping in view the material placed before us and the impressions gathered by the Committee during the course of its visits and hearings held within and outside the North-Eastern States, the Committee is of the firm view that:

- (a) The Armed Forces (Special Powers) Act, 1958 should be repealed. Therefore, recommending the continuation of the present Act, with or without amendments, does not arise. The Act is too sketchy, too bald and quite inadequate in several

particulars. It is true that the Hon'ble Supreme Court has upheld its constitutional validity but that circumstance is not an endorsement of the desirability or advisability of the Act. When the constitutional validity of an enactment is challenged in a Court, the Court examines (i) whether the Act is within the legislative competence of the Legislature which enacted it and (ii) whether the enactment violates any of the provisions of the Constitution. The Court does not - it is not supposed to - pronounce upon the wisdom or the necessity of such an enactment. It must be remembered that even while upholding its constitutional validity, the Hon'ble Court has found it fit and necessary not merely to approve the "Dos and Don'ts" in the instructions issued by the Army Headquarters from time to time but has also added certain riders of its own viz., those contained in clauses 8, 9 and 14 to 21 in para 74 of its judgment (at pages 156 and 157 of the judgment in *NAGA PEOPLES' MOVEMENT OF HUMAN RIGHTS v UNION OF INDIA - (1998) 2 SCC 109*). The Committee is of the opinion that legislative shape must be given to many of these riders. We must also mention the impression gathered by it during the course of its work viz., the Act, for whatever reason, has become a symbol of oppression, an object of hate and an instrument of discrimination and highhandedness. It is highly desirable and advisable to repeal this Act altogether, without, of course, losing sight of the overwhelming desire of an overwhelming majority of the region that the Army should remain (though the Act should go). For that purpose, an appropriate legal mechanism has to be devised,

(b) The Committee is also of the firm view that it would be more appropriate to recommend insertion of appropriate provisions in the Unlawful Activities (Prevention) Act, 1967 (as amended in the year 2004) - which is a cognate enactment as pointed out in Chapter III Part II of this Report instead of suggesting a new piece of legislation.

6. The reasons for adopting the course of introducing requisite and appropriate provisions in the Unlawful Activities (Protection) Act are as follows:

**ONE-** The ULP Act defines "terrorism" in terms which encompass and cover the activities of the nature carried on by several militant/insurgent organisations in the North-east States.

Use of arms and/or explosives so as to cause loss of life or property or to act against a government servant, with intent either to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country (as provided by Section 15), the kind of activity carried on by various militant / insurgent organisations in the North-east, falls within, the four corners of Section 15. It is terrorism within the meaning of the Act.

**TWO-** The ULP Act not only defines 'terrorism' in expansive terms but also specifically lists some of the organizations engaged in militant / insurgent activity in Manipur, Tripura, Nagaland and Assam as terrorist organizations in the schedule appended to the Act. In other words, the Act recognizes that the activities carried on by the schedule mentioned organizations fall within the definition of 'terrorism' and 'terrorist activity' as defined by the said Act. Furthermore, as pointed out in Chapter III of Part II of this Report, the ULP Act does contemplate, by necessary implication, the use of armed forces of the Union as well as the other para

military forces under the control of the Union to fight and curb the terrorist activities in the country. It is for the said reason that it has expressly barred, in Section 49, any suit, prosecution or other legal proceedings against "any serving or retired member of the armed forces or para military forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism". In this sense the ULP Act, as it now obtains, does provide for deploying the armed forces or para-military forces for fighting the militant/ insurgent/terrorist activity being carried on in some or all North-eastern States<sup>1</sup>. The Act is designed to curb the terrorist activities of not only the organisations mentioned in the schedule but any and every terrorist activity.

**THREE-** a major consequence of the proposed course would be to erase the feeling of discrimination and alienation among the people of the North-eastern States that they have been subjected to, what they call, "draconian" enactment made especially for them. The ULP Act applies to entire India including to the North-eastern States. The complaint of discrimination would then no longer be valid.

**FOUR-** The ULP Act is a comprehensive law designed to (i) ban unlawful organisations; (ii) to curb terrorist activities and the funding of terrorism; and (iii) investigation, trial and punishment of persons indulging in terrorist acts, unlike the Armed Forces (Special Powers) Act which deals only with the operations of the armed forces of the Union in a disturbed area. After the proposed amendments, ULP Act would be more comprehensive in the sense that it would expressly permit deployment of armed forces and para-military forces of the Union to achieve its object viz., curbing terrorism. In other words, operations of the armed

forces of the Union would be one of the ways of curbing terrorism. It would also mean that persons apprehended by the armed forces of the Union would be made over immediately to the nearest police station and would be tried in accordance with the procedural laws of the land. The prosecution too would be quicker and more effective because of the special provisions contained in Sections 44 (protection of witnesses) and 46 (admissibility of evidence collected through interception of communications). At the same time, the accused would also get the very important safeguard contained in Section 45 of the Act which provides that no court shall take cognizance of any offence under the Act unless previous sanction therefore is granted by the appropriate government, in case the prosecuting agency proposes to proceed against him for any offence in Chapter IV or Chapter VI of this Act. We may clarify that in law it lies within the discretion and judgement of the investigating officer to decide, after due investigation, whether to proceed against the accused or to drop the proceedings and in case, he decides to proceed against the witness, to determine the offence with which the accused is to be charged. In short, just because, a person is arrested by the armed forces acting under this Act, and is made over to the police, the police is not bound to proceed against him only for offences under this Act, the police is free, depending upon the evidence/material gathered during investigation, to file a charge sheet for offence under this Act or under IPC or such other appropriate enactment, as may be applicable.

7. As stated hereinabove, the ULP Act does contemplate, by necessary implication, use of armed forces or para-military forces to conduct operations and to take steps to fight and curb terrorism. It does not, however, contain any provision specifying their powers,

duties and procedures relevant to their deployment. It does not also provide for an internal mechanism ensuring accountability of such forces with a view to guard against abuses and excesses by delinquent members of such forces. It is this lacuna, which is to be supplied by inserting appropriate provisions in the ULP Act. The provisions so introduced should be clear, unambiguous and must specify the powers of the armed forces/para military forces while acting to curb terrorist/insurgent activities.

8. We may also refer in this connection to the necessity of creating a mechanism, which we may designate as the "Grievances Cell"- Over the years many people from the region have been complaining that among the most difficult issues is the problem faced by those who seek information about family members and friends who have been picked up and detained by armed forces or security forces. There have been a large number of cases where those taken away without warrants have "disappeared", or ended up dead or badly injured. Suspicion and bitterness have grown as a result. There is need for a mechanism which is transparent, quick and involves authorities from concerned agencies as well as civil society groups to provide information on the whereabouts of missing persons within 24 hours.

9. To ensure public confidence in the process of detention and arrest, grievances cells are proposed to be set up in each district where armed forces are deployed. These cells will receive complaints regarding allegations of missing persons or abuse of law by security/armed forces, make prompt enquiries and furnish information to the complainant. Where, however, the complainant is not satisfied with the information furnished and is prepared to file an affidavit in support of his allegation, it shall be competent for the Cell to call upon the State level head of

the concerned force or organization to enquire into the matter and report the same to the cell as early as possible, not exceeding in any event, one week. The State level officers from whom these Grievances Cells seek information shall immediately make necessary enquiries and furnish full and correct information to the Grievances Cell as early as possible, not exceeding in any event one week. The Grievances Cells will be composed of three persons, namely, a senior member of the local administration as its chair, a Captain of the armed forces/security forces and a senior member of the local police. These will have dedicated communications, authority to obtain information from concerned authorities and have facilities for recording and responding to complaints. They shall locate their offices in the premises of the Sub Divisional Magistrate or in the premises of the District Magistrates, as the case may be. Such a mechanism is absolutely essential to achieve the two equally important purposes viz., (a) to infuse and instill confidence among the citizenry that the State, while deploying the armed forces of the Union to fight insurgency/terrorism has also taken care to provide for steps to guard against abuses/excesses with a view to protect the people and to preserve their democratic and civil rights; and (b) to protect the honour and the fair name of the forces.

11. While deploying the forces under sub-section (3) the Central Government shall, by a notification published in the Gazette, specifying the State or the part of the State in which the forces would operate and the period (not exceeding six months) for which the forces shall operate. At the end of the period so specified, the Central Government shall review the situation in consultation with the State Government and check whether the deployment of forces should continue and if it is to

continue for which period. This review shall take place as and when it is found necessary to continue the deployment of the forces at the expiry of the period earlier specified. It shall be permissible for the Central Government to vary the part of the State where the forces are deployed in case the earlier notification is in respect of a part of a State. Every notification extending the period of deployment of forces or varying the area of the State, as the case may be, shall be laid on the table of both the Houses of Parliament within one month of the publication of such notification.

12. A draft of the Bill, which is recommended to be incorporated as Chapter VI A of the Unlawful Activities (Preventive) Act, 1967 is enclosed herewith. The draft bill is meant to serve as a guide in drafting the legislation to be introduced in the Parliament. We may also mention that the Appendix to the draft incorporates the Do's and Don'ts issued by the Army and which have been approved by the Hon'ble Supreme Court of India in its decision report in Naga People's Movement for Human Rights Vs. Union of India (A.I.R 1998 Supreme Court 431) as well as the additional directions given by the Hon'ble Supreme Court. However, those directions which have been already incorporated in the Bill are not repeated in the Appendix.

13. A separate note submitted by Sri Sanjoy Hazarika, a Member of the Committee, is also enclosed at Annexure-XIV. ■

#### Endnotes:

1. As a matter of fact, it can be said that there are two enactments for fighting militant/insurgent /terrorist organizations, groups and gangs in the North-eastern States viz., the Armed Forces (Special Powers) Act whose application is limited to the North-eastern States alone and the ULP Act which extends to the whole of India including the North-eastern States.

# Recommendations of the National Consultation on the revised Draft National Tribal Policy

Guwahati, Assam, 6 to 7 August 2006

**I**n 2004, the government of India unveiled Draft National Tribal Policy. It held a series of regional consultations. Indigenous/tribal peoples organizations too held similar consultations and provided comments and suggestions.

On 21 July 2006, the government of India released its revised Draft National Tribal Policy. This time, indigenous organizations were given only 20 days to provide their comments. AITPN organized a National Consultation and key recommendations adopted at the National Consultation are given below.

The participants of the National Consultation on the draft National Tribal Policy (A Policy for the Scheduled Tribes of India) from different parts of India, assembled in Guwahati, Assam on 6-7 August 2006 unanimously adopted the following Declaration:

## 1. Preamble

1.1 The National Consultation on the draft National Tribal Policy expresses serious concern about the very short time (10 August 2006 as the deadline for submission of views/comments/ suggestions while the policy was made public only on 21 July 2006) provided by the Ministry of Tribal Affairs for submission of views/comments/ suggestions on the revised draft National Tribal Policy.

The National Consultation urges the Ministry of Tribal Affairs to extend the deadline and organize regional and national consultations with full and effective participation of the Scheduled Tribes for finalizing the draft National Tribal Policy.

1.2 The National Consultation on

the draft National Tribal Policy welcomes the revised National Tribal Policy which is required to address the historical injustices against the Scheduled Tribes. It is regrettable that it took over 60 years to draft such a National Policy on the Scheduled Tribes whose population is over 80 million.

1.3 The National Consultation also welcomes the statement of the draft National Tribal Policy which recognizes that "some of the terms used (e.g. primitive traits, backwardness) are also, in today's context, pejorative and need to be replaced with terms that are not derogatory."

1.4 The National Consultation emphasizes that it is not heterogeneity in terms of "separate languages and dialects, customs, cultural practices and life styles" but homogeneity in terms of dispossession, land alienation, pauperization, displacement and the denial of good governance and the rule of law should be the guiding principles for development of a National Tribal Policy.

1.5 The National Consultation recommends that apart from referring to Articles 244, 244A, 275(1), 342, 338(A) and 339 or the Fifth Schedule and the Sixth Schedule of the Constitution and the Nehruvian Principles, the National Tribal Policy should also refer to other constitutional provisions relating to the Scheduled Tribes such as 243(d), 243 (t), 243 (P), 270, 330, 332 (2), 334 and 371 to ensure that the Policy takes a holistic approach.

1.6 The National Consultation reiterates that the underlying principle of the Nehruvian Panchsheel i.e. to create "an enabling framework for the tribal

people to move according to their own genius in a system of self-governance while sharing the benefits of development, retaining the best elements of their tradition, cultural life and ethos” basically calls for granting of autonomy/self-governance to the Scheduled Tribes.

The Panchsheel reiterates the age-old recognized concept that development of the Scheduled Tribes is intrinsically linked with “territorial autonomy” for self-governance. Historically, the creation of autonomous “reserved areas” has been proven to be one of the effective means for self-governance and preserving the best elements of the tradition, cultural life and ethos of the indigenous and tribal peoples across the world. In the Indian sub-continent, the colonial British adopted the policy of “excluded and partially excluded areas” with regard to the tribal peoples. The same provisions be further strengthened and re-introduced where there have been lapsed to safeguard the identity of the Scheduled Tribes and guarantee self-governance.

1.7 The National Consultation highlights that the Autonomous District Councils under the 6th Schedule of the Constitution of India have so far proven to be inadequate to guarantee self-governance because of interference of the state governments. The Tribal Advisory Councils under the 5th Schedule have been perfunctory and the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 cannot be the panacea for the failure of the 5th Schedule and blatant violations of the provisions thereof.

1.8 The National Consultation expresses concern that the draft National Tribal Policy further weakens the Autonomous District Councils under the 6th Schedule and fails to provide any substantive recommendations for improvement of the administrative arrangements of the Scheduled Areas under the 5th Schedule.

Empowering the Scheduled Tribes

and/or further decentralization and strengthening federal features of the Constitution are indispensable for human development of the Scheduled Tribes.

1.9 The National Consultation also regrets that the draft National Tribal Policy remains silent on the right to freedom of religion of the Scheduled Tribes. Various State governments have enacted and have been enacting so-called Freedom of Religion Acts which in practice deny the right to freedom of religion of the Scheduled Tribes and defacto reduces all the Scheduled Tribes to be followers of Hinduism.

1.10 The National Consultation also recommends to give due recognition to the traditional institutions like village councils of the Scheduled Tribes and provide financial assistance to these institutions in tribal majority States like Mizoram and Nagaland where the provisions of the 73rd and 74th Amendments to the Constitution of India on the Panchayati Raj Institutions have not been extended. The traditional tribal institutions should be provided financial assistance at par with financial assistance provided to the Panchayati Raj institutions.

1.11 The National Consultation also calls upon the Ministry of Tribal Affairs for deletion of irrelevant statement on political participation (4.1) and reference to “UPA” government to ensure that it’s a national policy and not of a government of a particular party.

## 2. Need for policy

The National Consultation welcomes the recognition that “there is no single policy which looks at the issue of protection and development of Scheduled Tribes in an integrated and holistic manner”.

The National Consultation, however, regrets that the draft National Tribal Policy fails to take a holistic approach. For example, the draft National Tribal Policy in its Objectives calls for “empowerment of tribal communities to pro-

mote self-governance and self-rule as per the provisions and spirit of the Panchayats (Extension of Scheduled Areas) Act, 1996” and excludes the empowerment of the Autonomous District Councils under the 6th Schedule.

The National Consultation recommends to the Ministry of Tribal Affairs to give equal emphasis on the empowerment of the Autonomous District Councils and the institutions under them.

## 3. Guiding principles and objectives

3.1 The National Consultation affirms that the draft National Tribal Policy must not only be “guided by the principles enshrined in the Constitution of India for social, economic and political empowerment of Scheduled Tribes (Articles 14, 15(4), 16(4), 16(4A), 46, 243(d), 244(1), 244(2), 275(1), 330, 332, 335, 338A, 339(1), 340, 342, extension of 73rd and 74th Amendments of the Constitution to the Scheduled Areas through the PESA Act, etc.)” and the Nehruvian Principles.

The draft National Tribal Policy must also be guided by other constitutional provisions such as 243(d), 243(t), 243(P), 270, 330, 332(2), 334 and 371 which deal with Scheduled Tribes and international conventions like ILO Convention No 107 which has been ratified by the government of India, the ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries and the Draft United Nations Declaration on the Rights of Indigenous Peoples which has recently been adopted by the United Nations Human Rights Council.

In addition, the draft National Tribal Policy must also be developed based on the experiences of implementation or lack thereof of the provisions enshrined in the Constitution of India for protection and promotion of the rights of the Scheduled Tribes.

3.2 The National Consultation reiterates that self-governance must form the cornerstone of the draft National Tribal Policy. Without ensuring self-governance, the draft National Tribal Policy is bound to meet the same fate as those of the constitutional provisions.

#### 4. Objectives of the Policy

4.1 The National Consultation recommends that the draft National Tribal Policy should recommend developing a legislative framework for preventing alienation of lands owned by the Scheduled Tribes and restoring possession of illegally/wrongfully alienated lands within a specific time frame of 2015.

4.2 The National Consultation calls upon the Ministry of Tribal Affairs to undertake a holistic approach by equally focusing on tribal areas and scheduled areas including the institutions operating in these areas.

The National Consultation therefore recommends that the draft National Tribal Policy should also include recommendations for empowerment of the institutions under the 6th Schedule as well as the village council institutions or similar institutions in Tribal majority States where the provisions of the 73rd and 74th Amendments to the Constitution of India on Panchayati Raj have not been extended.

#### Cultural and traditional rights

4.3 The National Consultation asserts that recognition, preservation and promotion of their languages must form an integral part of cultural rights of the tribal peoples.

The National Consultation therefore recommends the recognition, promotion and preservation of tribal languages including education in mother tongues at least at primary level and the right to choose form of scripts (Roman or other scripts) if particular tribal communities do not have their

own scripts.

#### Access to privileges

4.4 The National Consultation recommends that in addition to nomadic and semi-nomadic tribes, a separate section be made for the shifting cultivators among the Scheduled Tribes and specific recommendations be made for their development through need based specific programmes.

#### Intellectual Property Rights

4.5 The National Consultation recommends that the draft National Tribal Policy should recommend necessary changes in the Bio-diversity Act and Patents Act etc for recognition, "conservation and protection of the intellectual property regime of the Scheduled Tribes" and their utilization with free, prior and informed consent of the Scheduled Tribes.

#### 5. Strategy

5.1 The National Consultation welcomes the statement for reorientation of the "institutional arrangements in the Scheduled/ Tribal areas, including strengthening and revamping of the administrative machinery to improve governance and delivery in districts".

In this context, the National Consultation recommends administrative reorganization of the tribal areas/scheduled areas to ensure greater political participation in self-governance and development. In this regard, the Autonomous District Councils under the 6th Schedule should be further empowered and the Bhuria Committee's recommendations be fully implemented.

5.2 The National Consultation also recommends –

- to provide equal emphasis for the development of the Tribal Areas and Scheduled Areas;
- delete reference to single line administration; and
- all developmental funds including

Tribal Sub Plan and Centrally Sponsored Schemes allocated for the tribal people be earmarked by the Planning Commission or any other Ministry/department for utilization by the relevant authorities/agencies.

#### 6. Alienation of Tribal land: Tenurial Insecurity

The National Consultation recommends that

6.1 Alienated lands be restored to the tribals by 2015 with the burden of proof placed on those who have appropriated the lands of the tribals illegally or by force or inducement;

6.2 A National Land Commission be set up "to prevent the growing incidence of tribal land alienation and restoration of alienated land to the tribals in accordance with the provisions of the Fifth Schedule and Sixth Schedule" with adequate funds and powers;

6.3 A Central law on the "Recognition of (Scheduled Tribes) Land Rights Act" be adopted, inter alia, to address loopholes in the State Acts prohibiting transfer of tribal lands to non-tribals and commercial entities and to recognize oral evidence in the absence of records in the disposal of tribals' land disputes;

6.2 The proposed high level empowered committee [6.1(d) of the National Tribal Policy] headed by the Chief Secretary of a State or any other Committee must have majority representation from the Scheduled Tribes;

6.4 The work of the proposed high-level empowered committee should be reported on an annual basis before the State assemblies; and

6.5 Land records of the tribals both in 5th and 6th Scheduled Areas and tribal areas be computerized.

#### 7. Tribal Forest Interface

7.1 The National Consultation recommends that the Forest Rights

(Recognition of Scheduled Tribes) Bill, 2005 should be enacted at the earliest and that it should not be extended to non-tribals.

## 8. Shifting Cultivation

The National Consultation recommends that

8.1 Shifting cultivation/Jum cultivation be recognised as a separate agricultural sector;

8.2 All measures including providing of budgetary allocations for awareness raising through village councils, traditional administrative set-ups of the indigenous and tribal peoples, Autonomous District Councils etc be taken before demarcation of community and individual jhum lands owned by indigenous and tribal peoples;

8.3 A special fund be created for providing grants and loans to the shifting cultivators for development of their jhum lands; and

8.4 A research center on shifting cultivation be established in North East India to improve shifting cultivation.

## 9. Displacements, Rehabilitation and Resettlement

The National Consultation recommends that

9.1 A "National Commission on Forced Evictions/Displacement" should be set up to study incidents of forced evictions of tribal peoples from their lands since the constitution came into force and ensure resettlement and rehabilitation of those who have been displaced and their descendents consistent with the guarantees provided under the constitution (5th Schedule and 6th Schedule and other related provisions);

9.2 The community rights/ collective rights of the Scheduled Tribes including over lands must be recognized;

9.3 Forced evictions/ relocations/ displacement of the Scheduled Tribes shall be prohibited except due to natural disasters;

9.4 Evictions/relocations/ displace-

ments in the name of armed conflict or national security or security of citizens be prohibited;

9.5 Tribal peoples be given the right to free, prior and informed consent while undertaking any project in their areas since the stage of conceptualization of the project and no development project, private or State, be launched unless and until all potential victims are fully resettled and rehabilitated first;

9.6 Rehabilitation should be considered an enforceable right of the displaced and indispensable duty of the state;

9.7 The Land Acquisition Act, 1894, the National Policy on Resettlement and Rehabilitation for Projects Affected Families-2003, the Coal Bearing Areas (Acquisition and Development) Act, 1957 and the National Mineral Policy, 1993 and all other such central and provincial laws facilitating alienation of land of the tribal peoples should be appropriately amended to ensure free, prior and informed consent; and

9.8 "Benefits in monetary terms" should be in addition to all benefits accruing from the projects and such benefits should be shared with the victims of forced evictions/displacement and their descendents, through employment as well as by making the victims and their descendents as share-holders of the projects.

## 10. Enhancement of Human Development Index Education

The National Consultation recommends that

10.1 Availability, accessibility, acceptability and adaptability be clearly enunciated for the success of the educational programmes for the Scheduled Tribes;

10.2 A detailed programme on providing free and compulsory high quality elementary education to indigenous and tribal children be prepared separately, concomitant budgetary allocations be made and implemented as a priority;

10.3 An in-depth analysis of the

reasons for high drop out rates including the shortcoming of the present incentives for school attendance be conducted to suggest remedial measures;

10.4 The right to education through mother tongue of the child at least at primary level be recognized and adequate resources be allocated;

10.5 An evaluation of the various programmes/ schemes undertaken for increasing education amongst the tribals including the requirement of Ashram (residential) Schools in Tribal Sub-Plan areas be conducted and the recommendations of the evaluation be implemented;

10.6 Mechanisms for timely disbursement of scholarship be evolved by the Central and State governments;

10.7 The pedagogy be prepared with full participation of tribal peoples;

10.8 The right to secondary education for tribal peoples be made free and compulsory as it prepares students for vocational and higher educational opportunities. Special attention should be paid to the "most vulnerable communities amongst Scheduled Tribes"; and

10.9 Provisions of scholarship for students pursuing higher education including in foreign countries be provided.

## Health

### Allopathic/Modern system of medicine

The National Consultation recommends that

10.10 Deletion of the proposal that "instead of having several single or two doctor PHCs in the tribal areas, where doctors rarely go, since they have to be all by themselves without any conducive company, it would be better to have only a few multi-doctor institutions at central locations with 4-5 doctors each;"

The National Consultation reiterates that even if the road network in the tribal areas is considerably improved, physical accessibility to the proposed

multi-doctor hospitals by the tribals will remain a problem. Therefore the proposal should be rejected and the PHCs in tribal areas must be continued.

The multi-doctor hospitals with super-speciality care should be set up at central places to supplement the PHCs;

10.11 The Ministry of Tribal Affairs should hold consultations with the Ministry of Health to take necessary administrative measures to make it mandatory for all government doctors for serving in the rural areas for a period of 10 years with five years exclusively in tribal areas;

10.12 All the vacancies of medical staff in the tribal areas be filled up within a period of one year positively after the adoption of the National Policy and the State governments will be required to report to the Ministry of Tribal Affairs; and

10.13 Take note of the positive effects of the Nagaland Communitisation of Public Institutions and Services Act of 2002 under which village health committee is empowered to manage, coordinate and monitor its health services and is responsible for buying medicines, paying salaries, maintaining accounts, planning expenses and focusing on public health issues and consider extending similar legislation to other tribal areas.

### Traditional System of Medicine

The National Consultation recommends that

10.14 All measures be taken for protection of vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples; and

10.15 A model "Traditional and Alternative Medicinal Act" be adopted with a view to (i) improve the quality and delivery of health care services to the tribal peoples through the development of traditional and alternative health care and to integrate it into the national health care delivery system, and (ii) to seek a legally workable basis by which

tribal societies would own their knowledge of traditional medicine and the government would provide resources to enable the tribal peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health.

### Livelihood opportunities and Migration

The National Consultation recommends that

10.16 In order to multiply the livelihood opportunities of the tribal peoples, special programmes like vocational courses and cottage units should be started in the tribal areas to train and provide gainful employment to the Scheduled Tribes.

#### Migration:

10.17 The National Consultation recommends that the draft National Tribal Policy recognize trafficking of the Scheduled Tribes in the name of migration.

### Creation of critical infrastructure

10.18 The development of critical infrastructures like road, electricity, telecommunication etc in the tribal areas at par with the areas with general populations should be prioritized with free, prior and informed consent of the Scheduled Tribes; and

10.19 Adequate additional funds should also be made available for development of infrastructures in the tribal areas and such funds should not be diverted for other purposes/projects or left unutilised.

### 11. Violent Manifestations

The National Consultation recommends that the above heading be changed to "Increasing violence and militarization in tribal areas".

The National Consultation also recommends that

11.1 All the State governments

ensure that the right of life and liberty of the Scheduled Tribes is not violated by involving them in armed conflict either through force or inducements;

11.2 The displacement of the Scheduled Tribes shall not be ordered (through force or inducements) for reasons related to the conflict unless the security of the Scheduled Tribe civilians involved is in danger or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order to ensure that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition;

11.3 All the draconian laws such as the Armed Forces Special Powers Act be repealed; and

11.4 Militarisation in the name of development and national security be stopped and de-militarisation of the tribal areas should immediately be undertaken. In addition, creation of inter-tribal and inter community conflicts be treated with serious concerns and all efforts to use such means to control violent manifestations be stopped with immediate effect.

### 12. Conservation and Development of Particularly Vulnerable Tribal Groups (PTGs)

12.1 The National Consultation welcomes the use of the term "Particularly Vulnerable Tribal Groups (PTGs)" instead of the Primitive Tribal Groups (PTGs); and recommends that the abbreviated form of the "Particularly Vulnerable Tribal Groups" be changed to PVTGs.

### 13. Empowerment

13.1 The National Consultation recommends giving over-riding effect to the constitutional guarantees, including PESA over both central and state laws in so far as such laws relate to governance in tribal areas.

### 14. Gender Equity

14.1 The National Consultation

recommends insertion of the words, "including free tuition and special classes" after 15.3 (a) Special literacy programmes drives"; and

14.2 Priority be given to Scheduled Tribes women in all programmes for development and special programmes like vocational courses and cottage units be started in the tribal areas to train and provide gainful employment to the tribal womenfolk.

### 15. Enlisting Support of NGOs

The National Consultation recommends that

15.1 Fifty per cent of all proposed grants meant for the tribal areas should be directly channelised and implemented and monitored through tribal people's institutions and organizations and programmes be undertaken for capacity building of the tribal NGOs;

15.2 The current process for granting funds be reformed and advisory council consisting of tribals, persons working in tribal areas and representatives of the Ministry of Tribal Affairs be formed to screen the project applications and mandatory requirement of approval from the State government be done away with; and

15.3 The current budget heads for grant of funds be revised after necessary consultation with tribal peoples.

### 16. Tribal Culture and Traditional Knowledge

#### Tribal arts and Crafts

16.1 The National Consultation recommends that adequate resources and incentives including finance should be made available to tribal artists and craftsmen for procurement of basic tools and implements as well as in rewards; and

16.2 The National Consultation further recommends that adequate resources be allocated for development of tribal museums.

#### Traditional Knowledge

17.1 The National Consultation recommends that collective rights of tribal peoples over their traditional knowledge be recognised and necessary amendments be made in the Biological Diversity Act of 2002 and Patents Act;

17.2 The National Consultation also recommends that-

- adequate resources should be provided for documentation, promotion and preservation of traditional knowledge and wisdom of tribal peoples;
- provisions should also be made for financing tribal researchers to do research on traditional knowledge and wisdom;
- mechanisms for benefit sharing of traditional knowledge by the community be created and necessary amendments be made in the Biological Diversity Act of 2002; and
- transfer of traditional knowledge and wisdom of tribal peoples to non-tribal areas without guarantees for benefit sharing and the right to free, prior and informed consent be banned.

### 18. Administration of Tribal Areas

#### 18.1 Fifth Schedule Areas:

##### a. Governor's report

The National Consultation recommends that

- measures be taken to ensure full compliance for timely submission of the reports under Clause 3 of the Fifth Schedule and article 244 of the Constitution of India;
- a detailed "Guidelines on Reporting Under Clause 3 of the Fifth Schedule and article 244 of the Constitution of India" be prepared by the Ministry of Tribal Affairs in consultation with tribal peoples in order to ensure that true situation is duly reflected in the governor's report; and
- the Governor's report be made public immediately following the submission to the Ministry of Tribal

Affairs by the concerned State government and be uploaded in the website of the Ministry of Tribal Affairs.

##### b. Tribal Advisory Councils

The National Consultation recommends that

- the governor should ensure that Tribal Advisory Council (TAC) consists of tribal leaders who are neither elected in the State legislature nor employees of the State government to ensure that the members could give full time to the TAC;
- Measures be taken to ensure that all the concerned State governments having Scheduled Areas appoint members of the Tribal Advisory Councils;
- Specific budgetary allocations be made for Tribal Advisory Councils from Grants-in-Aid assistance to the State government for their proper and regular functioning;
- Rules be framed to ensure that the TAC meetings are held regularly, at least four times in a year at quarterly basis and their reports be made public;
- Mechanisms be developed for implementation of the TAC recommendations; and
- TACs should not be formed in the States having Autonomous District Councils under the Sixth Schedules.

#### 18.2 Sixth Scheduled Areas:

##### Autonomous District Councils

The National Consultation recommends that

- The powers and subjects of the Autonomous District Councils should be uniform and include subjects listed under the 11th and 12th Schedule.

In addition, the Autonomous Councils be further empowered by taking the following measures:

- Delegation of power to deal with

law and order and police administration;

- Enabling to receive direct funding from the central government;
- Empowering to provide direct advice to the governor by the Council;
- Remit and control its service cadre; and
- Provide direct access to the Planning Commission
- the provisions of the 6th Schedule be extended to areas on the demand of the tribal communities after considering ethnic contiguity and size of the population;
- the Central funding for Plan expenditure be given directly to the ADCs instead of routing all funds through the State Governments;
- the implementation of centrally funded projects from various departments of the Union Government be entrusted to the ADCs with strict audit by the Comptroller and Auditor-General of India;
- the provisions of the Anti-Defection Laws be made applicable to all the Sixth Schedule areas; and
- in the States such as Manipur where the Sixth Schedule or Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 do not apply, an intermediary elected tier representing all the tribal communities proportion to the number of population of each community be developed at the district level.

### 18.3 Personnel Policy

The National Consultation recommends that officers/personnel belonging to tribal communities be preferably posted in the tribal areas.

## 19. The Regulatory and Protective Regime

### 19.1 National Commission for Scheduled Tribes

The National Consultation recommends that

- the National Commission for Scheduled Tribes be provided with adequate financial resources and staff;
- the National Commission for Scheduled Tribes must submit its Annual Reports regularly; and
- all information including the Annual Reports and Special Reports and follow up actions be made public and disseminated widely.

### 19.2 SCs & STs (Prevention of Atrocities) Act of 1989

The National Consultation recommends that

- the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of 1989 should be strictly enforced;
- expenses for the functioning of the Special Courts be borne by the Central government; and
- separate data on atrocities against the Scheduled Tribes be collected and recorded in the light of the separation of the National Commission for Scheduled Tribes.

### 20. Research and Training

The National Consultation recommends that

- an evaluation of all the Tribal Research Institutes be conducted by the Programme Evaluation Organisation of the Planning Commission; and
- the National Institute for Tribal Affairs should be made an autonomous institute.

### 21. Communication Strategy

The National Consultation recommends that

- there should be a comprehensive strategy for dissemination of information in the tribal areas about the constitutional and legal provisions

affecting the Scheduled tribes, their rights and duties, different schemes of the State and Central Governments, the system of governance etc to enable them to take informed decisions on issues governing them; and

- the Sarpanch / Gaon Burah / Headman of the respective village or the Chief of the respective tribe and educated youth of the areas concerned on specific honourarium basis should be engaged for this purpose.

### 22. Monitoring, Evaluation and Review Mechanisms

The National Consultation recommends that the annual review report of the implementation of the National Tribal Policy that would be undertaken by the Ministry of Tribal Affairs should be laid before the parliament as well as

*Cambodia... Cont. from pg 5*

4. Report to the Commission on Human Rights on the situation of human rights in Cambodia, UN Doc., E/CN.4/1999/101, 26 February 1998, para. 132.
5. Statement by the Office of the UN High Commissioner for Human Rights in Cambodia dated 9 August 2005
6. NGO Statement to the 2006 Consultative Group Meeting on Cambodia
7. *ibid*
8. Land alienation from the indigenous peoples in Cambodia, NGO Forum Cambodia
9. *Ibid*
10. Cambodia: Phnong Land Rights Under Threat, available at: <http://www.refintl.org/content/article/detail/6234/>
11. <http://www.ahrchk.net/statements/mainfile.php/2006statements/446/>
12. NGO Statement to the 2006 Consultative Group Meeting on Cambodia
13. <http://www.ahrchk.net/statements/mainfile.php/2006statements/446/>
14. CAMBODIA: Death threats to an activist working against land grabbing in Ratanakiri, <http://www.ahrchk.net/ua/mainfile.php/2006/2094/>
15. Cambodian court jails eight for illegal logging, 23 November 2006, available at: <http://www.alertnet.org/thenews/newsdesk/BKK292191.htm>

# Balochistan:

## Jackboot justice in tribal heartland

### I. Balochistan Imbroglia

Balochistan is the largest among Pakistan's four provinces, comprising 43 per cent of land area of the country. But only six per cent of Pakistan's population or around 8 million people inhabit Balochistan. The Baloch make up 54.7 per cent of the population while 29 per cent are Pashtun. Despite being the richest province in terms of energy and mineral resources, Balochistan remains one of the most under-developed provinces. The Baloch therefore have long been demanding greater autonomy and a larger share of the dividend from natural resources.

The denial of autonomy has been a major cause of the ongoing conflict. The 1973 Constitution provided that the concurrent list determining the quantum of provincial autonomy would be revised after every 10 years. This has never been done. Although the Balochistan crisis pre-dates General Pervez Musharraf's military regime, it still remained unaddressed. Upon assumption of Presidency in October 1999, General Pervez Musharraf promised to, among other things, work towards "strengthening the federation, removing inter-provincial disharmony and restoring national cohesion."<sup>1</sup> However, seven years later, Musharraf proved the saying "promises are made to be broken".

### II. Development and Militarization: Carrot and Stick approach

Tensions have been exacerbated by President Pervez Musharraf's determination to develop the area's oil and gas fields and launched mega projects and established new army cantonments in the province without taking into account local and provincial

sensitivities.<sup>2</sup> General Musharraf adopted the 'carrot and stick' policy to augment the military presence in the province and at the same time increase the pace of development to weaken the resistance in the province.

The Federal government has been using regular troops and paramilitary forces for "strengthening the federation". The region has been highly militarized, as Pakistan reportedly established one paramilitary post for every 500 people.<sup>3</sup> There were four mega military cantonments, 52 paramilitary cantonments, five naval bases including Jinnah naval base in Gwadar and six missile-testing ranges in Balochistan.<sup>4</sup> Balochistan continued to be under siege due to building of army cantonments in 2006.

In January 2005, military operation was carried out to suppress the armed protests by the tribal militias, consisting mainly of tribesmen following the gang rape of a lady doctor, Shazia Khalid on 7 January 2005 allegedly by an army officer.<sup>5</sup> However, the Balochistan crisis intensified after Pakistan government launched full-scale military operations in December 2005 following firing of eight rockets at a paramilitary base on the outskirts of the town of Kohlu, a stronghold of the Marri tribe during President Musharraf's visit to the area on 14 December 2005. On 17 December 2005, paramilitary forces began aerial bombardment at Kohlu.<sup>6</sup> By mid-June 2006, about 400 to 500 innocent Baloch people were reportedly killed in the army operations including in air raids in Balochistan, especially in Marri and Bugti areas.<sup>7</sup> About 80 to 85% of those either killed or injured were women and children.<sup>8</sup> The fighting caused widespread damage to buildings, and 85 percent people of Dera Bugti

were forced to flee the town.<sup>9</sup> The Pakistani Air Force chief Tanvir Mahmood Ahmed stated that the air force would continue to be used whenever and wherever the government desired.<sup>10</sup> The killing of Nawab Akbar Bugti, president of the Jamhoori Watan Party in a massive military operation in the Bhambore Hills between Kohlu and Dera Bugti districts on 26 August 2006 further escalated the spate of violence.<sup>11</sup> In July 2006, Prime Minister Shaukat Aziz ruled out general amnesty for "miscreants" in Balochistan.<sup>12</sup>

In 2005, Baloch leaders presented a 15-point agenda to the government that included greater control of resources, protection for Baloch minority and a halt to the building of military bases. However, President Musharraf showed little regard for their concerns.<sup>13</sup> In 2006, Rs 4 billion share under the interim National Finance Commission was eaten up by additional expenditure on law and order, reduction in oil and gas production and higher pay and pension bill imposed by the federal government.<sup>14</sup>

### Lack of development:

The government of Pakistan claimed that the ongoing development projects will benefit the Baloch besides creating job opportunities for them. But previous track record do not evoke any confidence.

On 28 August 2006, General Pervez Musharraf warned that the elements opposed to Balochistan's development would be crushed.<sup>15</sup> Monitoring cells have been established in the Planning Commission in Islamabad and Quetta to monitor the projects.<sup>16</sup> Several mega projects in Balochistan including Gwadar deep sea port, coastal highways between Karachi

and Gwadar, Mirani and Subakzai dams, costing more than Rs 135 billion were started.<sup>17</sup>

However, the Balochis fear that most of the jobs being created by the new port city of Gwadar and Saindak copper mining project will be given to non-Balochis and they alleged that 75% of their lands have been acquired by serving military officers at throwaway prices.<sup>18</sup> Besides, the Balochis have not been benefiting from the huge reserves of mineral resources despite Balochistan producing about 36 percent of natural gas of Pakistan.<sup>19</sup>

Balochistan also faces high illiteracy problem with the average literacy rate of the population aged 10 years and above being only 36 percent.<sup>20</sup> On 10 July 2006, the government of Pakistan signed a US\$ 22 million agreement with the World Bank for financing the Balochistan Education Support Program (BSEP) to improve access to quality primary education, in particular for girls.<sup>21</sup>

### III. Non-implementation of the recommendations of the Sub-committee

The failure to implement the recommendations of the parliamentary sub-committee is another cause of estrangement of the Baloch. On 29 September 2004, a Parliamentary Committee headed by President of Pakistan Muslim League, Chaudhry Shujaat Hussain was formed "to examine the current situation in Balochistan and make recommendations thereon." The committee was subsequently divided into two sub-committees – one headed by Wasim Sajjad mandated to examine the question of provincial autonomy and the other headed by Mushahid Hussain Sayed mandated to address the immediate crisis in the province.

On 13 July 2006, Prime Minister Shaukat Aziz after attending a meeting to review the status of implementation

of the recommendations of the sub-committee on Balochistan led by Senator Mushahid Hussain Sayed stated that the government had started implementing 30 of the 35 recommendations made by the parliamentary sub-committee on Balochistan relating to political issues. However, he did not elaborate precisely which recommendations were being implemented. The sub-committee on constitutional issues headed by Wasim Sajjad had failed to submit its final report.<sup>22</sup>

### IV. A climate of political repression

Balochistan crisis is a political problem which could only be resolved through dialogue. By using brute force, the government of Pakistan has been trying to bulldoze provincial autonomy. Hundreds of Balochis are being held without being charged or produced before courts.

#### a. Arbitrary arrest, illegal detention and torture

A fact-finding team of the Human Rights Commission of Pakistan (HRCP), which visited Balochistan in December 2005-January 2006, reported disappearances, torture, and other rights violations by the security forces.<sup>23</sup>

Political leaders and party activists were often the targets. According to a report released on 12 December 2006 by the Balochistan National Party-Mengal (BNP-M), around 4,000 Baloch youths, mainly political activists were in custody of Pakistani intelligence agencies. They were allegedly tortured by electric shocks, cigarette and candle burns, blows to sensitive parts of the body and various other methods. The report further alleged that torture cells and illegal detention centres were run by the intelligence agencies.<sup>24</sup> Although the government has reportedly admitted that a few Baloch have been detained, it has refused to give the exact figure of

those detained and their whereabouts.<sup>25</sup>

Some of the political leaders and activists arrested included Sajid Tareen, acting chief of Balochistan National Party (BNP) along with other party workers, who were arrested by police under the Maintenance of Public Order Ordinance (MPO) from the Quetta Press Club premises on 1 December 2006;<sup>26</sup> Gulam Mohammad Baloch, chairman of Baloch National Movement, and Sher Mohammad Baloch, a central leader of the Jamhoori Watan Party, who were arrested on 3 December 2006 by law enforcement agencies while trying to organize a public meeting near Juna Masjid, Shah Latif Bhitai Road to condemn the killing of Nawab Akbar Bugti,<sup>27</sup> 26 members of the Balochistan National Party (Mengal), the Jamhoori Watan Party and the National Party who were arrested by police from their houses in Killi Qamrani suburb in Quetta on 3 March 2005 for opposing the construction of large projects in Balochistan<sup>28</sup> and 13 leaders and activists of the Pukhtunkhwa Milli Awami Party (PMAP) who were arrested by the University Town police under the Maintenance of Public Order Ordinance during strike observed by the Pakistan Oppressed Nations Movement in Peshawar on 31 March 2005.<sup>29</sup>

The relatives of the nationalist leaders and political workers of Balochistan also suffered violations of their rights at the hands of the security agencies. Some of them included Obaidullah and Samiullah Baloch, brothers of Senator Sanaullah Baloch, who were allegedly kidnapped by intelligence agencies near Askari Park in Quetta Cantonment while heading towards Quetta Airport on 16 July 2006,<sup>30</sup> and three relatives of Senator Agha Shahid Bugti of Jamori Watan Party (JWP) identified as Jamal Bugti who were kidnapped by intelligence agencies from Sariab Road on 23 June 2006 and Bilal Bugti and Murtiza Bugti

who were kidnapped by intelligence agencies on 14 July 2006.<sup>31</sup>

#### b. Disappearance

According to the HRCP, 170 persons were still missing from Balochistan as on 12 December 2006,<sup>32</sup> most of them with no links with militant activities.<sup>33</sup> In July 2006, the chief of an intelligence agency had allegedly admitted that one Ali Asghar Bungulzai, a tailor from Quetta, who has been missing since 18 October 2001, was in their custody.<sup>34</sup>

#### V. Displacement: The plight of the displaced Balochis

According to United Nations estimates, there were 84,000 Internally Displaced Persons (IDPs) in Balochistan of which 26,000 were women and 33,000 were children as of December 2006.<sup>35</sup> As per the statistics of the Human Rights Commission of Pakistan, about 50,000 people have fled their villages and settlements from Dera Bugti as of July 2006. The officials have not provided relief as it claimed that the people who have fled Dera Bugti were very well off.<sup>36</sup> Due to total blockade of Marri and Bugti areas by the Pakistani army, about 8000 to 10,000 allegedly died due to exodus, malnourishment, lack of shelter and disease. They had been reportedly living in deplorable conditions in the makeshift camps with no access to potable water, food, and other basic necessities. No products, medicine and medical facility, doctor and electricity or even fuel to run water pumps were not provided to these areas.<sup>37</sup> The government was reportedly offering 10 goats to those who have returned to their homes in order to make their ends meet.<sup>38</sup>

Unfortunately the plight of the displaced has been overshadowed by the conflict in the region, which has been aggravated by the killing of Baloch chief Akbar Bugti. The government of Pakistan had failed to hear the cries for

help of the displaced due to its occupation with the operation against the tribal militias. The government has deliberately created the humanitarian crisis by not even recognizing the presence of IDPs in the province. Although the government had sought the intervention of the United Nations to avert the humanitarian crisis on 21 December 2006, it was too late.<sup>39</sup> Besides, the situation further aggravated as the government prevented journalists and aid groups to reach the affected areas.<sup>40</sup> Even the assistance sought from the UN was alleged to be conditional as only three districts of Naseerabad, Jaffarabad and Quetta, which housed majority of the IDPs were given permission. The other districts Sibi and Bolan were not considered. Besides, the UN was asked to carry out its relief operation through health facilities in the districts and under the supervision of local authorities.<sup>41</sup> The aid workers who had earlier visited the area alleged that military trucks rounded up displaced people and hid them ahead of their visits.<sup>42</sup>

There had been reports of severe malnutritional crisis among the IDPs. UNICEF in its internal assessment report on nutritional status of women and children among the IDPs revealed that 28 per cent children under the age of five were 'acutely undernourished', out of them, six per cent were in the state of 'severely acute malnutrition' and 80 per cent of the deaths among the IDPs were children under the age of five.<sup>43</sup> Six percent of the children were so underfed that they would die without immediate medical attention.<sup>44</sup>

In December 2006, the United Nations approved a \$1 million humanitarian relief package for six months to address this crisis. The package includes immediate setting up of 57 supplementary feeding centres and three therapeutic feeding centres in the three districts, provision of food,

medicine and nutrition for children, blankets, water purification and sanitation equipment and technical assistance.<sup>45</sup> However, the relief package was a peanut considering the presence of large numbers of IDPs.

Besides, development projects in the Gwadar area could also displace about 70,000 people. Given that those who have been displaced by previous development projects like Mangla Dam and the Tarbela Dam have not been rehabilitated, it is highly unlikely that those likely to be displaced would be adequately rehabilitated.<sup>46</sup> ■

#### Endnotes:

1. <http://www.achrweb.org/Review/2006/108-06.htm>
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## Philippines: Indigenous defenders on the line of fire

Since President Gloria Macapagal-Arroyo assumed power in January 2001 politically-motivated killings increased considerably. KARAPATAN (Alliance for the Advancement of People's Rights), a human rights organization in Philippines, documented 801 cases of extrajudicial killing and 208 cases of forced disappearances from January 2001 to 12 December 2006. At least 345 of the victims were affiliated with cause-oriented groups<sup>1</sup>, including 96 leaders from indigenous communities.<sup>2</sup> The victims include human rights activists, lawyers, journalists and church workers, leftist political activists and laymen. Often, the military label those killed or their organizations as "terrorists", communists, rebel sympathizers or "enemies of the state".<sup>3</sup> KARAPATAN also stated that from January to November 2006 alone, there were 185 extrajudicial killings and 93 forced disappearances. Of the 185 extrajudicial killings, 53 took place in Central Luzon, 30 in the Bicol Region and 20 in Southern Tagalog.<sup>4</sup> According to the National Union of Journalists of the Philippines, 12 journalists were killed in 2006, and 48 journalists were killed since Gloria Macapagal-Arroyo assumed presidency.<sup>5</sup>

The Oplan Bantay Laya (Operation Freedom Watch), a five-year counter insurgency plan started in 2002 by the Gloria Macapagal-Arroyo regime to "neutralize" the so-called "enemies of the State", contributed to such large scale extrajudicial killings. The Oplan Bantay Laya also resulted in massive dislocation of people in Mindanao where military operations have been intensified. Indigenous peoples, including the Morro tribes have become the disproportionate victims.<sup>6</sup>

### I. Targeting indigenous rights activists

According to Kalipunan ng Mamamayang Katutubo ng Pilipinas (KAMP or Assembly of Indigenous Peoples of the Philippines), indigenous leaders have been targeted with the aim to silence them for espousing causes that undermine the interests of big investors in mineral exploration. The Mines and Geosciences Bureau (MGB) of the Department of Environment and Natural Resources (DENR) had laid out plans to make way for 24 priority mining projects meant to raise a total investment of over \$8 billion by 2013. The government has granted mining rights to 762 medium and large-scale companies as of December 2005.<sup>7</sup> MGB has so far received 272 mining applications covering a total land area of 1,270,343.86 hectares in the Cordillera and nearby provinces. According to KAMP estimates, once the government approves the mining applications, more than 16,000 indigenous small scale miners and more than 100,000 indigenous peasant families will lose their livelihood sources. Militarization in the indigenous regions has been taking place to facilitate the entry and operation of large companies.<sup>8</sup>

Many of the indigenous rights activists were reportedly killed due to their resistance against the mining and other development projects undertaken by the government which hamper the interests of the indigenous peoples.<sup>9</sup> During 2006, several indigenous human rights activists were killed.

On 9 May 2006, human rights activist Rev. Jemias Tinambacan was shot dead and his wife Rev. Marilou Tinambacan, also a human rights activist, was wounded by four gunmen along the national highway in Brgy

Mobod, Oroquieta City. One of the perpetrators was identified by Rev. Marilou Tinambacan as Mr. Mamay Guimalan, who is reportedly a military intelligence personnel.<sup>10</sup>

On 8 June 2006, an indigenous leader Markus Bangit, the regional officer of the Cordillera Peoples Alliance and chairperson of the Binodngan Pongors Organization was killed at a stopover restaurant in Echague, Isabela.<sup>11</sup>

On the morning of 5 November 2006, Dr Rodrigo Catayong, chairperson of KARAPATAN-Eastern Samar, was shot dead by a death squad in Eastern Samar.<sup>12</sup>

On 3 October 2006, a prominent human rights defender Bishop Alberto Ramento of the Iglesia Filipina Independiente or Philippine Independent Church was killed by unidentified men at his convent in Tarlac City, 105 kilometres north of Manila. Prior to his death Bishop Ramento complained that he had been receiving death threats because of his active advocacy activities for human rights.<sup>13</sup>

On 12 December 2006, human rights lawyer Gil Gujo and his driver were reportedly shot dead by two gunmen aboard a motorcycle in Gubat town in eastern Philippines while on way to attend a court hearing in Sorsogon City.<sup>14</sup>

## II. Impunity

In the wake of severe criticism over unexplained killings, on 21 August 2006 President Gloria Macapagal Arroyo issued Administrative Order No. 157 to set up “Independent Commission to Address Media and Activist Killings” (also known as Melo Commission) headed by former Supreme Court Justice Jose Melo to investigate the killings and to submit recommendations to the President on policies and actions, including appropriate prosecution of the guilty and legislative proposals to end such killings.<sup>15</sup> The Melo commission

lacked independence and confidence of the victims’ families, as at least three of its members including Justice Melo once worked as assistant to Mrs. Arroyo’s late father, President Diosdado Macapagal.<sup>16</sup> The Commission failed to submit its report by the end of 2006.

Earlier on 12 May 2006, President Arroyo administration formed the Task Force Usig, a Philippine National Police (PNP) body led by Police Deputy Director General Avelino Razon which was mandated to probe extrajudicial killings in 10 weeks time.<sup>17</sup> The Task Force Usig stated that there were nine cases of activists’ killings in 2001, 10 in 2002, five in 2003, 20 in 2004, 32 in 2005 and 35 in 2006. But as expected, the Task Force Usig gave a clean chit to the government of the day by asserting that “There is no government policy — official or unofficial, formal or informal, written or covert — to suppress political dissent and fundamental constitutional freedoms, much less torture or murder critical journalists, leftist elements or the political opposition.” The Task Force’s report held that 23 of the 111 activists killed were linked to the Communist Party of the Philippines (CPP) and New People’s Army (NPA).<sup>18</sup>

In a rare case, on 22 November 2006, the Regional Trial Court (Branch 31) reportedly issued order for the arrest of Sergeant Serafin Jerry Napoles and his six accomplices, all Officers of the 404th Infantry Battalion of the Philippine Army (PA) for the murder of Mr. Bacar Japalali and his wife, Mrs. Carmen Japalali in September 2004.<sup>19</sup> But will the law catch up with one of the well known military officers Major General (retd) Palparn who has been held responsible for carrying out the killings of the activists? ■

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## Botswana ordered: Rights of the Basarwas in the CKGR recognised

Since time immemorial, Bushmen, who are also known as Basarwas in Botswana, lived in the area which came to be known as the Central Kalahari Game Reserve. Their rights were not extinguished by the colonial British. The British recognised the exclusive rights of particular bands to particular territories under a system of traditional land usage. Their rights were further strengthened under Article 14(3) of the Constitution of Botswana.

In February 2002, the government of Botswana displaced the Basarwas under the National Parks and Game Reserve Regulation on frivolous grounds such as protection of the wildlife population in the Reserve. As the government promoted the law of the jungle, the Basarwas sought a negotiated solution for a Management Plan for the Reserve. As negotiation failed and government made conditions of the Basarwas untenable, the Bushmen had no other option but to file a case in April 2002.

On 13 December 2006, the High Court of Botswana delivered its historic judgment upholding the rights of the Basarwas. The issues were framed by and judgement delivered on specific issues. Excerpts from the historic judgement are given below.

IN THE HIGH COURT OF  
BOTSWANA HELD AT LOBATSE

Misca. No. 52 of 2002

In the matter between:

ROY SESANA KEIWA

SETLHOBOGWA AND OTHERS

1st Applicant

2nd & further Applicants

and

THE ATTORNEY GENERAL

(in his capacity as Recognized agent  
of the . Government of the Republic  
of Botswana)

Respondent

Mr. G. Bennett for the Applicants

Mr. S.T.Pilane with him Mr. L. D.

Molodi for the Respondent;

I JUDGMENT

CORAM:

Hon. Mr. Justice M. Dibotelo

Hon. Justice U. Dow

Hon. Mr. Justice M. P. Phumaphi

M. DIBOTELO. J.:

**Issue No. 1. Was the termination of the provision of basic and essential services to the Applicants the Central Kalahari Game Reserve unlawful and unconstitutional?**

**Rulings: Para. 33 of the judgement**

In my judgment, the examples I have cited above show and demonstrate that the government consulted the Applicants and residents of the settlements inside the CKGR extensively before it made the decision to terminate the provision of services to the Applicants. It has been argued that the termination of services was unlawful or wrongful as it was preceded by the Government's prevarication in that the Government had consistently given assurances prior to the announcement in August 2001 that the services would not be withdrawn as long as some people continued to live in the settlements in the CKGR. It is argued on behalf of the Applicants for example that on 22nd - 23rd May 1996 the Government representatives assured the Ambassadors of Sweden, The United States, Britain, Norway and an official of the European Community that "social services to people who wish to stay in the Reserve will not be discontinued" (vide Exhibit P23); that on the 4th June 1996 the

Minister of Local Government repeated that "Services presently provided to the settlements will not be discontinued" (vide Exhibit P23); that on the 18th July 1996 the Acting Permanent Secretary in the Ministry of Local Government circulated a paper to other government departments stating that "The current residents of the CKGR will be allowed to remain in the Reserve and the current Government services will be maintained, though no new services will be provided" (vide Exhibit D193); that on the 16th September 1997 the District Commissioner, Ghanzi and Ghanzi Council Secretary wrote a letter (Exhibit D64) to the Botswana Guardian Newspaper stating that "The Government's position is that services will continue being provided for as long as there shall be a human soul in the CKGR"; and lastly that in April 2001 Dr. Nasha was reported to have told Mmegi Newspaper that "She did not approve the Ghanzi District Council Motion calling for the cutting of essential services" and that the motion "served to circumvent her Ministry's plans" (vide Exhibit P29). It is submitted very strongly that the decision of the Government to terminate the provision of services to the residents in the CKGR placed it in breach of these assurances, thus rendering that decision wrongful or unlawful.

I have noted that, save for what is attributed to Dr. Nasha in April 2001 and to which I shall revert shortly, these assurances were made in 1996 and 1997, some four years before the decision to terminate the services was made in 2001 and most of them even before the first relocations in 1997. I do not understand the Applicants to be saying that the Government was not entitled to change its position or policy that servic-

es would continue being provided as long as there were some people living in the CKGR; indeed if that were so, it would run counter to their contention elsewhere that they had a legitimate expectation that before the services were withdrawn they would at least be given reasonable notice to make alternative arrangements for the supply of basic services to them; further they have stated at paragraph 815 of their submissions that they do not submit for the present purposes that it was not open to the Government to depart from its policy, although there they were referring to the 1998 Policy, but that they had a legitimate expectation that before the Government decided to deviate or depart from its policy it would genuinely consult them. There is no doubt that in the words quoted from the Mmegi Newspaper above, Dr. Nasha was reacting to the resolution of the Ghanzi District Council but in my view it will be a mistake to read those words in isolation, instead the article should be read as a whole to appreciate the true import of what the Minister is reported to have said because in the same article she is also reported to have said that she did not understand what the article was about as she was on leave and that the issue (of termination of services) had long been settled and "Basarwa had moved to New Xade and Kaudwane." In my view, if there was any doubt that the Government was not equivocating on the issue of termination of services that doubt was put beyond doubt by the President at the opening of Parliament in October 2001 when he confirmed the government decision to terminate the provision of services to the residents of the segments in the CKGR with effect from the 31st January 2002, and in the letter (Exhibit P32) Dr. Nasha wrote to Ditshwanelo on the 7th January 2002 after the latter had written in December 2001 requesting an extension of the deadline to terminate the

provision of services. In her letter (Exhibit P32) Dr. Nasha states in no uncertain terms at Paragraph 3 thereof that:

"I am to inform you that the decision to terminate services in the CKGR will not be reversed."

In my view, it is clear that once the Government took the decision and then announced in August 2001 that the provision of services to the Applicants in the CKGR would be terminated in six months there is no evidence that after that announcement it gave any assurances to anyone, let alone to the Applicants, that such services would continue to be provided to the Applicants after the cut off date, or that the services would continue to be provided as long as there were some people in the settlements. Further, it is important to note that none of the Applicants or their witnesses has testified that he or she believed that as a result of the assurances which were made in 1996 and 1997 the Applicants would always be provided with services. There is no evidence from the Applicants that they had always been under the belief, or for that matter even the impression, that the provision of services to the settlements in the CKGR would not be terminated as a result of assurances that were given by government officials in 1996 and 1997 that services would be provided as long as there were some people in the CKGR. Instead, those who testified at all on the issue told the Court that the residents had been told over a period of time that the services would be terminated in future and that they had not opposed the termination of services and had responded by saying they did not care if the services were terminated as they could live in the CKGR without those services. That the Applicants can live in the CKGR without the services is, in my view, true because some of the Applicants or residents never relocated while others who relocated in 2002 have since returned to

and live in the settlements in the CKGR even though the services have not been restored. I therefore find as a fact that the government consulted the Applicants before it made the decision to terminate the provision of services inside the CKGR. In the premises, the contention of the Applicants that the termination by the Government of the provision of the basic and essential services to them in the CKGR was unlawful and unconstitutional has no merit and I reject it.

### Paragraph 53 of the judgement

I have found that the termination of the provision of services to the Applicants by the Government in the CKGR was not unlawful. I have also found that the Government did not forcibly or wrongly deprive the Applicants of the possession of the land they occupied in the settlements in the CKGR. When the Applicants relinquished possession of the land they occupied in the settlements in the CKGR and relocated to the new settlements of Kaudwane and New Xade outside the CKGR, they were allocated plots in the new settlements.

Furthermore, the Applicants were compensated for the structures they had erected on the land they occupied in the CKGR. They were then allowed to dismantle those structures and the material they had used to construct those structures was transported to the new settlements where the Applicants used it to build their dwellings on their new plots. The Applicants are not challenging the adequacy of the compensation they received for the structures they had built in their settlements in the CKGR. It has been suggested in evidence by PW5 that she did not know what they were being compensated for on the ground that it was not explained to her what the compensation was for. However, I have no doubt that the Applicants knew and understood that the land they were allo-

cated in the new settlements was in replacement of the land whose possession they had relinquished in the CKGR and further that the money they were paid was for the materials they had used to build their structures, including dwelling huts, in the CKGR. The evidence of the Respondent that since 1997 the relocation was a continuous process has not been disputed by the Applicants. After the first relocations in 1997 up to before the 2002 relocations, some residents relocated outside the CKGR from the settlements where the Applicants resided and those relocatees were paid compensation. I therefore find it improbable that the Applicants would not have known what those other residents who previously relocated were paid compensation for. The law accords equal treatment to all in that every person who desires to enter the Reserve must have a permit. In my view, therefore, there is nothing offensive in requiring the Applicants who relocated to obtain permits like everybody else in order to enter the CKGR. Further, "The New Shorter Oxford English Dictionary" defines the word "compensate" inter alia as to "make amends to, recompense" which last word it defines as to "make amends (to a person for loss, injury)". "The Concise Oxford Dictionary" defines the word "compensation" as "2 something, esp. money, given as recompense" while recompense is defined therein as "1 to make amends (to a person) or for (a loss etc.)." From these definitions, I have no doubt that the Applicants were paid the money they received and given plots they built their residences on at Kaudwane and New Xade for the loss of the sites or plots they occupied in the CKGR before the relocation. The receipt of compensation in the form of money as well as new plots in the settlements outside the CKGR was in replacement of the rights of the Applicants to occupy and possess land in the settlements inside the Reserve. I

therefore do not agree that the Government's refusal to allow the Applicants to enter the CKGR unless they have been issued with a permit is unlawful and unconstitutional.

**Issue No. 2. Whether the Government is obliged to restore the Provision of Services to the Applicants in the Central Kalahari Game Reserve?**

**Rulings: Paragraph 34 of the Judgement**

In their original notice of motion, the Applicants sought a declaratory order that the Government was obliged, first, to restore to them the basic and essential services that it terminated from the 31st January 2002; and, secondly, to continue to provide them with the basic and essential services that it had been providing immediately prior to the termination of the provision of those services. The consent order on this issue however, only directs the Court to establish after hearing evidence whether the Government is obliged to restore the provision of services to the Applicants in the CKGR. In my view, if the Court were to find on the first issue that the termination of the provision of services to the Applicants in the CKGR was unlawful, it would have to decree that the Government is obliged to restore the provision of those services to the Applicants in the CKGR, otherwise the finding that the termination of services was unlawful would be hollow and meaningless. I have already found on the first issue that the termination of the provision of services to the Applicants by the Government was neither lawful nor unconstitutional because I am satisfied on the evidence that the decision to terminate the provision of services to the Applicants was made after the Government had consulted the Applicants, who I am also satisfied knew and were aware from those consultations

that the provision of such services would be terminated at some point in the future. For the reasons stated in support of those findings, therefore, it follows that the Government is not obliged to restore the provision of services to the Applicants in the CKGR.

In the premises, I have come to the conclusion that the Government is not obliged to restore the provision of services to the Applicants in the Central Kalahari Game Reserve.

**Issue No.3. Whether Subsequent to 31st January 2002 the Applicants Were:**

- (i) In Possession of the Land Which They Lawfully Occupied in Their Settlements in CKGR

**Rulings: Paragraph 40 of the judgement**

I do not agree that the occupation of land in the settlements in the CKGR by the Applicants was unlawful even though the CKGR is state land and is owned by the government, the fact of it being state land having been conceded by the Applicants as I stated earlier. I take the view that the occupation of this state land by the Applicants was lawful for the simple reason that their occupation had not been lawfully terminated by the Government; and until such occupation was lawfully terminated by the owner of the CKGR, it could not be successfully contended in my view that the Applicants occupied the land in their settlements unlawfully. As this was state land, the Applicants occupied it at the sufferance or passive consent of the Government but that did not and could not mean in my judgment that their occupation of that land was unlawful, especially when regard is had to the fact that both the British Government and its successor in title, i.e. the Botswana Government, allowed or permitted the Applicants to remain on and use that land over many years. For the avoidance

of doubt, therefore, I find as a fact that the occupation of the land in the settlements by the Applicants in the CKGR was lawful.

Issue No. 3 (ii) Deprived of Such Possession by the Government Forcibly or Wrongly and Without Their Consent.

### **Rulings: Paragraph 46 of the judgement**

The evidence before this Court shows that some of the residents or Applicants never relocated from the CKGR notwithstanding that the provision of services to the residents was terminated by the Government at the latest at the beginning of March 2002; for instance, it is common cause that PW2, PW3 and the former Councillor, Mr. Moeti Gaborekwe, who the Court met at Metsiyanong during the inspection of the settlements in July 2004, did not relocate. Furthermore, when the Court conducted an inspection of the settlements in the CKGR before the trial started, there were visible signs that some of the residents who had previously relocated had returned or were returning to Metsiyanong and Molapo because at that time some people had recently completed building new huts while others were in the process of constructing new huts in those settlements; this was so notwithstanding that the provision of services inside the CKGR had been terminated by the Government some two years back. It will be recalled that in early November 2002 the Ghanzi District Council appointed a Task Force to carry out an inquiry to find out why people were returning to the CKGR," I have already referred to the Report of that Task Force which is Exhibit "P93". The establishment of this task force in November 2002 demonstrates that former residents of the CKGR were returning to the Reserve notwithstanding that the provision of services in the CKGR had been terminated by the Government

some nine or ten months back and had not been restored to the settlements. The Applicants have not even attempted to explain why, if their allegation that the termination of the provision of services to the settlements in the CKGR forced them to relocate is to be believed, some of them and other former residents of the CKGR who relocated have now returned to the settlements in the CKGR where they have settled notwithstanding that the provision of services has been terminated and that those services have not been restored to the settlements in the CKGR. This has been pointed out by Counsel for the Respondent in his written submissions who has further correctly submitted, in my view, that part of the evidence of Mr. Albertson (PW9) shows that before the 2002 relocations some of the residents in the settlements inside the CKGR left the Reserve permanently almost every year to leave outside the Reserve and that this was demonstrated by the reduction of the populations in the settlements notwithstanding that the services were being provided inside the Reserve which supports the contention of the Respondent that in 2002 the residents did not necessarily relocate as a direct consequence or result of the termination of the provision of services in the CKGR by the Government.

It will be recalled that one of the contentions of the Applicants is that the termination of the provision of services by the Government was unlawful because they were not consulted before the decision to terminate the services was made by the Government notwithstanding that the Applicants had a legitimate expectation that they would be consulted before the decision to terminate the services, which was likely to adversely affect them or their interests, was made. It will further be recalled that, except for one witness, the witnesses called by the Applicants testified that they did not need the services in any event. I have already

found in deciding issue number one that there is ample evidence from both the Applicants and Respondent which proves that the Applicants were consulted and even told that the provision of services to them in their settlements was temporary before the decision to terminate the provision of those services was made by the Government, and that as a result, the termination of the provision of those services by the Government was lawful. Arising from those findings it cannot, in my view, be successfully contended that the Applicants were forcibly or wrongly deprived of possession of the land they occupied in their settlements in the CKGR by the Government. In my judgment, the contention of the Applicants that the Government forcibly or wrongly deprived them of possession of the land they lawfully occupied in their settlements in the CKGR has no merit and must fail.

### **Issue No. 4. (a) issue special game licences to the Applicants is unlawful and unconstitutional**

#### **Rulings: Paragraph 49 of the judgement**

The CKGR was established by the High Commissioner's Notice No. 33 of 1961 (Exhibit "P43") dated 14th February 1961 pursuant to the provisions of Section 5(1) of the Game Proclamation (Chapter 114 of the Laws of the Bechuanaland Protectorate, 1948 - Exhibit "D42") which provided that the High Commissioner may from time to time by Notice in the Gazette declare any territory to be a Game Reserve. The High Commissioner's Notice establishing the CKGR did not establish the reserve for anything else other than a game reserve; in other words, that notice did not state that in addition to the CKGR being a Game Reserve it was also a Reserve for the Basarwa. It is contended on behalf of the Applicants that the Reserve was established not only as a

sanctuary for wildlife but also as a reserve or homeland for the Basarwa, and this contention is predicated on the arguments or proposals that were advanced at about the time the CKGR was established. One such proposal was that the game reserve should not only be established to conserve game but should also be established "to protect the food supplies of the existing Bushmen in the area from the activities of the European farming community at Ghanzi and visitors to the territory who were entering the area in increasingly large numbers either to poach game for biltong or to shoot predatory animals such as lion and leopard for their skins" (vide Exhibit P64 dated 9th February 1961 at page 36 in Bundle 2B). It was argued at the time the CKGR was established, as it is being argued now, that the intention in establishing the reserve was to establish a game reserve as well as a place where Basarwa may reside and hunt freely. At one stage after its establishment, it was even proposed that the CKGR should be changed to a Bushmen Reserve. For example, some three years after its establishment it was proposed that:

"The Reserve should be established as a reserve for Bushmen, rather than remain a Game Reserve, as their hunting is presently quite illegal and there would appear to be political advantage in making it clear that the Reserve is primarily for Bushmen and secondarily a game reserve" (vide Exhibit P76 dated 10th April 1964 at page 49 in Bundle 2B).

Although these proposals were advanced at and after the establishment of the CKGR it is very important and significant that when the CKGR was finally established there was no doubt or ambiguity as to the purpose for which it was established; namely, a game reserve. The High Commissioner's Notice No. 33 of 1961 dated 14th February 1961 (Exhibit P43) which established the CKGR states:

"It is hereby notified for general information that His Excellency the

High Commissioner has been pleased to declare part of the Ghanzi District which lies to the east of meridian of longitude which passes through the highest point of the hills known as Great Tsau shall be a Game Reserve, to be known as The Central Kalahari Game Reserve."

I have already stated that this Notice was made pursuant to the provisions of section 5(1) of the Game Proclamation, Chapter 114 of the Laws of Bechuanaland, 1948. The wording of this Notice is clear and unambiguous that by law the CKGR was established as a game reserve and for no other purpose; and it was established for that purpose only in spite of the several proposals that it was also to be a reserve for the Basarwa. In my view, if the High Commissioner or British Government at that time had wanted or intended the CKGR to be a game reserve as well as a Bushmen Reserve that would have been provided for or spelt out in clear terms in the High Commissioner's Notice No. 33 of 1961 that established the CKGR. The arguments that this Court should find that the CKGR was established as a sanctuary for wildlife as well as a reserve for the Basarwa are not new; they were advanced and rejected at the time of the establishment of the CKGR. I therefore see no justification to read into this Notice, as the Court has been urged to do, that which was never intended to be implied as forming part of the High Commissioner's Notice No. 33 of 1961 whose wording is patently clear as to the purpose of establishing the CKGR; namely, a game reserve and nothing more and nothing less. As the wording of the notice establishing the CKGR is clear and unambiguous, I take the view that it should not be interpreted by having regard to the arguments that were advanced and rejected before or at the time the Reserve was established. Section 5(2) of the Game Proclamation outlawed hunting in a Game Reserve but Section 14(2) thereof gave the Resident

Commissioner discretion to grant any person a special permit to hunt in a Game Reserve for specific purposes. Before the British Government established the CKGR in 1961, the residents of Central Kgalagadi, who included the Basarwa, hunted game in that part of the country and the establishment of the CKGR therefore rendered unlawful their hunting of wildlife in the CKGR. That the establishment of the CKGR had the effect of rendering unlawful hunting by the Basarwa in that Reserve was acknowledged in the statement quoted above from Exhibit P76 that "their hunting is presently quite illegal" and also by Dr. Silberbauer, (PW1), who was the Bushmen Survey Officer in 1961 and was also one of the people who were instrumental in the establishment of the CKGR. He testified that while the British Government knew that it was illegal to hunt game in the CKGR following its establishment, they looked at the illegal hunting by the Basarwa in the CKGR with what he termed "Nelson's Eye"; which he explained to mean that when faced with such illegal hunting the authorities looked the other way round or pretended that hunting by the Basarwa in the CKGR was legal when as a matter of law the reverse position was the case.

Paragraph 50 of the judgement-Section 12(3) of the Wildlife Conservation and National Parks Act, Cap 38:01, outlaws hunting in a game reserve except only in accordance with the terms and conditions of a permit issued under Section 39. Section 39(1) (b) of the same Act gives the Director of Wildlife and National Parks (the Director) a discretion to grant permits authorising –

"(b) the killing or capturing of animals in the interests of conservation, management, control or utilization of wildlife."

What is clear from the legislation at the time of the establishment of the CKGR and from the successive pieces of

legislation since then is that hunting in the CKGR by the Basarwa has never been a matter of right but has always been at the discretion of those under whom the responsibility for the CKGR falls. Section 92 of the Act gives the Minister power to make regulations to give force and effect to the provisions and for the better administration of the Act. Regulation 45(1) of the Wildlife Conservation and National Parks Regulations 2000 made by the Minister pursuant to the provisions of Section 92 of the Act provides that –

“45(1) Persons resident in the Central Kalahari Game Reserve at the time of the establishment of the Central Kalahari Game Reserve, or persons who can rightly lay claim to hunting rights in the Central Kalahari Game Reserve, may be permitted in writing by the Director to hunt specified animal species and collect veldt products in the game reserve and subject to any terms and conditions and in such areas as the Director may determine,” (my emphasis).

Again, what is clear from the provisions of sub-regulation 45(1) is that it is within the discretion of the Director to grant or not to grant permission in writing to hunt to persons who were either resident in the CKGR when it was established in 1961 or who can rightly lay claim to hunting rights in the CKGR; in other words, the provisions of this sub-regulation are not peremptory but permissive in regard to the Director's power to grant permission to persons mentioned therein to hunt in the CKGR. Regulation 3(1) of the Wildlife Conservation (Hunting and Licensing) Regulations 2001 also made by the Minister pursuant to the provisions of Section 92 of the Act outlaws the hunting of a game animal by any person whatsoever unless such person has been issued with a licence to do so and under sub-regulation (2)(d) thereof one such licence which may be issued is a special game licence. It is provided in regulation 9(1)

to (3) of these 2001 Regulations that –

“9. (1) A special game licence shall be issued free of charge. The special game licence shall be valid for a period of one year. The special game licence may only be issued to citizens who are principally dependent on hunting and gathering of wild products for their food and such other criteria as may be determined by the Director” (my emphasis).

#### **Paraph 51 of the Judgement**

The Applicants have led no evidence in these proceedings to show that they are principally dependent on hunting for their food notwithstanding that the burden of proof was on them to do so. In fact, the evidence before the Court shows that the Applicants are not principally dependent on hunting for their food because that evidence shows that their life in the CKGR had increasingly become sedentary in their settlements from which game had moved further and further away, making the ability to find such game difficult unless one used horses to travel long distances. Evidence before the court also shows that the Applicants did not principally depend on hunting for their food because they cultivated crops such as maize, beans and melons and kept domestic animals like goats and chickens as a source for their food. For instance, PW6 told the Court that when Assistant Minister Kokorwe addressed a meeting of the residents at Molapo in August 2001 on the withdrawal of services, they told her that she could take away her services and they would live on their crops. As the issuing of special game licences to the Applicants on a yearly basis was at the discretion of the Director of Wildlife and National Parks, it follows that special game licences were not issued as a matter of legal right to the Applicants; in terms of the law, the Director may refuse to issue special game licences. This is, however, not the end of the matter because the discretion

conferred by statute on the Director of Wildlife and National Parks to issue special game licences to the Applicants in the CKGR has to be exercised judicially by him. The Applicants and residents of the KGR have over some years been issued with special game licences on stated conditions, and there is no doubt that the decision to stop the issuing of special game licences was altering a practice which the Applicants had come to expect from the Government. This decision was therefore bound to affect the Applicants or their interests adversely in that they would no longer be able to hunt game in the CKGR but there is no evidence or suggestion that the Applicants were given the opportunity to make representations before the decision to stop the issuing of special game licences was made. In our law it is accepted that a public authority may under certain circumstances be bound to give a person who is affected by its decision an opportunity of making representations if that person has an interest of which it would not be fair to deprive him without first giving him a hearing. As the Director of Wildlife and National Parks “did not give the Applicants an opportunity to make representations before he made the decision to stop the issuing of special game licences to them which decision was likely to affect the Applicants or their interests adversely that decision was invalid and falls to be set aside. The constitutionality of the action of the Director of Wildlife in refusing to issue special game licences does not arise in this instance because the enabling legislation gives him the discretion when it comes to issuing special game licences to the Applicants, all that is required is that the Director should exercise the discretion conferred upon him judicially.

In the premises, the Government's refusal issue special game licences to the Applicants was unlawful and is set aside.

Issue No. 4(b). allow the Applicants to enter the CKGR unless they have been issued with a permit is unlawful and unconstitutional.

### Rulings: Paragraph 52 of the judgement

Although the Applicants argue that the Government's refusal to allow them to enter the CKGR unless they have been issued with a permit is unlawful and unconstitutional, the difficulty "in deciding this issue is again caused by the fact that none of the Applicants has come forward to give evidence in regard to how and when he or she was denied entry into the CKGR; what is before the Court are the allegations by the First Applicant on this issue who has elected not to give evidence so that his allegations may be tested in open Court; and who notwithstanding his allegation that he was denied entry into the Reserve did enter the Reserve in any event without a permit. It is one of the Respondent's witnesses who gave evidence which was not refuted by the Applicants and which I therefore believe that it was only when some of the former residents tried to enter the Reserve at an un gazetted point that they were prevented from doing so. It will be recalled that the Applicants have conceded, and it is now common cause, that the CKGR is state land. This means that ownership of the CKGR is vested in the Government. It follows therefore that as owner of the CKGR, the Government can exercise all rights of ownership in respect of the CKGR, including the right to determine who may come into the CKGR and under what terms and conditions, and the right to decide who may or may not go into the CKGR. Based upon the Applicants' admission that the CKGR is owned by the Government, it follows that the Government has the right to impose conditions as to how any person, including the Applicants, may enter the CKGR. The position now is that the

Government as owner of the CKGR wants the Applicants to obtain permits before they can enter the CKGR, and this is a proper exercise of one of the rights of ownership on the part of Government which the Government is entitled to do.

### Final Order of the High Court

#### Paragraph 55 of the Judgement

Finally, in view of the decisions reached by each of us, the court makes the following Order:

1. The termination in 2002 by the Government of the provision of basic and essential services to the Applicants in the CKGR was neither unlawful nor unconstitutional. (Dow J dissenting).
2. The Government is not obliged to restore the provision of such services to the Applicants in the CKGR. (Dow J dissenting)
3. Prior to 31 Jan 2002, the Applicants were in possession of the land, which they lawfully occupied in their settlements in the CKGR. (unanimous decision)
4. The Applicants were deprived of such possession by the Government forcibly or wrongly and without their consent. (Dibotelo J dissenting)
5. The Government refusal to issue special game licenses to the Appellants is unlawful (unanimous decision)
6. The Government refusal to issue special game licenses to the Applicants is unconstitutional (Dibotelo dissenting)
7. The Government refusal to allow the Applicants to enter the CKGR unless they are issued with permits is unlawful and unconstitutional. (Dibotelo dissenting)
8. Each party shall pay their own costs. (Dow dissenting)

Delivered in open court at Lobatse this 13th day of December 2006. ■

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  37. Two women and two children killed in Jet bombing near Kahan, Baloch Voice, 15 June 2006, available at: [http://www.balochvoice.com/Marri\\_files/Two\\_women\\_and\\_two\\_children\\_killed\\_in\\_Jet\\_bombing-15-6-06.html](http://www.balochvoice.com/Marri_files/Two_women_and_two_children_killed_in_Jet_bombing-15-6-06.html)
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  42. New aid crisis in Pakistan, The Christian Science Monitor, 21 December 2006, <http://www.csmonitor.com/2006/1221/p01s04-wosc.html>
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  46. Tens of thousands displaced by army operations against insurgent groups, IDMC: available at: [http://www.internal-displacement.org/8025708F004CE90B/\(httpCountrySummaries\)/1AB4F1FA51EF3D76C12571FD0048789A?OpenDocument&count=10000](http://www.internal-displacement.org/8025708F004CE90B/(httpCountrySummaries)/1AB4F1FA51EF3D76C12571FD0048789A?OpenDocument&count=10000)

## AMERICAS/PACIFIC

### United States: Eggs on its face

**T**he United States' second and third periodic reports on the implementation of International Covenant on Civil and Political Rights (ICCPR) came up for examination before the UN Human Rights Committee in July 2006. As expected, the US faced flaks from the Human Rights Committee on many issues including Abu Garaib and Guantamo Bay. International media was quick to highlight the eggs on the United States' face.

But Abu Garaib and Guantamo Bay are not the only issues. The Human Rights Committee in its Concluding Observations (CCPR/C/USA/CO/3/Rev.1) also expressed concern that "no action has been taken by the State party to address its previous recommendation relating to the extinguishment of aboriginal and indigenous rights". The Committee expressed concerns that while the guarantees provided by the Fifth amendment of the US Constitution apply to the taking of land in situations where treaties were concluded between the federal government and Indian tribes, in other situations, in particular where land was assigned by creating a reservation or is held by reason of long possession and use, tribal property rights can be extinguished on the basis of the plenary authority

of Congress for conducting Indian affairs without due process and fair compensation. Moreover, the concept of permanent trusteeship over the Indian and Alaska native tribes and their land as well as the actual exercise of this trusteeship in managing the so called Individual Indian Money (IIM) accounts infringe the full enjoyment of their rights under the ICCPR.

The United States also failed to provide sufficient information on the consequences of the situation of indigenous Native Hawaiians of Public Law 103-150 apologizing to the Native Hawaiians Peoples for the illegal overthrow of the Kingdom of Hawaii, which resulted in the suppression of the inherent sovereignty of the Hawaiian people.

The HRC urged the US The State party should review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous population. The US was asked to take further steps in order to secure the rights of all indigenous peoples under articles 1 and 27 of the ICCPR to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture.

Is the super power listening?

### Australia: Extinguishing land rights of the aborigines

In another act of extinguishing land rights of the aborigines, in August 2006, the Senate of Australia passed the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006. Under the new regime, Aboriginal people in the Northern Territory will be offered low-interest loans and 99-year lease on their land to try to encourage private ownership and economic development.

The Aboriginal Land Rights (Northern Territory) Act of 1976 provided for traditional Aboriginal owners to claim unalienated land in the Northern Territory. It established how land claims can be argued before an Aboriginal Land Commissioner and, if upheld, provided for title to the land to be granted to an Aboriginal Land Trust. It established Aboriginal Land Councils which managed communally on behalf of all Aboriginal people.

The Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 was introduced to the House of Representatives on 31 May 2006 and passed with amendments on 19 June 2006. When it was introduced before the



## ASIAN INDIGENOUS & TRIBAL PEOPLES NETWORK

**A**sian Indigenous and Tribal Peoples Network (AITPN) is an alliance of indigenous and tribal peoples' organisations and individual activists across the Asian region. It seeks to promote and protect the rights of indigenous and tribal peoples in Asia:

- ▶▶ by providing accurate and timely information to national human rights institutions, the United Nations and its specialised mechanisms, as appropriate;
- ▶▶ by conducting research, campaigning and lobbying on country situations or individual cases;
- ▶▶ by increasing the capacity of indigenous peoples through relevant training programmes for indigenous peoples' rights activists and community leaders;
- ▶▶ by providing legal, political and practical advice to indigenous peoples organisations;
- ▶▶ by providing input into international standard-setting processes on the rights of indigenous peoples; and
- ▶▶ by securing the economic, social and cultural rights of indigenous peoples through rights-based approaches to development.

AITPN has Special Consultative Status with the United Nations Economic and Social Council (ECOSOC).

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Senate on 20 June 2006, the Selection of Bills Committee recommended that the Bill be referred to the Senate Community Affairs Legal Committee to be reported by 1 August 2006. The Committee gave a little over two weeks to provide written submissions to be lodged by 12 July 2006. It held one public hearing in Darwin on 21 July 2006.

The Senate Community Affairs Legal Committee's Report stated that the time made available for this inquiry was totally inadequate. There was insufficient time for many groups to prepare submissions and one single public hearing prevented the Committee hearing from a number of witnesses.

The Committee, among others, recommended that the Government commit to further negotiations and dissemination of information on provisions which have not yet been the subject of the broad consultation processes, among others, with the Northern Territory government, Land Councils, traditional owners and communities likely to be affected by the Bill.

The Government failed to hold any discussion as it rammed through the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 in the Senate on 17 August 2006. The government made 63 amendments to the Bill but did not accept a single recommendation from the NGOs – meaning indigenous peoples views were thrown out.

The Bill received the Royal Assent on 5 September 2006 and became a law.

Moreover, before the Amendment Act came into effect on 1 October 2006, the Minister for Indigenous Affairs announced on 12 September 2006 the reconsideration of the permit system for entry onto Aboriginal land in the Northern Territory. The Government released a discussion paper outlining proposed changes to the Aboriginal Land Rights Amendment Act and related legislation titled Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act - Time for Change?

Those who are desirous of extinguishing aborigines' land rights were invited to comment by 28 February 2007. ■

# Latest Publications from AITPN

NO IMAGE

## **The State of India's Indigenous/Tribal Peoples 2007 (forthcoming!)**

Covering the events of 2006, it presents the first ever comprehensive study on 83.4 million indigenous/tribal peoples of India. It covers wide range of issues including information about who are the Scheduled Tribes of India and their geographical locations; state of their civil and political rights; violations by the armed opposition groups; failure of the constitutional and legal mechanisms; non-implementation of the affirmative action programmes; repression under various laws and the state of their right to food, health and education etc. It also contains an analysis of National Commission for Scheduled Tribes, the Recognition of Forest Rights Act, 2006 and the revised Draft National Tribal Policy of India.



## **Report of the National Consultation on draft National Tribal Policy, August 2006**

In 2004, the Ministry of Tribal Affairs of the government of India made public the first ever draft policy on the scheduled tribes, Draft National Tribal Policy. The Ministry of Tribal Affairs organised a series of consultations to elicit views. Indigenous and tribal peoples' organisations also organised their own consultations and submitted specific recommendations. The revised draft has recently been released (5 July 2006) for submission of comments/recommendations. Asian Indigenous and Tribal Peoples Network held a National Consultation on the revised Draft National Tribal Policy on 6-8 August 2006 to provide specific comments from indigenous and tribal representatives of the country.



## **Then and Now: Repression on indigenous Jumma Peoples, May 2006**

Then and Now, presented at the 5th session of the Permanent Forum on Indigenous Issues in May 2006, chronicles the repression on the indigenous Jumma peoples in the Chittagong Hill Tracts of Bangladesh since the signing of the Peace Accord in December 1997. It examines recent attacks on indigenous Jumma peoples at Maischari on 3 April 2006, repression against resistance, human rights violations, violence against Jumma women and Jumma children, and the failure of the CHTs Peace Accord, in particular, the failure to demilitarize the CHTs, continued implantation of illegal plain settlers, failure to rehabilitate returnee Jumma refugees and IDPs, failure of the CHTs Land Commission and the failure of the administrative mechanisms for implementation of the CHTs Accord.

