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CIVIL AND POLITICAL RIGHTS

**Written statement* submitted by the Asian Indigenous and Tribal Peoples Network
(AITPN), a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[30 December 2004]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Review of AFSPA in India: Too Little, Too Late

At the time of writing of this written statement, the Committee to Review the Armed Forces Special Powers Act established by the government of India is visiting Manipur. Modelled on the Armed Forces (Special Powers) Ordinance promulgated by the colonial British government on 15 August 1942 to suppress “Quit India Movement”, the Armed Forces Special Powers Act of 1958 (AFSPA) was adopted by the government of India to quell the Naga insurgency. Initially, it was supposed to have remained in operation for one year. After 46 years of imposition of the AFSPA, the Naga problem is far from resolved. The government of India and Naga armed opposition groups – both Issac-Muivah and Kaplang factions of the National Socialist Council of Nagaland – have been trying to find a solution through dialogue after a ceasefire was declared on 25 July 1997.

Under Section 3 of the AFSPA, a representative of the Central government can declare certain areas or the entire State as disturbed. The United Nations Human Rights Committee in its concluding observations of 7 August 1997 stated that India “*is in effect using emergency powers without resorting to article 4, paragraph 3, of the International Covenant*” on Civil and Political Rights. While section 4(d) of the AFSPA allows search without warrant, section 4(c) allows arrest without warrant. The armed forces are allowed to destroy properties without any verification under section 4(b). The lack of any record while conducting search, affecting warrants or destroying properties facilitate extrajudicial executions under section 4(a). Under Section 6 of the AFSPA, the armed forces enjoy virtual impunity as none can be prosecuted without the prior permission of the Central government. The Act has been a major cause of alienation of the indigenous peoples of the North East.

It took unprecedented demonstrations by some members of Manipur women organisations, *Meira Paibis*, who stripped themselves in front of the Kangla Fort of Manipur, then headquarter of the Assam Rifles to protest against the alleged extrajudicial execution of Ms Thangjam Manorama Devi on the intervening night of 11 and 12 July 2004. The protest shook the nation and Manipur witnessed civil disobedience movement, unprecedented in post independent India, by Apunba Lup, a congregation of 32 civil liberties organizations of Manipur.

In the light of the misuse of the AFSPA in the last 46 years, the Committee to Review the AFSPA must focus on these following issues while formulating its recommendations.

First, undoubtedly, there are insurgency problems in many States of India. However, the AFSPA failed to contain any insurgency. When the AFSPA was imposed on 8 September 1980, there were only four armed opposition groups in Manipur – the United National Liberation Front, People's Revolutionary Party of Kangleipak, People's Liberation Army, and National Socialist Council of Nagaland. However, today there are over two dozens armed opposition groups including the Kanglei Yaol Kanba Lup, People's United Liberation Front, North East Minority Peoples Front, Islamic National Front, Islamic Revolutionary Front, United Islamic Liberation Army, Kuki National Army, Kuki National Front, Kuki Revolutionary Army, Zomi Revolutionary Army and the United Kuki Liberation Front. The AFSPA has manifestly failed.

Second, there is no doubt that the armed opposition groups have been responsible for gross and widespread human rights violations and violations of international humanitarian laws. While India did not have specific laws in 1958 to deal with armed opposition groups, it has subsequently adopted numerous draconian laws such as the Terrorist and Disruptive Activities Prevention Act, 1985 and the Prevention of Terrorism Act (POTA), 2002. After the lapse of these laws, the government of India amended the Unlawful Activities Prevention Act of 1967 in December 2004 to incorporate some provisions of the POTA 2002. There are adequate and specific laws to deal with insurgent groups.

Third, the strength of any democracy lies in upholding the supremacy of the judiciary and primacy of the rule of law. It requires putting in place effective criminal-law provisions to deter the commission of offences against the innocents and punishment of breaches of such provisions while exercising executive powers; and not in providing the arbitrary powers to the security forces to be law unto themselves. The AFSPA violates basic tenets of criminal justice system in any civilized society – first, by providing special powers which tantamount to awarding heavier penalty than one would get under normal criminal justice system, a clear violation of the cardinal principle of criminal justice system - *nullum crimen, nulla poena sine lege*¹ and second, through non-application of due process of law which makes the armed forces to be their own judge and jury. Above all, under Section 6 of the AFSPA, the armed forces enjoy virtual impunity as none can be prosecuted without the prior permission of the Central government.

There is no need for retention of the AFSPA as there are adequate laws to deal with the unlawful activities of the insurgent groups. However, the Review Committee has already decided to retain the AFSPA with some amendments.

If the supremacy of the judiciary and primacy of the rule of law are to be upheld, the Committee must incorporate the judgements of the Supreme Court of India and opinion of international bodies including the United Nations Human Rights Committee on the AFSPA in the amended AFSPA. Leaving it to armed forces to respect “dos and don’ts” as naively espoused by the Supreme Court of India in its judgment on the constitutional validity of the AFSPA and to the courts to decide “case by case basis” have failed to stop gross human rights violations under the AFSPA.

Recommendation 1: The State government alone be empowered to declare certain areas or the entire State as “disturbed” subject to the approval by two third majority in the State Legislative Assembly. The declaration of certain areas as “disturbed” must be exceptional and temporary and not be extended beyond two times and a clear definition of “disturbed areas” be provided.

Recommendation 2: Non-commissioned officers shall be prohibited from ordering the use of fire-arms. Commissioned officers “shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives”.

¹ *nullum crimen* means no crime without a law and *nulla poena sine lege* means no punishment without law.

The principles of “absolutely necessary”, a stricter and more compelling test of necessity, and proportionality for the “use of force” which may result, as an unintended outcome, in the deprivation of life, as provided in the UN Code of Conduct for Law Enforcement Officials and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials shall be incorporated. Judicial inquiries must be mandatory in all cases of death at the hands of the security and armed forces and completed within a specific time frame and that the judges in such inquiries, including those under the Commission of Enquiry Act of 1952, be empowered to direct the prosecution of security and armed forces personnel.

Recommendation 3: Presumption of innocence of the alleged absconders must be guaranteed and the principle of proportionality of force must be respected under section 4(b) of the AFSPA

Recommendation 4: No one shall be arrested without warrant by the armed forces. In case of arrest without warrant under exceptional circumstances as provided under sections 41 and 42 of the Criminal Procedure Code of India, the arrested person must be handed over to the police within 8 to 12 hours and a report be made by the armed forces to the nearest police station explaining the grounds and circumstances under which arrest had to be made without warrant. The guidelines provided in the Supreme Court judgement in the case of *DK Basu Vs State of West Bengal* in order to guarantee the rights of the arrested persons while in the custody of the armed forces i.e. from time of arrest without warrant to the handing over the arrested persons to the nearest police station must be incorporated.

Recommendation 5: As directed by the Supreme Court of India, the property or the arms, ammunition etc., seized during the course of search conducted under Section 4(d) of the AFSPA must be handed over to officer in charge of the nearest police station together with a report of the circumstances occasioning such search and seizure and the provisions of Cr.P.C. governing search and seizure have to be followed during the course of search and seizure conducted in exercise of the power conferred under Section 4(d) of the Central Act (AFSPA).” In addition, measures be taken to reduce human rights violations during the cordon and search operations

Recommendation 6: The supremacy of the judiciary must be upheld and the requirement of governmental sanction for proceedings against the armed forces be abolished and be left to the courts to decide whether proceedings are vexatious or abusive.
