

# Observations on the State of Indigenous Human Rights in India

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## CULTURAL SURVIVAL

Cultural Survival is an international Indigenous rights organization with a global Indigenous leadership and consultative status with ECOSOC since 2005. Cultural Survival is located in Cambridge, Massachusetts, and is registered as a 501(c)(3) non-profit organization in the United States. Cultural Survival monitors the protection of Indigenous Peoples' rights in countries throughout the world and publishes its findings in its magazine, the *Cultural Survival Quarterly*; and on its website: [www.cs.org](http://www.cs.org) Cultural Survival also produces and distributes quality radio programs that strengthen and sustain Indigenous languages, cultures, and civil participation. Sandeep Kindo from the University of Wisconsin-Madison contributed to this report.

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### I. Background

84.3 million or 8.2% of India's population is Indigenous<sup>1</sup> (Adivasi), and considered to be 'descendants of the original inhabitants of India.'<sup>2</sup> Only a percentage of Indigenous Peoples are classified as "Scheduled Tribes" in the Constitution of India (1950) with over 461 ethnic tribes, and an additional 174 unrecognized tribal groups.<sup>3</sup> The Constitution only lists a few tribes but does not define the term "Scheduled Tribes." The *Census of India*<sup>4</sup> reports that ethnographic accounts of "Scheduled Tribe" is often disputed due to its conceptual and practical difficulties in recognizing various communities as Scheduled Tribe. Some question the demarcation between recognized tribes and other caste-groups around them with similar cultures and interests, and raise concerns about its origins in colonial politics and power structures as well as post-colonial ideologies.<sup>5</sup> Still, the national government largely follows a broad working definition developed by the 1965 Advisory Committee Report on the Revision of the Lists of Scheduled Castes and Scheduled Tribes, popularly known as the Lokur Committee Report. It defines "Scheduled Tribes" as groups of Indigenous people characterized by "primitive traits, distinctive culture, geographical isolation, shyness of contact with the community at large and backwardness,"<sup>6</sup> language that is discriminatory. The Constitution of India provides for special protections for the classified Scheduled Tribes using paternalistic and discriminatory language: recognizing their social, educational and economic "backwardness," and the need to "protect" them from social injustice and various forms of exploitation, Articles 15(4) and 46.

### II. Analysis of the Situation

India's recognition of Indigenous Peoples in international and domestic law, policy, and practice is paradoxical. While India voted in favour of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 and signed the ILO Convention 107, the government continues to deny the term and concept of "Indigenous Peoples" claiming that all Indians are Indigenous.<sup>7</sup> Despite governmental posturing, Indigenous groups in India internalize and assert rights protected by international laws. In 2012, ILO Committee Experts noted that the national tribal policy was being considered but had not been finalized.

The challenge for Indigenous rights advocates in India is the historically accepted view that all Indians are Indigenous. In responding to a criminal appeal case involving physical and mental abuse of a tribal woman, the 2010 Supreme Court case of *Kailas & Others v. State of Maharashtra* observed that Scheduled Tribes (Indigenous Peoples) are the original inhabitants,

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<sup>1</sup> "Indigenous Peoples in India," International Work Group of Indigenous Affairs, n.d. Accessed 16, August 2016 from <http://www.iwgia.org/regions/asia/india>

<sup>2</sup> ACHR, "Who are the Indigenous Peoples in India?" *INDIA: Human Rights Report Quarterly, Issue 2*, 2010, p. 67. Accessed 16, August 2016 from <http://www.achrweb.org/ihrrq/issue2/ihrrq-oct-dec-2010.pdf>

<sup>3</sup> ACHR, "Who are the Indigenous Peoples in India?" 2010; The Constitution (Scheduled Tribes) Order, 1950

<sup>4</sup> For example, 1891 *Census of India* Report

<sup>5</sup> Baviskar, Amita. "Indian Indignities: Adivasi Engagements with Hindu Nationalism In India." *Indigenous Experience Today*. By Marisol De La. Cadena and Orin Starn. Oxford: Berg, 2007. 278-281

<sup>6</sup> P. 7.

<sup>7</sup> C.R. Bijoy, Shankar Gopalakrishnan, and Shomona Khanna, *India and the Rights of Indigenous Peoples*, 2010. Accessed 16, August 2016 from <http://aippnet.org/india-and-the-rights-of-Indigenous-peoples-2/>

constitute 8% of the population, and that the Mundas language predates the Dravidian languages - making pre-Dravidian Aborigines the ancestors of the present Tribals or Adivasi (Indigenous Peoples)<sup>8 9 10</sup> who were persecuted in the 17th century.<sup>11</sup>

The rights of Indigenous Peoples are guaranteed within the Indian Constitutional framework. Part IV of the Constitution lays down the Directive Principles of State Policy that are ‘fundamental to the governance of the country,’ and include ‘Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections,<sup>12</sup> which must be enforced as laws by the State. India’s Constitution provides special protection and assistance to vulnerable groups in India including Indigenous Peoples (Adivasi) in order to help alleviate extreme levels of poverty, illiteracy, disease, and early mortality.<sup>13</sup> The Fifth and Sixth Schedules of the Constitution offer special laws on Indigenous Peoples’ land rights and self-governance and are applicable to designated parts of the country with high tribal population including central India and the North-East states.<sup>14</sup> Part III of the Constitution acknowledges Fundamental Rights, and prohibition laws that combat discrimination and promote “equality before the law or the equal protection of laws, non-discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them, special provision for the advancement of any socially and educationally backward class of citizens as well as Scheduled Castes and Scheduled Tribes, affirmative action through the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services of the State, and abolition of ‘Untouchability.’”<sup>15</sup>

Despite these constitutional rights and special provisions granted by the Constitution and ratification of 18 International Human Rights Treaties, which includes the Convention on the Elimination of all Forms of Racial Discrimination, socially accepted discrimination, harassment, and violence towards disadvantaged and marginalized groups continue, with the government itself using the discriminative portrayal of Indigenous Peoples, as “backward” in its own constitution.<sup>16</sup> Also, the 1989 Schedules Castes and Scheduled Tribes (Atrocities Prevention) Act enables legal

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<sup>8</sup> Kailas v. State of Maharashtra, (2011) 1 SCC 793.

<sup>9</sup> ACHR, “Who are the Indigenous Peoples in India?” 2010

<sup>10</sup> “India, Largely a Country of Immigrants,” *The Hindu*, 2011. Accessed 16, August 2016 from <http://www.thehindu.com/opinion/op-ed/india-largely-a-country-of-immigrants/article1081343.ece>

<sup>11</sup> CRIMINAL APPELLATE JURISDICTION, CRIMINAL APPEAL NO. \_\_\_11\_\_\_/2011 (Arising out of Special Leave Petition (Crl) No. 10367 of 2010), Kailas v. State of Maharashtra, (2011). Accessed 22 August 2016 from <https://indiankanoon.org/doc/1632114/>

<sup>12</sup> Human Rights Council, “NATIONAL REPORT SUBMITTED IN ACCORDANCE WITH PARAGRAPH 15(a) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1\* India,” *The United Nations General Assembly*, 2008. Accessed on 20, August 2016 from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/112/43/PDF/G0811243.pdf?OpenElement>

<sup>13</sup> ACHR, “Who are the Indigenous Peoples in India?” 2010

<sup>14</sup> “2016 Yearbook Article: India,” *International Work Group for Indigenous Affairs*, 2016, [http://www.iwgia.org/images/stories/sections/regions/asia/documents/IW2016/India\\_IW2016\\_web\\_redu.pdf](http://www.iwgia.org/images/stories/sections/regions/asia/documents/IW2016/India_IW2016_web_redu.pdf)

<sup>15</sup> Human Rights Council, “NATIONAL REPORT SUBMITTED IN ACCORDANCE WITH PARAGRAPH 15(a) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1\* India,” *The United Nations General Assembly*, 2008. Accessed on 20, August 2016 from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/112/43/PDF/G0811243.pdf?OpenElement>

<sup>16</sup> “Scheduled Tribes Introduction,” Ministry of Tribal Affairs: Government of India, n.d. Accessed 20, August 2016 from <http://tribal.nic.in/Content/IntroductionScheduledTribes.aspx>

prohibition against discriminatory attitudes but as a result, atrocities continue towards Scheduled Tribes and strong prejudices from law enforcement, especially security forces.

### III. Continuing Rights Violations

#### A. Land Rights (UNDRIP Articles 18, 19, 26, 27, 28, 30, 32, 37, 38, and 46)

In 2013 the Prime Minister established the High-level Committee on Socio-Economic, Health and Educational Status of the Tribals of India. In May 2014 a report was released with recommendations including amendments to laws to allow Scheduled Tribes control over their own resources and the prevention of further alienation of land.<sup>17</sup> However, the government delayed making this report publicly and widely available and has failed to effectively implement the recommendations, as demonstrated by the following examples.

In August 2015, the government opposed the reinstatement of the Indigenous Peoples Land Acquisition Ordinance (LARR Act, effective Jan 1, 2014). While the ordinance was allowed to lapse, parts of the legislation were salvaged and an amendment included, which was The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, to exempt five types of projects from receiving consent and completing social impact assessments.<sup>18</sup> This amendment calls for five categories to be exempt. Article 41 of the Indian Constitution states that: “As far as possible, no acquisition of land shall be made in the Scheduled Areas” and that families would be resettled “preferably in the same Scheduled Area in a compact block so that they can retain their ethnic, linguistic and cultural identity.”<sup>19</sup> However, there is a lack of legal redress for displaced Indigenous Persons. Schedule Five, a special provision of the Constitution which ensures land rights to Scheduled Tribes has been ineffective, as the majority of Indigenous lands in 2015 remain unrestored and alienated.<sup>20</sup>

To circumvent legal difficulties in acquiring tribal lands for private commercial use, states like Jharkhand are making efforts to amending two of its tribal land statutes: Chhotanagpur Tenancy Act and Santhal Pargana Tenancy Act. Having failed to adopt the amendments in the July 2016 state assembly session, the Jharkhand government has proposed ordinances, i.e., executive action from the President of India, that bypass democratic and legislative norms of law making. While the executive action is now pending, various Indigenous Peoples groups and activists in Jharkhand continue to protest government’s attempt to allowing acquisition of tribal agricultural land for non-agricultural purposes.

#### B. Forced Evictions (UNDRIP Articles 4, 7,8, 10, 26, 27, 28, 30, 32, 37, 38, and 46)

Eviction notices were distributed to over 1,200 Indigenous families in 13 villages in Tripura on September 2015 by the state government to acquire land to set up a firing range for the Assam Rifles. FPIC was not conducted, disregarding the Indigenous Peoples’ right to self-determination, land was acquired without following procedure, and no displaced person received

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<sup>17</sup> “2016 Yearbook Article: India,” *International Work Group for Indigenous Affairs*, 2016, p. 333.

<sup>18</sup> “The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015,” PRS Legislative Research. Accessed on 20, August 2016 from <http://www.prsindia.org/billtrack/the-right-to-fair-compensation-and-transparency-in-land-acquisition-rehabilitation-and-resettlement-amendment-bill-2015-3649/>

<sup>19</sup> “2014 Yearbook Article: India,” *International Work Group for Indigenous Affairs*, 2014, p. 339. Accessed 22 August, 2016 from <http://www.iwgia.org/images/stories/sections/regions/asia/documents/IW2014/IndiaIW2014.pdf>

<sup>20</sup> “2016 Yearbook Article: India,” *International Work Group for Indigenous Affairs*, 2016, p. 332-333.

proper compensation. Also in violation of these articles was the 2014 proposed cement plant which caused thousands of Indigenous Persons from nearly 27 villages in Manavar Tehsil of Dhar district in Madhya Pradesh to be displaced due to the acquisition of their agricultural land.<sup>21</sup>

Indigenous Peoples residing in forest areas face the threat of removal in the name of forest conservation. Despite Section 4(5) of The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, which provides that no member of a forest-dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from land until the recognition and verification procedure for settlement of forest rights is complete, Indigenous Peoples are denied their rights and are repressed by the law. The Ministry of Tribal Affairs, reported on 31 October 2015, that a total of 4,405,395 claims had been received across the country under the Forest Rights Act, of which 3,813,344 claims (86.56% of the total received) have been rejected or continue to be pending. Many Indigenous Peoples, including 450 Indigenous families belonging to the Gond and Baiga tribes in the Kanha Tiger Reserve in Madhya Pradesh were evicted in June 2014 and had not been rehabilitated, resettled, nor financially assisted as of 15 January 2015.<sup>22</sup>

On February 10, 2012, government officials violently evicted residents of the Perinchamkutty Adivasi Colony. 62 Adivasi were arrested and imprisoned under the charge of “illegal encroachment into government land”. Months later, they were released, and began a non-violent, protest on October 1, 2012. The District Collector of Idukki later promised to allot an acre of land to each family displaced here, but, in the last two years, the government has not met with its promise. 7 people have died in the struggle to reclaim their lands, while the government has failed at reaching a consensus on rehabilitating those evicted.<sup>23</sup>fpic

### C. Violations of Free, Prior and Informed Consent by Extractive Industries (UNDRIP Articles 8, 22, 24, 29)

An anti-coal protest in 2011 also resulted in six deaths in Jharkhand, India during two protests. The Coal Bearing Areas (Acquisition and Development) Act (CBA Act) does not require a Free, Prior, and Informed Consent (FPIC) of the affected communities nor a social impact assessment. Coal India, however, is required under India’s Panchayat (Extension to Scheduled Areas) Act (PESA Act) to consult through village assemblies in protected Indigenous regions before acquiring any land, or deciding on rehabilitation and resettlement measures, but no consultations were made for any of Coal India’s three mine sites.<sup>24</sup> “Recognition of the powers of the gram sabha is central to the implementation of both the PESA Act and the Forest Rights Act, and it is this decentralisation of power to Adivasi communities that the state and central governments seem to be refusing to accept,”<sup>25</sup> said Sudha Bharadwaj, a human rights lawyer working with Indigenous communities in Chhattisgarh. Coal India’s failure to acknowledge Indigenous People’s rights

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<sup>21</sup> “2015 Yearbook Article: India,” *International Work Group for Indigenous Affairs*, 2015, p. 336.

Accessed 22 August, 2016 from

[http://www.iwgia.org/images/stories/sections/regions/asia/documents/IW2015/India\\_IW2015\\_web.pdf](http://www.iwgia.org/images/stories/sections/regions/asia/documents/IW2015/India_IW2015_web.pdf)

<sup>22</sup> “2016 Yearbook Article: India,” *International Work Group for Indigenous Affairs*, 2016, p. 335.

<sup>23</sup> “The Promised Land: Adivasi Land Struggles in Kerala - Ritimo.” 2015. 31 Aug. 2016

<<http://www.ritimo.org/The-Promised-Land-Adivasi-Land-Struggles-in-Kerala>>

<sup>24</sup> “India Government and Coal India Sacrifice Indigenous Rights in the Name of Development,” Amnesty International, 2016. Accessed on 30 Aug, 2016 from <http://www.amnestyusa.org/news/press-releases/indian-government-and-coal-india-sacrifice-Indigenous-rights-in-the-name-of-development>

<sup>25</sup> “India Government and Coal India Sacrifice Indigenous Rights in the Name of Development,” 2016.

including FPIC are a result of the government's inability to enforce and properly implement international human rights and inclusivity during development.

As of February 2015, chief minister Raghubar Das entered into negotiations with global steel and mining company ArcelorMittal, in the hopes of reviving a steel project whose MoU was signed back in 2005 but was shut down due to illegal land acquisition, mining, and clearance hurdles in 2013.<sup>26</sup> There still has been no consultation among the Adivasi on this issue since it was officially closed.

Coal mines and companies, like Coal India (CIL), are quickly grabbing up Indigenous lands in Chhattisgarh, Jharkhand and Odisha without consultation, as well as creating massive pollution, and causing health problems among the local people. Land acquisition for Coal India's mines is carried out under the Coal Bearing Areas (Acquisition and Development) Act (CBA Act), which does not require authorities to consult affected communities, or seek the Free, Prior and Informed Consent of Indigenous Peoples. A new land acquisition law enacted in 2014 specifically exempts acquisition under the CBA Act from seeking the consent of affected families or carrying out social impact assessments.<sup>27</sup> By 2020, it is speculated that the government plans to double total coal output in India without consulting the tribal peoples who live there.<sup>28</sup>

From these coal sites, high levels of arsenic, mercury, chromium, nickel etc. have been found to spread into the waters, leading to skin diseases such as eczema, and rashes as well as other diseases such as dysentery, diarrhea, jaundice, and typhoid. Adivasi women and children are employed in secondary activities such as loading and unloading of coals and according to Chotanagpur Adivasi Sewa Samiti, an NGO working in Hazaribad district, there is no economic security for workdays lost due to health problems, and even during pregnancy, women have to work causing problems among the pregnant women and their newborns.<sup>29</sup>

#### B. Torture, Physical Abuse, and Murder (UNDRIP Articles 2 and 7)

Indigenous Peoples are disproportionately the targets of physical violence, and often are targeted by State security forces. For 2014, the National Crime Records Bureau (NCRB) of the Ministry of Home Affairs, reported a total of 11,451 crime cases against Indigenous Peoples committed by non-tribals, not including human rights violations committed by security forces. This represents a 68.6% increase from 2013 with 6,793<sup>30</sup> including 729 reported cases of rape and 156 murders. 5,922 crimes were committed in 2012, and 5,756<sup>31</sup> in 2011.

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<sup>26</sup> "Arcelor Mittal keen to start - The Telegraph." 2015. 31 Aug. 2016

<[http://www.telegraphindia.com/1150226/jsp/frontpage/story\\_5626.jsp](http://www.telegraphindia.com/1150226/jsp/frontpage/story_5626.jsp)>

<sup>27</sup> "PRS | Bill Track | The Right to Fair Compensation and Transparency in ..." 2015. 31 Aug. 2016

<<http://www.prsindia.org/billtrack/the-right-to-fair-compensation-and-transparency-in-land-acquisition-rehabilitation-and-resettlement-amendment-bill-2015-3649/>>

<sup>28</sup> "Human right violations at mines run by Coal India: Amnesty | Business ..." 2016. 31 Aug. 2016

<[http://www.business-standard.com/article/pti-stories/human-right-violations-at-mines-run-by-coal-india-amnesty-116071301103\\_1.html](http://www.business-standard.com/article/pti-stories/human-right-violations-at-mines-run-by-coal-india-amnesty-116071301103_1.html)>

<sup>29</sup> "Effects of coal mining in Jharkhand (India) - SlideShare." 2015. 31 Aug. 2016

<<http://www.slideshare.net/maxchand35/effects-of-coal-mining-in-jharkhand-india>>

<sup>30</sup> "2016 Yearbook Article: India," *International Work Group for Indigenous Affairs*, 2016, p. 331-332.

<sup>31</sup> "2014 Yearbook Article: India," *International Work Group for Indigenous Affairs*, 2014, p. 339.

Security forces are also responsible for various deaths, including that of a 52-year-old Indigenous farmer on 28 June 2015, and an Indigenous youth on 18, August 2015, both due to alleged torture in Assam. In September 2015, police opened fire on Indigenous Peoples protesting against the government's land acquisition for a military project. Akku Kharwar, an Indigenous leader was seriously hurt, along with eight others; thirty-five others sustained minor injuries. On 29 November 2015, two Indigenous tribals aged 35 and 30 were killed in Meghalaya. India's security forces also targeted Indigenous women for sexual abuse. In October 2015, four women, including a 14-year-old, were allegedly blindfolded and gang-raped by security forces.<sup>32</sup> In 2014, a 16-year old schoolgirl at Dwimuguri village was killed by security forces, as well as two innocent Indigenous villagers on 3 September, twenty-six Indigenous Peoples were beaten by the Central Reserve Police Force in Kokenar and Chote Tongpal region on 26 November, and five Indigenous Persons from Kasalpadh village, were beaten. Adivasi living in Bodo areas were victims of serial attacks by the National Democratic Front of Boroland, Songbijit Faction and at least eighty Indigenous Peoples were killed. Five Indigenous Bodo tribals were also killed in 'retaliatory attacks' by miscreants from the Indigenous communities, leading to a humanitarian crisis, and the displacement of over 287,182<sup>33</sup> Indigenous Peoples. Reports show that armed opposition groups, particularly Maoists, were also responsible for the deaths of Indigenous Peoples from 2011-2015, many of which are unreported.<sup>34</sup> The limited number of cases documented in this report are just a glimpse of the human rights violations.

In the case of *Kailas v. State of Maharashtra*, 2011, Nandabai, a 25 year old Indigenous woman from the Bhil community was beaten, abused, stripped of her clothing and paraded nude in her village by "two powerful persons."<sup>35</sup> The Criminal Appeal 2011 was dismissed, and Justice Markandey Katju declared that "It is time now to undo the historical injustice to them (Indigenous Peoples)."<sup>36</sup>

#### IV. Questions

1. What steps has India taken to implement Articles 15(4), 15(5), 16(4), 16(4A), 46, etc. of India's Constitution, including special provisions Schedule 5 and 6, and the ratification of ILO Convention No. 169?
2. The Constitution of India forbids taking land away from Scheduled Tribes. What mechanisms are in place to assure Indigenous Peoples can claim status for Scheduled Tribes under Article 342 to receive the protection ensured to them by the Constitution and UNDRIP?
3. What communications policies and measures are in place that ensure FPIC occurs before any land is acquired by the government?
4. What measures have been taken to monitor and train security forces to prevent discrimination, physical abuse, and human rights violations towards Indigenous Peoples?

#### V. Recommendations

Cultural Survival urges the government of India to:

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<sup>32</sup> "2016 Yearbook Article: India," *International Work Group for Indigenous Affairs*, 2016, p. 332.

<sup>33</sup> "2015 Yearbook Article: India," *International Work Group for Indigenous Affairs*, 2015, 335.

<sup>34</sup> "2016 Yearbook Article: India," *International Work Group for Indigenous Affairs*, 2016, p. 332.

<sup>35</sup> CRIMINAL APPELLATE JURISDICTION, CRIMINAL APPEAL NO. \_\_\_11\_\_\_/2011

<sup>36</sup> CRIMINAL APPELLATE JURISDICTION, CRIMINAL APPEAL NO. \_\_\_11\_\_\_/2011

1. Ratify ILO Convention 169.
2. "Forest Clearances" must only be ordered when site visits of affected areas have been conducted, with a full analysis of the effects on the environment and a 'social impact assessment' on the Indigenous community including Free, Prior and Informed Consent of the Indigenous village with full compliance to the Forest Rights Act, 2006 (FRA, 2006), including plans for rehabilitation, resettlement and adequate compensation if agreed to by the affected villagers.
3. Rescind the clause in the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2015 that exempts infrastructure projects including projects under public private partnership where the ownership of the land continues to vest with the government from 'Social Impact Assessment,' 'Special Provisions for Safeguarding Food Security', and 'Consent' provisions. No exemptions shall be given without FPIC.
4. Ensure creating effective mechanisms to enforcing tribal land laws, including restoring acquired lands to the original land holders.
5. Enforce existing legal prohibitions on discrimination and consider enacting comprehensive anti-discrimination legislation, including the training and accountability of security forces for to act indiscriminately.
6. Amend discriminatory language, such as "primitiveness" and "backwardness," that appears on the 1949 Constitution to describe Scheduled Tribes, and rescind it from the Ministry of Tribal Affairs literature and internet content.
7. Invite UN Special Rapporteur on the Rights of Indigenous Peoples to visit India.
8. Create a National Action plan on implementing the rights of Indigenous Peoples based on the World Conference on Indigenous Peoples' Outcome Document.