

Shadow report for the Universal Periodic Review of India 2012**Joint Submission by:****International Human Rights Association of American Minorities (IHRAAM) - Nainamo, Canada****And:****Indian Council of South America (CISA) - La Paz, Brazil****Indigenous Peoples and Nations Coalition (IPNC) - Anchorage, US****International Council for Human Rights (ICHR) - Brussels, Belgium****International Educational Development - Los Angeles, US****Association of Humanitarian Lawyers - San Francisco, US****International Association of Schools of Social Work (IASSW) - Hong Kong**

The International Human Rights Association of American Minorities submits this shadow report on the human rights situation in India to the Office of the High Commissioner for Human Rights.

There are a host of endemic problems with the ability of the Indian government to respect its human rights obligations. From systemic use of torture by the police to a lax approach to tackling the inherent discrimination that is part and parcel of the caste system the government of India is failing to fulfill its human rights obligations on many issues and has failed to undertake many of the recommendations that were the product of its first UPR.

For 65 years the Government of India has stationed a military presence in the state of Jammu & Kashmir steadfastly refusing to honor the repeated requests of the United Nations to offer a plebiscite to the inhabitants. In that time tens of thousands of civilians have lost their lives at the hands of the Indian forces stationed there. The deployment persistently ranks as the largest deployment of military and para-military personnel anywhere on earth numbering in excess of 500,000 personnel. Coupled with this there are a number of laws that are specifically used in Jammu & Kashmir that give, in the clearest of terms, near complete immunity from prosecution for acts contrary to human rights norms; the most serious of which include extra-judicial execution, torture, rape, arbitrary arrest and detention, disappearance, restriction of the press and freedom of speech, and the denial of the right of freedom of assembly.

Laws such as the Jammu & Kashmir Public Safety Act, the Armed Forces Special Powers Act, the Criminal Procedure Code, and the National Security Act serve to allow the forces stationed in J&K to carry out human rights violations at whim. The most telling consequence of the application of these laws may be the persistent discovery of mass graves throughout the state of Jammu & Kashmir; currently the number of bodies proven to be in mass graves in the state numbers almost 3000 but is likely to be much higher as only a small area has currently been investigated.

In the summer of 2010 over 120 people were killed throughout Jammu & Kashmir whilst protesting the presence of Indian troops. Many thousands were arrested with many of those being held under the draconian Public Safety Act. Along with these deaths came overt acts of torture and mistreatment of detainees, many of whom now require constant medical attention; attention that is unavailable.

India should begin to immediately focus on the following major human rights problems in Indian Administered Kashmir:

1. Investigate to the full extent possible the several thousand bodies that have been found in mass graves in the state.
2. Repeal those laws which are in strict violation of international human rights norms and the treaties to which India is signatory.
3. Immediately bring the convention against torture into law.

4. Immediately ratify and bring into law the Convention for the Protection of All Persons From Enforced Disappearance.
5. Strengthen accountability mechanisms in India to enhance treaty implementation at all levels of government, including the creation of comprehensive monitoring and reporting processes; and, the development of effective enforcement capabilities at all levels.
6. To hold a plebiscite in Indian Administered Kashmir in order to allow the people of Kashmir to exercise their right to self-determination.

The Armed Forces (Jammu & Kashmir) Special Powers Act 1958/1990 (AFSPA)

The AFSPA, introduced in “*disturbed areas*” in 1958, but tailored to J&K in 1990, has bestowed sweeping powers upon the armed forces that operate in J&K and has allowed them to act with impunity while carrying out acts of torture and extra judicial execution. This in turn facilitates acts of enforced disappearance as evidence is hidden by disposing of the bodies. The act violates many of the non-derogatory principles of the International Human Rights law and norms; principally the right to life, the right to remedy, the right to be free from arbitrary deprivation of liberty and from torture and facilitates/represents cruel inhuman and degrading treatment or punishment. All of these rights are enshrined in the ICCPR and other human right treaties.

A number of states raised the issue of impunity during the first UPR of India, sadly little or no progress has been made towards rectifying the problem since the initial UPR.

Having empowered through Section 3 of AFSPA, the Governor issued tow notifications, first dated 6th July 1990 and second dated 10th August 2001, describing district of Srinagar, Budgam, Anantnag, Pulwama, Baramulla, Kupwara, Jammu, Kathu, Lidhampur, Poonch, Rajunri, and Doda to be “disturbed areas”.

Section 4 of AFSPA gives sweeping powers to the “armed forces” that facilitate gross human rights violations with impunity as reproduced below:

“Special powers of the armed forces”. Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area;

- a) *If he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise sue force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire arms, ammunition or explosive substances;*
- b) *If he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as training camp for armed volunteers or utilized as a hide-out by armed gangs or absconds wanted for any offence;*
- c) *Arrest, without warrant, any persons who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest:*
- d) *Enter and search, without warrant, any premises to make any such arrest as aforesaid or to recover any person believed to be wrongful restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances*

believed to be unlawful kept in such premises and may for that purpose use such force as may be necessary, and seize any such property, arm, ammunition or explosive substances;

- e) *Stop, search and seize any vehicle or vessel reasonably suspected to be carrying any person who is a proclaimed offender, or any persons who has committed a non-cognizable offence, or against whom a reasonable suspicion exists that he has committed or is about to commit a non-cognizable offence, or any person who is carrying any arms, ammunition or explosive substance believed to be unlawfully held by him, and may, for that purpose, use or seizure, as the case may be.*

Contrary to ICCPR and UDHR, no person can take action against a member of the armed force that is suspected of having committed a crime, purported to be done under the act, without the express permission of the federal government. Section 7 extends unwarranted protection against “any person” acting under the powers conferral by AFSPA and which is reproduced as follows:

The Criminal Procedure Code 1973

Despite the special status given to the state of Jammu & Kashmir, Indian forces are protected by the immunity provisions of the Criminal Procedure Code of 1973 which applies to whole of India. The application of this code has resulted in an increased likelihood of excessive force being used by Indian forces as permission for prosecution has to be sought from the Government of India. Amnesty International noted in 2005 that the Indian sponsored J&K government had made almost three hundred requests to prosecute members of the armed forces but not a single one was granted¹. The J&K government simply does not request to prosecute unless the evidence is particularly compelling and the people of J&K have taken to the streets in protest so 300 is nowhere near a truly representative number.

Section 45

Section 45 of the CPC protects any member of the armed forces from arrest by civilian authorities for:

“anything done or purported to be done by him in discharge of his official duty after obtaining consent of the central government”².

Section 197

Section 197 of the CPC has been used to block the trial in civilian courts of members of the armed forces alleged to be responsible for human rights abuses.

It states that:

“No court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government”³.

Human Rights Watch obtained a copy of a standard letter that is issued by the Government of India in response to requests to launch a prosecution that states that “*after due consideration of the facts and the circumstances of the case*” the government has “*decided not to grant sanction to prosecute*”⁴.

The Prevention of Terrorism Act (POTA)

¹ Amnesty International, “*Briefing on The Armed Forces*” (Special Powers Act), 1958.

² Section 45, Criminal Procedure Code 1973.

³ Section 197(2), Criminal Procedure Code 1973. Human Rights Watch, “*Everyone Lives in Fear*”: Patterns of Impunity in Jammu and Kashmir, 12 September 2006, C1811.P29.

⁴ Human Rights Watch, “*Everyone lives in fear*”: Patterns of impunity in Jammu & Kashmir, 12 September 2006, C 118, P 29.

The POTA was aggressively used in the 1990's and 2000's giving the police force blanket authority to book mostly innocents on alleged terrorist activities leading to arbitrary detention, torture and execution.

Section 3 (5) of the Act criminalizes membership of a “terrorist gang or terrorist organization”. The section fails to define clearly what constitutes “membership” of a “terrorist gang” or a “terrorist organization”. It does not require evidence that the person accused of being a member has been involved in any offence. His guilt is only having membership which is not defined.

The provision violates the international standards regarding the requirement of certainty in criminal law.

Section 14 of the Act allows the investigating officer to require any person to furnish information to the investigating officer which he considers to be relevant for the purpose of this Act. Section 14 (1) states:

“Notwithstanding anything contained in any other law, the officer investigating any offence under this Act with prior approval in writing of an officer not below the rank of a superintendent of Police, may require any officer or authority of the central government or a State Government or a local authority or a rank or a company or a firm or any other institution, establishment, organization or any individual to furnish information in their possession in relation to such offence, on points or matters, where the investigating officer has reason to believe that such information will be useful for, or relevant to the purpose of this Act.”

This section infringes the freedom of person and protection of journalists under law. Further this section does not exclude the lawyers explicitly from the obligation to disclose information obtained from their clients.

Section 23 (3) of the Act authorizes executive to determine the issues relating to jurisdiction of Special Courts. The judiciary has no jurisdiction over these issues. The Special Courts are not independent from the executive power. This provision is contrary with the right to a trial before a competent, impartial and independent tribunal, and Principle 3 of the Basic Principles on the Independence of the Judiciary which states: “The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”

The Act provides for trial in camera. Section 30 (1) of the Act declares:

“Notwithstanding anything contained in the code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the Special Court desires.”

The trial procedures under the POTA violate International Standards of due process. This provision is in violation to International Standards and inconsistent to Article 14 (1) of the International Covenant on Civil and Political Rights, the Body of Principles for the Protection of All Person Under Any Form of Detention or Imprisonment (Section 36 Sub Section 1) and Article 10 and 11 of the Universal Declaration of Human Rights which entitles everyone to a fair and public hearing by a competent, independent and impartial tribunal by law. Further, these require that all court hearings and judgments, including criminal proceedings be public. This practice has substantially increased the fake trials and arbitrary arrests and imprisonment of the Kashmiri people.

Section 30 (2) of the Act allows to keep the identity and address of any witness in secret. The permission to keep the identity and address of any witness secret has resulted in fake trials and has been frequently used for imprisonment of the people for years together. This provision deprives the accused of the right his or her defense, to obtain the necessary information to challenge the reliability and to undertake cross-

examination. The provision is illegal, volatile to International Standards and is directly contrary to Article 14(3) of International Covenants on Civil and Political Rights which declares: *“To examine or have examined the witness against him and to obtain the attendance and examination of witness...”*

The Act under Section 32 (1) allows the confession made to a Public Officer to be admissible in the trial. This provision increases the use of torture. Confession in Police custody in India is widely extracted through torture. Under the Indian Evidence Act, a confession in front of a police officer is no confession. This provision of POTA is also inconsistent with Article (14 (3) of the International Covenant and Civil Political Rights which requires everyone shall be entitled to the guarantee of not being compelled to testify against himself or to confess guilt.

Section 48 (7) reverses the presumption of innocence. It is now on the shoulders of the accused to prove that he is innocent. This is in violation to Article 14 (2) 206 ICCPR and Article 11 of UDHR and Principle 36 of The Body of Principles for the Protection of All Person Under Any Form of Detention or Imprisonment.

The Jammu & Kashmir Public Safety Act 1978 (PSA) Amended 1987 & 1990

The PSA falls short of the recognized norms of justice, such as equality before law, the right of the accused of appearance before a Magistrate within 24 hours of arrest, fair trial in public, access to counsel, cross examination of witnesses, appeal against conviction, protection from being tried under retrospective application of law and many other such provisions. This Act refers specifically to the territory of Jammu & Kashmir and is not applicable outside of that territory; however there are other examples of tailored versions of the public safety acts that apply to other parts of India. For the purposes of this document only an abbreviated analysis of the PSA is applicable. This analysis aims to outline how those provisions, based on impunity and lack of a requirement of evidence or trial, allow Indian forces to more easily enact an enforced execution and shield the perpetrators from justice.

The PSA is an overly broad law that actively allows preventative detention for a period of up to two years for the exceptionally broad, *“acting in a manner that is prejudicial to the security of the state or the maintenance of public order.”* The PSA is therefore permitted to be used to detain people for all manner of acts as seen fit by the arresting officer or the magistrate in front of whom the papers are brought. There are numerous examples of arrests being made for what is essentially nothing more than the exercise of the right to free speech and right to assembly.

There is also an impunity clause in the PSA which states that:

“No suit, prosecution or any other legal proceeding shall lie against any person for anything done or intended to be done in good faith in pursuance of the provisions of this Act”¹³.

Those who are arrested under the PSA can be held for two years without charge and there is considerable documentation where the judiciary openly states that the victim is being held in *“preventative detention”*. There are also a considerable number of cases in which those detained under the PSA, once released, are immediately re-arrested often on the same charge as it is deemed by the arresting authority that the judiciary was incorrect in the quashing of the original PSA order. However, those instances are outside the scope of this document and, as such, will not be examined in detail.

No accurate figures for those detained under the PSA are available as there are no records which are certainly kept. In 2005 some 443 habeas corpus petitions were lodged to challenge detentions for that year.

¹³Jammu & Kashmir Public Safety Act (22), 1978.

This figure is not representative of the total as family members and victims are frequently threatened and coerced into not fighting at all.

Under Section 8 of the Act, the Government has the power to detain any person with a view to prevent him from acting in a manner deemed “*prejudicial to maintenance of public order*” or “*to the security of the State*”. The period of detention is twelve months in the case of a person acting in any manner prejudicial to the maintenance of public order and two years in the case of a person acting in any manner prejudicial to the security of the State. Under this Act, people are held in detention not on the grounds that they have committed any offence under law, but purely on the purported presumption that they may in future commit acts that are harmful to the maintenance of public order or to the security of the State.

The use of vague and ambiguous definitions in this Act is contrary to the principles of security of the person as said down in Article 3 of the Universal Declaration of Human Rights (Everyone has the right to life, liberty and security of the person) and Article 6 of the International Covenant on Civil and Political Rights (Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention...) This Act not only facilitates arbitrary arrest and detention but also encourages the torture in custody and extra judicial, summary and arbitrary executions, including force encounter.

Under sub section (1) of section 13 of the Act, when a person is detained in pursuance of the detention order, the authority making the detention order shall not later than five days communicate to him the grounds on which the order has been made. However, in January 1990, the Governor of the State Jammu & Kashmir amended the section 13, removing this particular requirement. Now under Section 13 (2) the duty to inform the detainee of the grounds for his detention does not “*require the authority to disclose facts which it considers to be against the Public interest to disclose*”.

The Provision is inconsistent with International Human Rights standards and the Article 9 (2) of International Covenant on civil and Political Rights which states: “*Anyone who is arrested shall be informed, at the time of arrest of the reason for his arrest and shall be promptly informed of any charges against him.*”

The suspension of legal Safeguards relating to arrest and detention facilitates torture and cruel, inhuman or degrading treatment. ICCPR prohibits torture and Article 4 lays down that no derogation from this article may be made under any circumstances, not even in times of emergency.

Under the PSA, there is no provision for the victim to compensation for unlawful arrest or detention. This is inconsistent to Article 9 (5) of International Covenant on Civil and Political Rights which lays down: “*Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation*”.

The National Security Act 1980 (NSA)

The Act permits administrative detention of any person for a period of one year. Under Section 8(2) of this Act, the authorities are empowered not to disclose the grounds of detention to the detainee. This provision is in direct contravention of Article 14 (3)(a) of the International Covenant on Civil and Political Rights (ICCPR)...*To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.*”

In considering India’s second periodic report in 1988, the members of the UN Human Rights Committee were of the opinion that the National Security Act (NSA) derogated the rights guaranteed under the Article 9 of the International Covenants on Civil and Political Rights which states, “*1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrested or detention. No one shall be deprived of his liberty...*”

India and the Convention Against Torture

The practice of the police and the armed forces using torture as a means to extract confessions is widely accepted as commonplace throughout India and the surrounding disputed territories. There is ample evidence that there is a culture of denial or a refusal to accept that torture is both commonplace and accepted as a legitimate tool by those that use it. Current laws and legislation that are in place in India are contrary to international human rights norms, they promote and encourage the use of torture by the police, military and para-military forces, there is a lack of accountability for those who commit torture and the penalties, in the exceptionally rare instances that a perpetrator is prosecuted, are minimal.

It is telling that the government in India is yet to ratify the UN Convention Against Torture and other cruel, inhuman or degrading treatment (UNCAT) despite saying that this was a priority during its universal periodic review in 2008. The Indian government tacitly accepts that the problem of torture is so widespread that it is simply unable to ratify and follow the principles of the UNCAT. In an apparent attempt to make progress towards the signing of the UNCAT India has written a Prevention of Torture Bill which, as shown below, is deeply flawed and offers little hope that the judiciary will stop the use of torture in the near future.

The Indian National Human Rights Commission, despite questions over its impartiality and ability to function, has recorded some 16,836 custodial deaths in years from 1994 up until 2008. That amounts to over three custodial deaths per day across India. These figures apply only to deaths in police custody as there is no mechanism for the recording of deaths in military custody; this is of particular relevance in the disputed territories.

The experience of IHRAAM, and the International Council for Human Rights, indicates that in the state of Jammu & Kashmir the number of custodial deaths in this time period is likely to be in the region of the 10,000. Therefore, in the experience of these organisations, the figure produced by the NHRC is woefully under represented despite its already high number. Worryingly the number of custodial deaths in India rose year on year from 2000 up until 2008 with the figures at 1,037 and 1,977 respectively.

Furthermore, the NHRC does not record, and has no power to act upon, instances where torture takes place but does not result in death. Our research shows that the number of incidences of torture in J&K is certainly in excess of 100,000 in the time period for which the NHRC has released statistics.

Furthermore it is the practice of the NHRC to only accept a complaint of custodial death from one source. In practice this results in the seemingly obscure custom of the police making the complaint upon themselves before the family of the victim is aware of the death. The family are then unable to pursue the case and predictably deaths are often noted suicide or similar.

It is the experience of this organisation that those who are tortured and released are later intimidated by the armed forces should they express a desire to seek redress. Furthermore, those families that have taken possession of a loved one that has died in custody are subject to the same fear and intimidation in order to prevent them lodging a case either internally or with the mechanism of the OHCHR.

UNCAT

It is useful to highlight Article 2 of the UNCAT: Article 2

Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

An order from a superior officer or a public authority may not be invoked as a justification of torture.

Prevention of Torture Bill

The prevention of Torture Bill is seen within India as a stepping stone to the eventual ratification of the UNCAT. However, the bill, comprising less than 500 words, falls short of the provisions set out the UNCAT on several key issues and will fail to adequately reduce instances of torture across India. Most notably there is no mention of the likely sentences or punishment for those convicted of causing death by torture, in fact there is no mention of death by torture at all.

The bill does not address, at any point articles 2, 3, 4, 5, 8, 12, 14 and 15 of UNCAT. Furthermore the penalties envisioned by the bill are often less than those that could potentially handed out by the very legislation that it seek to remedy such as the criminal procedure code. These contradictions will serve to increase the time taken to prosecute or resolve cases and will likely result in the continuation of the woefully inadequate conviction rate.

IHRAAM, and the International Council for Human Rights, concludes that current measures being undertaken by the Indian government will fail to adequately reduce instances of torture, and death from torture, in police or military custody. Furthermore, while the efforts of the NHRC and the potential introduction of the Prevention of Torture Bill may appear to show promise at first glance the reality is somewhat different. The year on year increase in recorded custodial deaths is a worrying trend, a trend that is unlikely to be reversed with the Prevention of Torture Bill. A more positive trend would be to repeal those laws that allow immunity for the armed forces and to modify existing complaint procedures for the police.

Furthermore, punishment for those who commit torture should be considerably increased and amendments should be made to those procedures that significantly reduce the likelihood of the guilty being held to account. Critically, if the Government of India is to progress towards the ratification of the UNCAT, sweeping modifications to legislation will be required in order to meet the obligations of the convention.

The Shopian Case

On the 29th of May 2009 two sisters disappeared in the Shopian district of Kashmir. Less than 24 hours later their bodies were discovered within sight of a para-military outpost just a few kilometers from where they were last seen. As the evidence stacked up against the Indian forces stationed in the area a it is suspected that a mass coverup was undertaken by the Government of India to ensure that none of their forces could be found guilty. This involved intimidation of witnesses, falsification of evidence and the persistent release of mis-information in the hope that the populous would not place blame upon the Indian Government. The space afforded in this shadow report does not allow a detailed examination of the case but IHRAAM has previously submitted document A/HRC/15/NGO/7 which has a more detailed review of the case. It is telling that though the crime took place over two years ago a perpetrator has yet to be prosecuted for this crime. If, as is widely accepted, it was indeed members of the Indian para-military forces that carried out this act, then it is clear evidence that the Government of India is complicit in the rape and murder of two young women. Furthermore, their considered effort to cover up this act shows that they have no wish to seek justice. Cases such as this, which are numerous during the six decade long Kashmir conflict are clear evidence that the Government of India is failing to undertake its human rights commitments seriously.

Mass Graves

In mid 2008 almost 1000 bodies were discovered in just two districts of Indian Administered Kashmir. This was closely followed by the European Parliament passing the *Urgency Resolution on Mass Graves in Kashmir* which called upon the government of India to sanction an impartial investigation into the graves

with a view to discovering the identities of the victims. Until this date no such investigation has been carried out and the Government of India continues to state that the bodies are those of para-militaries. More recently around 2000 bodies were discovered in several more districts over 500 of which were proven to be local people who had disappeared over the previous two decades. IHRAAM calls upon the OHCHR to request more information relating to why the Government of India has failed to properly investigate these graves.

Disappearance

India signed the International Convention for Protection of All Persons from Enforced Disappearances in February 2007, but has failed to ratify the convention. The crime of Enforced Involuntary Disappearances not codified as a distinct offence in Indian penal laws.

It is believed that a minimum of 8000 Kashmiris have disappeared to date though accurate figures are of course impossible to obtain at this time. On the 18th of August 2009 official figures released by the pro-India Jammu & Kashmir state assembly said 3,429 persons had disappeared between 1990 and July 2009, with only 110 persons missing after arrest by the security forces. The practice of torture extra-judicial killings, summary execution and enforced disappearance is reported by multiple member states of the United Nations in their own human rights reports as well as many reports submitted to the Human Rights Council. Disappearances are commonplace with many occurring with the last known whereabouts of the victim being in the hands of Indian military or paramilitary forces. Numerous, continuous and frequent instances of torture are reported ranging from a beating in the street up to death by electrocution in custody. Arbitrary arrests are commonplace and seen by many as a daily risk in Indian Administered Kashmir. It is likely that acts such as arbitrary arrest and torture lead to the victim then disappearing. As highlighted above, it is believed that the bodies of several thousand of the disappeared are in mass graves dotted around Kashmir, only some of which have been discovered at this time.

Conclusion

Since the OHCHR undertook the initial Universal Periodic Review of India in 2008 little seems to have changed regarding the human rights situation in Indian Administered Kashmir. IHRAAM, and the other supporting organisations, call upon the OHCHR, through all available channels, including the UPR mechanism, to assist the Government of India in implementing the human rights treaties, covenants, and declarations to which it is signatory whilst also using the UPR mechanism to request information regarding the slow progress being made towards ending police impunity, retracting laws such as the Public Safety Act, prosecuting the perpetrators of human rights abuses and allowing an international investigation into the recurring discovery of mass graves in Indian Administered Kashmir.