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INDIA

@India: examination of the second periodic report by the human rights committee

Recommendations to bring Indian laws and practices in line with international human rights standards

INTRODUCTION

The Human Rights Committee is a body of 18 experts from a wide range of legal systems which forms the treaty body established under the International Covenant on Civil and Political Rights (ICCPR - hereafter referred to as "the Covenant") to supervise implementation of that Covenant. As of 31 January 1993, 112 states had ratified or acceded to the Covenant; India did so on 10 April 1979. Under Article 40 of the Covenant, State Parties commit themselves to submit a report on the measures they have taken to give effect to the rights recognized in the Covenant. One of the tasks of the Human Rights Committee is to examine these reports.

India's first report (CCPR/C/10/Add.8) was examined in 1984; its second report (CCPR/C/37/Add.13), due in 1985, was submitted on 12 July 1989 after seven reminders had been sent to the Indian Government. Its third report, due on 9 July 1990, has not yet been submitted, although the Committee extended the deadline for submission until 31 March 1992. The Committee sits alternately in Geneva and New York. India's second report was examined on 26 and 27 March 1991 at the Committee's forty-first session in New York, when the Committee also examined reports submitted by Panama, Sri Lanka, Sweden and the United Kingdom (including Northern Ireland and Hong Kong).

In contrast to the United Nations Commission on Human Rights, a body which consists of representatives of 53 governments, the 18 members of the Human Rights Committee sit in their personal capacity as human rights experts and do not represent governments. Many of its members come from developing countries. During the examination of India's report particularly pointed questions were, for example, raised by the experts from Egypt, Kenya, Jordan, Mauritius, Costa Rica and Ecuador, as well as by the experts from France, Hungary, the United Kingdom and the USSR. (A list of the 18 members of the Human Rights Committee at the time the report was examined is attached as Appendix A). The *Press Trust of India*, in a report of 29 March 1991 which appeared in *the Hindustan Times*, had the following to say about the importance of the Committee's work: "Since the members [of the Committee] are elected on a rotating basis among nations, the organisation has a reputation of impartiality....The UN Committee is not a disciplinary organisation and its recommendations are not binding. However, because of the prestige it carries, its recommendations amount to international pressure." India was represented at the Committee hearing by its then Attorney General, Mr G. Ramaswamy (who has since resigned), who expressed his country's deep appreciation for the role the Committee plays in monitoring the implementation of human rights in India and the extremely valuable observations it had made. He stated to the Committee that "India is committed to the observance of civil and political rights" and that "there is no doubt that the provisions of the Covenant constitute obligations in India".(1) (A selection of articles which appeared in the Indian press

about the observations members of the Human Rights Committee made about India is attached as Appendix B.)

At the outset of the hearings, the government's representative gives an introductory statement, highlighting points in the report submitted by the government. Committee members ask questions to which the government's representative responds orally. Individual committee members then make concluding observations.

This paper reviews the various questions put and observations made by individual members of the Committee as well as the conclusions they have drawn about the practical application in India of those human rights guarantees provided in the Covenant which fall within Amnesty International's mandate. The Committee's proceedings are summarized by the UN in Summary Records, for the March session on India published in four papers. These record the statements made at the Committee's 1039th, 1040th, 1041st and 1042nd meetings. (2)

The hearings which are held in public, were attended by Amnesty International. In this report reference is not only made to statements summarized in the Summary Records but also to quotations from the actual statements made by Committee members as recorded on tape by the United Nations. (3) At the time India's second report was considered the Committee did not draw collective conclusions. Starting with its 44th session (23 March to 10 April 1992) the Committee has adopted the practice of issuing comments after the examinations of each state report containing its collective views on the positive aspects of the human rights situation in the state party, factors and difficulties impeding the application of the Covenant, principal subjects of concern and suggestions and recommendations. These do not replace the individual comments, but supplement them. During the hearings, Committee members ask questions and make observations in their individual capacity as experts. Although their opinions cannot be ascribed to the Committee as a whole, observations made during the hearings can have considerable weight if the same view is expressed by several members of the Committee.

Amnesty International attaches great importance to the systematic and periodic review by the Human Rights Committee of the implementation of a broad range of human rights by State Parties to the International Covenant on Civil and Political Rights. Human rights standards have to be implemented and enforced at the national and local level. International human rights treaty monitoring bodies, such as the Human Rights Committee established under the Covenant, can play an important complementary role in the continuing process of promoting and enhancing the protection of human rights, to which both national as well as international bodies each make their specific contribution. The examination of a country report by the Human Rights Committee is an opportunity to identify areas for improvement and to adopt measures to remedy failures faced by all countries in fully enforcing and protecting the human rights guaranteed in the Covenant.

This circular has been written because it is very unusual for the human rights situation in India to be scrutinised by a human rights body in the UN. The consideration by the Human Rights Committee of India's second periodic report under the Covenant provides a rare opportunity to observe how a group of 18 international human rights experts have dealt with India's observance of a wide range of human rights guarantees, many of which are within Amnesty International's mandate. In publishing this paper, Amnesty International hopes to stimulate further discussion within India - particularly among those professionally or otherwise involved with human rights protection in India - about the effective implementation of international human rights standards which the Indian Government is bound to respect and ensure. In particular, we hope that the recommendations made by individual members of the Committee about how to

bring Indian laws and practices in line with the international standards laid down in the Covenant will be widely studied and implemented by the Indian government.

Several members of the Human Rights Committee welcomed the important role the Supreme Court of India plays in defending human rights and one of them commented on the "excellent instructions" it has given from time to time. They expressed great interest in public interest litigation and asked how it was being used to protect such rights. However, at the end of their questioning about how the standards provided in the Covenant were reflected in Indian laws and practices, particular members of the Committee concluded that many of the Covenant's provisions did not seem to be applied in India; that provisions of the Armed Forces Special Powers Act (notably the wide powers to shoot to kill without accountability), of the Terrorist and Disruptive Activities (Prevention) Act and of the National Security Act contravened important rights provided in the Covenant; that India had in fact derogated from its obligations under the Covenant in situations which could perhaps not be justified under the strict terms set in Article 4 of the Covenant and that it had done so without informing the Committee as it was obliged to do; that there was a great discrepancy between Indian constitutional and legal provisions and violations of these laws and existing legal safeguards in actual practice; and that widespread police abuses - such as torture, killings of detainees in custody and arbitrary killings - did not appear to be adequately investigated and punished.

Most Committee members stressed that there was a clear need for India to review its laws, and particularly the special and "anti-terrorist" legislation, to bring Indian laws and practices in line with international standards and commitments. For example, Mr Fodor concluded that after the dialogue with the Indian government, he remained concerned about "the implementation of the Covenant in these so called disturbed areas, the extraordinary great number of arbitrary killings, widespread arbitrary arrests in some states, the excessive powers given to the security forces including authority to shoot to kill suspected law breakers [and] failure to bring to trial a number of alleged police offenders...". (4) He said he hoped India's next periodic report would reflect continuing progress in India's implementation of the Covenant in these areas.

The Attorney General of India assured the Committee that he valued the recommendations Committee members had made and that the cases they had referred to would be communicated and investigated by his government. However, when an Amnesty International delegation visited New Delhi in November 1992 to discuss its human rights concerns with the government, officials in the Ministry of Home Affairs, the Ministry of External Affairs, the Ministry of Law and Justice and the Ministry of Defence did not seem to be aware of the observations made by members of the Human Rights Committee. The delegation gave a previous version of this paper - which has now been updated - to various officials with the request that the government undertake a thorough review of special laws and practices so as to make them compatible with international human rights standards such as the Covenant, to which India is a party. As of writing, the government has not, as yet, taken that step. Rather, while clarifying some legal provisions, government officials sought to justify many provisions in these laws which fall short of international human rights standards, such as the lack of access to a judicial authority for persons arrested under the TADA provisions, the change in the burden of proof and resort to *in camera* trials under that same Act, the lack of access to a judicial authority for detainees held in detention under the National Security Act and the broadly formulated powers to shoot to kill with virtual immunity from prosecution granted to members of the security forces acting under the provisions of the Armed Forces (Special Powers) Act.

I GENERAL MATTERS RELATING TO THE APPLICATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS IN INDIA

Dissemination

The government was asked what measures it had taken to disseminate information on the rights provided in the International Covenant on Civil and Political Rights. The Attorney General replied that the government had widely disseminated this information and that Indian citizens were well acquainted with the basic rights embodied in the Covenant. He added that the Covenant and other international instruments on human rights had been translated into several languages, although he did not specify which languages and that human rights, in the broadest sense, formed part of the school curriculum.

Mr Ando asked whether the text of the Covenant had been translated into India's minority languages, and how much human rights education had been undertaken among law enforcement officers, especially those in the police and army who might be operating in emergency situations, in which human rights were most at risk. He wanted to know how they were constrained, and to what extent their activities were monitored. Mr Sadi asked whether there had been a campaign to educate at least the legal profession on how the Covenant applied in India. Mr Lallah suggested that the government take note of the General Comments (5) the Human Rights Committee had adopted about the rights guaranteed in the Covenant and suggested that lawyers as well as judges in India might find it useful to consider the decisions the Committee had taken in cases in which individuals had complained, under the terms of the (first) Optional Protocol to the Covenant, that their rights had been violated. (6)

Mr Myullerson expressed concern about the use of force by the security forces in India and commented that this could never be justified against unarmed demonstrators. He asked whether the Code of Conduct for Law Enforcement Officials, and other related documents, were widely known in law enforcement circles in India. The Attorney General did not give specific answers to these questions. (7)

Application of the International Covenant on Civil and Political Rights in India

Professor Higgins commended India on the detailed information provided in its report. She added however that she would "have liked the legal information perhaps to have been matched by more on the factual background against which the laws are presently having to be applied and the problems that this is giving rise to".

The Attorney General observed in general terms that under no circumstances did international law ever confer any rights upon the people of any country. Nor, he added, could an individual claiming a violation of his rights in India do so on the basis of an Article in the Covenant, although a right guaranteed by the Indian Constitution could be interpreted to include the guarantees provided in the Covenant. Despite his repeated assurances that the guarantees provided in the Covenant were already incorporated into the Indian Constitution and national laws, several Committee members - including Mr Serrano Caldera, Mr Aguilar, Mr Sadi, Mr Ando and Miss Chanet - were concerned that this was, in fact, not the case and that many of the Covenant's provisions did not seem to apply in India, or were not effectively implemented.

After hearing the Attorney General, Mr Serrano Caldero concluded that "It is not clear to me at all how it [the Covenant] is being implemented...for several reasons. First of all because of the reservations, secondly because I don't know the extent to which it [the Covenant] is absorbed within the Constitution in qualitative and quantitative terms, thirdly because it is not clear...how many provisions of the Covenant have been assimilated in regular regulations and fourthly it is not clear to me what the effective and practical degree of implementation of the Covenant is in common courts of justice...." (8)

Furthermore, when India became a party to the International Covenant on Civil and Political Rights, it made a declaration which restricted the application of some provisions of the Covenant in India. Committee members treated India's declaration as a reservation and thus as a measure by which India declared it withheld consent to be bound by certain provisions of the Covenant. (9) Given these reservations, Professor Higgins found in these "the suggestion that far from Indian law being interpreted in accordance with the Covenant it is the Covenant that is to be interpreted in accordance with Indian law". She concluded that she was, in general, "disturbed by reservations that say the Covenant is to be interpreted in accordance with national legislation. The effect of this is really to say that the Covenant in certain circumstances will not be in effect in the country concerned".

Ms Chanet expressed concern that the reservations India had made created the possibility that whole sections of the Covenant were not being applied, in particular the reservation referring to Article 22 of the Indian Constitution which permits administrative detention without meeting the time constraints and other legal safeguards provided in Article 9 of the Covenant. She was concerned that these reservations made by the Indian Government allowed various rights to be restricted in a manner which probably went beyond what was envisaged in the relevant articles of the Covenant. The effect of the reservations, she said, was that the Government did not have to make a statement of derogation, as it would otherwise be required to do under Article 4 of the Covenant (see below).

Various Committee members were concerned that the effective implementation of the Covenant in India had been placed in doubt by the reservations the government had entered. Mr Ando observed:

"Reservation should be not the rule but the exception.... Too much stress on a particular national sovereignty may discourage the necessity of international co-operation as the very purpose of the international protection of human rights".

In concluding, several Committee members called on India to lift the reservations it had made when it became a party to the Covenant. (10)

Derogation of rights guaranteed under the International Covenant on Civil and Political Rights during states of emergency

The International Covenant on Civil and Political Rights allows states to derogate from certain provisions of the Covenant, but only if exceptional circumstances exist which justify the state's inability to comply with its obligations under the Covenant. Only if the strict requirements for such derogations laid down in the Covenant are met, does the Covenant permit them. States wishing to derogate also have to follow a number of procedural steps. The requirements are laid down in Article 4 of the Covenant, paragraph 1 of which reads in part:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation...."

But no derogation is ever allowed from a number of rights specified in Article 4 (2) of the Covenant: the right to life (Article 6), the right not to be tortured (Article 7), the freedom from slavery (Article 8 (1 and 2)), the right not to be imprisoned for failing to meet a contractual obligation (Article 11), the right not to be subjected to retroactive punishment (Article 15), the right to recognition of a person before the law (Article

16) and the right to freedom of thought, conscience and religion (Article 18). The formalities required to derogate from other rights provided in the Covenant are specified in Article 4 paragraph 3: the State wishing to derogate has to inform other State Parties to the Covenant through the Secretary-General of the UN of any derogations made and of the reasons why the state is doing so. The UN needs to be similarly informed of the termination of any derogation.

To date, India has not made any formal derogation from any right guaranteed in the Covenant. It is thus obliged to observe all its provisions fully. Yet various Committee members said they were convinced that the National Security Act, the Terrorist and Disruptive Activities Act and the Armed Forces (Special Powers) Act contained provisions effectively derogating from rights guaranteed in Articles 6, 9 and 14 of the Covenant - even, as Mr Myullerson found, from the right to life from which no derogation is ever permitted under any circumstances. Considering the guarantees laid down in Article 9 the Covenant - protecting the liberty and security of the person and prohibiting arbitrary arrest and detention - Professor Higgins observed "I find that these guarantees are in fact in certain areas suspended because of special legislation and secondly there seems to be a real problem about them being ignored in practice in spite of the excellent instructions from the Supreme Court from time to time." She said that it was clear that the Terrorist and Disruptive Activities (Prevention) Act and the National Security (Amendment) Act provided for limitations in respect of the right of assembly, the courts and detention. She added that "It seems clear... to many of my colleagues and me that these do derogate from rights in the Covenant". In concluding, she noted that any such derogation had, of course, to be justified by reference to the exigencies of the situation within the meaning of Article 4 of the Covenant and added that "I do have doubts whether those acts meet the 'strictly required' test in several very important areas".

Some Committee members felt that these laws in effect established a continuing state of emergency, without being officially proclaimed as such, and asked why the Committee had not been notified of the derogations it had in effect made as the Indian government was bound to do under the terms of Article 4 of the Covenant. One Committee member remarked that constitutional provisions could be suspended if an emergency was proclaimed [indeed, India did so when it passed the 59th Amendment to the Constitution, which was in force from 30 March 1988 until 29 December 1989 allowing the right to life to be suspended in the event an emergency was declared in the state of Punjab] and asked why the Committee had not been notified when it made such an important derogation from the Covenant. And Professor Higgins observed: "I still seek clarification as to why there has been no notification of the derogation [of the TADA and the NSA] and the only answer I began to hear [from the Attorney General] was the insistence that it did not apply throughout the country. But even if these measures are applied only in regions they are still derogations of rights under the Covenant and would require notification to us. And that I think is the problem for us".

The Attorney General simply responded by saying that he had no doubt that Indian legislation did not contravene Article 4(1) of the Covenant. **(11)**

II SPECIFIC LAWS AND THEIR COMPATIBILITY WITH THE RIGHTS PROVIDED IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Many Committee members repeatedly expressed concern about the special laws which apply in many parts of India, notably the Armed Forces (Special Powers) Act (in force since 1958), the Terrorist and Disruptive Activities (Prevention) Act, 1987, and the National Security Act, 1980. **(12)**

The Armed Forces (Special Powers) Act

The Act is currently in force in Assam and some other parts of the north-eastern states, in Punjab as well as in parts of the state of Jammu and Kashmir. **(13)** The Act gives the security forces wide powers to make arrests and conduct searches without warrant, provides broadly defined powers to shoot to kill, and the security forces acting under its provisions are granted virtual immunity from prosecution. **(14)** Ordinary legal safeguards to protect the right to life and to prevent arbitrary arrests and detentions do not apply.

Nearly all Committee members expressed concern about the application of the Act and many of them (Ms Chanet, Mr Lallah, Mr Fodor, Mr Aguilar, Mr Wako, Mr Wennergren and Mr Myullerson) agreed that its provisions were incompatible with India's obligations under the Covenant, notably Article 4 (see above) and Article 6, which protects the right to life.

Mr Lallah asked whether the various guarantees in the Code of Criminal Procedure applied with regard to the searching of women, the possibility of their suffering violations of their dignity and physical integrity and the time limitations within which the military authorities were obliged to hand over arrested persons to the civilian authorities. He said he had the impression that the Act "short circuits the various guarantees laid down in the Code of Criminal Procedure...and might even short circuit the guarantees to be found in the Constitution itself". **(15)** Mr Wennergren found the Act to be clearly unconstitutional and was worried that a legal challenge had been pending for such a long time before the constitutional court. Considering whether provisions of the Act were compatible with India's obligations under the Covenant, Mr Myullerson read Section 4 of the Act and had this to say:

"These are derogations from several articles in the Covenant...Where the Act speaks of the use of firearms against persons violating laws, it seems to me to [be] a derogation from Article 6 of the Covenant [from] which no derogation is permitted."

He later stressed he had the same concerns about the application of the Act in Jammu and Kashmir. Mr Aguilar had no doubts that the Act contravened Article 6 of the Covenant, he said:

"These laws greatly concern me because when we give a person powers and for very subjective reasons powers to be able to deny the lives of citizens that is far too much power. I think it is excessive, particularly when that person is immune and can act with impunity because he or she will not be punished. I am convinced that these laws are contrary to Article 6 of the Covenant".

Mr Wako commented that Article 4 of the Act was open to abuse, that the powers given to the police and other law enforcement officers under its provisions were "too broad" and went well beyond what was provided in the Committee's General Comment on Article 6 of the Covenant - on the right to life - and Article 3 of the Code of Conduct for Law Enforcement Officials and its Commentary. **(16)** In reply to the observations that the powers to shoot under the Act appeared to violate the Indian Constitution and contravened the Covenant and other international human rights standards, the Attorney General said that the New Delhi High Court had upheld the Act as valid. He did not respond to the other observations, and simply assured members of the Committee that there had been no misuse of the powers conferred on the security forces under the Act, and dismissed the misgivings expressed by some Committee members as "purely theoretical".

But Mr Lallah remained concerned that he was receiving no reply from the Indian Government's representative about the rules and regulations governing the use of firearms by the police and security forces. Concerned about the broad scope of the Act, especially Section 4, he asked whether the powers to

shoot to kill at any person acting in contravention of a law prohibiting the assembly of five or more persons also applied to people in their homes. "What happens" he asked "if seven relatives are talking about how to conduct a wedding or about some cultural matter, or [are] assembling for family purposes. It seems to me that the wording here is so broad that it could cover lawful exercise of basic liberties". The Attorney General said in response that the use of firearms was not authorized to break up any assembly of five or more persons at random, but only if the assembly had already been declared illegal under an order by a magistrate, although he did not specify the legal authority for this.

Mr Aguilar, Mr El Shafei, Mr Wako and Mr Lallah were concerned that the Act provided immunity from prosecution, contrary to the requirements of the Covenant. Interested to learn how India was applying Article 2 (3) (a) of the Covenant - which requires states to ensure that any person whose rights recognized in the Covenant are violated has the right to an effective remedy "notwithstanding that the violation has been committed by persons acting in an official capacity" - Mr Wako asked what remedies were available in cases where law enforcement officials had exceeded their authority. And Mr Lallah observed:

"In the section which gives immunity both from prosecution and from civil process I find a very dangerous word here. It says 'no prosecution, suit, [etc.] shall be instituted except with the previous sanction of the central government against any person in respect of anything done or purported to be done'. Purported is the dangerous thing because anyone killing anybody can say 'Well I thought I was performing my functions'. It is a highly dangerous one [word] when one is dealing with the right to life. I sincerely hope, Attorney General, that you will bring this to the attention of the government. True, there are disturbed areas but people also live in disturbed areas and not everyone causes disturbance in a disturbed area. This is like a hammer which can be used or purported to be used in order to destroy fundamental rights with impunity except at the good pleasure of the central government. This is a very, very serious matter."

The Attorney General said in reply that if an officer had exceeded his powers, the Government would grant the right to prosecute that officer. He did not, however, give examples of cases in which such permission had been granted, and Amnesty International knows of no cases in the north-east of India in which any member of the security forces has been tried and convicted during the last five years for violating human rights. (The government informed Amnesty International in November 1992 that action had been taken against 230 members of the security forces in Jammu and Kashmir in connection with human rights violations, but no details of the nature of the offences committed or the punishments provided had been given to Amnesty International as of March 1993. In Punjab no punishments are known to have been given to any member of the security forces for breaches of human rights.)

Mr Lallah also remarked that the north-east of India was an area lacking ready access to lawyers and suggested that those military authorities the state had to rely on should be brought effectively under civilian control and that people running the risk of suffering transgressions committed by the non-civilian authorities should have ready access to redress. (17)

Mr El-Shafei asked about the declaration of areas as disturbed under the Armed Forces (Special Powers) Act and he and Mr Aguilar noted that some of these declarations, as in force in Assam and Manipur, had no time limit, and had been in force for 33 years. (18) "Is it conceivable" Mr El-Shafei asked "that there are disturbed areas indefinitely?" and "is there a statutory obligation to review these notifications?". The Attorney General responded by saying that the disturbed areas declaration was subject to judicial review if challenged at the time of the declaration, but agreed that there was no statutory obligation to review such a declaration at any time. (19) He did not respond to the concern several

Committee members expressed that areas could be declared "disturbed" indefinitely beyond saying that the Government would not hesitate to repeal such a declaration once the situation there had returned to normal. (20)

Finally, Professor Higgins questioned whether the Armed Forces (Special Powers) Act and other special laws could be justified under the terms of Article 4 of the Covenant in that they were "strictly required by the exigencies of the situation". She observed :

"For example, the Attorney General mentioned that the provisions upon the use of firearms in section 4 of the Armed Forces Act were very rarely used. But if they are very rarely used they can't be 'strictly required by the exigencies of the situation' and it would be better to get rid of them. I don't feel there is a mechanism for testing the measures in all the special legislation in terms of our article 4 requirements, whether as to the measures themselves, the duration of their applicability or their geographic scope. I sometimes feel that outside of these special measures the excellent system does not always work."

The Terrorist and Disruptive Activities (Prevention) Act (TADA)

The Act allows detention in judicial custody for investigation for up to one year without formal charge. The Act does not oblige the authorities to bring arrested persons before a judicial authority. (21) Article 4(2) of the Act defines "terrorist" and "disruptive" activities so broadly that they also encompass peaceful expressions of views which question the sovereignty or territorial integrity of the country or support a claim for secession. Trials are by Special Courts sitting *in camera*, the identity of witnesses can be kept secret and the burden of proof is shifted to the accused person.

In its report to the Committee, India argued that "The Act does not violate article 9 of the International Covenant on Civil and Political Rights [providing guarantees for the security of the person], as it does not provide for depriving anyone of his liberty on grounds and in accordance with procedures other than those established by law", a statement repeated by the Attorney General to the Committee. (22) Professor Higgins, however, explained that as far as the committee was concerned "One will not necessarily be within an article of the Covenant because there is domestic law that covers these matters... so one still has to go on further to ask whether in fact these matters...are compatible with the Covenant." This, she and others found, was not the case.

She noted that some provisions of the TADA were clearly not compatible with articles of the Covenant and that, for example, Article 9 of the Covenant did not contain and limitation provisions which could justify the TADA. Specifically, she noted that under the TADA there was a one-year detention for investigation of rather broadly defined offences in circumstances in which bail was difficult to obtain. Ms. Chanet recalled that Article 14 (1) of the Covenant established that hearings should be public except in special circumstances, but that Article 16 (1) of TADA established secrecy as the principle when stipulating that all procedures should be conducted *in camera*. She asked:

"Witnesses could keep their identity and address secret, the court [could] determine where it would hold its hearings and the decisions would not be published. My question is how can one reconcile such provisions with the Covenant, particularly Article 14, since these courts dealing with terrorist activities may pass death sentences?"

Mr Aguilar concluded that: "in the law which I have quoted [TADA] we find a norm which seems to me to be completely unacceptable: presumption of guilt". He, also, concluded that Article 14 of the Covenant had been contravened by this provision. Professor Higgins, speaking about the National Security Act and TADA, also noted: "It seems... clear to many of my colleagues and me that these [two Acts] do derogate from rights under the Covenant". She concluded that any such derogations had to be justified by reference to the exigencies of the situation within the meaning of Article 4 of the Covenant concluding: "I do have doubts whether those acts meet the 'strictly required' test in several important situations."

Thus, the broad provisions of the Act caused considerable concern to many Committee members not only in terms of their contents and duration: Mr Aguilar noted the Act and the Armed Forces (Special Powers) Act had the effect of establishing a continuing state of emergency without being declared as such and without being subjected to a time limit. Concern was also expressed about the scope of the Act's application. Professor Higgins, for example, noted:

" This Act (TADA) I understand is being applied in fact in certain other Indian states where the government does not face armed opposition. State governments have recently announced that it will be used against criminal groups. So in Gujarat I understand that over 2,000 people have been detained under its provisions between the entry into force of the Act in '86 and January 1990. This seems to be disturbing that the Act can have not only the content it has but such a broad geographic scope of application".

The Attorney General did not reply to these specific concerns. He responded in general terms by saying that India had a legitimate concern to preserve its territorial integrity, that the courts established under the Act were perhaps the most impartial of all Indian courts and that an ordinary court could not deal with problems such as the intimidation of witnesses. He noted however that the constitutionality of the Act had been challenged and was being reviewed by the Supreme Court. Despite the Committee's pointed observations, he said that in India's view there was nothing in the TADA (Prevention) Act that violated Article 9 of the Covenant. (23)

The National Security Act

The National Security Act, 1980, (NSA) and, in Jammu and Kashmir, the Jammu and Kashmir Public Safety Act, 1978, both permit people to be detained without trial for preventive purposes on loosely defined grounds of national security. The NSA provides several safeguards for detainees held under its provisions: they have the right to be informed of the grounds of detention within ten days from the day of detention (unless the authorities decide it is against the public interest to do so), to have their detention reviewed by an Advisory Board within seven weeks from that date and the Board's recommendation is binding on the government. However, additional safeguards for detainees held under its provisions and provided in section 3 of the Constitution 44th Amendment Act - reducing the period of detention without review by an Advisory Board from three to two months and requiring that the Board only consists of sitting judges of the higher judiciary - have still not been brought into force by successive governments, even though the Amendment had obtained parliamentary and subsequently presidential assent in 1978. There was concern that preventive detention laws in India did not meet the human rights standards provided in the Covenant.

Professor Higgins observed that under section 8(2) of the National Security Act, the authorities may decide not to disclose the grounds on which people can be detained under the NSA. She also noted the Act's requirement that detentions had to be reviewed within seven weeks from the date of detention and informed the Attorney General that:

"these are periods that are very considerably longer than would be compatible with Article 9(4) of our Covenant...There is no provision under the National Security Act that requires a person to be brought forward promptly. In that context the Attorney General might be interested to note that the United Kingdom has found it necessary to enter a derogation because it was anxious that a seven day gap before bringing a person before a judicial or other authority might not be compatible with the Covenant. And one is talking about very substantially longer periods here". (24)

She felt it was clear that the NSA contained provisions "which clearly are not compatible with certain articles of the Covenant", notably Article 9 of the Covenant. She concluded that therefore a derogation from the Covenant was needed and that this had to be done formally under Article 4 of the Covenant. In response, the Attorney General simply observed that the legal grounds on which people could be held in preventive detention in India were "fully in accordance with international law" and there was no doubt that Indian legislation did not contravene Article 4(1) of the Covenant. (25)

III TORTURE AND DEATHS IN CUSTODY

Mr Prado Vallejo said that police excesses and the mistreatment of detainees tarnished India's human rights record. He noted that "Apparently, there is excessive power held by the police in practice and those powers, which sometimes become abusive, increase the risk of human rights violations". Concern about police excesses was shared by Mr Serrano Caldera who was concerned that "there be concrete, effective measures that might ensure that such situations do not become more widespread".

Several Committee members - Mr Wako and Mr Wennergren - noted that torture was not specifically prohibited in the Constitution. The Attorney General said that prisoners were nevertheless protected against torture because strict regulations were in force regarding the treatment of prisoners, and because the protection of life and personal liberty in Article 21 of the Constitution included, in the Supreme Court's view, the right to peace and human dignity. But Mr Wennergren found that these provisions of Article 21 were too general in scope and that provisions prohibiting torture based on those in the Covenant were of fundamental importance especially since, as Mr Wako pointed out, no derogation was possible from the right not to be tortured.

Mr Wako was deeply concerned about reports of deaths in custody, which he said appeared to be a widespread abuse. He emphasized that it was especially within the competence of the state to prevent these, because the people concerned were in their custody. He asked what steps the government had taken to prevent such deaths and whether legal proceedings had been initiated against police officers involved in such cases.

In response, the Attorney General said there were strict rules of investigation into such cases: detainees had to be brought before a magistrate within 24 hours and a magistrate would carry out an investigation into reports of custodial deaths and make a preliminary report. Deaths in custody, he said, were not on the rise. (26)

IV FAILURE TO BRING HUMAN RIGHTS OFFENDERS TO JUSTICE

Many Committee members, including Mr Prado Vallejo, Mr Fodor and Mr Wako, were concerned that members of the police and security forces were not brought to justice for committing human rights violations and that allegations of such abuses were not sufficiently investigated. (When discussing the protection of the right to life, several Committee members had expressed concern that members of the armed forces exercising the powers given to them under the Armed Forces (Special Powers Act) were granted immunity from prosecution altogether. They found these provisions contravened the requirements of the Covenant.)

The Attorney General said there were specific enactments providing for action against and punishment of the police and army committing excesses. India had taken action on individual violations, he said, without having achieved Utopian conditions.

In concluding, Mr Prado Vallejo remarked:

"It would appear that in some cases there seems to be impunity in the security forces which are violating human rights. Sometimes these activities carried out by the security forces escape the control of the Government authorities. Therefore it would be wise for them to be controlled and that measures be adopted to prevent such abuses. It would appear necessary further to encourage investigations of violations and pursue punishment. It would appear that such investigations have not been best suited or at least not concluded and decided a heavy enough punishment for those who have breached the human rights laws". (27)

V SELECTED POINTS MADE BY THE MEMBERS OF THE HUMAN RIGHTS COMMITTEE AND AMNESTY INTERNATIONAL RECOMMENDATIONS BASED ON THE EXAMINATION OF INDIA'S REPORT

1. Several Committee members found that provisions in the Armed Forces (Special Powers) Act, the Terrorist and Disruptive Activities Act and the National Security Act contravened some of the most important rights guaranteed in the Covenant - including Articles 4, 6, 9, and 14 - and that there was a distinct possibility that they could not be justified by the "exigencies of the situation" prevailing in India.

Amnesty International recommends that the Government undertake a comprehensive review of these laws to bring them in line with international standards.

2. Many Committee members found the powers to shoot to kill in the Armed Forces (Special Powers) Act to be excessive and in contravention of the right to life provided in Article 6 of the Covenant. They questioned whether the Act complied with India's obligation under the Covenant to bring a person to trial with the least possible delay and whether the Act provided sufficient safeguards for the physical integrity of arrested persons and thus met the requirements of the Covenant. Provisions for immunity from prosecution in the Act were found by several members to contravene the requirements of Article 2 of the Covenant.

Amnesty International recommends that the government strictly control and restrict the circumstances permitting the security forces to shoot to kill so that they remain within the limits set in international human rights standards protecting the right to life including Article 6 of the Covenant and the Commentary thereto. It could remove immunity from prosecution for the security forces acting under its provisions. It could also create a statutory mechanism to periodically review the decision to declare an area "disturbed" and the need to exercise the special powers granted to the security forces under the Act.

3. With regard to the Terrorist and Disruptive Activities Act, some Committee members found that the Act's provisions permitting one year detention for investigation for broadly defined offenses contravened the requirements in Article 9 of the Covenant (for liberty and security of the person) and that provisions for mandatory trial *in camera* and the presumption of guilt contravened Article 14 of the Covenant (minimum safeguards for fair trial). One also doubted whether the provisions of the Act could be justified as emergency legislation under the terms of Article 4 of the Covenant.

Amnesty International recommends that the Government review the Act and incorporate the minimum safeguards provided in the relevant articles of the Covenant.

4. With regard to the National Security Act, several Committee members found the provisions permitting refusal to disclose the grounds of detention and permitting prolonged detention without being promptly produced before a judicial authority were not compatible with Article 9 of the Covenant.

Amnesty International recommends that the Government review the National Security Act and incorporate the minimum safeguards provided in the Covenant.

5. Several Committee members were concerned that the reservations made by India when it acceded to the Covenant rendered several of its provisions ineffective.

Amnesty International recommends that the Government lift the reservations it made when it became a party to the International Covenant on Civil and Political Rights.

6. Amnesty International recommends that the Government also take several other measures which would strengthen the effective application of the Covenant in India. These include:

- the government could disseminate the text of its report to the Human Rights Committee and also the summary records of the examination of that report by the Committee as widely as possible to officials in central and state governments, as well as to professionals and groups concerned with human rights protection;

- the government could translate the text of the Covenant in more Indian languages than Hindi and undertake a program of human rights education among members of the police and army;

- the government could make readily available to members of the judiciary and the legal profession the General Comments the Committee has adopted about the rights provided in the Covenant as well as the two volumes of Selected Decisions (and copies of views adopted in cases after these two volumes were published) taken by the Committee in cases where individuals - in countries which signed the (first) Optional Protocol to the International Covenant on Civil and Political Rights - complained that their rights under the Covenant had been violated.

ENDNOTES

ⁱ Observations made by the Attorney General as part of his introductory remarks, summarized in CCPR/C/SR.1039 at paragraphs 5 and 15.

ⁱⁱ Ref. nrs: CCPR/C/SR.1039, CCPR/C/SR.1040, CCPR/C/SR.1041 and CCPR/C/SR.1042.

Copies of these Summary Records, as well as of India's report to the Human Rights Committee (CCPR/C/37/Add.13) can be obtained from the United Nations office in Geneva and New York, the United Nations Information Centre in New Delhi and from the Research Department at Amnesty International.

Addresses: United Nations Information Centre, 55 Lodhi Estate, New Delhi 110 003, Telephone (91 11) 690410, 623439, Fax: (91 11) 615037

United Nations Headquarters, New York, N.Y. 10017, U.S.A
Telephone: (212) 963-1234

United Nations Office at Geneva, Palais des Nations, 1211 Geneva 10 Switzerland, Telephone: (22) 734 6011

ⁱⁱⁱ References in this paper to statements made by Committee members relate to the official records summarized in the United Nations' Summary Records of the 26 and 27 March meetings of the Committee. Where statements are given in quotation marks they refer to the full statements made by committee members during the meeting as recorded by the UN on tapes and as transcribed by Amnesty International.

^{iv} Transcript of statement summarized in CCPR/C/SR.1042 at paragraph 15.

^v The Committee as a whole, reviewing its experience in examining country reports from all over the world, has drawn up a series of General Comments on specific articles of the Covenant to assist State parties in the interpretation and implementation of the Covenant's provisions and to clarify what sort of information the Committee expects to be incorporated in reports submitted by State parties under Article 40 of the Covenant.

^{vi} General Comments adopted under Article 40, paragraph 4 of the Covenant. So far, the Committee has adopted General Comments on the Covenant Articles 1,2,3,4,5,6,7,9,10,13,14,17,19,20 and 24.

The Committee has published two volumes of its views in individual cases under the Optional Protocol. (Selected Decisions of the Human Rights Committee under the Optional Protocol give references. Copies can be obtained from the UN offices listed at 3.)

^{vii} See CCPR/C/SR.1039 paragraphs 17,18,19,46, CCPR/C/SR.1040 paragraph 62 and CCPR/C/SR.1042 paragraph 23.

^{viii} Comments made by Committee members in this section are summarized at CCPR/C/SR.1039 at paragraphs 15,20,32,38,41, CCPR/C/SR. 1040 at par. 3, CCPR/C/SR.1041 at paragraph 11, and CCPR/CSR.1042 at paragraphs 3, 7 and 28 and Amnesty International transcripts of Mr Serrano Caldera's views summarized in paragraph 25 thereof. The Attorney General's views are reflected in CCPR/C/SR.1039 paragraphs 47 and 49.

^{ix} When India became a party to the Covenant in 1979 it made declarations about the application in India of several rights guaranteed in the Covenant. These relate to the right of self determination in Article 1, the rights of aliens lawfully in India provided in Article 13 and, what is of particular concern to Amnesty International, the right to liberty and security of the person laid down in Article 9 of the Covenant. The Indian government stated in respect of that Article:

"the provisions of the Article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India [provisions to keep people in preventive detention without charge or trial]. Further under the Indian Legal System there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State."

^x CCPR/C/SR.1039 at paragraph 24, CCPR/C/SR.1042 at paragraphs 3 (transcript by Amnesty International),7,19,21 and 28.

^y The comments made by members of the Committee and the Attorney General in this section are summarized in CCPR/C/SR.1039 at paragraphs 20, 39 and 42; CCPR/C/SR.1040 at paragraphs 18, 19, 20, 22 and 23 and CCPR/C/SR.1042 at paragraphs 13, 14 and 16.

^z The main provisions of these laws and Amnesty International's concerns about their application are described in India: Summary of Amnesty International's Concerns. (AI INDEX: ASA 20/21/90).

^{aa} In Assam, the Act has been in force since 27 November 1990. The Guwahati High Court ordered on 20 March 1991 that the Act should not be applied in 12 of the 23 districts in the state, since there was no material on record to warrant its imposition. The High Court found:

"..actually there are no Rules to guide the actions of the authorities under the Act. The ordinary protection guaranteed under the laws [of] life and limb are not regulated under the 1958 Act. Therefore, we hold the quality of life in the area where the Act is enforced by notification the citizen's life stands radically changed to his detriment in view of the actual practices followed". (paragraph 47 judgement).

The Act also applies to other north-eastern states: parts of Manipur (where it is in force at least since 1978 in Ukhrul, Chandel, Senapati and Tamenglong districts, inhabited by the Naga tribal population), border areas of Nagaland, parts of Mizoram, and possibly Arunachal Pradesh and Meghalaya. Furthermore, the Armed Forces Special Powers Act is in force in Punjab, and, since 6 July 1990, in 6 districts of the state of Jammu and Kashmir.

^{ab} Section 4 of the Act reads in part:

"Special Powers of the Armed Forces.- Any commissioned 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 to do for the maintenance of public order, after giving such due warning as he may consider necessary fire upon or otherwise use 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".

The Ministry of Defence explained to Amnesty International that instructions issued under the Act specified: "open fire only after due warning". However, the normal duty on the armed forces to disperse an assembly by using "as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly..." under Section 130 of the Code of Criminal Procedure does not apply. Nor are the security forces required to provide a report of the death or report the matter to their superior and there is no obligation to hold an inquest or investigation into the death, as normally required under Sections 174 -176 of the Code of Criminal Procedure. The powers to shoot to kill far exceed the normal limitation set in Section 100 of the Indian Penal Code restricting justifiable killing to shooting in self-defence.

Section 6 of the same Act reads:

"No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act".

^{xxv} The Act effectively suspends fundamental rights guaranteed in Part III of the Indian Constitution, notably Articles 21 (protection of life and personal liberty) and 22 (protection against arrest and detention in certain cases). Furthermore, in contrast, for example, to Section 130 and 131 of the Code of Criminal Procedure the Act does not lay down guidelines for control by the civilian authorities over the armed forces. Limitations on the powers to search provided in Section 100 of the Code of Criminal Procedure - for example that a woman can only be searched by another woman - do not apply; nor does the duty to use minimal force to disperse assemblies provided in those Articles of the Code apply to personnel of the armed forces operating under the powers given to them under the Act.

^{xxvi} General Comment 6 (16) d on Article 6 of the Covenant reads in part:

"The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities".

The Commentary on Article 3 of the Code of Conduct for Law Enforcement Officials reads in part:

"(a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used....

(c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain and apprehend the suspected offender..."

Although the Committee did not refer to these, detailed standards for the legitimate use of firearms were recently endorsed by the United Nations. The **Basic Principles on the Use of Force and Firearms by Law Enforcement Officials** were adopted by the Eighth UN Congress on the Protection of Crime and Treatment of Offenders on 7 September 1990.

^{xxvii} In Amnesty International's experience, it has been extremely difficult for villagers living in the north-east of India to obtain redress. Whatever relief has been obtained, has been through the efforts of committed civil liberties lawyers willing to work sometimes for years without fees, in order to obtain compensation. Villagers live in remote areas, far away from the courts, and many of them do not know how to contact lawyers living in the cities or have the means to do so. Moreover, as described in Amnesty International's October 1990 report: "Operation Bluebird: A Case study of torture and extrajudicial executions in Manipur" (ASA20/17/090), victims of abuses who have brought complaints have often been subjected to intimidation and sometimes to renewed abuses by the security forces for doing so. No decision for compensation has yet been taken by the Gauhati High Court, even four years after that particular incident occurred.

Nevertheless, some victims of human rights abuses have approached the High Court for relief. For example, more than one hundred habeas corpus petitions have reportedly been filed in Assam since 27 November 1990 and although the court has directed that the missing people be produced in court and that victims of torture, including of rape, be given medical assistance at the expense of the state, no compensation to the victims is known to have been given so far. Compensation is known to have been ordered to be paid to no more than half a dozen victims of human rights abuses in north eastern India during the last decade, and with but one exception no criminal proceedings are known to have been instituted in civil courts against members of the security forces for committing human rights abuses.

^{xxx} Exceptional measures derogating from states' obligations under the Covenant should only be of a temporary nature. In its General Comment (5/13) on Article 4 of the Covenant the Human Rights Committee observed:

"that measures taken under Article 4 [the Covenant dealing with derogations from state obligations in times of emergency] are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that in times of emergency the protection of human rights becomes all the more important, particularly those rights from which no derogation can be made".

^{xxx} The Guwahati High Court, in its 20 March 1991 judgement referred to above, ordered both the Central and State Government of Assam to review, every month, whether the notifications bringing the Act into force in the state were necessary and to inform the general public of the outcome of that review.

^{xx} The comments made by members of the Committee and by the Attorney General on the Armed Forces (Special Powers) Act in this section are summarized in CCPR/C/SR.1039 at paragraphs 20,28,42 and 44, CCPR/C/SR.1040 at paragraphs 19, 55,59 and 60, CCPR/C/SR.1041 at paragraphs 8,9,77,78 and 79 and CCPR/C/SR.1042 at paragraphs 8,16,20,26 and 32. Direct quotations also refer to these paragraphs.

^{xxx} Normally Indian law requires arrested persons to be brought before a judicial magistrate, but the Act permits them to be brought instead before an executive magistrate who functions under control of the executive. Section 20(4) of TADA modifies normal procedures provided in Section 167 of the Code of Criminal Procedure - which obliges a magistrate to authorize detention of arrested persons after the first 24 hours after arrest - in the following way:

"(a) the reference in sub-section (1) thereof [Section 167 of the Code of Criminal Procedure] to "Judicial Magistrate" shall be construed as a reference to "Judicial Magistrate or Executive Magistrate or Special Executive Magistrate".

^{xxx} CCPR/C/37/Add.13 at paragraph 57 and CCPR/C/SR.1041 at paragraph 65.

^{xxx} The comments made by members of the Committee and the Attorney General on the Terrorist and Disruptive Activities (Prevention) Act are summarized in CCPR/C/SR.1039 at paragraphs 39 and 40, CCPR/C/SR.1040 at paragraph 18, CCPR/C/SR.1041 at paragraphs 65,67 and 68 and CCPR/C/SR.1042 at paragraphs 13,14,16 and 26. Direct quotations also refer to these paragraphs.

^{xxx} Article 9(4) of the Covenant reads:

"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful".

In respect of the concern expressed that the grounds for detention can be withheld from detainees held under the NSA, Article 9(2) of "the Covenant" is relevant:

"Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him".

^{xxx} Comments made by Committee members and the Attorney General on the National Security Act are summarized in CCPR/C/SR.1039 at paragraph 39, CCPR/C/SR.1040 at paragraphs 18 and 20, CCPR/C/SR.1041 at paragraph 62 and CCPR/C/SR.1042 at paragraphs 13 and 14. Direct quotations also refer to these paragraphs.

^{xxx} Comments made by Committee members and the Attorney General on reports of torture and custodial deaths are summarized in CCPR/C/SR.1040 at paragraphs 25,28 and 57, CCPR/C/SR.1041 at paragraph 11 and CCPR/C/SR.1042 at paragraphs 24 and 25. Direct quotations also refer to these paragraphs. Amnesty International's research contradicts the Attorney General's statement that deaths in custody were not on the rise. See *India, Torture, Rape and Deaths in Custody*, 25 March 1992, AI Index: ASA 20/06/92.

¹⁰⁰⁰ Comments made by Committee members and the Attorney General summarized in CCPR/C/SR.1039 at paragraph 36, CCPR/C/SR.1041 at paragraphs 6 and 75 and CCPR/C/SR.1042 at paragraphs 6,15,18 and 24. Direct quotations also refer to these paragraphs.

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