

“DENIED”

Failures in accountability for
human rights violations by
security force personnel in
Jammu and Kashmir

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EXECUTIVE SUMMARY

“If the Army knew that they would be charged, and will have to go to court and be prosecuted, they will think ten times before they pull their triggers on an innocent... The AFSPA is a like a blank cheque from the government of India to kill innocents like my nephew.”

---Mohammad Amin Magray, whose 17-year-old nephew Javid Ahmad Magray was killed by Indian security force personnel in April 2003.¹

The last time 17-year-old Javid Ahmad Magray’s family saw him alive, he was studying in his room. It was late on the evening of 30 April 2003. When they came downstairs the next morning, Javid was gone.

An Indian army officer in charge of a camp nearby told Javid’s parents that he was in a local police station. The family rushed to the police station, only to be told that Javid had been brought there, but was then taken to three different hospitals, before finally being declared dead.

During a subsequent police investigation, an army officer testified that Javid had been wounded in an encounter with some security force personnel. An investigation carried out by the district magistrate concluded that the army’s version of events was false, and that the “deceased boy was not a militant...and has been killed without any justification”.² The state police filed charges of murder and conspiracy to murder against nine army personnel, and the Jammu and Kashmir State Home Department wrote to the central Ministry of Defence in July 2007 seeking permission, or ‘sanction’, to prosecute the soldiers.

But Javid’s father, Ghulam Nabi Magray, says that he has to this day received no information on the outcome of the application. “We simply never heard what happened with it,” he said. A Ministry of

¹Amnesty International India interview with Mohammed Amin Magray, Budgam district, Jammu and Kashmir on 12 September 2013.

²Office of the Assistant Commissioner Revenue, Additional District Magistrate, Budgam, “Inquiry Report Into The Cause of Death of Javid Ahmad Magray,” August 12, 2003, Enq/960/SQ. Copy on file with Amnesty International India.

Defence document dated 10 January 2012 simply states that sanction for prosecution was denied on the grounds that “the individual killed was a militant from whom arms and ammunition was recovered”.³

Javaid Ahmad Magray is just one of hundreds of victims of human rights violations allegedly committed by security force personnel in Jammu and Kashmir. Indian security forces have been deployed in the state for decades, officially tasked with protecting civilians, upholding national security and combatting violence by armed groups. However, in the name of security operations, security force personnel have committed many grave human rights violations which have gone unpunished. The failure to address these abuses violates the rights of the victims and survivors to justice and remedy, which is enshrined in the Constitution of India and international human rights law.

This report documents obstacles to justice existing in both law and practice for victims of human rights violations in Jammu and Kashmir, and shows how the government’s response has failed to deliver justice. In writing this report, Amnesty International India analyzed government and legal documents related to over 100 cases of human rights violations committed between 1990 and 2013, and interviewed families of victims, their lawyers, journalists, academics, civil society activists, and state and central authorities.

One of the primary facilitators of impunity is the existence of Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (AFSPA) under which security forces are protected from prosecution for alleged human rights violations.⁴ This legal provision mandates prior executive permission from the central or state authorities for the prosecution of a member of the security forces.

This means that after the state police establish charges against a member of the security forces through a criminal investigation, they must send the casefile to the Ministry of Defence (MoD) or Ministry of Home Affairs (MHA) in New Delhi to seek permission to prosecute the alleged perpetrator.

For 25 years, the AFSPA been used to provide virtual immunity for security forces from prosecution for criminal offences. To date, the central government has denied permission to prosecute under section 7 of the AFSPA in every case brought against members of the army or paramilitary, or in a small number of cases, has kept the decision pending for years.⁵

The Ministry of Defence (MoD) claims that since 1990, it has received 44 applications seeking sanction to prosecute members of the armed forces under section 7 of the AFSPA. To Amnesty International India’s knowledge, the Ministry of Home Affairs has failed to grant permission to prosecute in all cases. The Ministry of Home Affairs denied Amnesty International India’s request for details of the cases.

Further, there is a worrying lack of transparency around the sanction process. Not a single family interviewed by Amnesty International India for this report had been informed by the authorities of the status or outcome of a sanction request in relation to their case. Families were rarely, if ever, informed of sanction decisions issued by the authorities, and were therefore unable to challenge sanction denials. Often, families mistakenly believed that the criminal case had been closed.

³International Peoples’ Tribunal for Human Rights and Justice in Indian Administered Kashmir (ITPK) and Association of Parents of Disappeared Persons (APDP), “Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir”, December 2012, p.241-243, Annexure 3, http://kashmirprocess.org/reports/alleged_Perpetrators.pdf (accessed on April 9, 2015). (ITPK and APDP, “Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir” December 2012)

⁴Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, Section 7. Available at http://indianarmy.nic.in/Site/RTI/rti/MML/MML_VOLUME_3/CHAPTER__03/457.htm (accessed 17 April 2015).

⁵Copy of RTI response 18 April 2012 provided to Amnesty International India by JKCCS in September 2013. (RTI response dated 18 April 2012)

Authorities argue that provisions like section 7 are necessary to prevent the filing of “motivated” or “false” cases against security force personnel by militant or terrorist groups and/or their sympathizers. But the need for mandatory executive approval has resulted in blanket immunity. Reasons for denial of executive approval include, “the allegation was motivated by vested interests to malign the image of security forces.”⁶ The findings of investigations carried out by the state police in Jammu and Kashmir are often summarily dismissed.

Many families interviewed said that the AFSPA also provides immunity for security force personnel indirectly at all stages of the accountability process. For instance, police and court records pertaining to nearly 100 cases of human rights violations filed by families of victims between 1990 and 2012 showed that the Jammu and Kashmir police often failed to register complaints, or take action on registered complaints until compelled by court orders, or by the findings of a judicially-ordered enquiry.

Cases documented by Amnesty International India and other groups also show that army personnel have been reluctant, or refused, to cooperate with police investigations in some instances. Requests for information made by police during investigations into incidents implicating security force personnel have been refused. Police requests for security force personnel to appear for questioning or identification have been turned down.

17-year-old Irfan Ganai was shot dead on the night of 30 June 2013 after he went outside his house in Ganderbal on hearing the sound of shouting. When his mother saw Irfan’s body, she lay down and placed her head on his chest and refused to move.

“We know that sometimes when the security forces kill innocents, they try to place a gun on their chest, take a picture to show the police, and then say he’s a militant,” Irfan’s cousin Reyaz said. “We refused to let that happen. We stayed with his body all night. We fought very bravely, and wouldn’t let the body go.”⁷

“Irfan would never have gone into the yard if he had seen the army vehicles, but we didn’t know. We didn’t see. After the army fired, they turned on their headlights from their vehicles and we could see more than 10 army men in the yard.”

The local police station registered a First Information Report (FIR) against unidentified army personnel for murder. They wrote twice to the relevant Army officials requesting the list of army personnel who had participated in the operation that night, the types of weapon carried by each of the army personnel, details of vehicles used in the operation and details of drivers, both civilian and army. The army said that they had “approached the higher headquarters for sharing the details” and assured “full cooperation”. However to date, the army has failed to respond to the police’s request for information.

* * *

Under India’s military and paramilitary codes, criminal offences, including crimes under international law, can be tried by the military justice system, if the offence is committed “while on active service”. Indian authorities argue that the military justice system is swift and effective.

⁶Copy of RTI response on file with Amnesty International India provided by JKCCS in September 2013.

⁷Amnesty International India interview with the family of Irfan Ganai in September 2013.

However, despite assurances from the Chief of Army Staff and the Head of the Army's Northern Command in December 2013 that there is “zero tolerance” for human rights violations by the army, more than 96% of all complaints brought against the army in Jammu & Kashmir have been dismissed as “false or baseless” or “with other ulterior motives of maligning the image of Armed Forces.”⁸

The army's human rights cell, established by the Army Headquarters in March 1993, reports on the Indian Army's official website that as of 30 December 2011, the army had received 1,532 allegations of human rights violations.⁹ The majority (995) were received from J&K, 485 from the Northeastern states, and 52 from other states. Of these, 1,508 were investigated by the army, and 24 investigations remained pending as of 2011. The army says it found through internal enquiries that 1,454 of these allegations were “false/baseless” and 54 complaints were true, and 129 army personnel were punished in these cases.¹⁰

However, few details of investigations conducted by the security forces are available to the public. The number of cases in which complaints against security force personnel have been investigated and military trials conducted are closed to public scrutiny. The military are reluctant to share substantive information about how they conduct inquiries and trials by court-martial into human rights violations. Details of court proceedings and sentences are not available. Evidence for finding the majority of allegations “false” is also not publicly available.

Amnesty International opposes in principle the investigation and prosecution of military officials for human rights violations before military courts. There is growing acceptance internationally that military courts should not have jurisdiction to try security forces for human rights violations. The UN Human Rights Committee and other international bodies have stated strongly that military courts should not be used to try military personnel accused of human rights violations, particularly where there are limited options for civilians to appeal against the judgements of military courts.¹¹

⁸Northern Command, Indian Army website, “Northern Army and Human Rights.” Section 16, <http://indianarmy.nic.in> (accessed 9 April 2015). (Northern Army and Human Rights, Section 16)

⁹Indian Army web portal, “Human Right Cell and Handling of Human Rights Violation Cases in the Army”, Annexure I, <http://indianarmy.nic.in/Site/FormTemplate/frmTempSimple.aspx?MnId=TMcObNMKb7TiapbzKWVpeA==&ParentID=mgRuNTM5R9IOqk0JrfPv3Q==&flag=OLsUIhCJDYK2YZORoKE52Q> (accessed 10 April 2015). (Indian Army web portal, “Human Right Cell and Handling of Human Rights Violation Cases in the Army”).

¹⁰Indian Army web portal, “Human Right Cell and Handling of Human Rights Violation Cases in the Army”, Annexure I.

¹¹See, e.g., Concluding Observations by the Human Rights Committee on Colombia (CCPR/C/79/Add.76), 5 May 1997, paras. 19, 23, 32, 34, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.76&Lang=en (accessed 10 April 2015); Concluding Observations by the Human Rights Committee on Venezuela (CCPR/CO/71/VEN), 26 April 2001, para. 8, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/CO/71/VEN&Lang=En (accessed 10 April 2015); Concluding Observations of the Human Rights Committee on Kyrgyz Republic (CCPR/CO/69/KGZ), 24 July 2000, para. 7, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/434/59/PDF/G0043459.pdf?OpenElement> (accessed 10 April 2015); Concluding Observations of the Human Rights Committee on Chile (CCPR/C/79/Add.104), 30 March 1999, para. 10, <http://www1.umn.edu/humanrts/hrcommittee/chile1999.html> (accessed 10 April 2015). Official link was not available; Concluding Observations of the Human Rights Committee on Belarus (CCPR/C/79/Add.86), 19 November 1997, para. 9, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/79/Add.86&Lang=En (accessed 10 April 2015); Concluding Observations of the Human Rights Committee on the former Yugoslav Republic of Macedonia (CCPR/C/79/Add.96), 18 August 1998, para. 10, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.96&Lang=en (accessed 10 April 2015); Concluding Observations of the Human Rights Committee on France (CCPR/C/79/Add.80), 4 August 1997, para. 16 et seq. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.80&Lang=en (accessed 10 April 2015); Report of the Human Rights Committee to the General Assembly, 35th period of session, UN Doc A/35/40 (1980), para 249 et seq.

Further, military courts in India suffer from particular structural flaws rendering them unsuitable for prosecuting human rights violations. There are serious concerns about the independence and competence of military courts, ranging from whether the officers appointed to serve as members - and essentially judges - in a court-martial have appropriate training or qualification in law, to whether in exercising their duties as judges, they are subordinate to, or independent of their superiors. For victims and their families, another issue is the lack of transparency about the status and outcomes of military trials. There is also limited recourse to appeal.

The United Kingdom model of military justice, on which the Army Act and Rules are based, was itself reformed after the European Court of Human Rights ruled in 1997 that the court-martial in the UK did not constitute a fair hearing by an “independent and impartial tribunal”, because all of the officers appointed to the court-martial were directly subordinate to the convening officer.¹²

In order for investigations and trials to be effective and to be regarded as credible, members of the security forces alleged to have committed human rights violations should be brought to trial in civilian courts in fair trials.

Personnel of the J&K state police have also been accused of human rights violations, including arbitrary detentions, rape in custody, torture and enforced disappearance. However, few individuals have been brought to justice in connection with these violations. Lawyers and human rights activists in J&K point to police failure to register cases against their own, and failure to complete investigations, as the main sources of impunity.

[Case]

“The Deputy Superintendent Police (DSP) came inside the room. I had been looking at the windows for a way to escape but the windows were locked. He kicked me with his shoes on, right in the abdomen. The DSP beat me with the leg of the chair with the nails still in it--on my legs, on my stomach and my vaginal parts. Then I fell unconscious. The nails went inside my legs and made them swell. I was bleeding like someone urinates. He beat me in the abdomen and vaginal parts...till there was blood everywhere.”

– 16-year-old Sheila (name changed to protect identity) who was allegedly sexually assaulted by a police officer during an interrogation in July 2004

The day after Sheila was taken into police custody and allegedly assaulted, she and her father went to the local police station in her area to file a complaint, but the police refused to register the case. Sheila says that the Inspector General, Kashmir, subsequently came to visit her family with a cheque for 200,000 rupees and an offer of jobs for her two brothers. She recounts that she told him, “This is an empty gesture. Is this really the government’s response? You can leave the money, but who will protect my family from harassment when you leave?”

Sheila approached the J&K State Human Rights Commission in 2004, which issued a one-page judgment in 2008.¹³ It is the only official document that Sheila has in relation to her complaint.

¹²European Court of Human Rights, *Findlay vs. United Kingdom*, Application number: 22107/93, Judgement dated 25 February 1997, para. 70.

¹³Copy of judgment on file with Amnesty International India.

The judgment recommended compensation for Sheila and her family and the registration of a case with the police. Neither recommendation has been implemented.

* * *

Families interviewed by Amnesty International India routinely said that after filing a complaint, they rarely received any information about the outcome or status of investigations from authorities, even after repeated visits to police stations. Families were often denied access to the police station itself, as well as being denied access to speak with the investigating officer or officer-in-charge. As a result, many families were unaware of whether their cases were ongoing or closed.

By not addressing human rights violations committed by security force personnel, India has not only failed to uphold its international obligations, but has also failed its own Constitution. Impunity only breeds further violence and alienation. By bringing alleged perpetrators to justice, the Indian government can send a clear signal that nobody is above the law, and that every person's right to equality and justice will be respected and protected.

RECOMMENDATIONS

Amnesty International urges the Indian government, particularly the Prime Minister, Chief Minister of J&K, and Ministries of Home Affairs and Defence to:

1. Take immediate steps to ensure that all human rights violations and crimes under international law alleged to have been committed by Indian security force personnel in Jammu and Kashmir are investigated by independent and impartial authorities, and where there is sufficient admissible evidence, those accused are prosecuted in proceedings which meet international fair trial standards and which do not impose the death penalty.
2. Remove all requirements of sanction or any prior executive permission for the prosecution of security force personnel from all relevant legislation including the Armed Forces Special Powers Act, the Code of Criminal Procedure, 1973 and the Code of Criminal Procedure, 1989.
3. Limit jurisdiction of military courts in India [by amending all relevant legislation, including service acts (e.g. Army Act and Rules, Border Security Force Act and Rules, and Central Reserve Police Force Act and Rules)] only to offences of a strictly military nature committed by military personnel.
4. Ensure that where previous criminal investigations have already collected sufficient admissible evidence about human rights violations allegedly committed by members of security forces, the prosecutions take place in civilian courts, including, where necessary, by ensuring grant of sanction from the Ministry of Defence or Ministry of Home Affairs.
5. Establish a programme to provide full and effective reparation (including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) to all victims of past human rights violations in Jammu and Kashmir. This should include, in consultation with civil society organizations and victims' groups, steps to publicly acknowledge the occurrence of human rights violations in the state and the obstruction of justice for victims.
6. Uphold the right to truth by keeping victims and their families informed of the status and results of investigations and prosecution by all authorities, as required under international human rights law, and at minimum, as laid down by the measures to improve public-police relations issued by the National Human Rights Commission in 1999.¹⁴

¹⁴National Human Rights Commission, “Need for the investigating agencies to keep the complainants/victims informed of the progress of investigation” Measures to Improve Police-Public Relationship and Confidence, 22 December 1999, p.75, section II(c)(e) & (f), <http://nhrc.nic.in/Documents/sec-4.pdf> (accessed 10 April 2015).

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