

India

Briefing: The Armed Forces Special Powers Act (AFSPA) Review Committee takes one step forward and two backwards

In October 2006, the human rights community in India was surprised at the disclosure by The Hindu newspaper¹ in which it reported that it had managed to secure a copy of report by *the Committee to review the Armed Forces (Special Powers) Act, 1958*,² (the Committee). The Committee, established by India's Central Government in November 2004, and headed by Retired Justice B.P. Jeevan Reddy, presented its report to the Government in June 2005. Since then the human rights community had tirelessly called for its findings to be released.

This briefing is a summary of, Amnesty International's observations and concerns, on the implications for human rights in India of implementing the Committee's recommendations.

One positive aspect of the Committee's recommendations is immediately clear: the Committee calls for the repeal of the Armed Forces (Special Powers) Act (AFSPA). Amnesty International has joined local and international human rights NGOs in strongly criticising the AFSPA and calling for its revocation,³ and can therefore only welcome this aspect of the Committee's recommendations. In addition, the Committee recommends that some of the excessive powers granted to the armed forces under AFSPA be abolished - for instance, the authority to use lethal force against any person contravening laws or orders "prohibiting the assembly of five or more persons".⁴ The alternative [legislation proposed] by the Committee (see below) also includes the list of "Do's and Don'ts" attached to the AFSPA, and rendered binding law by the Supreme Court⁵, and which impose certain restraints on the behaviour and powers of soldiers deployed under the Act.⁶

¹ See The Hindu, "Repeal Armed Forces Act: official panel," by Siddarth Varadarajan, 8 October 2006 available at <http://www.hinduonnet.com/thehindu/2006/10/08/stories/2006100806130100.htm>

² *Report of the Committee to review the Armed Forces (Special Powers) Act, 1958*, Government of India, Ministry of Home Affairs, 2005 (Committee's report).

³ See Amnesty International, *India: Briefing on the Armed Forces (Special Powers) Act, 1958*, AI Index: ASA 20/025/2005, 9 May 2005.

⁴ Armed Forces (Special Powers) Act, 1958, sec. 4.

⁵ Committee's report, Annexure I. See *Naga People's Movement of Human Rights v Union of India* [1997] ICHRL 117 (27 November 1997).

⁶ In its briefing on the AFSPA, AI highlighted how even with the application of this list of "Do's and Don'ts" the AFSPA still fell short of international standards, including provisions of treaties to which India is a state party. Moreover human rights activists have pointed out that even though these provisions exist, they are often nullified by the effect of other legislative provisions or are not consistently implemented.

However, the organization is deeply concerned that the repeal of the AFSPA in its proposed form would be, in the words of a leading Indian human rights lawyer, a “fake repeal”⁷ in that the Committee saw fit to recommend replacing the AFSPA with a new chapter to be added to another ‘special powers’ law, the Unlawful Activities (Prevention) Act, 1967 (UAPA) in order to enable armed forces’ intervention “to quell internal disturbance”.⁸

If adopted, this recommendation would result in many of the special powers granted to the armed forces under the AFSPA being maintained under the proposed amendment, and the strengthening of the UAPA, which itself already grants governments powers that are either inherently violative of human rights law and standards or else widely open to abuse.

AI is moreover concerned at the assertion by the Committee that, “A major consequence of the proposed course would be to erase the feeling of discrimination and alienation among the people of the North-eastern states that they have been subjected to, what they call, “draconian” enactment made especially for them. The UAP Act applies to entire India including to the North-eastern states. The complaint of discrimination would then no longer be valid.”⁹ AI believes that the Committee’s recommendation to reintroduce some of the powers of the forces currently under the AFSPA in the UAPA would simply transfer draconian powers from one piece of legislation to another and will not change the way those living in regions where the AFSPA is currently implemented feel, since it is highly likely that the UAPA will still be applied more heavily in these areas, resulting in the same “feeling of discrimination”. As one legal expert commented, it appears the Committee has approached the problems associated with the AFSPA from the angle of “what the Committee considers an acceptable formula for continuing the powers, and the use of those powers, that have become entrenched in, and because of, the AFSPA,”¹⁰ rather than addressing the questions of how the AFSPA facilitates human rights violations and fosters impunity.

The UAPA underwent wide-ranging changes in 2004,¹¹ shortly after the infamous Prevention of Terrorism Act (POTA) was repealed.¹² This legislation was criticised at the time by human rights defenders as “The Reincarnation of POTA.”¹³ Unfortunately, the Committee in its review seems to have favoured the further concentration of legal provisions for sweeping powers in the hands of the Government under the UAPA, instead of ensuring safeguards and limitations on government powers so that international human rights law and standards are not violated.

⁷ See Colin Gonsalves, “The Fake Repeal of AFSPA,” *Combat Law*, Volume 5, Issue 5 (November – December 2006)

⁸ Committee’s report, p. 83 Part-V: “Draft Chapter VI A to be inserted in the Unlawful Activities (Prevention) Act, 1967” (henceforth: Draft Ch. VI A), sec. 40 A(3), on p. 83.

⁹ Committee’s report p. 77 Part IV

¹⁰ Comments received from Dr. Usha Ramanathan, 7 November 2006.

¹¹ Unlawful Activities (Prevention) Ordinance, 2004.

¹² The Prevention of Terrorism Act (POTA) was enacted on March 28, 2002. POTA by an ordinance on 27 October 2004.

¹³ See Human Rights Features (Voice of the Asia-Pacific Human Rights Network, HRF/104), 12 October 2004, available at <http://www.hrhc.net/sahrdc/hrfeatures/HRF106.htm>.

Amnesty International's concerns regarding the Committee's recommendations are therefore twofold: concerns pertaining to the human rights implications of the proposed additions to UAPA in and of themselves, and pertaining to the implications of granting the armed forces powers under the UAPA.

1. Human rights concerns regarding the content of the proposed additional chapter to UAPA

a. Military rule without a time limit. The Committee recommends that under its proposed addition to the UAPA, a state government may call upon the Central Government to send "armed forces of the Union" to the state, where it is "of the opinion that on account of the terrorist acts or otherwise, a situation has arisen where public order cannot be maintained in the State..."¹⁴ the request having been tabled by the state Legislative Assembly for discussion.¹⁵ The Central Government may then deploy such forces.¹⁶ However, the Central Government may also send troops to a state of its own accord, where it believes that the situation warrants such action on the basis of similar considerations.¹⁷ Amnesty International is concerned that under both proposed provisions, the period during which troops will be deployed is potentially unlimited. The original period for which troop deployment may take place is up to three months at the initiative of the state,¹⁸ and six months at the initiative of the Central Government.¹⁹ However, in both cases there are provisions for further extensions of the troop deployment, following review by the government concerned, which could, at least in theory, be prolonged indefinitely. Moreover, the Central Government may "vary the area of deployment" at will. Its original decision to deploy troops for up to six months need not be approved by Parliament, and only subsequent decisions to extend the deployment or change its geographical are tabled for its discussion.²⁰ AI is concerned that the proposed legislation could facilitate what in effect has been military rule, for many months or even years.

Amnesty International is further concerned that whereas the state government must be convinced that unless troops are employed, it will not be able to control the situation,²¹ the Central Government may deploy troops to a state on a lower, and less clear, grounds of being "of the opinion" that such deployment has "become necessary to quell internal disturbance".²² The nature of such "disturbance" is left undefined, and thus open for the Central Government to interpret liberally. Amnesty International is concerned that this reduction of objective

¹⁴ Draft Ch. VI, sec. 40 A(1)(a).

¹⁵ *Ibid.*

¹⁶ *Ibid.*, sec. 40 A(2)

¹⁷ *Ibid.*, sec. 40 A(3).

¹⁸ *Ibid.*, sec. 40 A(1)(b).

¹⁹ *Ibid.*, sec. 40 A(3).

²⁰ *Ibid.*, sec. 40 A(3).

²¹ *Ibid.*, sec. 40 A(1)(a).

²² *Ibid.*, sec. 40 A(3).

criteria for assessing the reasonableness of the Central Government's decisions would result in a reduced capacity to challenge its actions in court.²³

b. Exceeding civilian law enforcement powers: As in the AFSPA, the armed forces that are deployed under the proposed legislation, must always act "in aid of the civil power"²⁴ rather than substituting civilian law with their own.²⁵ However, the Committee recommends that the additional chapter to the UAPA would qualify this principle. The chapter provides that forces:

*"...shall act in aid of civil power and shall, to the extent feasible and practicable, coordinate their operations with the operations of the Security Forces of the State Government. However, the manner in which such forces shall conduct their operations shall be within the discretion and judgment of such forces;"*²⁶

Amnesty International is concerned that this proposal would enable armed forces, deployed for law enforcement purposes, the discretion to conduct their operations in a manner which exceeds the powers granted to civilian law enforcement agencies and without civilian control or accountability over their operation. This is especially worrying when coupled with the very real risk that members of the armed forces who violate human rights will enjoy impunity (see below).

A related concern is the Committee's approach to the rights of persons arrested by the armed forces. The AFSPA has been subject to legal challenges in India's Supreme Court, including on this issue. While Amnesty International has expressed its concern that the Supreme Court chose not to repeal the Act altogether, the Court did inscribe unto AFSPA several Constitutional safeguards, which it elaborated. In its proposed legislation, the Committee chose to provide for these safeguards in a selective manner. Amnesty International is concerned that whereas the proposed legislation includes a provision for the preparation of an arrest memo as ordered in *D K Basu*,²⁷ they do not include other safeguards ordered therein, and currently forming part of AFSPA, such as informing the detainee's relatives of the fact or arrest and place of detention; having the arrested person countersign the arrest memo; and having the arrested person medically examined.

c. Far reaching powers for soldiers to use lethal force: the Committee proposes that members of the armed forces "not below the rank of a non-commissioned officer" be empowered to "use force or fire upon, after giving due warning, an individual or a group of

²³ In this respect, the Government's discretion is even wider in comparison to the AFSPA, which requires the local government to be of the opinion that the state "is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil powers is necessary". See Armed Forces (Special Powers) Act, 1958, sec. 3.

²⁴ *Ibid.*

²⁵ See also, in this respect India's Supreme Court ruling in *Naga People's Movement of Human Rights v Union of India* [1997] ICHRL 117 (27 November 1997).

²⁶ Draft Ch. VI, sec. 40 A(4).

²⁷ *D.K. Basu v. State of West Bengal*, 1997 (1) SCC 416. See the Commission's proposed Appendix-A, sec. 40 A(5)(b)(5).

individuals unlawfully carrying or in possession of or is reasonably suspected of being in unlawful possession of any of the articles mentioned in Section 15 of this Act.”²⁸ The said Section 15²⁹ actually criminalises the use rather than possession of weapons, explosives etc. Being “in possession” of such materials may simply mean having them stored in one’s house. The powers thus granted to armed forces personnel to use lethal force far exceeds what could reasonably be described as protecting lives in jeopardy, as provided in international law and standards.

The right to life is a key human right which must be protected at all times, and is provided for in Article 6 of the International Covenant of Civil and Political Rights (ICCPR), to which India is a state party.³⁰ The United Nations has developed standards which elaborate how this right is to be protected in practice, for instance Article 3 of the UN Code of Conduct for Law Enforcement Officials, adopted by the General Assembly in 1979, and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted in 1990.

The core principles require law enforcement officials to:

- “as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”³¹
- use firearms only “when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.”³²

Amnesty International is concerned that legislation allowing soldiers to shoot at persons merely for possessing or suspected to be possessing certain materials, clearly constitutes disregard for the right to life, which under international law cannot be derogated from even in times of emergency.

d. “Grievance cells” – a recipe for impunity:

The proposed additional chapter envisages the creation of a “grievance cell” in each district, composed of a magistrate, a “representative of the forces operating in that district” and a state police officer.³³ A “grievance cell” is described as “an independent body... competent to

²⁸ *Ibid.*, sec. 40 A(5)(b)(1).

²⁹ The Committee is referring to the UAPA as amended by the Unlawful Activities (Prevention) Amendment Ordinance, 2004.

³⁰ For an explanation of this provision see Human Rights Committee, General Comment No. 6: The right to life, art. 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 6 (1994).

³¹ Principle 4 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

³² Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly resolution 34/169 of 17 December 1979, Article 3, Commentary.

³³ Draft Ch. VI, sec. 40-C(1).

inquire into complaints of violations of rights of citizens”.³⁴ Amnesty International is concerned that such independence is far from guaranteed when the majority of members belong to security forces. Moreover, while “grievance cells” must promptly supply information to complainants, the proposal does not contain obligations beyond this. Amnesty International is deeply concerned that the proposed additional chapter perpetuates the almost total impunity that perpetrators of extrajudicial executions, enforced disappearance, torture and other ill-treatment and other violations of human rights have enjoyed under the AFSPA. Once a victim of a human rights violation has complained to the “grievance cell” and received information, there seems to be no further recourse for him or her. The “grievance cell” has no obligation to pass the complaints, or the findings of their investigation, to any body with powers to prosecute. The section appended to the proposed chapter states that,

*“If on enquiry, it is found that the allegations are correct, the victim should be suitably compensated and the necessary sanction for institution of prosecution and/or a suit or other proceeding should be granted under S.6 of the Central Act.”*³⁵

Yet, according to the proposed chapter the only body which can hold inquiries “to find if the allegations are correct” would be the “grievance cells” where, as noted, security forces’ representatives have a majority and which have no instructions, or even powers, to initiate or call for police investigations or prosecutions.

Amnesty International has in the past documented a consistent policy of impunity for perpetrators of human rights violations, including extrajudicial executions, enforced disappearances and torture.³⁶ The organization is concerned that the Committee’s proposal, lacking as it does any provisions in line with international law and standards, for prompt, independent and impartial investigations into allegations of such human rights violations, leading to prosecutions of suspected perpetrators,³⁷ will perpetuate this situation.

AI has moreover documented its concern that bodies such as the National Human Rights Commission are not mandated to independently investigate such violations. In a letter to the Government of India in August 2006, the organization highlighted its concern that recent amendments to the mandate of the National Human Rights Commission (NHRC) have not addressed restrictions in Section 19 of the Protection of Human Rights Act which concern complaints or reports of abuses committed by the armed forces. Section 19 allows the NHRC and State Human Rights Commissions to only seek a report from the Central Government on allegations of human rights violations by the armed forces (and not conduct an investigation

³⁴ *Ibid.*, sec. 40-C(2).

³⁵ *Ibid.*, sec. 40 A(5)(b), para. 24.

³⁶ See Amnesty International, *India: Briefing on the Armed Forces (Special Powers) Act, 1958*, AI Index: ASA 20/025/2005, 9 May 2005.

³⁷ See, among others, Articles 2(1) and 2(3) of the ICCPR; Article 12 of the UN Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UN General Assembly resolution 55/89 Annex, 4 December 2000.

of its own) thus confining it to the government's version or more usually the version of events given by the alleged perpetrators themselves. AI believes that this section, combined with the proposed provisions in the UAPA which prevent prosecution without sanction from the Government first would continue to foster a culture of impunity for human rights violations.

2. Concerns regarding the human rights implications of granting the armed forces powers under the UAPA.

The UAPA is not the main subject of this briefing, however, as noted, the Committee has recommended amending the UAPA in light of its review of the AFSPA and the former is therefore of relevance to this briefing, particularly as the UAPA also contains provisions that are of great concern to Amnesty International. Empowering state governments and the Central Government to deploy armed forces under this Act deepens such concerns. For instance:

- The UAPA criminalises, among other things, any act which, including by “words, either spoken or written” is “intended, or supports any claim, to bring about, on any ground whatsoever... the cession of a part of the territory of India from the Union” or which “causes or is intended to cause disaffection against India.”³⁸ This sweeping prohibition violates the right of individual to peacefully seek, receive and impart ideas,³⁹ as well as creating a vaguely defined crime of causing “disaffection against India,” which does not even have to be intentional, and may include the exposure of human rights violations or corruption.
- The UAPA provides for other vaguely-defined offences such as when “a person...is and continues to be a member of “an association declared unlawful, takes parts in its meetings, contributes to it or “in any way assists the operations of such association”⁴⁰; as well as “dealing with funds of an unlawful association.”⁴¹ None of these provisions require intention or knowledge of the unlawful status of the association concerned or nature of the acts involved. In other words, a person may be prosecuted and punished under the UAPA even if, for instance, that person was not aware that an unlawful association still considers that individual to be a member, has unwittingly and unknowingly assisted its operation through acts that are not, in and of themselves, illegal, or has dealt with funds believing them to be the property of a certain person and unaware that the individual was actually posing as a ‘front’ for an unlawful association.

Amnesty International is concerned that a law combining the criminalisation of certain forms of behaviour, vaguely and broadly defined, with granting powers for the Central Government to quell by military force an undefined “internal disturbance”,⁴² may be regarded as

³⁸ UAPA, sec. 2(1)(o). Sec. 2(1)(i) expands the definition of support etc. for “secession” to include “the assertion of any claim to determine whether such part will remain a part of the territory of India”.

³⁹ See for instance Art. 19 of the ICCPR.

⁴⁰ UAPA, sec. 10(a).

⁴¹ *Ibid.*, sec. 11.

⁴² Draft Ch. VI, sec. 40 A(3).

legitimising the use of the military to oppress the peaceful expression of opinions, to act against persons who have unknowingly and unintentionally broken ill-defined laws, or to otherwise violate human rights with impunity within operations against “disturbances.”

Amnesty International calls upon the Indian authorities to:

- Repeal the Armed Forces Special Powers Act (AFSPA) unconditionally;
- Ensure that it does not introduce provisions taken from the AFSPA into the recently amended Unlawful Activities (Prevention) Act, (UAPA) 1967;
- Repeal or amend the UAPA to bring it into line with international human rights law;
- Protect the civilian population from violent crimes, including acts committed by armed groups, and prosecute those responsible for such attacks within the framework of criminal law and in conformity with international human rights law and standards;
- Ensure that law enforcement personnel, including armed forces deployed for law enforcement purposes, respect the standards set out in the UN Code of Conduct for Law Enforcement Officials, and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;
- Amend Section 19 of the Protection of Human Rights Act which prohibits the NHRC and state Human Rights Commissions from independently investigating allegations of human rights violations by members of the armed or paramilitary forces.