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INDIA

The Prevention of Terrorism Bill 2000

Past abuses revisited?

June 2000

SUMMARY

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In 1999, the Government of India requested the Law Commission of India to "undertake a fresh examination of the issue of a suitable legislation for combatting terrorism and other anti-national activities". In April 2000 the Law Commission published a draft legislation -- the Prevention of Terrorism Bill 2000 -- which the Government of India is currently considering.

This report looks at the Prevention of Terrorism Bill as drafted by the Law Commission primarily in relation to international human rights standards and sounds a warning note. It argues that several provisions of the draft legislation violate international human rights standards and that if enacted, the legislation will facilitate violations of numerous rights which the Government of India is obligated to safeguard. Amnesty International is concerned that widespread human rights violations which occurred under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (which lapsed in 1995) will be revisited in this legislation which retains many of its provisions.

The report in particular looks at the way in which the draft legislation challenges the right to liberty and security of person, the right to fair trial, the right to freedom of expression, the right to association, the right not to be subjected to torture and the right to redress: all rights contained in the International Covenant on Civil and Political Rights to which India is a party. It further expresses concern about the inclusion within the draft legislation of the death penalty for certain crimes.

KEYWORDS: LEGISLATION1 / FREEDOM OF EXPRESSION1 / POLITICAL VIOLENCE / ICCPR / IMPUNITY / DETENTION WITHOUT TRIAL / TRIALS / DEATH PENALTY / FEAR OF TORTURE/ILL-TREATMENT

This report summarizes a 14-page document (7362 words) INDIA The Prevention of Terrorism Bill 2000: Past abuses revisited? (AI Index: ASA 20/22/00) issued by Amnesty International in June 2000. Anyone wishing further details or to take action on this issue should consult the full document. An extensive range of our materials on this and other subjects is available at <http://www.amnesty.org> and Amnesty International news releases can be received by email: <http://www.amnesty.org/news/emailnws.htm>

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INDIA

The Prevention of Terrorism Bill 2000

Past abuses revisited?

INTRODUCTION

In May 1995 when the Terrorist and Disruptive Activities (Prevention) Act (TADA) lapsed, there was widespread relief in India that the legislation, which had led to widespread human rights violations and which had been criticized by national and international human rights organizations, United Nations human rights mechanisms, the National Human Rights Commission (NHRC), lawyers and government ministers and officials themselves, had been put to rest.¹

In 1999, the Government of India requested the Law Commission of India to "undertake a fresh examination of the issue of a suitable legislation for combatting terrorism and other anti-national activities". The Law Commission indicated that instead of drafting new legislation it favoured amendments to the Criminal Law Amendment Bill, 1995² as apparently last amended by the Government of India in February 1999. In late 1999 it produced a "Working Paper", setting out arguments in favour of new legislation and proposing amendments to the Criminal Law Amendment Bill, 1995 which it stated were designed to:

1. *Create an in house mechanism to prevent the misuse of the special powers conferred by the Act upon the police officer.*
2. *Redesign several provisions to accord with the present day concept of human rights.*
3. *Afford a reasonable and real opportunity to the accused to defend himself effectively.*

In April 2000, the Law Commission proposed further amendments and reissued the draft legislation in the form of the Prevention of Terrorism Bill, 2000, in its 173rd Report³.

After scrutinising the Prevention of Terrorism Bill, which according to media reports seeks to revive TADA with a "human face" and which is slated to be introduced to Parliament shortly, Amnesty International is concerned that the lessons of TADA have not been learnt. While the organization welcomes the exclusion of some provisions of TADA which were violative of international standards and led to human rights violations and the inclusion of some safeguards,

¹ Although TADA lapsed in 1995, hundreds of people remain detained under the Act awaiting trial and despite government statements to the contrary, individuals in Jammu and Kashmir continue to be detained under the Act in connection with cases filed before its lapse.

² The Criminal Law Amendment Bill was originally introduced to Parliament in May 1995 just prior to the lapse of TADA.

³ In December 1999 and January 2000, the Law Commission held two meetings to discuss the proposed legislation set out in its "Working Paper". Invitations were sent by the Law Commission to a handful of human rights activists and organizations to attend a meeting on 20 December 1999. A further meeting was held on 29 January 2000. Both meetings were attended by a small number of human rights activists as well as serving and retired government officials and security force officials, Supreme Court advocates, academics and officials of the National Human Rights Commission. As a result of the comments it received on its "Working Paper", it amended the draft legislation and reissued it as part of its 173rd Report.

the organization does not believe that the proposed legislation provides sufficient safeguards to prevent human rights violations or is compatible with international human rights treaties to which India is a party.

Amnesty International is concerned that in discussing the draft legislation, the experience of abuses which occurred in the application of TADA has clearly not been fully drawn on. The organization notes from the original Working Paper of the Law Commission of India that it referred to various judgments of the Supreme Court concerning TADA cases in proposing the legislation. Other sources, however, appear to have been ignored. One of the recommendations that Amnesty International made when the Criminal Law Amendment Bill, 1995, was under consideration, was that the findings of the various Review Committees set up in 1994 to review all TADA cases should be fed into the debate surrounding the framing of future anti-terrorist legislation in order to prevent the re-enactment of provisions which were found to have led to widespread human rights violations including arbitrary arrest and detention and torture.⁴ In April 2000, Amnesty International sought information from the Ministry of Home Affairs about whether a formal review of TADA had been carried out by the Government of India. However, it has yet to receive a response to this request for information.

Amnesty International welcomes the fact the Law Commission of India, has omitted several provisions which were part of the earlier draft of the Bill. These include:

- Deleting provisions criminalising "disruptive activities". Amnesty International believed these provisions would be so broadly defined that they would lead to the detention of people who, without advocating violence, were peacefully expressing their political or other conscientiously held views. The organization believes such powers would violate Articles 9 and 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 19(1)(a) of the Constitution of India. Similar provisions of TADA led to the arbitrary detention of people whom Amnesty International considered to be prisoners of conscience.
- Deletion of section 17 of the earlier draft of the Bill which limited the possibility of appeal only to one court -- the Supreme Court -- and not to both the High Court and Supreme Court as the Code of Criminal Procedure (CrPC) provides, which in Amnesty International's opinion would not have provided for an effective right of appeal as Article 14(5) of the ICCPR requires. Nor would it have provided for equal protection of the law for all citizens. The Supreme Court in *Kartar Singh vs State of Punjab* recognized that "the indisputable reality is that the Supreme Court is beyond the reach of an average person considering the fact of distance, expense, etc." The Human Rights Committee has

⁴ See Amnesty International's report, *The Terrorist and Disruptive Activities (Prevention) Act: The lack of 'scrupulous care'*, November 1994, AI Index: ASA 20/39/94 and report by the Peoples Union for Democratic Rights (PUDR): *Lawless Roads: A report on TADA 1985-1993* (September 1993).

held that if domestic law provides for more than one instance of appeal, the convicted person must have access to each of them.⁵

Amnesty International also welcomes the inclusion of section 38 in the Prevention of Terrorism Bill providing for compensation for victims of unlawful arrest and detention. In light of the Law Commission's observations that Supreme Court orders have created a right to compensation, in practice superceding India's reservation to Article 9(5) of the ICCPR on this matter, Amnesty International believes that the Government of India should adopt legislation to ensure that the law is in harmony with Supreme Court orders and promptly withdraw its reservation to Article 9(5).

In publishing its concerns about the Prevention of Terrorism Bill 2000, Amnesty International is adding its voice to the concerns of many domestic human rights organizations which have carefully studied the Bill and provided comments both publicly and to the Law Commission of India⁶, many on the basis of their experience of abuses under TADA. As an international human rights organization, Amnesty International's concerns in this document focus primarily on the proposed legislation's incompatibility with international human rights treaties, particularly the International Covenant on Civil and Political Rights (ICCPR), to which India is a party, but also the range of human rights non-treaty standards which together constitute an international framework for human rights protection.

Many of the rights in the ICCPR are reflected in the Constitution of India. The Constitution guarantees that the fundamental rights of every citizen be treated in accordance with the law and article 14 lays down that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Amnesty International believes that the proposed legislation will suspend certain safeguards to protection of the law to those detained under it and that it is therefore incompatible with this fundamental right.

Amnesty International acknowledges that governments have a right and duty to protect the rights and safety of people within their territory. The organization shares concerns about abuses of human rights by non-state actors and has repeatedly called on armed groups to abide by international humanitarian law. However, any legislation or actions taken towards these ends must be in full conformity with international human rights standards.

⁵ Views expressed by the Human Rights Committee in *Rapael Henry vs. Jamaica*, Communication No.230/1987, CCPR/C/43/D/230/1987, paragraph 8.4.

⁶ See for example, *Not another Terrorist Law Please!*, a critique of the proposed Criminal Law Amendment Bill, published by the Peoples Union for Democratic Rights, Delhi, February 2000.

1. The right to liberty and security of person

Article 9 of the ICCPR:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. 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.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. 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...

- X Amnesty International is concerned that the Bill (section 3(3)) contains punishment for "abetment" of "terrorist acts" without spelling out requisite intent. This omission can (and did under TADA) lead to the imprisonment of innocent people. The Supreme Court of India, in upholding the constitutionality of TADA in 1993 in *Kartar Singh vs. State of Punjab* ruled that "abet" should be read as including a "guilty mind" i.e actual knowledge or reason to believe that the person with whom one communicates was involved in those activities. This important aspect of the Supreme Court's judgement appears to have been ignored in drawing up the current Bill. This would apply also to section 3(6) of the Bill which provides for punishment for those holding property derived from commission of a "terrorist act" or acquired through "terrorist funds" whether or not this was done knowingly.
- X Under section 24 of the Bill, there is no provision for challenging the sufficiency of the prosecution evidence prior to trial. As a result, a person may be detained in custody awaiting trial without there being any evidence against him/her, or clearly insufficient evidence on which to base a conviction. The prosecution may simply institute proceedings in order to detain a person in custody. Amnesty International believes that there is inadequate provision for review of detention (see below) and in particular notes that the procedures for review of detentions set out under sections 31 and 39 do not provide for challenges to detention by the accused. Given that a large number of people detained under similar provisions of TADA for several years awaiting trial have been released by Review Committees on the grounds that there is insufficient evidence against them, Amnesty International is concerned at proposals to re-enact a provision which may invite use by law enforcement officials to preventively detain individuals.
- X The Bill (section 30(2)) allows for people to be detained for 90 days in police custody without charge or trial. This period can be extended to 180 days on application by the Public Prosecutor. Amnesty International believes that this provision of the Bill contravenes Articles 9(2) and 9(3) of the ICCPR which require that all arrested persons be promptly

informed of the charges against them and that they be entitled to trial within a reasonable time or release.

- X Section 31 of the Bill is of concern to Amnesty International as it provides for review of orders of detention by executive bodies: the Director General of Police (DGP) or the Review Committee (provided for in section 39 of the Bill) made up of government officials. International human rights standards and mechanisms require supervision of detention by an independent, preferably judicial body. Principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that detention must be "ordered by, or be subject to the effective control of, a judicial or other authority". "Other authority" is defined as a body "whose status and tenure shall afford the strongest possible guarantees of competence, impartiality and independence". However, the Bill provides that except for initial remand under an amended version of section 167 of the Code of Criminal Procedure (CrPC) by a judicial magistrate, executive officials would be responsible for supervising the detention of individuals.

Amnesty International is concerned at the absence of an effective procedure for review of the legality and necessity of detention. Reports suggest that in similar circumstances where authorisation is sought for detention from executive and judicial officers under existing legislation, these are often automatically approved without the officers applying their mind. A recent newspaper article concerning those detained under TADA in Jammu and Kashmir recorded how "Deputy Commissioners and Superintendents of Police had... deposed before the court that they were made to sign on the dotted line by agencies detaining militants".⁷

- X In addition, the provision of "Review Committees" in section 39 of the Bill does not, in Amnesty International's view, ensure sufficient independent supervision of detention as envisaged in international standards. There are no detailed guidelines concerning their operation, they rely exclusively on executive officers, there is no mention of the right of the detainee to make a representation before a Review Committee and there is no information provided on what exactly the powers of such Committees would be including whether or not they would have power to review whether the application of the Act is justified in terms of the objectives for its promulgation or lawful in terms of procedure.
- X Finally, the Bill (section 30(6) and (7)) effectively gives the power of determination of bail to a Public Prosecutor rather than the court by providing that no person accused of an offence should be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release and that where the Public Prosecutor opposes bail, it should not be granted unless "the court is satisfied that there are grounds for believing that the accused is not guilty of committing such offence" (see also under 'Right to fair trial' below). While Amnesty International welcomes the addition of the right to appeal against rejection or granting of bail in section 29(4) of the Bill, the organization believes that

⁷ "20,000 TADA cases filed in J&K, but none convicted", *Times of India*, 22 February 2000.

provisions relating to bail are contrary to Article of 9(3) of the ICCPR which provides that it shall not be the general rule that persons are detained prior to trial, but that release pending trial may be conditional on guarantees to appear for trial.

2. The right to fair trial

Article 14 of the ICCPR:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

X Section 18(3) of the Bill provides that determination of issues relating to the jurisdiction of Special Courts are decided by the government and not by law or the judiciary. This provision is inconsistent with the right to a trial before a competent, independent and impartial tribunal and Principle 3 of the Basic Principles on the Independence of the Judiciary which states that "The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law".

X Amnesty International is concerned that section 18(4) and (5) of the Bill which provides for the appointment of judges by the Central or State Government "with the concurrence of the Chief Justice of the High Court" may be inconsistent with the right to a trial before a competent, independent and impartial tribunal, particularly if judges are selected to try cases

in Special Courts set up in individual cases. Under Principle 14 of the Basic Principles on the Independence of the Judiciary, the assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

- X Section 25(1) of the Bill provides for trial *in camera* if the Special Court "so desires", with the reasons to be given in writing. Amnesty International believes that this section is in violation of Article 14(1) of the ICCPR as the decision to hold the trial *in camera* is based solely on the discretion of the court trying the case without reference to clearly defined criteria. International standards require that except in narrowly defined circumstances, all court hearings and judgements must be public.

- X Amnesty International is concerned that several provisions of the Bill undermine the right of presumption of innocence guaranteed in Article 14(2) of the ICCPR⁸, namely:

- X Section 4 of the Bill seeks to re-enact the former section 5 of TADA which was widely criticised. It raises an irrebuttable presumption that if a person is found in unauthorised possession of arms in a "notified area", such possession is automatically connected with "terrorist acts" and the offence, normally punishable under the Arms Act, becomes triable under the Bill's special provisions, where few legal safeguards and heavier sentences upon conviction apply. This provision was widely used and abused under TADA and it is important to note that one of the Supreme Court judges in *Kartar Singh vs. State of Punjab* gave a dissenting opinion when this section of TADA was upheld.

While Amnesty International notes that the Law Commission in its recent amendments to the draft legislation has amended the wording in the following sections from clear presumption of guilt to "the court shall draw adverse inference", Amnesty International remains concerned that the wording of these sections continue to create irrebuttable presumptions which infringe on the right of all people to be presumed innocent.

- X Section 22(2) whereby if an accused refuses to give samples of hair or blood, the court shall "draw adverse inference" against the accused.
 - X Section 34 which obliges the Special Court trying offences under the Bill to "draw the adverse inference" against the accused if arms or explosives or other substances are recovered from the possession of the accused and there is reason to believe that they were used in the commission of an offence and if an expert finds fingerprints of the accused on the site of the offence or on anything used in connection with the offence.
- X Section 30(7) of the Bill is clearly not in conformity with the right of presumption of innocence or provision of release pending trial enshrined in Articles 14(2) and 9(3) of the

⁸ The UN Human Rights Committee has explained: "By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is therefore the duty of all public authorities to refrain from prejudicing the outcome of the trial" [Human Rights Committee General Comment 13, para 7].

ICCPR by providing that bail cannot be granted if opposed by the Public Prosecutor "until the court is satisfied that there are grounds for believing that he is not guilty of committing such offence". This at a stage in the proceedings when the prosecution are not obliged to disclose evidence against the accused.

- X Section 24(5) provides that a trial can take place in the absence of the accused and his/her lawyer "if the court thinks fit". There is no objective element contained in this provision and no right to make representations or to appeal against such a decision. This provision may violate Article 14(3)(d) of the ICCPR which grants the right of the accused to be tried in his presence.
- X Sections 25(2) and (3) of the Bill allows for the identity and address of witnesses to be kept secret on the court's own initiative or on application of the witness or the public prosecutor if satisfied that the life of a witness is in danger. There is no procedure to hear the accused on this issue. This denies the accused the rights adequately to prepare his or her defence and to examine witnesses on the same terms as the prosecution as guaranteed by Articles 14(3)(b) and 14(3)(e) of the ICCPR. This provision, which was included in TADA, was criticized by the Supreme Court in the *Kartar Singh* case: "Whatever may be the reasons for the non-disclosure of witnesses, the fact remains that the accused persons to be put up for trial under this Act which provides severe punishments, will be put to disadvantage to effective cross-examining and exposing the previous conduct and character of the witnesses". International standards require that the rights of victims and other witnesses to be protected from reprisals and from unnecessary anguish have to be balanced against the right of the accused to a fair trial. Among the fundamental principles set out in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power are that "the views and concerns of victims [should] be presented and considered at appropriate stages of the proceedings... without prejudice to the accused and consistent with the relevant national criminal justice system".
- X Amnesty International is concerned that several provisions of the Bill may lead to violations of the right of an accused set out in Article 14(3)(g) of the ICCPR not to be compelled to testify against himself or to confess guilt. In particular section 27 which provides that confessions made to a police officer should be admissible in trial (see under 'The right not to be subjected to torture' below) could facilitate the use of torture to extract confessions.
- X Finally, Amnesty International is concerned that section 21 of the Bill allows individuals to be tried under the Bill's provisions which guarantee fewer safeguards and as set out above, do not comply with international standards for fair trial, even if the charges under the Bill are not proved. Concerns about this provision have been highlighted by the case of those tried under TADA in connection with the assassination of former Prime Minister Rajiv Gandhi. Although subsequently cleared by the Supreme Court of charges under the Act, by virtue of being tried under provisions of the Act they were denied certain safeguards for fair trial. The clemency petitions against sentence of death of three of those originally tried are currently before the President of India.

3. The right to freedom of expression

Article 19 of the ICCPR:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

- X Amnesty International is concerned that section 3(8) of the Bill (which provides for punishment for those in possession of information of material assistance in preventing a "terrorist act" or in securing the apprehension, prosecution or conviction of a person for an offence under the Act), could be used against journalists and others investigating and reporting on the activities of individuals under suspicion of the state and would directly impair their right to freedom of expression. This threat to the right to freedom of expression is reinforced by section 14 of the Bill which gives powers to investigating officers to require individuals to furnish information in their possession and provides for punishment of up to three years' imprisonment for failure to do so.

4. The right to association

Article 22(1) of the ICCPR:

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

- X Amnesty International is concerned that section 3(5) of the Bill, which criminalizes membership of a "terrorist gang" or "terrorist organization" punishable by imprisonment of not less than five years and up to life and a fine, may violate international standards. The section does not define the terms "terrorist gang" or "terrorist organization" or what constitutes membership thereof. Neither does this section require that the person accused has committed any particular act -- the crime is complete upon proof of membership which is not defined. Amnesty International is concerned that this provision is vague and over broad and could lead to violations of the right to freedom of association enshrined in Article 22 of the ICCPR.

5. The right not to be subjected to torture

Article 7 of the ICCPR:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 14(3)(g) of the ICCPR:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(g) Not to be compelled to testify against himself or to confess guilt.

- X Section 30(2) of the Bill effectively provides for 90 days' detention in police custody without charge or trial by order of a judicial magistrate which can be extended to 180 days in some cases (see also under 'The right to liberty and security of person'). Amnesty International believes that these are dangerously long periods in police custody in India where torture is acknowledged by the authorities to be widespread⁹. The right not to be compelled to testify against oneself or confess guilt is also rooted in the presumption of innocence (see under 'The right to fair trial').
- X Amnesty International is further concerned that the provision for remand includes the possibility for police to request the transfer of an accused from judicial to police custody for a period of time for the purposes of further investigation (section 30(2)). Based on reports received by Amnesty International of the regular use of torture by police to extract confession, the organization is gravely concerned that this provision could facilitate the use of torture.
- X Amnesty International is extremely concerned to note the inclusion in the Bill of section 27 which provides that confessions made to a police officer should be admissible in trial.¹⁰ Much has already been said about the dangers of abuse under this provision which existed in TADA. The decision of the Supreme Court bench to uphold this provision of TADA in 1994 was not unanimous. One Supreme Court judge found the section to be "unfair, unjust and unconscionable, offending Article 14 and 21 of the Constitution" (guaranteeing respectively the right to equality before the law and the right to life and personal liberty).

Torture by police to gain confession in India is widely documented and universally acknowledged. The Indian Evidence Act excludes from evidence confessions made to police and yet the current Bill seeks to make such statements admissible -- thereby risking sending

⁹ NHRC figures for the number of complaints received between 1 April 1999 and 31 March 2000 show 1,139 complaints of death in police or judicial custody and 5,783 complaints falling under the category of "other police excesses".

¹⁰ In 1995, Amnesty International welcomed the fact that this provision had been omitted from the Criminal Law Amendment Bill 1995.

a signal that use of torture by police to extract confessions would be acceptable in a certain class of cases. Such a concept is abhorrent to international standards.

Such a move would also appear inconsistent with the Government of India's repeated statements that it is committed to eradicating torture. It would also be inconsistent with its signature of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which binds India not to do anything which is inconsistent with the object and purpose of the treaty¹¹. The prohibition of torture is absolute and may not be suspended no matter how heinous the crime for which someone has been arrested. It is a right from which, under Article 4 of the ICCPR, the Government of India is not permitted to derogate, even in situations of emergency.

- X The Bill does not explicitly prohibit statements made to the police and extracted under torture from being admissible in evidence against an accused as international human rights standards require, notably the United Nations Declaration on the Protection of all Persons from being subjected to Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UN Declaration on Torture).

Amnesty International notes that additional provisions (sub-sections (2), (3), (4) and (5) of section 27) have been included in the Bill, designed to provide safeguards for detainees. However, there is no apparent provision for sanctions against police where these sub-sections are not complied with. Amnesty International welcomes that sub-section 4 contains a time limit (which was added by the Law Commission in its recent amendments) to ensure that a person from whom a confession has been recorded should be produced before a magistrate within 48 hours. However, it is still concerned that 48 hours is a dangerously long period of time. In addition, Amnesty International believes that under sub-section 5, magistrates should be obliged to ask the detainee about his treatment rather than placing the onus on the detainee to say that he has been tortured. It is common for police to threaten detainees to remain silent while being brought before magistrates. In addition, according to reports received by Amnesty International, when detainees are brought before magistrates, magistrates regularly do not even look up from their work to view the detainee, do not ask questions of the detainee and are sometimes unaware that the police have in fact brought someone other than the detainee in question before the court in order to hide marks of torture. Amnesty International believes that these unlawful but common practices need to be addressed and prevented in any new legislation.

In addition, Amnesty International notes the inclusion of certain safeguards under section 33(1), (2) and (3) of the Bill providing for the immediate communication about an arrest to be made to a family member or relative, the preparation of a custody memo and the presence of the legal representative of the person arrested to be present during interrogation. The organization welcomes these safeguards, several of which have been made law through the Supreme Court's judgement in the case of *D.K. Basu vs State of West Bengal* in 1996. However, it is aware that such safeguards continue to be widely violated. Therefore Amnesty International believes that

¹¹ The Government of India signed the Convention in October 1997.

penalties for non-compliance should be clearly set out and disciplinary or criminal proceedings enacted for failure to comply with these requirements. The organization believes that these safeguards should also be strengthened. For example, the accused could be required to sign and time-log the custody memo and the custody memo could then be produced for inspection by the legal representative on request and copies made available.

While Amnesty International welcomes the fact that the Bill provides for the presence of a legal practitioner "during the interrogation" (section 33(3)), the organization would be interested to know what measures would be put in place to ensure compliance with this provision and whether it applies only to initial interrogation on arrest or periods of interrogation in police custody throughout the person's detention under the Act. In addition, the presence of a lawyer during interrogation presupposes that there is a system by which people who do not have sufficient means will be appointed competent, experienced and effective defence counsel to represent them, including during questioning, free of charge as provided for in Article 14(3) of the ICCPR. Amnesty International believes that the Bill should state clearly that all detainees will have the right to immediate access to legal advice and to have their lawyers present during any period of interrogation throughout their detention and will be informed of this right. International standards, including the UN Basic Principles on the Role of Lawyers and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, establish the right of all detained people to have access to a lawyer during pre-trial phases and the investigation.

In addition, Amnesty International is concerned about the exclusion of those who are not citizens of India from these safeguards. While it understands that there may be practical difficulties in immediately communicating information about an arrest to a family member or relative in a different country, international standards require that if the person detained or arrested is a foreign national, they must be promptly informed of their right to communicate with their embassy or consular post. The Vienna Convention on Consular Relations requires that an arrested, detained or imprisoned person be informed of this right without delay; Principle 16(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that this information be provided promptly. Amnesty International believes that the detaining authority could be required to notify a person of choice, including an international organization, or a diplomatic representative of the country of origin of the detainee of his or her detention to ensure that they are not dealt with in a prejudicial manner.

6. The right to redress

Article 2(3) of the ICCPR:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

- X Section 37(1) of the Bill provides for immunity from legal proceedings and prosecutions for the Central and State governments and officials acting "in good faith" under the legislation. Amnesty International has for many years repeated its concerns about impunity for human rights violations in India. In particular it has expressed concerns about provisions replicated in numerous laws which restrict the right of individuals to challenge the actions of the government.
- X The organization is extremely concerned to note the addition by the Law Commission under section 37(1) of the Bill of a further proviso that refers to immunity for "any serving member or retired member of the Armed Forces or other para-military forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combatting terrorism". This extremely broad provision which does not even limit its remit to actions taken in good faith under the Act but to undefined "operations directed towards combatting terrorism", in Amnesty International's view would provide for blanket immunity for abuses by security forces and undermines any safeguards proposed in the current Bill.

While Amnesty International acknowledges that section 37(2) of the Bill provides for the possibility of punishment of a police officer for corrupt or malicious proceedings, it believes that this provision is not sufficient to guard against impunity since as seen above, important limitations still exist against challenging the actions of not only police officers but other executive and judicial officials involved in the arrest and detention process.

7. The death penalty

UN Commission on Human Rights resolution (2000/65) of April 2000:

calling on all States that still maintain the death penalty to "progressively restrict the number of offences for which the death penalty may be imposed; to establish a moratorium on executions, with a view to completely abolishing the death penalty; and to make available to the public information with regard to the imposition of the death penalty".

Amnesty International is concerned to note the provision of the penalty of death for certain "terrorist" offences under section 3(2)(i) of the Bill. Amnesty International opposes the death penalty unconditionally on the grounds that it is the ultimate form of cruel, inhuman and degrading punishment and a violation of the right to life. The Human Rights Committee when examining India's third periodic report under the ICCPR in 1997 recommended that the number of offences carrying the death penalty be reduced with a view to its ultimate abolition. Amnesty International's concern about including provisions allowing for the death penalty in this legislation are heightened by its belief that provisions of the legislation provide for the possibility of unfair trial.

CONCLUSION

When the UN Human Rights Committee examined India's third periodic report in 1997 it welcomed the lapse of TADA and expressed concern that "there are legislative proposals to reintroduce parts of the act and that this could lead to further violations of the Covenant."¹² Amnesty International believes that provisions of the proposed Prevention of Terrorism Bill if enacted will facilitate the violation of rights which the government is obligated to safeguard enshrined in the ICCPR.

As a party to the ICCPR, the Government of India cannot derogate from rights set out within the treaty without officially declaring a state of emergency¹³. Certain rights within the ICCPR are non-derogable under any circumstances¹⁴ including the right not to be subjected to torture, which Amnesty International believes is threatened by provisions of the proposed legislation. In hearing India's second periodic report of measures taken to implement the government's obligations under the ICCPR, members of the UN Human Rights Committee expressed concern that TADA abrogated rights within the ICCPR, in effect establishing a continuing state of emergency. They further expressed concern that no emergency had been formally declared by the Government of India as required under the ICCPR and that no time limit had been indicated for the term of such a situation of emergency. The latter concern is particularly relevant in light of the fact that the Prevention of Terrorism Bill is proposed for a five-year term (as opposed to TADA which had a two-year term).

Amnesty International believes that in discussing the enactment of this legislation, Members of Parliament should be mindful of India's obligations under human rights treaties as well as its obligations to the people of India under the Constitution. By enacting the Prevention of Terrorism Bill as it now stands, Parliament would be giving its assent to the violation of articles of this important Covenant set out above as well as articles of its own Constitution.

¹² Concluding observations of the Human Rights Committee, India, UN doc CCPR/C/79/Add.81, 4 August 1997, para 24.

¹³ Article 4(1) of the ICCPR states that "In times 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, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

¹⁴ Article 4(2) clarifies that no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made.

WHAT YOU CAN DO:

Address the questions and summary of concerns set out below to the Law Minister and the Home Minister:

- Pointing out that while Amnesty International acknowledges that governments have a right and duty to protect the rights and safety of people in their territory, any legislation or actions taken towards these ends must be in fully conformity with international human rights standards;
- Expressing concern that in discussing any draft legislation, the experience of widespread abuses which occurred in the application of the Terrorist and Disruptive Activities (Prevention) Act (TADA) be fully drawn on and requesting information on what steps have been taken to review the application of that Act and to learn from this experience;
- Urging that the Government of India ensure a full and open discussion of the draft legislation within Parliament and within society at large as, if made law, the legislation would have a bearing on the human rights of all people in India.
- Expressing concern that various provisions of the draft legislation violate international human rights standards to which India is a party, notably the International Covenant on Civil and Political Rights and in Amnesty International's view would facilitate widespread violations of human rights including the right to fair trial, the right to liberty and security of person, the right to freedom of expression, the right to association, the right to redress and the right not to be tortured;
- Expressing concern in particular at the inclusion of provisions (section 27) in the draft legislation which under TADA led to the widespread use of torture and ill-treatment and which Amnesty International fears may lead to similar human rights violations at a time when India (by signing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) has bound itself not to do anything which is inconsistent with the object and purpose of the Convention against Torture.

Write to:

Mr Ram Jethmalani
Law Minister
Ministry of Law, Justice &
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4th Floor, A Wing
Shastri Bhavan
New Delhi 110 001, India

Mr L.K. Advani
Home Minister
Ministry of Home Affairs
North Block
New Delhi 110 001
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**Amnesty International's report
India, The Prevention of Terrorism Bill 2000: Past abuses revisited?
June 2000, AI Index: ASA 20/22/00**

ERRATA

Chapter 1: The right to liberty and security of person

Page 4, lines 38-40 should read: "The Bill (section 30(2)) allows for people to be detained for 90 days in custody without charge or trial." This period can be extended to 180 days on application...

Chapter 5: The right not to be subjected to torture

Page 10, lines 8-12 should read: "Section 30(2) of the Bill effectively provides for 30 days detention in police custody without charge or trial by order of a judicial magistrate. Amnesty International believes this section allows for dangerously long periods in police custody in India where torture is acknowledged by the authorities to be widespread." The right not to be compelled...

