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India

Abuse of the law in Gujarat: Muslims detained illegally in Ahmedabad

November 2003 Summary AI Index: ASA 20/029/2003

This report presents well-founded reports of the widespread use of arbitrary and illegal detention by Crime Branch police in Gujarat in the past year, in violation of national and international law. Evidence is also presented of the torture or ill-treatment of detainees.

These human rights violations are being carried out in the context of a large number of arrests of individuals suspected of involvement in a range of alleged conspiracies against the state. These alleged conspiracies include the killing of 59 Hindus in Godhra in February 2002 (which sparked communal violence resulting in the deaths of over 2,000 Muslims in the following three months) and subsequent acts of violence which are alleged to have been planned and carried out in retaliation for the killing of Muslims.

Scores of Muslim men are reported to have been illegally detained since March 2003, in the Gayakwad Haveli Police Station in Ahmedabad run by the Crime Branch. While many of them have subsequently been formally arrested under the Prevention of Terrorism Act, a large number of illegal detainees are reported to remain in custody in the Police Station. The report points to the climate of fear prevailing within the Muslim community in Gujarat, which means that most are too scared to make official complaints about illegal detention or about torture and ill-treatment (although there are unconfirmed reports of the latter).

The report further points to the failure of the courts to take action when confronted with allegations of illegal detention and torture, thereby denying those illegally detained the opportunity to obtain redress.

Amnesty International is calling on the authorities in India to urgently address this situation by setting up an independent investigation into these reports, bringing those responsible to justice, providing redress to the victims and making a public commitment to the rule of law.

This report summarizes a 20-page document, India, Abuse of the law in Gujarat: Muslims detained illegally in Ahmedabad (AI Index: ASA 20/029/2003) issued by Amnesty International in November 2003. 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:

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Abuse of the law in Gujarat: Muslims detained illegally in Ahmedabad

I. Introduction

This document presents well-founded reports of the use of arbitrary and illegal detention by Crime Branch police in Ahmedabad in the past year. Evidence is also presented of the torture and ill-treatment of detainees. These human rights violations are being carried out in the context of a large number of arrests of individuals suspected of involvement in a range of alleged conspiracies against the state[1]. These alleged conspiracies include the killing of 59 Hindus in Godhra in February 2002 (which sparked communal violence resulting in the deaths of over 2,000 Muslims in the following three months) and subsequent acts of violence which are alleged to have been planned and carried out in retaliation for the killing of Muslims (further information is provided in Section II of this report).

All those formally arrested and charged in relation to these conspiracies are Muslims and almost all have been charged under provisions of the Prevention of Terrorism Act, 2002 (POTA).[2] Many of these spent periods of time in illegal detention prior to their "formal" arrest. Others reportedly continue to be held indefinitely in illegal detention.

This report focuses on the abuse of arrest and detention procedures in relation to these arrests. It reinforces concerns about the breakdown of the rule of law in relation to the Muslim minority in the state and the increase in human rights violations facilitated by the use of POTA.[3] Amnesty International is also aware of significant concerns about procedures for fair trial raised by advocates acting for some of those detained under POTA.

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[1] The Crime Branch has been given the major responsibility for investigating the conspiracies in the state.

[2] According to press reports, all but one of 240 people charged under POTA in Gujarat are Muslims (*240 Pota cases, all against minorities*, Times of India, 15 September 2003).

[3] In October 2001 the President of India signed the Prevention of Terrorism Ordinance (POTO) which gave Indian police sweeping powers of arrest and detention. The Ordinance was modelled on the former Terrorist and Disruptive Activities (Prevention) Act, 1987, with a few modifications. POTA was subsequently enacted on 26 March 2002 but the Act states that its provisions are deemed to have come into force on 24 October 2001. Those accused of crimes before the enactment of POTA have therefore had charges retroactively applied. Amnesty International has previously raised concerns about provisions of POTA which undermine internationally recognised standards for fair trial and is continuing to monitor the application of POTA in Gujarat and other states of India. See *India: Briefing on the Prevention of Terrorism Ordinance*, November 2001, AI Index: ASA 20/049/2001.

Information received by Amnesty International indicates that in the course of operations to identify and take into custody those allegedly involved in these conspiracies, Crime Branch police in Ahmedabad from Gayakwad Haveli Police station have routinely resorted to arbitrary and illegal and incommunicado detention, denied access of detainees to lawyers and relatives, denied access to medical attention and used torture or ill-treatment to induce confession. Provisions of POTA which were claimed as "safeguards" for detainees by the Government of India when the statute was passed, appear to have been routinely ignored, along with legal safeguards contained in the ordinary criminal law and Supreme Court guidelines for arrest and detention. While evidence presented in this report relates specifically to Gayakwad Haveli Police Station, Amnesty International is concerned that patterns of illegal detention may be being replicated in other areas of the state where there is even less scrutiny of police practises. The fact that senior a state police official appears to have endorsed the illegal actions of police heightens these concerns (see under Section IIIi below).

The courts in Gujarat have to date failed to take any action to prevent or investigate and prosecute most of these illegal actions despite on occasion being confronted with allegations and evidence. The widespread use of incommunicado detention by police against members of the Muslim minority in Ahmedabad is reported to have terrorised the Muslim community who have been too scared to make official complaints.[4] Detailed information on other individuals has been almost impossible to confirm because of the reluctance of relatives to make complaints for fear of retribution preventing lawyers from challenging the illegal detentions in any formal legal proceedings.

The cases of two men which are presented in this report are somewhat unique in that a complaint concerning their treatment was presented before the Gujarat High Court. However, concerned for the safety of the two men and their relatives, Amnesty International is withholding their names from publication.[5]

Amnesty International understands that only a handful of *habeas corpus* petitions have been filed on behalf of those illegally detained, because of the overwhelming fear of retribution amongst relatives and even lawyers. However, what is of considerable concern is that the High Court appears to have ignored their complaints thereby denying them their right to have their complaint of torture independently and impartially investigated as set out under Article 13 of the United Nations (UN) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture). Their cases appear to exemplify the routine flouting (and acceptance of that flouting) of safeguards against torture or ill-treatment by institutions of the criminal justice system.

[4] *Muslim community traumatised in Godhra*, Hindu, 29 April 2003.

[5] The names of the two men and their wives are being provided by Amnesty International to the National Human Rights Commission with a request that the Commission investigates their cases and the broader pattern of illegal detentions, and ensures adequate protection for the men and their families.

Amnesty International would like to point out that in researching information on which this report is based, it has not been able to visit Gujarat to interview detainees or police or government officials concerned, as it would have liked to have done. Unfortunately the organization's request for a visit to Gujarat has so far been denied by the Government of India. However, this report is being sent to the authorities in Gujarat and Delhi for comment. It is based on discussions with lawyers and human rights activists (many of whom have been subjected to threats and harassment because of their work on these issues); publicly available legal documentation and press reports.[6]

II. Background

The context in which these arrests have been taking place is one of heightened communal tension, with allegations that the ruling Bharatiya Janata Party (BJP) government of the state actively connived in violence against Muslims perpetrated in the aftermath of the killing of Hindus in Godhra in February 2002.[7] More than 2,000 people, predominantly Muslims, were killed, and thousands more were displaced from their homes between the end of February and May 2002 in Gujarat. Sporadic incidents of communal violence continue to this day. Allegations of state connivance in the violence against Muslims have been given strength by the failure of the criminal justice system to bring those responsible to justice – a fact highlighted by the Supreme Court in a recent order which reportedly referred to "connivance" between the government and prosecution service.

As of mid-October, Amnesty International understands that there are 82 accused in detention in the Godhra conspiracy case. Around 50 accused have been declared to be absconding.

The authorities in Gujarat allege that in retaliation for the violence against Muslims, a series of conspiracies were hatched, to target Hindus and prominent officials held responsible. The former Home Minister of Gujarat Haren Pandya was shot dead on the morning of 26 March 2003. In the wake of his killing and following a series of arrests, Gujarat police claimed to have uncovered a wide-ranging conspiracy. The conspiracy was alleged to have encompassed a series of bomb blasts in Gujarat in May and September 2002 and an attack on *Vishwa Hindu Parishad* [World Hindu Council] leader Jagdish Tiwari. Young Muslim men were alleged to have been trained by the Inter Service Intelligence agency (ISI) in Pakistan. This has become

[6] The harassment and intimidation of human rights defenders working with members of the Muslim community in the state appears to be widespread. For example, see Amnesty International's Urgent Action update. AI Index: ASA 20/024/2003, 2 September 2003, Fear for the safety of Teesta Setalvad (f), Rais Khan Azeezkhan Pathan (m), Suhel Tirmizi (m) and other human rights defenders in Gujarat state.

[7] A train transporting a large number of Hindu *kar sevaks* returning from the city of Ayodhya, in the state of Uttar Pradesh, where they had taken part in a program promoted by the *Vishwa Hindu Parishad* (World Hindu Council), was set on fire at Godhra, in Gujarat. The exact circumstances of the incident are disputed. Fifty-nine passengers, including 15 children and 25 women, were burnt alive.

known as the "ISI conspiracy", for which Amnesty International has been informed that police filed a First Information Report under which offences can be filed for a period running from April 2002 to April 2003. Scores of suspects have been detained illegally or formally under POTA in connection with this conspiracy, including the two men referred to below.

An attack on the Akshardham Hindu temple on 24 September 2002 in Gandhinagar in which at least 26 people were killed and over 40 injured has also led to allegations that the attack was planned by "Islamic militants and Pakistani intelligence operatives" and has led to a number of arrests in Gujarat, Andhra Pradesh and Jammu and Kashmir.

III. Bias within the criminal justice system in Gujarat

The processes of seeking redress by victims of communal violence in Gujarat have raised concerns about the impartiality of institutions of the criminal justice system in the state, including the police, prosecution service and elements of the judiciary. This led to the National Human Rights Commission (NHRC) in August 2003 filing a Special Leave Petition in the Supreme Court seeking orders for five key cases in which individuals are accused of perpetrating communal violence, to be tried outside the state, expressing deep concern about the "damage to the credibility of the criminal justice delivery system and negation of human rights of victims."

In the face of severe criticism from the international community as well as human rights organisations and the NHRC, the Chief Minister of Gujarat, Narendra Modi asserted in a letter sent to the President of India in August 2003, that the state had "not deviated from the principles enshrined in the Constitution." This report demonstrates the hollowness of that claim. It points to violations of numerous fundamental rights set out in the Constitution of India, including: equality before the law (Article 14); prohibition against discrimination (Article 15); protection of life and personal liberty (Article 21); and protection against arrest and detention in certain cases (Article 22). The practices of Gujarat police are also in clear contravention of international human rights standards to which India is a party.

IV. Blatant abuse of the law against members of the Muslim community

The cases of W and X (names withheld for security)

In two *habeas corpus* petitions (No.658 and 650 of 2003) filed in the Gujarat High Court on 7 July 2003, Y and Z, the wives of two men - W and his father X - claimed that their husbands had been arrested by Crime Branch police officers and were being illegally detained. Twenty-year-old Y, resident of Ahmedabad, alleged that her husband W had been arrested from his father's house in Ahmedabad on 15 June and that she had not seen him since. Forty-year-old Z alleged that she had not seen her husband since he left for Jammu on business on 19 May

but that she had been told unofficially that her husband was being illegally detained with his son, at the Gayakwad Haveli Police Station in Raikhad, Ahmedabad, having been arrested in Jammu some time after 20 June. Despite approaching Crime Branch officials on several occasions, the women were told that their husbands were not in custody.

The two women approached a lawyer with their concerns about their husbands' safety. On 7 July, *habeas corpus* petitions were filed in the Gujarat High Court asking the court to direct the authorities to reveal their whereabouts. The petitions were heard on 8 July and notice issued to the Crime Branch to discover the whereabouts of the two men. The court set the next date of hearing for the Crime Branch to respond, for 11 July.

On 9 July Crime Branch officers reportedly called the two women to the Gayakwad Haveli Police Station where they were allowed to meet their husbands for a period of around two hours, in the presence of police officers. In a subsequent affidavit filed before the Gujarat High Court, Y testified:[8]

"*we could see with our own eyes that they were very much beaten and there was swelling on the entire body. My husband and my father were so much frightened that they could not properly talk to us. Throughout our meeting they were weeping. They have specifically told us that they have not been beaten at all for the obvious reasons. However, that was not at all true. They could barely walk and that was enough to suggest their physical condition.*"

The two men gave their wives letters in Urdu telling them to withdraw the petitions or they would be killed. The women were then threatened by the Superintendent of Police not to pursue the petitions or their husbands, and they themselves, would be charged under POTA:

"*That Police Inspector A threateningly told us to withdraw our respective petitions. He told us to accompany him to tender apology of his senior police officer for filing petitions before this Honourable Court or else the consequences could be unthinkable.*"

The women also testified that they had seen many other detained people in the Gayakwad Haveli Police Station who were handcuffed or chained and who indicated that they were being held in illegal detention without the knowledge of their families.

For fear of the consequences and under extreme pressure from the police, the two women agreed to withdraw their petitions. The next day - 10 July - Crime Branch officers drove the women to the High Court where they signed an affidavit testifying that their husbands had called them from the state of Jammu and Kashmir saying that they were safe and that therefore they now wanted to withdraw their *habeas corpus* petitions.

However, the lawyer acting for the two women persuaded them to pursue the case in the High Court and affidavits testifying to their meeting with their husbands were filed at the hearing on 11 July. In response, the Court repeated its request to the Crime Branch to give a statement as to the whereabouts of the two men. The Crime Branch continued to deny they were in their custody. The High Court gave an order saying that even if the two men were not in Crime

[8] This is a translation from the original Gujarati.

Branch custody, the state had a duty to discover their whereabouts and adjourned the case for a further six days till 17 July.

On 16 July (as reported in the media on 17 July) W and X were produced, along with two other men, by Crime Branch officers in the special court established to administer POTA cases in Ahmedabad.[9] Police claimed that they had been arrested the previous day at a railway station in Ahmedabad, with bullets and money in their possession and had been arrested in connection with the 'ISI conspiracy' case. The Crime Branch officers failed to mention to the special court that the two men were the subject of *habeas corpus* petitions in the High Court and the special court remanded them to 15 days police custody.

At the High Court hearing of the *habeas corpus* petitions on 17 July, lawyers appearing for the state testified to the court that the two men had been arrested under POTA and had been produced before the Special POTA Court and were now in custody. In response, the judge indicated that the *habeas corpus* petitions were no longer valid because the two men were in legal custody and dismissed them.

The judge did not take any action to investigate the claims of illegal detention or torture or to provide remedy despite evidence before him that the two men had been illegally detained for a month and had been subjected to torture or ill-treatment. In response to a request by lawyers acting for the wives of the two men to be granted leave to appeal to the Supreme Court, the judge stated:

"In our opinion, no substantial question of law of general importance is involved in these petitions which is required to be decided by the Hon'ble Supreme Court."

Both men continued to be remanded to police custody until they were finally sent to jail in the second week of August. They have reportedly refused to provide testimony regarding their period of illegal detention or to confirm their wives' allegations of torture, for fear of retribution.

i. Illegal detention

Amnesty International has received information that scores of Muslim men have been illegally detained for questioning in connection with the killing of former Home Minister Haren Pandya (see above). Amnesty International was told by a local lawyer that between the end of March and the beginning of May 2003, up to 380 people had been called by police for interrogation. Arrests have continued after May and are reported to be still continuing. The men are not formally arrested and no records are kept of their detention and interrogation by police. In some cases, this "interrogation" is reported to last for two weeks, while in other cases it lasts one or two days. Some detainees have been allowed to see their families during this period and in other cases relatives have been able to provide food for the young men but not been permitted to see them. Most detainees are reported to have been held at the

[9] *ISI links: Four arrested*, Indian Express (Ahmedabad), 17 July 2003.

Gayakwad Haveli Police Station in Ahmedabad, the headquarters of the Crime Branch. At the end of September 2003, Amnesty International received unconfirmed reports that between 25 and 80 individuals were illegally detained at this police station.

There are unconfirmed reports of routine beating during interrogation at Gayakwad Haveli Police Station. Following interrogation for several days or sometimes weeks, some arrests have been formalised, with the date of arrest shown in relevant documents as this later date, and with the period of interrogation not formally acknowledged. The arrests of around half of the 380 people reportedly arrested between the end of March and the beginning of May are reported to have been formalised in this way.

Most family members appear to be too scared to make representations to the authorities about illegal detention. However, in a rare show of public anger, members of the Muslim community in various parts of Ahmedabad observed a *bandh* [shut-down] on 2 September in protest at the arbitrary arrest and illegal detention of Muslims. This was sparked by the arrest of five men, including two clerics, in connection with the attack on the Akshardam Temple in September 2002.[10] The wife of one of the suspects publicly claimed that her husband had been detained on 9 August, not on 25 August as police claimed, and that she had visited him on four occasions in Crime Branch custody during his period in illegal detention. She was reported as saying: "The police told us that my husband had been picked up for interrogation and that we should not talk to anybody or hire a lawyer or they would inflict charges on him which would keep him behind bars for more than 20 years."[11]

Amnesty International is extremely concerned at reported comments attributed to the Joint Commissioner of Police (Crime), that people were regularly detained for questioning for days at a time without being formally arrested or brought before a magistrate. He is reported to have commented: "We do not arrest a person as soon as he is detained. We first question him and after we have established his *prima facie* involvement in the crime, he is arrested. And we have powers under the CrPC [Code of Criminal Procedure] to call any person for questioning."[12]

[10] The two clerics formed the Human Welfare Trust after the riots, which took over the running of a hospital in Dariapur from the Ahmedabad Municipal Corporation in January 2003. Local Muslims have accused the authorities of targeting the clerics because they were providing services to the Muslim community.

[11] *Gujarat Muslims strike to protest police action*, Agence France Presse, 2 September 2003.

[12] *Kill-Modi plot: no evidence as yet*, Indian Express, 18 October 2002. His comments were made when the Indian Express questioned the discrepancy in the dates of arrest of Smirkhan Sarfarazkhan Pathan who was arrested on 27 September 2002 but was shown arrested by the Crime Branch on 1 October when the court remanded him to further police custody. He was shot dead by police while in custody on 22 October after allegedly trying to escape. See also *Pandya Killing: Muslims get midnight knocks*, Hindustan Times, 21 April 2003, which cites cases of individuals illegally detained and quotes the Joint Commissioner of Police (Crime) as admitting that number of people had been picked up for interrogation.

This statement indicates that police in Gujarat have been acting contrary to Indian law which governs arrest and detention and Article 21 of the Constitution which denies the deprivation of personal liberty except according to procedure established by law. The CrPC does not allow for detention for questioning for days at a time without an individual being brought before a magistrate. This position was reinforced by the Law Commission of India in its 177th Report issued in December 2001 on the Law Relating to Arrest. In that report it referred to consultations held on the issue of arrest and concluded as follows:

> *"In para 3.8 of the Consultation Paper, a proposal was put forward to the effect that no arrest shall be made and no person shall be detained merely for the purpose of questioning. It was pointed out that such arrest or detention amounts to unwarranted and unlawful interference of the personal liberty guaranteed by Article 21 of the Constitution. There was no serious opposition to this proposal from any quarter. Indeed, this proposal follows from what we have stated hereinabove, namely, that arrest should not be made in a casual manner but only on the basis of some material on the basis of which, the police officer is reasonably satisfied that arrest of such person is necessary. It cannot be that the police is permitted to detain anyone they like and question him with a view to find out whether he has committed any cognizable offence. Such an absolute power cannot be conceded under our constitutional system. If questioning any person suspected of committing a cognizable offence is found necessary for the purposes of investigation, he may be questioned by the police officer either at the residence of the person or at such other place as may be indicated by the person and agreed to by the police officer."*[13]

In addition, Supreme Court safeguards - which include the requirement to produce witnessed memos of arrest; to inform a relative or friend of detention "as soon as practicable"; to maintain detailed records of arrest and detention; to permit a detainee access to a medical examination; and to permit access to a lawyer during interrogation - apply to "all cases of arrest and detention".[14]

Two of these safeguards also appear in section 52 of POTA which states that:

> *(1) Where a police officer arrests a person, he shall prepare a custody memo of the person arrested.*
> *(2) The person arrested shall be informed of his right to consult a legal practitioner as soon as he is brought to the police station.*
> *(3) Whenever any person is arrested, information of his arrest shall be immediately communicated by the police officer to a family member or in his absence to a relative of such person by telegram, telephone or by any other*

[13] Page 122.
[14] *D.K. Basu v. State of West Bengal*

means and this fact shall be recorded by the police officer under the signature of the person arrested.
(4) The person arrested shall be permitted to meet the legal practitioner representing him during the course of interrogation of the accused person:
Provided that nothing in this sub-section shall entitle the legal practitioner to remain present throughout the period of interrogations.

Section 167 of the CrPC provides that if a person is arrested and detained in custody and the investigation cannot be completed within a period of twenty-four hours, the person should be sent to appear before the nearest judicial magistrate. This reflects Article 22(2) of the Constitution which provides that "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest." Magistrates are permitted under section 167 CrPC to remand persons arrested for a further period of police custody of up to fifteen days. POTA (section 49(2)) allows for that period of police custody to be up to thirty days.

Sections 342 to 348 of the Indian Penal Code provide for punishment for wrongful confinement. Section 345 provides for imprisonment for up to two years for wrongful confinement of a person for whose liberation writ has been issued. Referring to these sections, the Law Commission has confirmed that they are relevant to the offence of illegal detention by police:

"If a person is illegally arrested or is arrested without any justification whatsoever or where the arrest is proved to be mala fide or actuated by extraneous considerations, the police officer concerned can be prosecuted for wrongful confinement of that person which is an offence under section 342 of the Indian Penal Code; if the wrongful confinement is for three or more days it is section 343 and in case it is for ten days or more, it would be section 344. Sections 343 and 344 are aggravated forms of the offence specified in section 342."

The detention of individuals in a police station or unofficial detention centre without recording the fact is a fundamental human rights violation which encourages further abuse in the form of torture. Detainees are effectively "disappeared"[15] and deprived of all rights and law enforcement officials have unfettered power over them. The UN Commission on Human Rights has repeatedly stated that "prolonged incommunicado detention may facilitate the

[15] "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time (Rome Statute, Article 7(2)(i)).

perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment."[16] The Special Rapporteur on Torture has further stated the following:

> *"Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal, and persons held incommunicado should be released without delay. Information regarding the time and place of arrest as well as the identity of the law enforcement officials having carried out the arrest should be scrupulously recorded; similar information should also be recorded regarding the actual detention. Legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention. Security personnel who do not honour such provisions should be punished. In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association. In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours."*[17]

Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR) requires that "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." The climate of fear which is reported to be preventing detainees or their relatives from bringing proceedings before a court and the court's apparent disregard for the rights of detainees is effectively denying detainees in Gujarat their right to this vital remedy.

The right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required to prevent enforced "disappearances" under all circumstances (Article 9 of the UN Declaration on the Protection of all Persons from Enforced Disappearance). In India, High Courts and the Supreme Court are granted powers to issue writs in response to *habeas corpus* petitions under Articles 226 and 32 respectively of the Constitution. The Supreme Court has held that *habeas corpus* petitions should be heard expeditiously. In light of this, Amnesty International is extremely concerned that the High Court, after hearing evidence of the illegal detention and torture of W and X, gave Crime Branch officials six days to respond. This despite the fact that the lawyers for the two women requested the court to order an immediate inspection of the Crime Branch

[16] For instance, E/CN.4/RES/1998/38, 17 April 1998, para. 5; E/CN.4/RES/1999/32, 23 April 1999, para. 5; E/CN.4/RES/2000/43, 20 April 2000, para. 7.

[17] UN Doc A/156/56, para 39(f), 3 July 2001.

police station and argued that if sufficient time was given to the Crime Branch they would show the two men as having been arrested under POTA.

The UN Declaration on Disappearances provides that competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found. In the Indian state of Punjab, where hundreds of "disappearances" took place in the 1980s and early 1990s, the courts on occasion directed warrant officers to inspect places of detention to look for detainees in response to *habeas corpus* petitions. To Amnesty International's knowledge, to date, the courts in Gujarat have not availed themselves of these powers.

Amnesty International is further shocked at the attitude of the Gujarat High Court in dismissing the *habeas corpus* petitions in relation to W and X without reference to the evidence of illegal detention and torture. This is particularly so in light of Supreme Court jurisprudence which has pointed to the importance of taking a broad view in *habeas corpus* petitions. In 1980, the Supreme Court commented: "Access to human justice is the essence of Article 32. The liberating writ of *habeas corpus* is no longer trammelled by the traditional limits of English vintage; and that is why in India, as in America, the broader horizons of *habeas corpus* spread out, beyond the orbit of release from illegal custody, into every trauma and torture on persons in legal custody, if cruelty is contrary to law, degrades human dignity or defiles his personhood to a degree that violates Articles 21, 14 and 19 enlivened by the preamble."[18]

ii. Torture

Torture is prohibited under international human rights law. Even in states of emergency it is a non-derogable right, as emphasised in Article 2(2) of the Convention against Torture. Article 7 of the ICCPR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

Amnesty International is concerned at allegations that W and X were subjected to torture or ill-treatment while in police custody. Due to the prevailing (and in Amnesty International's view well-founded) fear of retribution, allegations of torture or ill-treatment from Muslims arrested in recent months in Gujarat have been few. On 22 July 2003 it was reported that 29 detainees brought before the special POTA court in Ahmedabad on 21 July complained that they had been coerced into making confessions and signing confessional statements by police detaining them.[19] Amnesty International has also received several unconfirmed reports of the torture and ill-treatment of those detained illegally. In such a situation, it is paramount that detainees are given opportunities to make complaints to an independent body and to be

[18] *Prem Shankar Shukla v. Delhi Administration* (1980) 3 SCC 526: 1980 SCC (Cri) 815.
[19] *29 produced before POTA court*, Indian Express, 22 July 2003.

protected from retribution during the course of any investigation and after, as required by the Convention against Torture. The role of an independent judiciary in providing such opportunities is crucial and a central tenet of international standards for the protection of detainees. However, Amnesty International is concerned that the judiciary in Gujarat has failed to carry out its obligations in this regard, despite the fact that evidence was placed before the court of the illegal detention and torture of W and X, practices in clear violation of both Indian law and international human rights standards to which India is a party.

Judges have a special responsibility to ensure that all allegations of torture which come to their attention at any stage of the judicial process are subject to prompt and impartial investigation by competent and independent bodies. Article 12 of the Convention against Torture states that "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."[20] Article 13 of the Convention goes further, stating that "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

Another important responsibility of judges is to ensure that statements extracted under torture or ill-treatment are not invoked as evidence in court proceedings, in line with international standards. Under section 32(4) of POTA, a person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or electronic device within forty-eight hours. Sub-section (5) further states that "... if there is any complaint of torture, such person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody."

International human rights standards are clear that no-one should be compelled to testify against himself or to confess guilt (Article 14(g) of the ICCPR). Article 15 of the Convention against Torture states that

> *"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."*

In addition, the Special Rapporteur on Torture has recommended that

[20] India has not yet ratified the Convention but as a signatory it is obliged not to do anything which is inconsistent with its object and purpose pending ratification.

> *"where allegations of torture or other forms of ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture or similar ill-treatment".*[21]

Finally, Amnesty International is concerned at reports that several detainees have been denied access to medical treatment while in detention.

iii. Access to legal representation

W and X were not given access to a lawyer while in police detention – either during the period of illegal detention or following their production in the POTA court. Lawyers filed an application with the lower court to gain access to the two men but were not immediately granted access to them. Amnesty International has been told that it is impossible for lawyers to see detainees held by the Crime Branch and that they are regularly forced to apply to the court for orders to visit clients. However, even when the court has issued orders, Amnesty International understands that police regularly continue to deny lawyers access. This is in clear violation of Indian law and international human rights standards.

Section 51(3) of POTA grants an arrested person the right to meet their legal representative during interrogation (and does not specify that special permission of the court has to be obtained). It is clear that in the case of W and X, as in many others, legal representation was actively denied by police.

Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, states that:

> *"A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it."*

Principle 1 of the UN Basic Principles on the Role of Lawyers states that:

> *"All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."*

Principle 7 further states that:

[21] Report of the Special Rapporteur's visit to Brazil, 30 March 2001, UN Doc E/CN.4/2001/66/Add.2, at page 56, para 169 (i).

"Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention."

While Principle 8 states that:

"All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."

iv. Discriminatory use of the Prevention of Terrorism Act

Amnesty International's concerns about provisions of POTA - under which people can be arrested on mere suspicion, can be remanded for exceptionally and dangerously long periods in police custody and detained without charge or trial for six months - are on record. To date POTA has been used to arrest and detain political opponents, members of particular communities and even children under 18 in states throughout India.

Initially the authorities detained those accused of involvement in the Godhra killings under POTO. However, following an outcry about the bias in detaining people accused of involvement in the killings at Godhra in February 2002 under POTO while detaining those accused of involvement in the subsequent communal violence under the ordinary criminal law, charges under POTO were withdrawn in the second week of March 2002. Nonetheless, POTA charges were reapplied in February 2003 to those accused of involvement in the killings at Godhra. According to the state authorities, the decision to re-apply POTA was taken following the confession of an accused who pointed to the involvement of Maulana Hassan Umarji, a local cleric, who, it was alleged, had planned the attack.[22] No charges were framed under POTA for those accused of taking part in the subsequent communal violence.[23]

Justifying the use of POTA in the case of the killing of former Gujarat Home Minister Haren Pandya case, the Deputy Superintendent of Police (CBI), S.K. Gupta in June 2003 argued that "investigations till now have revealed that a major conspiracy was hatched to strike terror in minds of a particular section of people in Gujarat by using firearms, causing death and injury

[22] On 28 August 2003, this accused reportedly retracted his confession, claiming that it had been "forced" (*Approver in Godhra case retracts confession*, Times of India, 30 August 2003).

[23] See *India: The state must ensure redress for the victims - A memorandum to the Government of Gujarat on its duties in the aftermath of the violence*, 28 March 2002, AI Index: ASA 20/005/2002, *India: Gujarat one year on -- the credibility of the criminal justice system is at stake*, 26 February 2003, AI Index: ASA 20/008/2003 and *India: Crimes against women in Gujarat – denied and unpunished*, 7 March 2003, AI Index: ASA 20/010/2003.

to persons as retaliation to the alleged indiscriminate murder of members of Muslim community during post-Godhra riots in Ahmedabad."[24]

This report does not address the application of POTA in these cases as such, although Amnesty International believes that there is an urgent need for a review of the application of POTA in Gujarat, as in other states.[25] The organization is concerned about the exclusive application of the Act against the minority community under definitions of "terrorist acts" which are extremely vague, and criminalization of conspiracy, abetment, advocacy and incitement (Section 3(3)) which are extremely broad. There are indications that the Act is being used arbitrarily and punitively against Muslims (as referred to earlier, the Act has been used only against Muslims and one Sikh in the state): reports indicate that police regularly threaten those illegally detained and their relatives that they will be charged under POTA if they fail to cooperate or make complaints about their treatment to the courts or human rights organisations. Such threats seriously call into question the legal and evidential basis on which individuals are being detained and subsequently charged under POTA and reinforce concerns expressed by Amnesty International and other human rights organizations at the time of the enactment of the Act that it would lead to an increase in human rights violations.

Exceptional circumstances?

The Gujarat government claims that it is taking action to foil a series of conspiracies against the state by Islamic militants backed by Pakistan, planned in retaliation for the killing of Muslims during communal riots. Acts of violence which target civilians such as those which have taken place in Gujarat in the past year and led to the deaths of a number of civilians, have been condemned by all sections of society, as well as Amnesty International. No one doubts that States have legitimate and urgent reasons to take measures to protect their nationals and others against violent attack and to bring the perpetrators of such acts to justice. The manner in which such measures are conducted, however, can have a far-reaching effect on overall respect for human rights.

States are required to act with respect for the human rights of all concerned. In the words of the Law Commission of India, "Whether it is for securing the liberty of an individual or for maintaining the peace and law and order in the society, law is essential. Not only should there be a proper law, there should also be proper implementation of law."[26] The abuse of the law

[24] *CBI slaps POTA charges on Haren Pandya killers*, Hindu, 2 June 2003

[25] In April 2003 the government constituted a Review Committee under section 60 of POTA. Its mandate permits it to "take a comprehensive view of the use" of the Act and entertain complaints or grievances, as well as to "suggest measures to ensure that the provisions of [POTA]... are invoked for combating terrorism only". On 27 October 2003 the President, A. P.J. Abdul Kalam, promulgated an ordinance to amend POTA to confer more powers on the Review Committee to make its decisions binding on the relevant authorities and on the police officers investigating the cases.

[26] 177th Report of the Law Commission, "Law relating to arrest", December 2001, p.6, available at www.nic.in/lawcom.

by police and contradictory reports concerning the responsibility for various acts of violence[27] only increase concerns that the Government of Gujarat is following up its tacit support for communal violence against Muslims in February 2002 with a targeted campaign to detain and imprison large numbers of Muslims in a discriminatory manner.

Article 4 of the ICCPR allows for derogation from certain rights in times of public emergency, but not all rights.[28] Importantly in this context, derogation must also never involve discrimination. Building on States' other obligations under international law, the UN Human Rights Committee has developed a list of elements that, in addition to the rights specified in article 4, cannot be subject to lawful derogation.[29] These elements include the following: all persons deprived of liberty must be treated with respect for their dignity; hostage-taking, abduction, and unacknowledged detention are prohibited; persons belonging to minorities are to be protected; unlawful deportations or transfers of population are prohibited; and "no declaration of a state of emergency... may be invoked as justification for a State party to engage itself... in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence."

On 8 March 2002, the UN Committee on the Elimination of Racial Discrimination[30] issued a statement recalling that the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted, and requesting States and international organizations to ensure that measures taken in the struggle against "terrorism" do not discriminate in purpose or effect on grounds of race, color, descent or national or ethnic origin. The Committee insisted that the principle of non-discrimination must be observed in all areas, in particular in matters concerning liberty, security and dignity of the person, equality before tribunals and due process of law, as well as international cooperation in judicial and police matters in these fields.

The Human Rights Committee, in its General Comment on Article 9 of the ICCPR (liberty and security of person) directed that:

> *"if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para.1), information of the reasons must be given (para.2) and court control of the detention must be*

[27] For example police from Gujarat and Jammu and Kashmir have given contradictory reports about the role of local Muslims in the attack on the Akshardham Temple.

[28] Article 4(2) of the ICCPR states that there can be no derogation from articles 6, 7, 8 (paragraphs 1 and 2, 11, 15, 16 and 18 of the Covenant.

[29] See General Comment No.29 of the Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001. The Human Rights Committee is the body established to monitor the implementation by States Party of the ICCPR and its Protocols.

[30] The Committee is the body established to monitor the implementation by States Party to the Convention on the Elimination of All Forms of Racial Discrimination. India has been a party to the Convention since 1968.

available (para.4) as well as compensation in the case of a breach (para.5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted."[31]

The application of POTA, therefore should not suspend these fundamental rights and Amnesty International notes that no formal state of emergency has been declared in Gujarat.

[31] Para 4.

V. Conclusion

Amnesty International is calling for urgent intervention to end the use of illegal detention in Ahmedabad. Abuse of the law in India in the form of illegal detention and torture is nothing new. Amnesty International and other human rights organizations have documented the practice over a number of years. However, information contained in this report points to a systematic pattern of human rights violations being carried out in Ahmedabad with the support of the state government and institutions of the criminal justice system with little or no chance of redress for its victims. It also reinforces concerns about discrimination against Muslims within the criminal justice system in the state.

Amnesty International is aware of the openly stated hostility of the Government of Gujarat to human rights organisations and "international interference" in its internal affairs.[32] But in ratifying international human rights instruments, India has recognised the international jurisdiction of the United Nations in relation to human rights. The state must answer internationally for violations of human rights.

[32] In August 2003, in his open letter to the President of India, Chief Minister of Gujarat Narendra Modi referred to "self-appointed and so-called champions of human rights groups" who obstruct the path of progress and made veiled criticisms of the NHRC's intervention in the issue of justice to victims of the communal violence, claiming that it had been "carried away by propaganda." (*Letter from Modi to President*, Indian Express, 6 August 2003).

VI. Recommendations

Amnesty International is addressing the recommendations which follow to both the Gujarat government and the Union Government, in recognition of their responsibility to ensure the human rights of their citizens and to provide justice where those rights have been violated:

- To immediately ensure the independent inspection of Gayakwad Haveli Police Station and all police stations in the state, to determine whether individuals are being illegally detained and whether up-to-date and accurate records of detention are being maintained. Amnesty International recommends that such an inspection be carried out by an independent judicial body.

- To ensure that all those illegally detained in Gujarat are immediately released.

- To ensure that where police are found to have acted illegally, prompt action is initiated against them, including the bringing of charges under sections 342-8 of the Indian Penal Code (punishment for wrongful confinement).

- To give a clear and public commitment that the requirement of sanction for prosecution of state officials found responsible for illegal detention and/or torture will not apply to these cases since illegally detaining an individual cannot be said to have been carried out in discharge of official duty. Claiming such immunity from prosecution would hold India in violation of Article 2(a) of the ICCPR which requires states 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."

- To ensure that all those in detention in Gujarat are provided with an opportunity to bring any complaints of torture or ill-treatment in a safe environment with meaningful assurances that they will not be subjected to reprisals.

- To ensure that any persons found to have been illegally detained are entitled to bring proceedings against police and to adequate redress, including compensation, in accordance with directions of the Supreme Court.

- To give clear and public instructions to police at all levels that detention of individuals for "questioning" without following formal procedures for arrest and detention is not lawful, and that such actions with be prosecuted.

- To ensure that all detainees are provided with prompt access to legal representatives as provided for in national and international in law and to ensure that immediate action is taken against any police officers denying such access. Additionally to ensure

that detainees are provided with prompt access to relatives and full access to a doctor and medical treatment where necessary, in accordance with the law.

- To make a clear commitment that state authorities will fully cooperate with the National Human Rights Commission in the future, granting it full access to detainees and places of detention where required.

- To facilitate an urgent and independent review of the cases of all those detained under POTA in Gujarat to establish the lawfulness of their detention.

- To ensure that police and other institutions of the criminal justice system in the state act in observance of Article 14 of the Constitution guaranteeing equality before the law irrespective of religion.

- To invite relevant UN human rights mechanisms – including the Special Rapporteur on Torture, the Special Rapporteur on the Independence of the Judiciary, and the Working Group on Arbitrary Detention - to visit India to study the law and practice regarding arrest and detention and make recommendations to ensure full compliance with international human rights standards.