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INDIA

Back to the Future

India's 2008 Counterterrorism Laws

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Back to the Future

India's 2008 Counterterrorism Laws

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I. Summary

On December 15, 2008, three weeks after a seaborne-based attack in Mumbai on November 26 killed at least 166 people and wounded over 300 others, the Indian government submitted two new counterterrorism laws to parliament. The next day, after only one day of debate, parliament adopted amendments to the Unlawful Activities (Prevention) Act 1967 (UAPA), India's principal federal counterterrorism law, and passed the National Investigation Agency Act (NIAA). Because neither draft law had been made public before the parliamentary session, each was adopted without significant input or scrutiny from the general public or Indian civil society organizations.

The 2008 laws contain provisions that mirror earlier counterterrorism legislation. Previous governments had allowed those laws to lapse, or repealed them, because they had led to serious human rights violations. The Terrorist and Disruptive Activities (Prevention) Act 1985 (TADA) was allowed to lapse under a sunset clause in 1995, while the Prevention of Terrorism Act 2002 (POTA) was repealed in 2004. These laws had been widely criticized within India and internationally for being in contravention of the Indian Constitution and India's obligations under international human rights law. Each had facilitated serious human rights abuses by government forces during counterterrorism operations, including arbitrary arrests, torture, extrajudicial killings and enforced disappearances. The abuses under POTA were so widespread and serious that the then-opposition Congress Party called for the repeal of the law in the 2004 general election campaign, and swiftly moved to do so once in office.

In reaction to the 2008 attacks, several of the most abusive provisions of TADA and POTA were revived, raising concerns that India will repeat the human rights violations of the past. While India, like all governments, has a responsibility to protect their citizens from terrorist attacks, the fight against terrorism must be conducted in accordance with international human rights law. Of particular relevance is the International Covenant on Civil and Political Rights (ICCPR), to which India is a state party, which sets out fundamental due process and fair trial protections that are applicable at all times, even during states of emergency. As United Nations Security Council Resolution 1456 confirms, "States must ensure that any measure taken to combat terrorism must comply with all their obligations under international law ... in particular international human rights, refugee and humanitarian law."

Experience in India and elsewhere, including with respect to the so-called "global war on terror," shows that counterterrorism efforts that violate basic rights, further alienate

communities, and serve as a recruitment tool for militant groups.¹

This report outlines Human Rights Watch's legal concerns with respect to key aspects of India's new counterterrorism laws. These laws:

- Expand the vague and overbroad definition of terrorism under existing Indian law to encompass a wide range of non-violent political activity, including political protest by minority populations and civil society groups.
- Strengthen the existing power of the government to ban an organization on limited evidence and with limited rights to judicial review, and to make membership of summarily proscribed groups a criminal offense.
- Authorize warrant-less search, seizure and arrest with wide authority and few safeguards, and compulsion of information from third parties without a court order.
- Allow detention without charge of up to 180 days, including up to 30 days in police custody, and create a strong presumption against bail.
- Create a presumption of guilt for terrorism offenses where certain kinds of inculpatory evidence are found, without a showing of criminal intent.
- Authorize the creation of special courts at the state and federal level, with wide discretion to hold *in camera* (closed) hearings and use secret witnesses.
- Contain no sunset provisions or mandatory periodic review schedule that could help safeguard against abuse.

¹ An upcoming Human Rights Watch report details abuses by state police and other authorities during counterterrorism operations in India.

II. Recommendations

India continues to face serious threats of terrorist attacks. However, resuscitating counterterrorism measures that have already been shown to fail and that violate fundamental human rights guarantees is not a sound or effective response. Measures of the kind found in the 2008 laws have a track record of facilitating abusive practices by the security forces, including arbitrary arrest and detention, torture and ill-treatment, and the targeting of ethnic and religious minorities. In their previous incarnations, such measures were so closely associated with abuse that they were repealed. India should not repeat these mistakes of the past.

To the Government of India:

- Revise the UAPA's definition of terrorism to be consistent with the recommendations of the UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, notably that it cover only those acts that are committed with the intention of causing death or serious injury; are committed for the purpose of provoking terror or coercing the government to do or refrain from doing any act; and are in line with international conventions relating to terrorism.
- Ensure that restrictions on organizations are in accordance with the right to freedom of association under international law; institute a fair review process by which groups listed as "terrorist organizations" or "terrorist gangs" can challenge the evidentiary basis for the government's classification before an independent court, and present evidence and call witnesses in support of their challenge.
- Repeal provisions criminalizing "unlawful associations."
- Ensure speedy judicial review and the possibility of bail for persons arrested and detained on the allegation of membership in a terrorist organization or terrorist gang.
- Repeal the overly broad search, seizure and arrest provisions in section 43 of the UAPA.
- Repeal provisions authorizing 30 days of pre-charge detention in police custody, and up to 180 days of pre-charge detention in judicial custody.
- Repeal the prohibition on bail introduced by section 43D(5) of the UAPA.
- Repeal the presumption of guilt established by section 43E of the UAPA.

- Amend the NIAA to ensure the independence of the Special Courts from the executive, in particular by ensuring that the courts are not constrained from ruling on jurisdictional issues.
- Amend the NIAA to remove the blanket power of courts to hold *in camera* (closed) proceedings.
- Amend the NIAA to constrain the Special Courts' power to conceal the identity of witnesses, in order to ensure that defendants can adequately confront the witnesses against them.
- Amend the UAPA and NIAA to include sunset clauses, so that the laws would expire within several years unless reenacted.
- Institute a process of regular review of the UAPA and its human rights consequences by a relevant committee of the legislature, the Lok Sabha.

III. Vague and Overbroad Definition of Terrorism

The 2008 amendments to the UAPA contain a vague and overbroad definition of terrorism that could facilitate serious human rights violations.

Martin Scheinin, the United Nations special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, has highlighted the risks of codifying vague and overly broad definitions of terrorism and related terms into law.² He notes that in many countries, such overbroad definitions are used by government authorities “to stigmatize political, ethnic, regional or other movements they simply do not like,” even though United Nations Security Council Resolution 1456 confirms that states must ensure that measures adopted to combat terrorism “comply with all their obligations under international law ... in particular international human rights, refugee and humanitarian law.”³

Vague definitions, accompanied by harsh penalties and wide ancillary powers of detention and investigation, can be misused to persecute political opponents or authorize repressive measures against unpopular or marginal religious and ethnic populations.

In order to ensure that only conduct of a terrorist nature is covered by counterterrorism measures, the special rapporteur recommends that any definition of terrorism contain the following three cumulative characteristics:

- The acts are committed with the intention of causing death or serious bodily injury (and not just property damage).
- The acts are committed for the purpose of provoking terror in the general public or part of it, intimidating a population, or compelling a government or an international organization to do or refrain from doing any act.
- The acts constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism.⁴

² UN Commission on Human Rights, “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin,” E/CN.4/2006/98, December 28, 2005, http://www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_terrorism/3_CODEXTER/Working_Documents/2006/Scheinin%20E-CN.4-2006-98.pdf (accessed June 1, 2010).

³ Ibid., para. 56; United Nations Security Council, Resolution 1456 (2003), S/RES/1456 (2003), <http://www.unhcr.org/refworld/docid/3f45dbdb.html> (accessed June 1, 2010), para 6.

⁴ UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, E/CN.4/2006/98, December 28, 2005,

The overbroad definition of terrorism introduced in the 2008 UAPA amendments does not meet these criteria.⁵ The amendments cover acts “likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people ... by any means of whatever nature to cause or likely to cause” death or injury to persons, damage to property, or “the disruption of any supplies or services essential to the life of the community in or in any foreign country.”⁶ This sweeping definition inappropriately encompasses a large number of non-violent forms of political protest, such as peaceful demonstrations affecting rail services or ports, or industrial action in a large range of industries. It gives authorities the ability to classify political opponents and a broad range of peaceful opposition movements arising from regional, ethnic or religious grievances, as “terrorist.”

The recent history of counterterrorism laws in India underscores the real risk of misuse of such definitions and the sweeping powers associated with them. TADA, enacted in 1985 to counter a Sikh separatist movement in Punjab, was routinely used to arbitrarily detain and torture terrorism suspects; thousands became victims of extrajudicial executions.⁷ It was also used against Dalits (so-called “untouchables”), religious minorities and trade union activists, not just terrorism suspects. In the decade during which it was in force, over 67,000 people were detained under TADA, of whom only 8,000 were brought to trial.⁸

TADA was allowed to lapse in 1995, but was replaced by POTA in 2002, which was also widely abused.⁹ Activists alleged that it was used to harass political opponents and target particular communities such as tribal groups, religious and ethnic minorities, and Dalits. In fact, most detentions under POTA occurred in Jharkhand, not in states like Jammu and Kashmir, where there was an ongoing internal armed conflict.¹⁰ In addition, the application of POTA in Gujarat revealed a pattern of religious discrimination against Muslims, who were

http://www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_terrorism/3_CODEXTER/Working_Documents/2006/Sheinin%20E-CN.4-2006-98.pdf (accessed June 1, 2010), para. 37.

⁵ Unlawful Activities (Prevention) Amendment Act 2008, No.76-C of 2008.

⁶ UAPA 1967, as amended by the Unlawful Activities (Prevention) Amendment Act 2008, sec 15.

⁷ Terrorism and Disruptive Activities (Prevention) Act 1985; Asia Watch (now Human Rights Watch/Asia), *Punjab in Crisis*, (New York: Human Rights Watch, 1991) pp.148-157. See also South Asia Human Rights Documentation Centre, Alternate Report and Commentary to the UN Human Rights Committee on India's 3rd Periodic Report Under Article 40 of the International Covenant on Civil and Political Rights (1997); Human Rights Watch, *Protecting the Killers: A Policy of Impunity in Punjab, India*, October 17, 2007, <http://www.hrw.org/en/reports/2007/10/17/protecting-killers-o>.

⁸ Bar Association of the City of New York, *Antiterrorism and Security Laws in India* (2006), p.48.

⁹ Prevention of Terrorism Act 2002.

¹⁰ *Ibid.*, pp.75-81.

disproportionately held under the law's relaxed standards for pre-trial detention.¹¹ In Tamil Nadu, the authorities detained political leaders, including Member of Parliament V. Gopalswamy, popularly known as Vaiko, under POTA for alleged support of the armed separatist Liberation Tigers of Tamil Eelam in Sri Lanka. Vaiko was arrested in 2002 and remained in detention for over a year, until he was released on bail. POTA charges against him were dropped in August 2004 when the review committee said that speeches supporting a banned group did not amount to terrorism. The law was eventually repealed in 2004 after intensive campaigning by human rights activists.¹²

¹¹ Ibid., p.80.

¹² See, for example, South Asia Human Rights Documentation Centre, "Alternate Report and Commentary to the UN Human Rights Committee on India's 3rd Periodic Report Under Article 40 of the International Covenant on Civil and Political Rights," July 1997, http://www.hrdc.net/sahrdc/resources/alternate_report.htm (accessed June 8, 2010); Bar Association of the City of New York, "Antiterrorism and Security Laws in India," 2006, http://www.nycbar.org/pdf/ABCNY_India_Report.pdf (accessed June 8, 2010).

IV. Unlawful Restrictions on Freedom of Association

The 2008 amendments to the UAPA expand the power of the central government to ban organizations and prosecute their members. The UAPA previously empowered the government to outlaw groups as a “terrorist organization,” “terrorist gang” or “unlawful association.” The amendments expanded those powers by increasing the number of criminal offenses linked to association with or membership in a terrorist organization or gang, terms defined by reference to the vague and overbroad definition of “terrorism” described above.

Under the UAPA, an unlawful activity is any action (including speech and communication) that supports any claim for secession or which broadly “disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India.”¹³ Unlawful activity also includes any action that “causes or is intended to cause disaffection against India.”¹⁴ An association can be declared unlawful if it has as its object such “unlawful activity” or promotes or encourages “unlawful activity.”¹⁵

The Home Ministry of the central government can declare a group to be a “terrorist organization,” “terrorist gang,” or “unlawful association” with immediate effect.¹⁶ Where a group is declared an “unlawful association,” the government has up to six months to establish the basis for this declaration before a specially constituted tribunal composed of a High Court justice nominated by the central government. The government must show on the balance of probabilities that it has sufficient cause for declaring the associational unlawful, and it can withhold evidence from the proscribed association (but not the tribunal) on the grounds that the public interest requires non-disclosure.¹⁷

However, even the limited review procedures available to “unlawful” groups are not available to groups declared to be “terrorist” organizations or gangs. A group declared to be a terrorist organization or gang can apply to a review committee, chaired by a sitting or

¹³ UAPA, sec. 2 (f).

¹⁴ Ibid., sec. 2.

¹⁵ Ibid., sec. 2 (g).

¹⁶ Ibid., sec. 3.

¹⁷ See discussion in Supreme Court of India, *Jamaat-E-Islami Hind v. Union of India* and *Jafar v. Union of India*, 1 SCC 428 (1995), at para. 21.

retired High Court justice, to have the declaration revoked. But it cannot introduce new evidence or present witnesses in support of its application.¹⁸

Membership in any group declared to be an unlawful association or a terrorist organization or gang is a criminal offense punishable by up to two years of imprisonment.¹⁹ In the case of a terrorist organization or gang that is “involved in” a terrorist act, membership is punishable by up to life imprisonment—irrespective of whether the member had any involvement with the act.²⁰ Because the declaration proscribing the group takes immediate effect, members (or suspected members) may be arrested and charged as soon as the group is so declared, without regard to the sufficiency of the evidence underlying the declaration.

The government’s broad authority under the UAPA to proscribe a group can enable the police to “round up the usual suspects” in the aftermath of a violent incident and detain persons for lengthy periods without trial. The power to summarily declare a group to be unlawful or terrorist, and to criminalize its membership, has enormous potential for abuse and infringement of basic freedoms. This power could also be used to pursue discriminatory and abusive counterterrorism tactics, such as mass arrests of persons from one religious group or caste. As noted above, both the TADA and POTA were used in this manner. In 2002, in the state of Gujarat, the state government invoked POTA to arbitrarily detain hundreds of Muslims (including juveniles) in the aftermath of the Godhra train fire, even as thousands of Muslims were being killed in communal violence.²¹ In the state of Jharkand, POTA’s provisions on terrorist organizations were used to detain thousands of alleged Naxalite sympathizers, in some cases based merely on the political literature they possessed.²²

International law guarantees the right to form associations, and any restrictions placed on that right must be necessary in a democratic society for national security or public safety, public order, the protection of public health or morals or the protection of the rights and

¹⁸ UAPA, secs. 36(4), 37. The UAPA provides that the review committee may annul the central government’s refusal to revoke a declaration if “it considers that the decision to reject [de-listing] was flawed when considered in light of the principles on an application for judicial review.” No in-person hearing is required and no provisions are made for the applicant group to present its own evidence against the central government’s decision to list them as a terrorist group.

¹⁹ UAPA, secs. 10, 20.

²⁰ Ibid., sec. 20.

²¹ Human Rights Watch, *Compounding Injustice: The Government's Failure to Redress Massacres in Gujarat* (New York: Human Rights Watch, June 2003), <http://www.hrw.org/en/node/12314/section/1>; see also, Bar Association of the City of New York, *Antiterrorism and Security Laws in India*, p. 79.

²² *Antiterrorism and Security Laws in India*, pp. 76, 85. “Naxalite” derives from the 1967 armed peasant uprising in the village of Naxalbari in West Bengal, marking the beginning of the Maoist revolutionary political movement in India. Many different groups identify themselves as Naxalite, but chief among them is the Communist Party of India-Maoist (CPI-Maoist). Naxalites call for a total transformation of the existing political system to create a new social order; they pursue this agenda through various means, including armed attacks against the state. The Indian Ministry of Home Affairs reported 1591 incidents of Naxalite violence in 2008, with 721 fatalities: Ministry of Home Affairs, *Annual Report 2008-2009*, p.171.

freedoms of others, and be the least restrictive possible.²³ Restrictions on the right to freedom of association may not discriminate on the basis of religion, ethnicity, political opinion or another prescribed status.²⁴

²³ ICCPR, art. 22. See Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (Kehl: N.P. Engel, 2nd ed. 2005), pp. 504-508.

²⁴ *Ibid.*, art. 2.

V. Arbitrary Arrest, Search and Seizure, and Compulsion of Information

The 2008 UAPA amendments permit the security forces to conduct searches and arrests that otherwise would be unlawful under Indian law. They authorize “any officer of a Designated Authority” to search any person or property, and seize any property or arrest any person, where they have “reason to believe from personal knowledge or information given by any person and taken in writing ... or from any document” or thing that an offense has been committed under the UAPA.²⁵ Authorities acting under the UAPA can also compel information from third parties without a court order or judicial warrant.²⁶ Thus, a superintendent of police could authorize an officer to compel any government agency, corporation, or “any other institution, establishment, organization or any individual” to furnish information “where the investigating officer has reason to believe that such information will be useful for, or relevant to” the investigation. Failure to comply with the demand is punishable by up to three years in prison.²⁷

These provisions confer discretion for search, seizure and arrest that is much broader than under the Indian criminal procedure code. As a general rule, the Code of Criminal Procedure requires a threshold of “reasonable suspicion” for arrest and “reasonable grounds” for searches by a police officer.²⁸ By contrast, the 2008 UAPA allows such actions based on an extremely low standard of certainty (“reason to believe,”) and only on the “personal knowledge” of the relevant officer, without requiring this knowledge to be specified in writing and provided to superior officers or a magistrate within a limited period, such as 24 hours. They greatly increase the risk that individuals will have their privacy violated or be deprived of their liberty, on vague and unspecified grounds.

International law protects against arbitrary or unlawful interference with a person’s privacy and home.²⁹ Under article 17 of the ICCPR, searches and seizures of persons or their property require a specific decision by a state authority expressly empowered by law to do so—usually a judicial authority.³⁰ The Human Rights Committee, the international expert body

²⁵ UAPA, sec. 43A.

²⁶ *Ibid.* sec. 43F.

²⁷ *Ibid.*

²⁸ See Code of Criminal Procedure 1973, secs. 41 & 165.

²⁹ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by India on April 10, 1979; ICCPR, article 17(1).

³⁰ ICCPR, article 17(2).

that monitors compliance with the ICCPR, has ruled that the prohibition against arbitrary searches under article 17 “is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”³¹

The UAPA provides authorities broad subjective grounds for conducting searches and seizures and carrying out arrests without warrant in which discretion is not, in any meaningful way, limited. This is inconsistent with the obligation to protect the right to privacy and home, and compounds concerns that the law does not adequately protect against arbitrary arrest and detention (discussed further below).

Under the Indian criminal procedure code, police must inform a person “forthwith” of the “full particulars of the offence for which [he or she] is arrested” arrest.³² The UAPA only requires that police inform an individual of the grounds of arrest “as soon as may be.” This vague formulation could result in individuals remaining unaware of the reasons for their arrest, and undermine their ability to take appropriate action. This raises particular safety concerns in the aftermath of a terrorist attack, since in India the authorities’ labeling an individual a “terrorist” is likely to get widespread media dissemination.

The provision violates India’s obligations under the ICCPR, which requires that anyone arrested “shall be informed, at the time of arrest, of the reasons” for their arrest.³³ According to the Human Rights Committee, merely referencing the legal basis for arrest without any indication of the substance of the complaint is insufficient. An individual needs to be sufficiently informed of the reasons for arrest to be able to take immediate steps to secure their release in the event the reasons given are invalid or unfounded.³⁴

³¹ Human Rights Committee, *Rafael Armando Rojas García v. Colombia*, Communication No. 687/1996, U.N. Doc. CCPR/C/71/D/687/1996 (2001), para. 10.3.

³² Code of Criminal Procedure 1973, sec. 50(1).

³³ ICCPR, art. 9(2).

³⁴ Human Rights Committee, *Adolfo Drescher Caldas v. Uruguay*, Communication No. 43/1979, U.N. Doc. CCPR/C/OP/2 at 80 (1990), para. 13.2.

VI. Arbitrary Detention

The 2008 amendments to the UAPA give Indian authorities heightened powers to detain persons without charge, which places them at greater risk of mistreatment and violates basic due process rights.

Under the amended UAPA, the period that an individual can be held in police custody was increased from 15 days to 30 days. Detainees face the greatest risk of torture and other ill-treatment while in the custody of the police, who may seek to extract confessions and evidence of wrongdoing.³⁵ Adding 15 days to the permissible period of police custody will increase the risk that detainees face.

The 2008 UAPA law also permits a detainee to be held in judicial custody without charge for up to 180 days (including the 30 days in police custody). A court can authorize an initial period of 90 days pre-charge detention without special grounds of any kind. A court can extend detention for up to 90 more days if the public prosecutor files a report with the court “indicating the progress of the investigation” and the specific reasons for the continued detention of the suspect—a very low threshold to enable an additional three months of pre-charge detention.

Under the Indian Code of Criminal Procedure, a magistrate may only authorize the pre-charge detention of an accused person for a total period of at most 90 days, and only where the Magistrate is satisfied that “there are adequate grounds exist for doing so.”³⁶ Under the regular criminal procedure, the accused must be released on bail after 90 days, even if he or she is accused of an offence punishable by death or life imprisonment, if charges have not been filed.

Article 9 of the ICCPR upholds the right to liberty and prohibits arbitrary arrest or detention. Those detained on a criminal charge shall be promptly informed of any charges against them.³⁷ It is well established in international human rights law that any interference with the

³⁵ See Human Rights Watch, *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police*, August 4, 2009, <http://www.hrw.org/en/reports/2009/08/04/broken-system-o>, pp. 67-73. The Law Commission of India, in its 1994 report on custodial crimes, stated: “Members of the weaker or poorer sections of society, are arrested informally and kept in police custody for days together without any entry of such arrests in the police records. During the informal detention they are subjected to torture, which at times results in death.” Law Commission of India, “152nd Report on Custodial Crimes,” 1994, <http://lawcommissionofindia.nic.in/101-169/Report152.pdf> (accessed June 16, 2009), para. 1.5.

³⁶ Code of Criminal Procedure, Act 45 of 1973, sec. 167.

³⁷ ICCPR, article 9.

fundamental right to liberty must be shown to be strictly necessary and proportionate. The Human Rights Committee in 2008 concluded that it was “disturbed” by the United Kingdom’s Counter-Terrorism Bill 2008, which permits a 28-day pre-charge detention in terrorism cases, and was “even more disturbed” by the proposed extension of this maximum detention period to 42 days. The Committee recommended, consistent with article 9 of the ICCPR, that terrorist suspects be “promptly informed of any charges and tried within a reasonable time or released.”³⁸

Pre-charge detention, whether of 90 or 180 days, with little or no burden on the investigating authorities to demonstrate its necessity, violates India’s article 9 obligations to ensure that all arrested persons are “promptly” informed of the charges against them. Judges extending pre-charge detention from 90 to 180 days will be committing a further violation of the prohibition on arbitrary detention where it is not proportional or necessary in all the circumstances. In the absence of any requirement for the reviewing judge to assess whether there are reasonable grounds to believe that the detained person has committed a terrorism offense, individuals do not have an effective right to challenge the lawfulness of their detention as article 9 requires.

India has historically used long-term detention without charge as a means of “backdoor” preventive detention of persons deemed to be associated with militant organizations. Under TADA provisions similar to those in the UAPA, the government from 1985 to 1994 arrested 76,000 terrorism suspects and other persons who allegedly presented a national security threat. The government’s use of sweeping detention powers has also become a means to intimidate members of religious minorities and other vulnerable groups to provide information to investigations, since prolonged detention—even in the absence of a conviction—can have dire economic and emotional consequences for families living hand-to-mouth.

For individuals who are charged, the 2008 UAPA requires a denial of bail where the court determines “that there are reasonable grounds for believing that the accusation against such a person is *prima facie* true.”³⁹ This provision applies not only to persons accused of direct involvement in violent acts, but also to anyone charged with the offenses of membership of a terrorist organization, harboring a terrorist, fundraising for a terrorist organization and conspiracy to commit a terrorist act. A *prima facie* basis for the offense of

³⁸ Human Rights Committee, Final Conclusions and Recommendations on Reports of the United Kingdom, France, San Marino and Ireland, 93rd session, July 25, 2008, para. 15, <http://www2.ohchr.org/english/bodies/hrc/hrcs93.htm> (accessed June 8, 2010).

³⁹ UAPA, sec. 43D(5).

membership may be relatively easy to establish, resulting in ineligibility for bail irrespective of factors, such as any threat posed by the detainee, or flight risk.

The easy denial of bail under the UAPA facilitates police and prosecutorial abuse of the law to allow prolonged pre-trial detention contrary to general Indian criminal law and international human rights law. India's criminal procedure law maintains the court's discretion to order bail even where there is a presumption against bail.⁴⁰ The ICCPR provides that "it shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial."⁴¹

⁴⁰ Code of Criminal Procedure, para. 439 sets a list of relevant factors for a court to consider in the exercise of its discretion even for offenses where there is a presumption against bail.

⁴¹ ICCPR, art. 9(3).

VII. Presumption of Guilt

The amended UAPA requires a court during trial to presume the guilt of an accused person for engaging in terrorism where certain inculpatory evidence is proved but without a showing of criminal intent.⁴² These are where:

- Arms, explosives, or any other substances specified in section 15 of UAPA were recovered from the possession of the accused, and there is reason to believe that the items or other substances of a similar nature were used in the commission of the offense.⁴³
- The fingerprints of the accused or other “definitive evidence” suggesting the involvement of the accused in the offense were found at the site of the offense or on anything used in connection with the commission of the offense.

If a court determines that either of these two forms of evidence against the accused is proved beyond a reasonable doubt, “the Court shall presume, unless contrary is shown, that the accused has committed the offence.” This provision is highly problematic because it permits an individual to be convicted of acts of terrorism solely on the basis of material evidence, without any showing of intent to commit a crime. It shifts the burden of proof onto the defendant to prove there was no such intent, even though there is a great risk that police could plant such evidence to ensure detention.

The end result could be that persons prosecuted under UAPA do not benefit from the presumption of innocence, leading to an unfair trial. The ICCPR provides that everyone charged with a criminal offense has the right to be presumed innocent until proven guilty.⁴⁴ The Human Rights Committee has stated that the presumption of innocence is “fundamental to the protection of human rights” and “imposes on the prosecution the burden of proving the charge” beyond reasonable doubt. It cannot be derogated from, even during a public emergency or other declared state of exception.⁴⁵ While the Indian Constitution does not expressly guarantee the presumption of innocence, the Supreme Court of India has included

⁴² UAPA, sec. 43E.

⁴³ The list of substances includes bombs, dynamite, other explosive substances or inflammable substances, firearms or other lethal weapons, poisonous or noxious gasses, or any other substances of a hazardous nature. UAPA, sec. 15.

⁴⁴ ICCPR, art.14(2).

⁴⁵ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), sec. IV.

such a presumption in its holdings concerning the constitutional right to a fair trial.⁴⁶ This provision of the UAPA encourages abusive prosecution, undermines the basic right to a fair trial right and creates enormous risks of wrongful conviction.

Special Courts and Fair Trial Rights

The National Investigation Agency Act (NIAA) creates a specialized federal police agency authorized to investigate certain crimes, including offenses under the UAPA.⁴⁷ It remains to be seen how the NIA will function in practice, but it is immediately concerning that the NIAA authorizes the creation of Special Courts to try numerous offenses, including “terrorism offenses” under UAPA.⁴⁸ No Special Courts have yet been established under the NIAA, and the NIA has not initiated any prosecutions.

Human Rights Watch opposes the creation and use of special courts to try national security crimes. While the functioning of an NIAA Special Court is yet to be seen, the authorities should be cautious because the record of national security courts in many countries over many years shows that such courts, while highly sensitive to the need to protect national security, typically lack the respect for the rights of defendants intrinsic to criminal courts of broader practice. National security courts are frequently authorized by law to conduct trials in a manner that restricts the rights of defendants beyond what is permissible under international human rights law.

Under the NIAA either the central or state governments may establish Special Courts. They are presided over by a judge appointed by the central or state government on the recommendation of the chief justice of the relevant state High Court.⁴⁹ While the Special Court judges do not lose the institutional guarantees of their independence as judges under Indian law, the experience of similar special courts in many countries is that judicial appointments to such courts place a premium on judges whose concerns about state security overshadow concerns about defendants’ rights.

The executive is empowered under the NIAA to determine the jurisdiction of the court where there is a dispute as to its substantive competence over a matter.⁵⁰ Jurisdictional issues are

⁴⁶ Indian Supreme Court, *State of Punjab v. Baldev Singh*, AIR 1999 SC 2378.

⁴⁷ National Investigative Agency Act 2008, No. 75 of 2008; NIAA, secs. 3-5.

⁴⁸ NIAA, secs. 11-21.

⁴⁹ *Ibid.*, sec. 11.

⁵⁰ *Ibid.*, sec. 11(2).

fundamentally a judicial function, and should therefore be decided by the court itself, not the executive.⁵¹ Empowering the government to determine whether or not a case properly belongs in a Special Court allows it to intrude upon judicial functions, calling into question the independence of the court. The requirement of an independent and impartial tribunal is an essential aspect of a fair trial under the Indian constitution and the ICCPR.⁵²

Another concern is the unfettered discretion of Special Courts to hold *in camera* (closed) proceedings. The NIAA authorizes the court to hold all or any proceedings *in camera* “if [it] so desires.”⁵³ While there is sometimes a need for *in camera* proceedings, to ensure protection of both witness or defendant, this open-ended allowance for closed trial proceedings conflicts with the basic fair trial right of all defendants to a public trial.⁵⁴ As the UN Human Rights Committee has stated, the publicity of hearings “provides an important safeguard for the interest of the individual and of society at large.”⁵⁵

The safeguard of public trials is of special importance in what are often highly charged and politicized terrorism-related proceedings. International fair trial guarantees permit proceedings to be closed for reasons of morals, public order, or national security in a democratic society, or to the extent strictly necessary where publicity would prejudice the interests of justice.⁵⁶ In the context of terrorism-related cases, there may be relevant considerations relating to the security of witnesses, the confidentiality of certain evidence and evidence-gathering methods, or the protection of the accused from harm, which necessitate the closing of portions of a hearing. However, as the UN Human Rights Committee has stressed, *in camera* proceedings should be held only in “exceptional circumstances” in accordance with the exceptions set out above.⁵⁷ The determination must be made on a case-by-case basis, weighing the reasons for closing the hearing against the right to a public hearing. The blanket power of the Special Courts to hold *in camera* hearings, on any grounds and for any reason, and potentially to conduct the entire trial *in camera*, is not compatible with an accused’s right to a public hearing.

⁵¹ See Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985), paras. 3 and 5.

⁵² Indian Constitution, art. 50; ICCPR, art. 14(1).

⁵³ NIAA, sec. 17(1).

⁵⁴ ICCPR, art. 14(1).

⁵⁵ Human Rights Committee, General Comment 32, “Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial,” CCPR/C/GC/32, para. 28.

⁵⁶ ICCPR, art. 14(1).

⁵⁷ Human Rights Committee, General Comment 32, para. 29.

The NIAA permits the Special Courts to completely conceal the identity of persons giving testimony if it is satisfied that the life of the witness is in danger. The application for concealment of a witness' identity can be made by the witness or the prosecutor, or the court can do this on its own motion.⁵⁸ Prosecutors and courts have an obligation to ensure the security of all witnesses to a criminal case and take appropriate action, including keeping the identity of certain witnesses from media and general public, as well as other witness protection measures. However, complete anonymity of witnesses, in which the defendant's lawyer can neither know the name of the witness beforehand nor have the practical possibility of observing the witness under questioning, denies the defendant the effective opportunity to confront the witness.⁵⁹

When considering similar powers under TADA, the Indian Supreme Court expressed concern that the anonymity of prosecution witnesses could disadvantage the accused by making effective cross-examination very difficult.⁶⁰ However, the provisions that allow the special courts to protect witness identity do not contain any specific rules to constrain the court's discretion and set out which concealment measures are appropriate and which are not. Under the legislation it appears that the court could conceal the identity of witnesses even from defendants and their counsel. If applied in such a manner, these provisions would be inconsistent with the defendant's right to a fair trial, which includes the right to examine prosecution witnesses.⁶¹

⁵⁸ NIAA, secs. 17(2)-(3).

⁵⁹ European Court of Human Rights, *Van Mechelen v. Netherlands* (App. 21363/93, 21364/93, 21427/93, 22056/93), Judgment of April 23, 1997; (1998) 25 EHRR 647; ECHR, *P.S. v. Germany* (App. 33900/96), Judgment of December 20, 2001.

⁶⁰ Indian Supreme Court, *Kartar Singh v State of Punjab*, [1994] 2 SCR 375, para. 289, March 11, 1994.

⁶¹ ICCPR, art. 14(3)(e).

VIII. Acknowledgements

This report was written by Nehal Bhuta, and edited by Meenakshi Ganguly, South Asia director for Human Rights Watch, and by Brad Adams, director of the Asia division at Human Rights Watch. The report was reviewed by James Ross, Legal and Policy director of Human Rights Watch, and Joseph Saunders, deputy program director.

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Back to the Future

India's 2008 Counterterrorism Laws

In the wake of the brutal attack on Mumbai in 2008 that killed 166 people, the Indian government reinstated harsh counterterrorism measures that it had previously repealed or allowed to lapse because they had led to serious human rights violations.

Back to the Future: India's 2008 Counterterrorism Laws details the ways in which the reinstated measures, most of which are amendments to India's Unlawful Activities Prevention Act, could lead to torture, prolonged pre-charge detention, and other serious abuses.

The amendments reinforce powers that allow the government to proscribe or classify as "terrorist" a broad range of peaceful opposition movements. The 2008 laws widen the broad definition of terrorism contained in previous law. Security forces are empowered to conduct searches and compel third-party information without a court order or warrant. Suspects can be detained without charge for up to 180 days, including 30 days in police custody, where most abuse traditionally occurs. Terrorism suspects can be denied bail and prosecuted in special courts empowered to hold closed-door hearings with secret witnesses. In some circumstances, suspects do not even benefit from the presumption of innocence. The amendments could be abused to target legitimate activities by political, ethnic, regional, or other movements.

Human Rights Watch urges the Indian government to revise these laws to respect due process and other international human rights standards.