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Joint Submission by the Asian Forum for Human Rights and Development (FORUM-ASIA), Jammu Kashmir Coalition of Civil Society (JKCCS), Association of Parents of Disappeared Persons (APDP), Banglar Manabadhikar Suraksha Mancha (MASUM) and Human Rights Alert (HRA)

In view of the adoption by the UN Human Rights Committee of the List of Issues Prior to Reporting on India pursuant to the Article 40 of the International Covenant on Civil and Political Rights

126th session of the UN Human Rights Committee

About FORUM-ASIA:

The Asian Forum for Human Rights and Development (FORUM-ASIA) is a membership based human rights and development organisation in Asia with a network of 67 members in 21 countries across the region. FORUM-ASIA works to promote and protect all human rights for all, including the right to development, through collaboration and cooperation among human rights organisations and defenders in Asia and beyond. FORUM-ASIA was founded in 1991, and established its Secretariat in Bangkok in 1992. FORUM-ASIA has consultative status with the UN Economic and Social Council.

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I. Introduction

Joining organisations

1. This report is prepared by the Asian Forum for Human Rights and Development (FORUM-ASIA), with the support of its members in India, Jammu Kashmir Coalition of Civil Society (JKCCS), Association of Parents of Disappeared Persons (APDP), Banglar Manabadhikar Suraksha Mancha (MASUM) and Human Rights Alert (HRA).

Methodology

2. The report is based on the research and first-hand information by FORUM-ASIA members in India as part of their work, as well as secondary research and data from third party sources including other non-governmental organisations and media. Collection of information and cross checking of data has been carried out mutually by all organisations joining this submission. Information on individual cases is disclosed here with prior consent from individuals mentioned.

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[1] Jammu Kashmir Coalition of Civil Society (JKCCS) and Association of Parents of Disappeared Persons (APDP), Banglar Manabadhikar Suraksha Mancha (MASUM) and Human Rights Alert (HRA)

II. Contributions to List of Issues

3. The United Nations ('UN') Human Rights Committee ('the Committee'), at its 126th session, will adopt this list of issues prior to reporting on India for its review of the implementation of the International Covenant on Civil and Political Rights ('the Covenant'). In this context, the Asian Forum for Human Rights and Development (FORUM-ASIA) and its member organisations in India welcome the opportunity to contribute to the Committee's preparation of its List of Issues on India.

4. The Government of India ratified International Covenant on Civil and Political Rights (ICCPR onwards) on 10 April, 1979 with Reservations on Article 1, 9 and 13 and declarations on Articles 12, 19(3), 21, and 22. These reservations and declarations must be withdrawn.

Article 1 Right to self-determination

5. The Government of India declared that 'the right of self-determination' applies only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity. The constitution of India is silent on the legal processes to deal with the aspiration of the peoples and nations to depart form the Union.

6. The Committee during India's third periodic review stressed the need to address the issue of "armed insurgency" by political means. The Concluding Observations of the Human Rights Committee in 1997 stated[2], "in this respect, bearing in mind the provisions of article 1, 19 and 25 of the Covenant: the Committee endorses the views of the National Human Rights Commission that the problems in areas affected by terrorism and armed insurgency are essentially political in character and that the approach to resolving such problem must also, essentially, be political, and emphasizes that terrorism should be fought with means that are compatible with the Covenant".

7. The denial of recognition of right to self-determination and erosion of other democratic rights in the Indian administered Jammu & Kashmir (IAJK) has led to continuous widespread human rights violations at the hands of Indian armed forces. It is an internationally acknowledged dispute between India and Pakistan. The UN Security Council resolution 47[3] adopted on 21 April 1984 Resolutions of 1948 recognised the right of self-determination of the people of Jammu and Kashmir to be exercised through an impartial plebiscite in the region to determine the will of the people for their future political and geographical identity. Till date, no such plebiscite has been held in IAJK. The first ever report of the UN Office of the High Commissioner for Human Rights (OHCHR) in June 2018 called on India and Pakistan to "fully respect the right of self-determination of the people of Kashmir as protected under international law."[4]

[2] Para 18, Concluding Observation of the Human Rights Committee, India CCPR/C/79/Add.81 dated 4 August 1997
[3] Available from http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/47 (1948).
[4] https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf

8. The law that attacks the activities of armed groups demanding right to self-determination is the Unlawful Activities Prevention Act[5] (UAPA), which covers such attacks within the broad definition of terrorism. Section 2(i) states "secession of a part of the territory of India from the Union" includes the assertion of any claim to determine whether such part will remain a part of the territory of India. Manipur with just 0.2% of the population of India constitute at least 65% of the total detentions under this law across the country[6]. Manipur, which stood as an independent kingdom in South East Asia for at least two millennia was forcibly merged into the Union of India on 15 October 1949. No plebiscite or referendum of the people of Manipur was conducted violating the right to self-determination of the Manipur nation.

9. The Committee should urge the government of India to remove the reservation and to initiate an inclusive peace process by dropping its reservation on Article 1 of the Covenant and by respecting people's right to self-determination to freely determine their political status and pursue their economic and social development.

Article 1 (2) Freedom from deprivation of means of subsistence

10. IAJK is the highest militarized zone in the world with estimated 700,000 armed personnel occupying thousands of acres of land leading to the depletion of land resources required for economic sustenance. The Line of Control (LOC), which divides the erstwhile state of Jammu and Kashmir into two, each held by India and Pakistan – denies the people from IAJK to pursue trade and other economic activities through the natural trade route into Central Asia. The deprivation of trade due to the divided nature of J&K negatively impacting sustainable livelihood in the region.

Article 1 (3) Promotion of the realisation of the right to self-determination

11. IAJK is also connected with the rest of India through a single all-weather road adversely affecting trade and business since Government disallowed other important roads like Shopian road and Kapran-Doda road in Jammu division to be used for civilian traffic.[7] The closure of roads fundamentally alters the region's economy due to lack of people's access to resources. The extensive militarisation has resulted in fragmentation of the region affecting free movement and economic activities. In April 2019, the state government banned civilian traffic for two days a week on Kashmir's National Highway.[8]

Article 2

12. Since the break out of armed conflict in IAJK in late 1980s, the government imposed draconian laws like the Disturbed Areas Act and Armed Forces Special Powers Act (AFSPA), 1990, that permits 'shoot to death' power to armed forces and provides virtual immunity from

[5] https://mha.gov.in/sites/default/files/A1967-37_0.pdf

[6] https://www.thehindu.com/news/national/other-states/manipur-records-65-uapa-cases/article7563462.ece

[7] https://www.greaterkashmir.com/(X(1)S(l1lkkj45gzpjmumq20zremey))/news/front-page/4-decades-on-doda-dessa-kapran-road-yet-to-become-a-reality/315877.html

[8] https://www.india.com/lok-sabha-elections-2019-india/civilian-traffic-banned-from-national-highway-in-jk-parties-say-move-not-thought-through-3620622/

prosecution resulting in gross human rights violations. Additionally, the frequent imposition of section 144 of Criminal Procedure Code to bar civilian assembly of five and more people resembles a state of perpetual emergency.

13. Other draconian laws like Public Safety Act (PSA) violate fundamental freedoms enshrined in ICCPR. PSA allows for detention without trial or charges for up to 1 year, which can be extended repeatedly, and has been frequently used to curb political dissent in IAJK[9]. The first ever UN report on Kashmir also called for amending PSA to ensure its compliance with international human rights law.[10]

Article 2(1) Non Discrimination

14. The political ideology of the present government is based on majoritarian politics is leading to gross discrimination on the basis of sex, language, religious and political backgrounds. Several incidents of violence, mob attacks on minorities and Dalits reinforced discrimination and a culture of impunity due to lax implementation of laws by the government.

15. Laws like AFSPA discriminates citizens on the basis of race, religion and national origin. The maximum punishment for 'disturbing public order' is only six months imprisonment in all of India except in the 'disturbed area" of North East India and IAJK where it allows "use force to the extent of causing death". Committee on Elimination of Racial Discrimination in its report on India in 2007 has observed AFSPA as a racist law and has recommended for its repeal.

Article 2 (2) Adoption of laws and legislation to enforce the Covenant

16. IAJK has many laws which do not meet the international human rights standard and are frequently used to punish people holding a contrarian view or are critical of the conduct of the government. Some of the laws and provisions which compromise universal human rights are as follows:

17. **Sections 107 and 151** of Jammu and Kashmir Criminal Procedure Code envisage preventive action to be taken against a person likely to commit a cognizable offence. Section 107 confers the power upon the Executive Magistrate to ask for execution of a bond, non-compliance with which would result in detention of not more than one year. Section 151 empowers a police officer to arrest a person without a warrant and/or magisterial orders. These sections of law have been employed to curb movement and means of expression of activists, protestors and the general public.

18. **Section 124A** of Ranabir Penal Code in IAJK and Indian Penal Code deal with the offence of sedition. It is one of the most controversial and one of the most draconian laws in operation. Under this law, a person is liable to be imprisoned for life for lawful expression. This law is

[9] https://www.amnesty.org/en/documents/ASA20/001/2011/en/
[10] https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf

being used to persecute activists and human rights defenders, writers, journalists and demonstrators.

19. **Section 144 of Jammu and Kashmir Criminal Procedure Code and Criminal Procedure Code of India:** The original intent of this legislation seems to empower the administration to take prompt action when immediate prevention or a speedy remedy of any sudden and grave emergency is desirable. However, illegal and unwarranted application of this law has been employed to curb fundamental rights. This law has been used at various occasions to prevent seminars, debates, or conferences critical of state practice and narrative. Such laws that provide restriction on sending, receiving and disseminating information is a violation of Article 19(1)(a) of the Indian Constitution.

20. **Section 3 of the Foreigners Act 1946:** This enactment has been used to deny access to foreign journalists, to stop them from reporting and conveying their understanding of the ground situation. In December 2018, a Pulitzer Prize-winning journalist had been denied entry back into India for alleged violation of visa conditions by travelling to restricted and protected areas in Jammu & Kashmir without permission.

21. **UAPA, 1967:** This law has been used to stifle dissent, intimidate opposition and pressure human rights groups and ban political outfits and formations. Under chapters II and IV of this Act, the government can declare any organisation or activity as unlawful or as a terrorist organization. Mere membership in such an organisation can invite criminal prosecution (Section 10). This Act also allows detention without charge for up to 180 days (Section 43D). Under Section 43E, in contrary to ordinary evidence law, the burden of proof lies with the accused to demonstrate innocence when weapons are "believed" to be used in the commission of such offence or are found in possession. Ambiguous and open-ended definitions of certain serious charges make this law prone to being employed as a tool for infringement on fundamental rights, that otherwise cannot be curtailed so arbitrarily.

22. **Enemy Agents Ordinance, 2005 applicable in IAJK**: Various provisions of this ordinance are in conflict with recognised legal principles of jurisprudence as well as in contravention with universal standards. The accused is not accorded the right to legal counsel under this ordinance except with the permission of the Special Judge or the Reviewing Judge presiding over the trial. This restriction over the right to consult a lawyer is unreasonable and in contravention to Articles 14 and 21 of the Indian Constitution. Under this ordinance, an accused, if shown guilty, can be put to death under Section 3.

23. **National Human Rights Commission and State Human Rights Commission:** The Protection of Human Rights Act 1993 as well as the Jammu & Kashmir Protection of Human Rights Act 1997 established the National Human Rights Commission (NHRC) for India and a State Human Rights Commission (SHRC) for Jammu & Kashmir, respectively. Ironically, these Acts also confer a measure of impunity to public servants and government officials. These government controlled commissions are recommendatory in nature and ineffective. These commissions

have no mandate over the army and their non-binding recommendations are seldom implemented. Under Section 25 of Jammu & Kashmir Protection of Human Rights Act and Section 38 of Protection of Human Rights Act 1993, legal proceedings cannot be initiated against the Government, the Commission or any Member thereof or any person acting under the direction either of the Government or the Commission in respect of anything which is in good faith done or intended to be done in pursuance to this Act. Furthermore, both of these Acts do not confer powers of contempt on the SHRC and the NHRC, effectively rendering them incapable of exacting true dispensation of justice. In the 2017 Universal Periodic Review (UPR) of India, it was pointed out that India did not support the recommendation to implement the 2011 international observations on ensuring high standards and independence of NHRC.

24. **AFSPA:** AFSPA was enforced in north east India in 1958 and in Jammu and Kashmir in 1990. Section 4 of this Act gives wide discretionary powers to members of the armed forces to the extent of causing death. Further, section 6 and section 7 of AFSPA (IAJK version) requires mandatory prior sanction from the government to prosecute members of armed forces. This in reality has become a legislative safeguard to cover up atrocities propagated by the armed forces and it has become a license to kill and promotes impunity. In a strict legal perspective, the contents of this legislation fail to meet international and Indian legal standards and are not adherent to the spirit of ICCPR.

25. In its application, AFSPA leads to restrictions on right of life guaranteed under Article 21 of the Indian Constitution. It makes no distinction between killing a combatant and taking a civilian life. The application of this Act also leads to arbitrary detention whereby a suspect, not pronounced guilty, languishes in detention. Such detention violates Article 22 of the Constitution. AFSPA has no provision to communicate to the detainees, the grounds of their arrest. There is ambiguity in the language of Section 5 of AFSPA as to when to handover a detainee to the nearest magistrate. There is no provision for reviewing a detention.

26. In the last review of India in 1997, the Committee stated[11] that it "remains concerned at the continuing reliance on special powers under legislations such as Armed Forces (Special Powers) Act … in areas declared to be disturbed and at serious human rights violations, in particular with respect to Articles 6, 7, 9 and 14 of the Covenant… The Committee noting that the examination of the constitutionality of the Armed Forces (Special Powers), long pending before the Supreme Court is due to be heard in August 1997, hopes that its provision will also be examined for their compatibility with the Covenant."

27. After due hearing, where the counsel of National Human Rights Commission submitted the recommendation of the Committee before the Constitutional Bench, the Supreme Court pronounced its judgement on 27 November 1997. However, the judgement[12] completely

[11] Para 18, Concluding Observation of the Human Rights Committee: India, CCPR/C/79/Add81, dated 04/08/97,
[12] Naga People's Movement for Human Rights v/s Union of India, 1997

ignored the recommendations of the Committee to examine the compatibility of the provisions of the AFSPA with the Covenant.

28. Committee on the Elimination of All Forms of Discrimination against Women recommended the review or repeal of the AFSPA in 2000, 2007[13] and 2014[14]. Stamping the act as racist, Committee on the Elimination of Racial Discrimination also recommended its repeal in 2007. The Committee on Economic Social and Cultural Rights also recommend its repeal in 2008[15].

29. It may be noted that Professor Christof Heyns, UN Special Rapporteur on extra-judicial execution in his report after his official visit to India in 2012 gave a detailed legal analysis of the AFSPA[16]. He observed that[17], "…the NHRC shared with the Special Rapporteur its views in support of AFSPA's repeal … The Supreme Court of India ruled, however, in 1997 that AFSPA did not violate the Constitution. The Special Rapporteur is unclear about how the Supreme Court reached such a conclusion. …the powers granted under AFSPA are in reality broader than that allowable under the state of emergency as the right to life may effectively be suspended under the Act and the safe guards applicable in a state of emergency as absent."

30. The Special Rapporteur on the situation of human rights defender, and the Special Rapporteur on violence against women who visited India in 2011 and 2013 also made the same recommendation to repeal the AFSPA. The UPR Working Group in all the three cycles (2008, 2012 and 2017) recommended the repeal of AFSPA. The Government of India's own committees and commissions[18] set up to review AFSPA, which are publicly available, have recommended its repeal. But the Government of India has repeatedly rejected these recommendations.

31. The Committee should reiterates its calls to the government of India to repeal AFSPA.

Article 2 (3) Access to remedy

32. In India, violations of freedoms are frequent and cases of victim getting an effective remedy is rare. In case of any violation of freedom, it is a matter of right of a person to lodge complaint

[13] Para 8, Concluding Comment of the Committee on the Elimination of Discrimination against Women: India, CEDAW/C/IND/CO/3 dated 2 February 2007

[14] Para 13(b), Concluding observation on the combined fourth and fifth periodic report of India, CEDAW/C/IND/CO/4-5 dated 24 July 2014

[15] Para 50, Concluding Observation of the Committee on Economic, Social and Cultural Rights, India, E/C.12/IND/CO/5 dated 8 August 2008

[16] Report of the Special Rapporteur on extrajudicial, summary or arbitrary execution, Christof Heyns, Mission to India, A/HRC/23/47/Add.1 dated 26 April 2013

[17] Para 26 and 27, Report of the Special Rapporteur on extrajudicial, summary or arbitrary execution, Christof Heyns, Mission to India, A/HRC/23/47/Add.1 dated 26 April 2013

[18] 1. Committee for the Review of Armed Forces (Special Powers) Act, set up by the Union Home Ministry, Govt of India, headed by Justice Jeevan Reddy, 2004

2. Second Administrative Reform Commission (Public Order) of the Government of India headed by Veerapa Moilly, 2004

3. Committee for Confidence Building Measures in Jammu and Kashmir headed by Hamid Ansari, former Vice President of India, 2007

4. Supreme Court appointed Commission pertaining to writ petition (Criminal) No. 129 of 2012, EEVFAM vs Union of India, 2013

in the police station. The duty of the law enforcing agencies is to register the complaint immediately and start an investigation. But in most of the cases it has been observed that the police does not even register the complaint properly. The complaint is usually recorded as a general diary entry which is not a formal complaint and is used just to keep a record of the incident. In several cases, the police do not accept complaints from the victims in cases where perpetrators belong to law enforcement agencies such as the Border Security Force (BSF) and police or other influential persons like political leaders or supporters of ruling political parties. Though there are several directives from the Supreme Court making registration of a complaint as First Information Report (FIR) and immediate investigation compulsory, law enforcement agencies are not committed to follow the directive.

33. Due to the impunity provided to armed forces under laws like AFSPA and section 197 of Criminal Procedure Code of India, prosecution of armed forces accused of human rights violations is almost non-existent. These legislations require mandatory prior sanction from the government for prosecution and sanctions are routinely denied and thus preventing delivery of justice for the victims. The impunity enjoyed by the armed forces has led to a situation where even filing of FIRs before the police against armed forces personnel accused of human rights violations is discouraged and victims have to resort to other mechanisms available under judiciary or the human rights commissions.

Article 2 (3) Access to judicial remedy

34. Articles 32 and 226 of the Indian Constitution give the right to individuals to move to the Supreme *Court* to seek justice when they feel that they have been 'unduly deprived' of their rights. However, at the grass-root level, the law enforcement agencies often do not act appropriately to ensure justice. In most of these cases the procedure is not followed creating challenges for credible investigation and justice. Due to high cost of litigation and corruption in the process of administration of justice, many victims often prefer not to report and as a consequence, most of cases of violation of rights and freedoms in India go without any remedy. Lower judiciary system in India is influenced by police administration, political leaders and hence they lack independence and credibility.

35. In IAJK, PSA does not allow for the right to be heard and remedy for detainees to seek compensation for wrongful confinement. Similar provisions under section 107 of Jammu and Kashmir Criminal Procedure Code does not provide for right to be heard before being detained. These discrepancies in laws and provisions has allowed for misuse in which several thousand people have been booked either without any charges or with unsubstantiated charges without the victim (detainee) being granted the prior right to be heard before a competent magistrate accepting or denying the charges.

36. In north eastern state of Manipur, with little or no action from the Government, civil society groups systematically documented enforced disappearances, extrajudicial killing, rape and torture committed under AFSPA. The Extrajudicial Execution Victim Families Association,

Manipur, (EEVFAM) and Human Rights Alert (HRA) petitioned the Supreme Court of India[19] seeking justice for a list of 1,528 victims of extrajudicial execution carried out from 1979 to 2012. The Supreme Court after perusing report of its own fact finding commission and acknowledging the systematic violation of the right to life under AFSPA, pronounced a historic judgment in 2016 re-asserting that the criminal cases should be registered against the police and armed forces of the union and that criminal investigation should commence in each case of extrajudicial killing.

37. The Central Bureau of Investigation (CBI) is assigned to investigate 98 cases where there is already a prima facie finding. But the CBI is not only carrying out the task in a very slow pace but also demonstrate extreme reluctance to do so. Witnesses and human rights defenders involved in the case are systematically intimidated and harassed. This has compelled present UN Special Rapporteur on extrajudicial, summary, arbitrary executions, Agnes Callamard, and UN Special Rapporteur on situation of human rights defenders, Michel Forst, to issue a public statement on 4 July, 2018 reiterating that "the Government of India has an obligation to ensure prompt, effective and thorough investigations into all allegations of potentially unlawful killings, and a failure to do so is a violation of its international obligations. Justice delayed is justice denied."[20] Till date only 39 FIRs have been registered and eight charge sheets have been filed against some lower ranking Manipur Police personnel. The Supreme Court registry has not listed a case for hearing since September 2018.

Article 4 Derogation of rights

38. Indian government has declared IAJK as a 'Disturbed Area' and the application of AFSPA presumes the situation of armed conflict. Despite these official measures, at the international forums the Indian state does not recognize IAJK as a situation of international or non-international armed conflict and sidesteps its obligations to follow Geneva Conventions, 1949. The AFSPA violates right of life guaranteed under Article 21 of the Indian Constitution. The application of this Act also empowers to arrest/detain without warrant whereby a suspect languishes in detention without conviction. Such detention is violates Article 22 of the Constitution. AFSPA does not make it compulsory to communicate to detainees, the grounds of their arrest. There is ambiguity in the language of Section 5 of AFSPA as to when to handover a detainee to the nearest magistrate. There is no provision for reviewing a detention. These violate Article 4 (1) of ICCPR.

Article 6(1) Right to life

39. The constitution of India provides for the right to life under Article 21 of the constitution, yet citizens are frequently deprived of this right when the law enforcement agencies of the country like the Border Security Force (BSF), Central Reserve Police Force (CRPF) and the police itself conduct unlawful killings. Incidents of extra-judicial killings, custodial deaths,

[19] Writ Petition (Criminal) number 129 of 2012

[20] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23323&LangID=E

enforced disappearances and political killings are frequent in India. In most of these incidents no actions are taken against perpetrators.

40. Indian armed forces frequently violate Article 6 (1) of the ICCPR by shooting unarmed protestors and killing unarmed civilians during gun battles with alleged militants. From January 2008 to December 2018, there were 4,059 extrajudicial killings in Jammu & Kashmir, out of which 1,081 were civilians.[21] In 2018, at least 160 civilians, 31 of whom were children, were killed - the highest number over the past decade. Nineteen civilians, including five women, were recorded to have been killed in the Kashmir Valley in 2017 and at least 40 civilians in 2018, in the context of military operations or clashes between Indian armed forces and armed militants.[22]

Article 6 (2) (4) and (6) Death penalty

41. India retains death penalty in several legal provisions and criminal code. Majority of convicts who are sentenced to death so far are first time offenders and are from marginalised community as revealed by research[23]. In many cases, the death penalty has been imposed on individuals against whom there is no material evidence but only circumstantial evidence.[24] Acting in breach of this article and the right to life that the article seeks to protect, India hanged Mohammad Afzal Guru in February 2013, who was accused of carrying out the attack on the Indian parliament in 2001. Although a previous Supreme Court judgement had observed that death penalty should be ordered in rarest of cases, the Supreme Court judgement upholding Afzal Guru's hanging mentioned that there was only circumstantial evidence against Guru but the court will not proceed against hanging Guru to satisfy the 'collective conscience of the country'.

42. While section 6 (4) of ICCPR lays out that, "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." In Afzal Guru's case pardon was not granted despite the clemency plea filed by Guru's wife before the President of India.[25] The Government of India also did not hand over Afzal Guru's body to his family for the last rites and buried him inside the prison much like another Kashmiri nationalist Maqbool Bhat – in Tihar jail premises.[26]

Article 7 Torture and cruel, inhuman or degrading treatment and punishment

43. Allegations of torture are very common in India. Law enforcement agencies are often accused of custodial torture and these offences often go unpunished due to culture of impunity. The marginalised communities living in international border areas of India face torture routinely

[21] http://jkccs.net/2018-deadliest-year-of-the-decade-jkccs-annual-human-rights-review/
[22] http://jkccs.net/2018-deadliest-year-of-the-decade-jkccs-annual-human-rights-review/
[23] https://www.project39a.com/stages-in-deathpenalty-cases/
[24] https://www.theguardian.com/commentisfree/2013/feb/10/hanging-afzal-guru-india-democracy
[25] https://www.hindustantimes.com/india-news/rejected-afzal-guru-s-mercy-plea-on-government-s-advice-pranab-mukherjee/story-8Y6pgE86jbtQz4kk3OoKPL.html
[26] https://www.thehindu.com/news/national/afzal-guru-hanged-in-secrecy-buried-in-tihar-jail/article4396289.ece

committed by security forces. Human rights organisation, MASUM, has documented and reported to the NHRC evidence of consistent patterns of torture in West Bengal which shares an international border with Bangladesh. However, in most of these cases the perpetrators remain unpunished and victims are waiting for justice.

44. Since the break out of armed conflict in IAJK in late eighties, torture, inhuman or degrading treatment and punishment has been routinely used against civilians under detention. The OHCHR report on the situation of human rights in Kashmir claimed that 'there have long been persistent claims of torture by security forces in Kashmir'[27]. JKCCS and APDP have consistently maintained that torture is one of the most under-reported crimes in IAJK and perpetrators often go unpunished. JKCCS and APDP documented different forms of torture perpetrated by armed forces, which include stripping detainees naked (or down to bare minimum), beatings with wooden sticks, iron rods or leather belts, roller treatment whereby a heavy wooden log or an iron rod is rolled over the legs of the detainee, with extra weight applied to it by forces personnel who sit on the opposite sides of this rod, water-boarding, dunking detainees' head in water, electrocution (including in genitals), hanging from the ceiling (mostly upside down), burning of the body with hot iron rods, heaters, stoves or cigarette butts, solitary confinement, sleep deprivation, sexualized torture including rape and sodomy, among others.

45. Anti-Torture Bill was presented before the parliament. However, it has not been enacted as law[28]. Right to compensation for torture is also not recognised. India signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1997 and is yet to ratify it. This suggests that there is no clear political will to prohibit torture in India.

Article 8 Freedom from slavery, servitude and forced labour

46. In IAJK, JKCCS and APDP have documented several cases where armed forces have forcibly used civilians as labour without remuneration in areas close to the Line of Control (LOC). In 2009, State Human Rights Commission received a complaint by a local legislator against Indian Army for allegedly using civilians for forced labour in 39 villages in Mawar area of IAJK's Kupwara district to construct bunkers, extract timber and undertake night patrolling in the area. In 2010, the then Director General of Police carried out an investigation and verified the allegation. In its response, the Indian Army challenged the jurisdiction of SHRC over armed forces stationed in the state of IAJK.[29]

Article 9 Freedom from arbitrary arrest and detention

47. At the time of ratification of the Covenant, the Government of India declared that the provisions of the article shall be applied in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India.

[27] https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf
[28] https://thewire.in/external-affairs/prevention-of-torture-bill-india-law-commission
[29] http://www.greaterkashmir.com/news/2012/Oct/16/army-challenges-shrc-jurisdiction-81.asp

48. In India, illegal detention is widely perpetrated by the police and other law enforcement agencies. The Article 22 of the Indian Constitution guarantees that anyone arrested shall not be detained for more than 24 hours without being produced before the nearest magistrate. However, this provision is routinely violated. In many cases the victim is detained in police custody for more than 24 hours where they are regularly exposed to torture and other forms of inhuman treatment and produced before the magistrate at a later date. This trend has been well documented by MASUM in border areas of West Bengal state[30].

49. In IAJK, this right is frequently violated in several ways. Public Safety Act is being primarily used to detain individuals for their political stand and ideology. A report pushed by Amnesty International31, claims that instead of using the institutions, procedures and human rights safeguards of ordinary criminal justice system, the authorities are using the PSA to secure long-term detention of political activists, suspected members or supporters of armed groups and a range of other individuals against whom there is insufficient evidence for a trial or conviction - to keep them "out of circulation."

50. Similarly, laws like the AFSPA, National Security Act, Unlawful Activities Prevention Act grant legal sanction to arbitrary arrest or detention. The Herald on 24 January, 2018 reported that between Burhan Wani's killing in July 2016 and February 2017, more than 750 habeas corpus petitions have been filed in Kashmir against detentions made under the Public Safety Act. Only 257 people has been released till January 2018.32

51. The Supreme Court of India in its judgment on D. K Basu case33 in 1996 issued guidelines in order to maintain a protocol during arresting a person. But unfortunately the guidelines are not followed by the law enforcement agencies in many cases. In many cases document are altered to show arrest at a later date appearing to follow the guidelines. People are arrested arbitrarily and without intimation and are illegally detained beyond the stipulated time stated in the guidelines. In IAJK, this right is frequently violated by authorities as arrested persons are rarely informed of charges against them. This is especially the case with detentions carried out under Public Safety Act. On 28 February, 2019, after Jamaa-e-Islami (JeI) Jammu and Kashmir was declared an "unlawful organization" by the central government, police reported that 250 leaders and activists have been detained, while JeI put the number at over 300.34

52. In several cases victims are held in detention for prolonged periods and released without being produced before the magistrate. MASUM has documented this trend in West Bengal. In IAJK, authorities do not always follow law while arresting individuals. JKCCS and APDP have

[30] http://www.masum.org.in/Publication.aspx
[31] https://www.amnesty.org/download/Documents/28000/asa200122011en.pdf
[32] https://www.herald.dawn.com/news/1153995 and https://herald.dawn.com/news/1153995/how-kashmirs-senior-citizens-are-battling-the-public-safety-act
[33]https://lawbriefs.in/dk-basu-v-state-of-west-bengal-1996-guidelines-for-all-types-of-arrest-and-detention/
[34] https://indianexpress.com/article/india/jamaat-e-islami-jk-banned-militants-home-ministry-5605844/

documented several cases where individuals were arrested and not brought before a competent judge following their detention. In some cases, the illegal detention has also resulted in the death of individuals in custody.35

53. Victims of arbitrary detention usually do not lodge complaints against law enforcement authorities due to lack of knowledge, awareness, victim protection and support system and also for fear of repercussions from the law enforcing agencies.

54. Under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State. However, in few instances the victim received compensation after prolonged litigation before the judiciary and National Human Rights Commission.

Article 10 Rights of those deprived of their liberty

55. Civil society have regularly documented cases of violations of basic rights of those in detention. In IAJK, JKCCS and APDP have documented cases where detained individuals were humiliated, tortured, and forcibly stripped naked. In 2017, State Human Rights Commission took note of the alleged torture and stripping naked of a prisoner at Kot Bhalwal Jail in Jammu.[36]

56. In IAJK, PSA prisoners are kept with hardened criminals in prisons. This practice has not changed despite several reports, and continues across IAJK.

57. The UN OHCHR report on human rights situation in Kashmir[37] revealed that over 1,000 Kashmiris including minors were held under the PSA between March 2016 and August 2017. In IAJK, JKCCS and APDP have documented several cases of detention of minors where the minor detainees were lodged in jails with hardened criminals and other convicts in complete disregard for Article 10(2)(b) and other juvenile justice norms.

58. According to the Prison Statistics India 2015 report by the National Crime Records Bureau (NCRB), India's prisons are overcrowded with an occupancy ratio of 14% more than the capacity. More than two-thirds of the inmates are under trials – those detained in prisons during trial, investigation or inquiry but not convicted of any crime in a court of law. Chhattisgarh and Delhi are among the top three in the list with an occupancy ratio of more than double the capacity. Prisons are overcrowded by 77.9% in Meghalaya, by 68.8% in Uttar Pradesh and by 39.8% in Madhya Pradesh. In absolute numbers, Uttar Pradesh had the highest number of under trials (62,669), followed by Bihar (23,424) and Maharashtra (21,667). In Bihar, 82% of prisoners were under trials, the highest among states. The share of the prison population awaiting trial or sentencing in India is extremely high by international standards. More than 25% of under trial prisoners in 16 out of 36 states and union territories

[35] https://www.firstpost.com/india/custodial-death-of-kashmir-teacher-rizwan-pandit-likely-due-to-his-affiliations-with-jamaat-e-islami-claims-family-6292901.html

[36] http://kashmirnarrator.com/report-claims-inmates-stripped-tortured-kot-bhalwal-shrc-takes-note/

[37] https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf

have been detained for more than one year in 2014. Jammu and Kashmir tops this list with 54%, followed by Goa (50%) and Gujarat (42%). Uttar Pradesh leads in terms of number (18,214).[38]

Article 12 Freedom of movement

59. The Freedom of Movement as described in the Article 19 of the Indian Constitution is severely restricted and violated in India. In the international border areas of India, where Indian citizens live or have properties beyond the international border face severe restrictions from the law enforcement agencies. Bangladesh and India share a 4,156 km long international border including 2,217 km in West Bengal and Indian side of the border is fenced with barbed wire and concrete with a gap of 150 metres from the actual border with gates at certain intervals. Population within this area face restrictions on movement as a result. Economic activities are also restricted and livelihood options are limited in these border areas.

60. Racial discrimination against the Mongoloid people from North Eastern part of India and from Jammu and Kashmir has resulted in exodus of hundreds of students and professionals from metropolitan cities of India.

61. In AIJK, civilians are not allowed to construct houses near Army Camps and those who have constructed houses with permission are considered a problem as pointed out by Indian Defence Minister Nirmala Sitharaman[39]. In addition to this, as mentioned above, in the month of April 2019, the government of India restricted movement on the National Highway for two days a week, making the lives of civilians extremely difficult.

62. In IAJK, government authorities have frequently denied travel documents to scores of residents on pretexts of 'law and order'. The right to travel is a fundamental human right and Indian authorities do not fully respect this right. Many political activists, who contest India's claims over IAJK have in the past been denied passports and barred from travelling outside Kashmir. Travel within IAJK to certain areas which the government has deemed 'restricted' is also not allowed, preventing people's access to these areas.

63. This right is virtually under permanent infringement in IAJK as due to the divided nature of the erstwhile Jammu and Kashmir, people are prevented from freely moving to parts controlled by Pakistan or the vice-versa.[40] This has led to a situation where there are thousands of divided families on both sides of Kashmir who are unable to visit each other.

Article 14 Right to fair trial

64. Various international standards, national laws and directives by Supreme Court constitute a platform for fair trials in India. However, lack of prosecutions for abuse of power by the

[38] https://thewire.in/uncategorised/india-prison-conditions

[39] https://economictimes.indiatimes.com/news/defence/civilian-construction-near-army-camps-a-problem-nirmala-sitharaman/articleshow/62896136.cms?from=mdr

[40] https://thewire.in/uncategorised/understanding-the-lives-of-those-living-along-the-loc

executives and the state agencies denies right to fair trial in India. Article 21 of Indian Constitution provides right to fair trial and article 39 (A) mandates the state to provide free legal aid to the accused. However, despite all these provisions, fair trial is often denied due to its lax implementation and lack of victim support system.

65. In IAJK, fairness and equality before law is jeopardized as hundreds of Kashmiris languishing in jails show. Hundreds of Kashmiris are jailed in India and are held as under trials without conviction. There are scores of cases where Kashmiris jailed on false and trumped-up charges were later found innocent by Courts and released. This is done without any recompense to the victims, although several of them have spent decades in jail without being charged. [41]

66. Presumption of innocence, as articulated in the Article 14(2) of the Covenant, is universally accepted and has been incorporated in the Indian Constitution. However, few legislations like section 498A (anti-Dowry law) or the Unlawful Activities (Prevention) Act, 1967 presume guilt until proven innocent.

67. In IAJK, charges against individuals booked under Public Safety Act or even under Ranabir Penal Code provisions are not informed to the detainee prior to the arrest. The charges are often communicated after the individual is placed under detention and/or, in some cases, after the individual has already spent certain amount of time in illegal custody of the police.[42]

68. All the provisions mentioned in the Article 14(3) of the ICCPR are incorporated in the Indian Constitution as well as the Criminal Procedure Code. However, in most cases these provisions are not implemented properly. The accused is generally taken to the court without prior information. Court officials lack knowledge and proper training on human rights and the legal proceedings.

69. In IAJK, there are no procedures whereby the state authorities are required to allow detainees to prepare his/her defence or choose their legal counsel. The case of incarcerated Hurriyat leader Masarat Alam Bhat illustrates this well.[43]

70. Army Summary Court of Inquiry and Court Martial laws under the Army Act 1950 violate the basic principles of fair trials. In cases of allegation of human rights of civilian the trials should be conducted by the ordinary civilian court and not under the Court Martial as prescribed in the Army Act.

71. According to sub- section 12 of Section 2 of the Juvenile (Care and Protection) Act, 2015 a "child" means a person who has not completed eighteen years of age. However, the age bar is not uniform in other child related legislations. Although government has laid various legislations and rules to stop the incidents of juvenile crimes, the present laws on juveniles do

[41] https://www.aljazeera.com/indepth/features/2017/03/wrongly-jailed-mohammed-rafiq-shah-story-170302101430798.html
[42] https://www.amnesty.org/en/documents/ASA20/001/2011/en/
[43] https://www.huffingtonpost.in/entry/jailed-kashmiri-politician-masarat-alam-bhat_in_5c29ea47e4b08aaf7a92287e

not deter offences by juveniles due to its lax implementation and lack of training of enforcement personnel.

72. Juvenile Justice is frequently violated by authorities in IAJK. A JKCCS and APDP report in 2018 "laid bare that there are no legal and normative processes or practices protecting children's rights in Jammu and Kashmir as hundreds of minors have been booked under the repressive Public Safety Act (PSA), with total disregard to the fact of their being children."[44]

73. Amnesty International India reported that legal safeguards to prevent excessive pretrial detention are routinely flouted across states in India, leading to the violations of detainees' fair trial rights.[45] The report found that two out of three people in Indian prisons are under trials, and this proportion has not changed for several years despite various Supreme Court judgments, executive guidelines and legal reforms,"

Article 18 Freedom of religion or belief

74. In IAJK, under the pretext of maintaining law and order, the Jammu and Kashmir government has frequently resorted to curbing and restricting rights of freedom of religion and belief of the civilian population. In 2018, on 12 Fridays out of 52, prayers were disallowed in the Jamia Masjid. As data shows, this is a trend to prevent people from congregating for religious purposes. In 2017, the predominantly Muslim population was prevented from offering Friday prayers in the historic Jamia Masjid for 18 out of 52 Fridays.[46] In 2016, following the civilian uprising after Burhan Wani's killing, Jamia Masjid was locked down for 19 weeks.[47] Every year, severe restrictions are put in place by the Jammu and Kashmir authorities to thwart the Moharram processions, stating that there are possibilities of sectarian violence.

Article 19 Freedom of opinion and expression

75. The right to free speech in India is increasingly under threat from multiple sources: agencies of the state, non-state actors of various hues, vigilante and corporate interests that dictate content. Self-censorship is on the rise, as are the attempts to eliminate and silence those who seek to speak the truth. For journalists, bloggers, artists, authors, film-makers, right to information activists and citizens, freedom of expression is fraught with risks, from murderous attacks to harassment, intimidation, online abuse and implication in false cases. Activists, journalists are routinely threatened and harassed online for their lawful expression against corruption, communal violence and pro-peace statements while hate speech by organised groups are neither acted upon nor dealt with effective prohibition measures. In 2018, seven journalists were killed in relation to their work, and at least 27 incidents of attacks on 33 journalists were reported. At least ten journalists were arrested and six others (including three foreign journalists) were detained. At least 17 instances of threats and

[44] http://jkccs.net/terrorized-impact-violence-children-jammu-and-kashmir/
[45] https://amnesty.org.in/news-update/overuse-pre-trial-detention-continues-violate-detainees-rights/
[46] JKCCS, Annual Human Rights Review 2017
[47] JKCCS, Annual Human Rights Review 2018

harassment and 114 instances of censorship of news, film, academia, cultural events and public meetings were recorded[48].

76. In IAJK, the right to hold opinions without interference is held hostage by way of criminalisation of dissent through arrests and intimidation. The right to freedom of opinion and expression in Jammu & Kashmir is curtailed by the government, which regularly gags expressions of political opinions and peaceful dissent. The space for media to carry out their work without fear of being targeted is almost completely closed. In September 2017, Kashmiri freelance photojournalist Kamran Yousuf was arrested by the National Investigation Agency (NIA) without any charges and was released on bail in March 2018. His charge sheet, produced in January 2018, accused him of carrying out terrorist and secessionist activities.[49]

77. With regard to internet censorship and surveillance, in April 2017, in IAJK, the government banned social media for over a month and halted 3G and 4G internet, citing misuse of the services by "anti-national elements."[50] In December 2017, the government of Jammu & Kashmir passed an order that barred all government employees from making, sharing or endorsing any political comments on any social media platforms. In July 2018, the district administration of Kishtwar in Jammu & Kashmir issued an order that required administrators of WhatsApp groups to register themselves, disclose details of all group members, and accept responsibility for all posts made in the groups. The order also required group administrators to disclose any posts made in the group that could "lead to trouble."[51] On 21 July 2018, Indian government issued an "advisory" to foreign correspondents working in India, reminding them that they need prior permission before travelling to certain "protected" areas, including Jammu and Kashmir. According to the Foreigners (Protected Areas) Order, 1958, the whole of Arunachal Pradesh, Manipur, Mizoram, Nagaland, Sikkim, and parts of Himachal Pradesh, Jammu & Kashmir, Rajasthan and Uttarakhand have been declared as "protected areas".[52] This in effect is a move to restrict information from IAJK to travel outside.

Article 20 Prohibition of incitement to hatred

78. Inciting public campaign against religious minorities and Dalits are systematically carried out by the ruling political party and other right wing organisations and activists with impunity. Assaults, rapes and deaths that could be directly linked to such incitement were reported in 2018 by Amnesty International[53].

[48] https://freespeechcollective.in/2018/12/31/free-speech-in-india-2018-the-state-rolls-on/

[49] The United Jehad Council, also known as the Muttahida Jihad Council (MJC), is an umbrella organisation of armed groups operating in Jammu & Kashmir.

[50] https://www.hindustantimes.com/india-news/j-k-government-lifts-ban-on-social-media-in-kashmir/story-U9dfX6tswZhmrqTYFITk5J.html

[51] https://scroll.in/latest/884872/j-k-kishtwar-administration-asks-those-running-whatsapp-groups-to-get-registered-in-10-days

[52] https://www.greaterkashmir.com/news/kashmir/govt-asks-foreign-journalists-to-seek-permission-before-travelling-tojammu-and-kashmir/291140.html

[53] https://amnesty.org.in/news-update/over-200-alleged-hate-crimes-in-2018-reveals-halt-the-hate-website/

Article 21 Right to freedom of peaceful assembly

79. Article 19(1)(b) of the Indian Constitution provides the right to assemble peacefully. There are several court orders stating that the government has to respect, protect and promote these rights. Despite this, protesters are routinely targeted by enforcement agencies and are often killed. On 24 March, 2018 police opened fire on unarmed protesters in Toothukudi district of Tamil Nadu killing 13 protesters.

80. In IAJK, a state of permanent emergency exists due to the imposition of 'Disturbed area' status and section 144, which prohibits assembly of four or more people. JKCCS and APDP have documented scores of incidents of violations to the right of peaceful assembly. In 2017, the government authorities imposed approximately 20 state-wide and 40 partial/district-based curfew-like restrictions. Approximately 22 complete shutdowns/hartals were observed and approximately 100 partial/district-based shutdowns were observed. Unprecedented and strict restrictions were imposed around 8 July, 2017, which marked the first death anniversary of the armed group leader Burhan Wani. An increase in and frequent shut down of schools and colleges were witnessed in 2017 particularly since the students' agitation in April, 2017.[54]

81. Section 144 of Indian Criminal Procedure Code claimed in Greater Imphal in Manipur state for more than four decades. There is no public space to stage peaceful protest. Peaceful protests requires prior permission from the district administration and is made mandatory all the time.

Article 22 Right to freedom of association

82. In IAJK, the right to freedom of association is frequently curbed with impositions of bans and restrictions. In February 2019, Kashmir's largest religious organization Jammat e Islami was banned by Government of India and a month later Jammu and Kashmir Liberation Front, which is a political party seeking Kashmir's right to self-determination under the UN mechanisms, was banned. The bans amount to curbing of freedom of association and criminalisation of right to demand right to self-determination.

83. In Manipur, an organization named as Extrajudicial Execution Victims and Family Members (EEVFAM) was denied registration by the registrar of society allegedly for its "anti-state name". Foreign Contribution Regulation Act (FCRA) requires all civil society organisations to obtain prior registration to receive foreign resources and registrations of several civil societies are routinely denied, suspended or cancelled for alleged violation of the FCRA.

Article 24 Rights of the child

84. Article 24(3) of the Covenant states that "Every child has the right to acquire a nationality." However, in IAJK where children of ex-militants born to their Pakistan-based wives have been

[54] https://jkccs.files.wordpress.com/2017/12/jkccs-annual-human-rights-review-2017.pdf

denied this right by the government as these children are not provided with identity documents and passports.[55]

Article 25 Right to participate in the conduct of public affairs

85. In IAJK, these rights and opportunities are routinely suspended by the Indian Government and elections to local Assembly have been delayed due unavailability of armed forces. The government of India announced Parliamentary Elections in February, followed by the deployment of 100 additional companies in Kashmir. Mass arrests of political and religious leaders and banning of religious and political organisations was carried out, ahead of the elections in India. Election of Commission of India's decision to not announce Assembly Elections in Jammu and Kashmir was based on the assessment of the Ministry of Home Affairs (MHA) that it does not possess adequate security personnel for conducting elections.[56] This admission by MHA further proves that elections in Jammu and Kashmir are a military exercise and are only made possible by the massive presence of armed forces on ground.

Article 27 Rights of minorities

86. The discourse on minorities in India is confined to religious minorities and to a limited extent linguistic minorities[57]. The concept of ethnic minorities is conspicuous by its absence in all policy discourses. Whereas discriminatory practices such as permanent imposition of AFSPA are confined only to the ethnically distinct peoples of the North East India and IAJK. Legal and constitutional protections and ameliorative measures that come with the recognition of minority status are unavailable to them.

87. The Committee should urge the Government of India to recognise the existence of ethnic minorities and indigenous people within its territories and give them the protection of Article 27 of the Covenant along with the Declaration on the Rights of the Indigenous Peoples, 2007.

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[55] https://scroll.in/article/912522/i-have-no-one-here-why-pakistani-wives-of-former-kashmiri-militants-long-for-home

[56] https://economictimes.indiatimes.com/news/elections/lok-sabha/india/inadequate-security-personnel-hinders-jk-assembly-polls/articleshow/68350594.cms

[57] Article 29 (Protection of interest of minorities) and 30 (Right to minorities to establish and administer educational institutions) of the Constitution of India