

RIGHT TO FREEDOM FROM TORTURE: HAS INDIA COMPLIED WITH ITS INTERNATIONAL OBLIGATIONS?

Written by *Rajul Sharma** & *Avani Tewari***

* 5th Year BA LLB Student, OP Jindal Global University

** 5th Year BA LLB Student, OP Jindal Global University

Introduction

The will of the international community regarding human dignity, worth and respect and fundamental freedoms is well reflected in the Universal Declaration of Human Rights (“UDHR”), “mother” document of all the different human rights instruments that are currently in place, in the post-World War II era. Prohibition against torture, by virtue of being a *jus cogens* norm, is placed on a very high pedestal and hence, it is the responsibility of all States to curb any practice of torture against their citizens. Article 5 of the UDHR specifies that no person shall be subjected to any kind of cruel degrading or inhumane treatment or torture or punishment.¹ Its recognition is the foundation of freedom, justice and peace in the world.

Torture, which is defined in the United Nations Convention Against Torture, and Other Cruel, Inhumane or Degrading Treatment or Punishment (“UNCAT”), envisages a complete prohibition on torture or cruel, degrading and inhumane treatment.² Although customary international law and major conventions have called for a complete prohibition against torture many State Parties have violated their obligation to prevent torture and protect its individuals from cruel, inhumane and degrading treatment.

In this paper, the authors examine the obligations India has to prohibit and prevent torture in all its forms. It has these obligations by virtue of being a State Party and State Signatory to the International Covenant on Civil and Political Rights, 1966 (“ICCPR”) and UNCAT respectively. Additionally, the authors look at the different ways in which India has not complied with its obligations under the aforementioned conventions because of arbitrary and capricious implementation of the provisions of the Armed Forces (Special Powers) Act

¹ Article 5, Universal Declaration of Human Rights, 1948.

² Article 1, United Nations Convention Against Torture, 1984

("AFSPA"). Lastly, the authors provide recommendations to help curb the human rights violations taking place because of India's non-compliance with international treaties.

Treaties in Place to Ensure Prohibition of Torture

India has been a State Party to the ICCPR since 1979. Article 7 of the ICCPR lays down an obligation on the State Parties that no person shall be subjected to any kind of cruel degrading or inhumane treatment or torture or punishment.³ No derogation from this obligation may be made by the State-party even in time of public emergency which may threaten the life of the nation.⁴ Similarly, no one shall be subjected to arbitrary arrest or detention.⁵ No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.⁶ There are strict and mandatory requirements prescribed in case anyone is arrested or detained by the state agencies.⁷ The right to liberty of movement within the territory of a State is a basic human right and cannot be subject to any restrictions except those which are provided according to the law, or are compulsory to ensure protection of public order, public morals or health, national security or the freedom and rights of others.⁸

Though 168 States including India have ratified the ICCPR which came into force on 23rd March, 1976⁹, the instances of torture, and other cruel and inhuman treatment by the police and other security agencies continued unabated on a very large-scale world-wide. Hence, it was felt necessary by the UN member-states to create a more specific and more effective instrument to curb such practices. So, UNCAT was adopted by the United Nations General Assembly ("UNGA") on 10th December, 1984 and came into force on 26th June, 1987 once the minimum number of 20 states ratified or acceded to it.¹⁰ India is a signatory to this Convention but has not yet ratified the same.

Both ICCPR and UNCAT require the state parties to cause investigation of the torture or cruel treatment. They both also require the State Party to ensure that the rights and remedies

³ Article 7, International Covenant on Civil and Political Rights, 1966.

⁴ Article 4 (2), International Covenant on Civil and Political Rights, 1966.

⁵ Article 9 (1), International Covenant on Civil and Political Rights, 1966.

⁶ *Ibid.*

⁷ Article 9 (2), International Covenant on Civil and Political Rights, 1966; Article 9 (3), International Covenant on Civil and Political Rights, 1966; Article 9 (4), International Covenant on Civil and Political Rights, 1966; Article 9 (5), International Covenant on Civil and Political Rights, 1966.

⁸ Article 12, International Covenant on Civil and Political Rights, 1966.

⁹ Article 49, International Covenant on Civil and Political Rights, 1966

¹⁰ Article 27, United Nations Convention Against Torture, 1984

prescribed under these instruments are made available to all the individuals within its territorial jurisdiction and complaints are investigated briskly and in a fair manner by the competent authorities. Article 4, UNCAT provides that the State Party is obliged to criminalize all acts of torture or attempt to commit torture and prescribe for appropriate penalties taking into account their gravity.¹¹ The UNCAT unequivocally calls for avoiding any impunity for torture. The States are required to cooperate with each other to ensure that the culprits of torture are prosecuted and the accused does not take advantage of any jurisdictional issue.¹²

To discourage torture as an instrument to extract confessional statement, the UNCAT prescribes that any statement made as a result of torture shall not be used as evidence in any proceedings, except against the torture inflicting official himself.¹³ The State Parties are required to properly educate and sensitise their law enforcement and other public officials involved in dealing with the person under arrest, detention, custody or imprisonment, about prohibition against torture. This shall be included in the rules or instructions framed for the concerned public officials.¹⁴ UNCAT requires the State Party to make provision for redressal and adequate compensation for the victims of torture.¹⁵ In UNCAT, there is no scope of any derogation to any of its provisions. No ground like a state or threat of war, internal instability or any public emergency can be cited as a justification to inflict torture. The prohibition against torture in UNCAT is absolute in nature.¹⁶ Various torture tactics are used by Police and other Security agencies world over in interrogating the terror accused and suspects and the State agencies tend to hide or justify the same. The UNCAT, however, makes no distinction discrimination of the background or nature of crime of the individual and prohibits torture in absolute terms.

At this juncture, it is pertinent to note that the United Nations Human Rights Committee (“UNHRC”) and Committee Against Torture (“CAT”) may entertain complaints from individuals but they are only quasi-judicial bodies and their decisions are not legally binding on the States.

¹¹ Article 4, United Nations Convention Against Torture, 1984

¹² Article 5, United Nations Convention Against Torture, 1984

¹³ Article 15, United Nations Convention Against Torture, 1984

¹⁴ Article 10, United Nations Convention Against Torture, 1984

¹⁵ Article 14, United Nations Convention Against Torture, 1984

¹⁶ Article 2, United Nations Convention Against Torture, 1984

The Optional Protocol to the Convention against Torture was adopted by the UNGA on 18th December, 2002 to strengthen the measures needed against torture and protect the victims. One of the main objectives of the Protocol is to establish a system of regular visits by independent international and national bodies to places of detentions, in order to prevent torture and other ill-treatment.¹⁷ It prescribes for formation of sub-committee on prevention of torture, at international level.¹⁸ The State Party is required to set up visiting body(ies) at the domestic level for prevention of torture.¹⁹

Examination of the AFSPA

In India, several allegations of inflicting torture and subjecting the individuals under custody or detention of Police and Security forces are received from all parts of the country. One such legislation which is mired in controversy due to its alleged illogical application is the AFSPA. It is currently in implementation in various places in India, such as the State of Jammu and Kashmir, Manipur etc.²⁰ Extraordinary powers lie in the hands of the Indian armed forces in these “disturbed areas”.²¹

Perhaps the most problematic provision is Section 7, Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.²² Due to this provision being in place, armed forces are given “blanket immunity” from being prosecuted for human rights violations they have allegedly committed. This is so because this provision lays down that in order to prosecute a member of the armed forces, permission is required beforehand from state or central executive.²³ The consequences of this are that after charges are made against a member of the armed forces, this must be sent to the Ministry of Defence or the Ministry of Home Affairs in New Delhi to get permission to go ahead with the prosecution of the accused.²⁴ Families of the victims have never, in any case, up till now, been given any information by the concerned authorities of the

¹⁷ Article 1, Optional Protocol to the Convention against Torture, 2002

¹⁸ Article 2 (1), Optional Protocol to the Convention against Torture, 2002

¹⁹ Article 3, Optional Protocol to the Convention against Torture, 2002

²⁰ Asian Human Rights Commission, *The Armed Forces (Special Powers) Act, 1958 in Manipur and Other States of the Northeast of India: Sanctioning Repression in Violation of India's Human Rights Obligations*, REDRESS, August 2011

²¹ Section 3, Armed Forces (Special Powers) Act, 1958

²² Section 7, Armed Forces (Special Powers) Act, 1958

²³ Amnesty International Ltd., *Denied: Failures in Accountability for Human Rights Violations by Security Force Personnel in Jammu and Kashmir*, AMNESTY

INTERNATIONAL, <https://www.amnesty.org/download/Documents/ASA2018742015ENGLISH.PDF>, July 2015

²⁴ *Ibid.*

progress their case has made. This points towards the fact that there is a total lack of transparency in these cases. Authorities often try to justify the abovementioned Section 7 by saying that its existence is crucial to ensure that “false” or “motivated” cases are not filed, with mala fide intentions against the members of the armed forces.²⁵

It’s disheartening to note that the provisions of an Act are flagrantly misused to such an extreme extent where several innocent people have to pay the price. Perhaps the most horrifying case is of Javaid Ahmad, the 17 year old innocent boy who was declared a militant and was murdered without any appropriate explanation.²⁶ One major issue that arises here- and perhaps acts as a contradiction to claims of human rights violations in these areas- is that the Army’s Human Rights Cell, has on its official website, reported that as of December 30th, 2011, out of 1,532 accusations of human rights violations that it had received, only 54 were found to be true.²⁷ It is because of such claims that jurisdiction of military courts should be limited.

It is, thus, abundantly clear from the above discussion that India’s obligation of prohibiting torture is blatantly not being adhered to. Under the guise of acting under the AFSPA, military personnel arbitrarily arrest, detain and torture innocent civilians.

Is India Adhering to this Obligations provided under the ICCPR and the UNCAT?

Firstly, in the case of *Naga People’s Movement for Human Rights v. Union of India*²⁸, the validity of AFSPA was challenged. *Inter alia*, the Indian Supreme Court in this judgment held that the numerous provisions of the AFSPA were indeed compatible with the Articles of the Constitution of India. In the same year, prior to this judgment, the UNHRC while analysing India’s third periodic report, stressed on the importance of abiding by the provisions of the ICCPR while keeping a check on terrorist activities.²⁹ However, the Apex Court kept silent on the obligations of India under the ICCPR in the *Naga People’s Movement* case.

²⁵ *Ibid.*

²⁶ Amnesty International India, *Kashmir: The Student Who Was Shot and Branded a Militant Overnight*, AMNESTY INTERNATIONAL, <https://amnesty.org.in/kashmir-student-shot-branded-militant-overnight/>, June 29th 2015

²⁷ PTI, *129 Army Personnel Found Guilty in Human Rights Violation Cases*, THE TIMES OF INDIA, <https://timesofindia.indiatimes.com/india/129-army-personnel-found-guilty-in-human-rights-violation-cases/articleshow/13020150.cms>, May 6, 2012

²⁸ *Naga People's Movement of Human Rights v. Union of India*, 1998 AIR 431

²⁹ Asian Human Rights Commission, *The Armed Forces (Special Powers) Act, 1958 in Manipur and Other States of the Northeast of India: Sanctioning Repression in Violation of India’s Human Rights Obligations*, REDRESS, August 2011

Secondly, when we look at the right to life guaranteed under Article 6, ICCPR³⁰, we see that the Section 4(a), AFSPA³¹ which authorises the use of lethal force is not compatible with Article 6, ICCPR. Section 4 (a), AFSPA assigns military personnel with the power to use lethal weapons in any situation he considers fitting. The Act fails to provide any guidelines as to what circumstance can be considered as appropriate for the officer to use lethal force. Thus, as mentioned earlier, Section 4(a), AFSPA is a clear cut violation of the right to life guaranteed under Article 6, ICCPR.

Thirdly, Article 7, ICCPR³² which provides for prohibition of torture, cruel, inhuman and degrading treatment is clearly incompatible with AFSPA's, provisions such as authority to arrest,³³ plus use of compulsory force while arresting. Requirements under Article 7, ICCPR are not fulfilled.

Fourthly, the right to liberty and security of persons guaranteed under Section 9, ICCPR is also incompatible with Section 4(c), AFSPA³⁴ which authorises military personnel to arrest citizens. AFSPA is spotted with provisions which are in clear violation of Articles enshrined in the ICCPR to which India is a State Party, thus creating on it a legal obligation to domestically implement its articles.

The AFSPA therefore goes against India's obligation to prohibit and prevent torture against its citizens. A Judicial Commission, appointed by the Indian Supreme Court, said in its report that AFSPA has been highly misused by armed forces personnel and the act has created a situation where armed forces have grossly violated human rights.³⁵ The Indian Supreme also fails to recognize India's international law obligations to absolutely prohibit torture and has held AFSPA to be constitutional.³⁶ This is in violation of the moral obligation of India by virtue of signing the UNCAT. By upholding AFSPA to be constitutional, the Indian State provides for

³⁰ Article 16, International Covenant on Civil and Political Rights, 1966

³¹ Section 4(a), Armed Forces (Special Powers) Act, 1958

³² Article 7, International Covenant on Civil and Political Rights, 1966

³³ Section 4(c), Armed Forces (Special Powers) Act, 1958

³⁴ *Ibid.*

³⁵ Utkarsh Anand, *In reports by inquiry panels, tales of AFSPA abuse in Manipur*, INDIAN EXPRESS, August 22nd 2014

³⁶ Naga People's Movement of Human Rights v. Union of India, 1998 AIR 431

conditions, which permit torture and cruel, inhumane and degrading treatment, which discriminates against individuals residing in the states classified as 'disturbed area'.

Recommendations

The Amnesty International Report in its 2015 report on Jammu and Kashmir provided for various guidelines the Indian Government and its concerned authorities could follow. Some of them included erasing the requirement of sanction or a beforehand approval of the executive to prosecute a military personnel alleged of human rights violations, also limiting the scope of jurisdiction of military courts to ensure transparency, restitution, compensation rehabilitation for all the victims of the atrocities committed by armed forces personnel³⁷ and lastly, to ensure that the victims, along with their family members, are fully aware of the progress of investigations being conducted by the appropriate authorities and also to ensure that public-police relations laid down by the National Human Rights Commission in 1999 is abided by.³⁸

Perhaps if these guidelines and recommendations are taken more seriously, then a change would surely be seen in the human rights violations rate. The rate would go down drastically.

Conclusion

International Conventions discussed above have expressly prohibited all forms of torture and acts, which are cruel, inhumane and degrading. The prohibition against torture has also been recognized as a '*jus cogens*' norm and therefore, States, which haven't ratified conventions prohibiting torture, also have an obligation to protect torture. Despite these provisions, the Indian State, through enacting the AFSPA, has created a situation where torture is permitted. Provisions under the AFSPA are often misused, by State Officials and have lead to discrimination against a particular group of people especially religious minorities in Jammu & Kashmir and the marginalized tribes in the North East.

Indian government is strongly urged to abide by the aforementioned guidelines and also most importantly, send in its report to the UNHRC so that it becomes aware of the status of the

³⁷ Amnesty International Ltd., *Denied: Failures in Accountability for Human Rights Violations by Security Force Personnel in Jammu and Kashmir*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/download/Documents/ASA2018742015ENGLISH.PDF>, July 2015

³⁸ National Human Rights Commission, *Measures to Improve Public-Police Relationship*, NATIONAL HUMAN RIGHTS COMMISSION <http://nhrc.nic.in/Documents/sec-4.pdf>, August 2nd 1999

various problems attached to the implementation of AFSPA and the obligation of India to prohibit torture comes into the limelight. Since prohibition against torture is a customary international law, India, because it is a State signatory to the UNCAT, has a moral obligation upon it to abide by its provisions.

Apart from fixing the loopholes in laws such as AFSPA, the Indian State should also raise awareness, advocacy and adherence to laws which prohibit torture and other forms of cruel and degrading treatment. Further, State officials should also be made aware of the legal and moral consequences of using torture and degrading methods on civilians. Additionally, the Indian State should also try to enact laws which punish torture in order to make Indian domestic laws consistent with International treaties and conventions prohibiting torture.

It is interesting to note that the Union Cabinet has approved the Prevention of Torture Bill, 2010 which makes torture a punishable offence. The Statement of Objects and Reasons of the Bill states that the Bill would meet the requirements of the UN Convention against Torture. India is a signatory of the Convention but has not enacted a law on torture which would enable it to ratify the Convention. The Bill defines torture as “grievous hurt”, or danger to life, limb and health and seeks to provide for punishment for torture committed by government officials. Complaints against torture should be lodged within six months of occurrence. The sanction of the appropriate government is required before the accused is prosecuted in a court. The critics have pointed out that the definition of torture is inconsistent with that of UNCAT. It does not include mental pain or suffering and some other acts which may constitute torture. No provision exists of any independent authority to ensure that complaints involving torture are investigated into, and neither are there any provisions which ensure that compensation is granted to victims of torture.³⁹

The above mentioned inconsistencies need to be remedied by our lawmakers. The loopholes mentioned need to be rectified, if Indian statutes have to be made consistent with India’s international obligations. The Indian State must abide by customary international laws if it has to be a respectable member in the international arena. More importantly, the concept of torture is

³⁹ PRS India, “The Prevention of Torture Bill, 2010” <http://www.prsindia.org/billtrack/the-prevention-of-torture-bill-2010-1129/>

inhumane and regardless of there being an international obligation on India, it should strive to ensure that perpetrators of such torture methods are penalized and deterred.

