

SECURITY WITH
HUMAN RIGHTS

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A 'LAWLESS LAW'

Detentions under the
Jammu and Kashmir
Public Safety Act

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Cover and back photo: Security force personnel enforcing a curfew at Lal Chowk in Srinagar, September 2008.
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1. INTRODUCTION AND SUMMARY

‘We have to keep some people out of circulation...’

Samuel Verghese, (then) Financial Commissioner - Home, Jammu and Kashmir in a meeting with Amnesty International, Srinagar
20 May 2010

Shabir Ahmad Shah has been kept “out of circulation” and in and out of prison for much of the time since 1989, when a popular movement and armed uprising for independence began in the Indian state of Jammu and Kashmir (J&K). As the leader of the Jammu and Kashmir Democratic Freedom Party he has been amongst the most vocal and consistent voices demanding an independent Kashmir. As a result he has spent over 25 years in various prisons, much of it in “preventive” or administrative detention, that is, detention by executive order without charge or trial.¹ His incarceration has been solely for peacefully expressing his political views. Shah was last released from prison on 3 November 2010 but since that time has been subject to periods of arbitrary house arrest.



Photo 1: Shabir Shah being arrested by police while en-route to Sopore and Baramulla (© J&K Freedom Democratic Party)

At the time of Amnesty International's visit to Srinagar, the capital of J&K, in May 2010, Shabir Shah was in prison. Amnesty International was denied permission by the state authorities to meet with him, but was able to meet his wife Dr. Bilqees who said, "His continuing detention is a tactic to break his resistance. The government think that if they keep him away from us and make us all suffer, he will agree to remaining silent. Even though he is concerned about our daughters who rarely see their father, he will not desert his principles."

Shabir Shah is one of the most high profile of those detained under the Jammu and Kashmir Public Safety Act, 1978 (PSA) but he is only one among thousands who have been detained without charge or trial in this manner. Estimates of the number detained under the PSA over the past two decades range from 8,000-20,000.

This report reveals how the PSA violates India's international human rights legal obligations. It further provides evidence of the ways in which administrative detention under the PSA continues to be used in J&K to detain individuals for years at a time, without trial, depriving them of human rights protections otherwise applicable in Indian law.

The report is based on research conducted by an Amnesty International team during a visit to Srinagar in May 2010 and subsequent analysis of government and legal documents relating to over 600 individuals detained under the PSA between 2003 and 2010. The research shows that instead of using the institutions, procedures and human rights safeguards of ordinary criminal justice, the authorities are using the PSA to secure the 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."

The region of Kashmir has been a source of dispute in South Asia for decades. But since 1989, J&K has witnessed an ongoing popular movement and armed uprising for independence. Armed groups regularly carry out attacks on security forces as well as civilians. Amnesty International acknowledges the right, indeed the duty of the state to defend and protect its population from violence. However, this must be done while respecting the human rights of all concerned.

Amnesty International takes no position on the guilt or innocence of those alleged to have committed human rights abuses or recognizably criminal offences. However, everyone must be able to enjoy the full range of human rights guaranteed under national and international law. By using the PSA to incarcerate suspects without adequate evidence, India has not only gravely violated their human rights but also failed in its duty to charge and try such individuals and to punish them if found guilty in a fair trial.

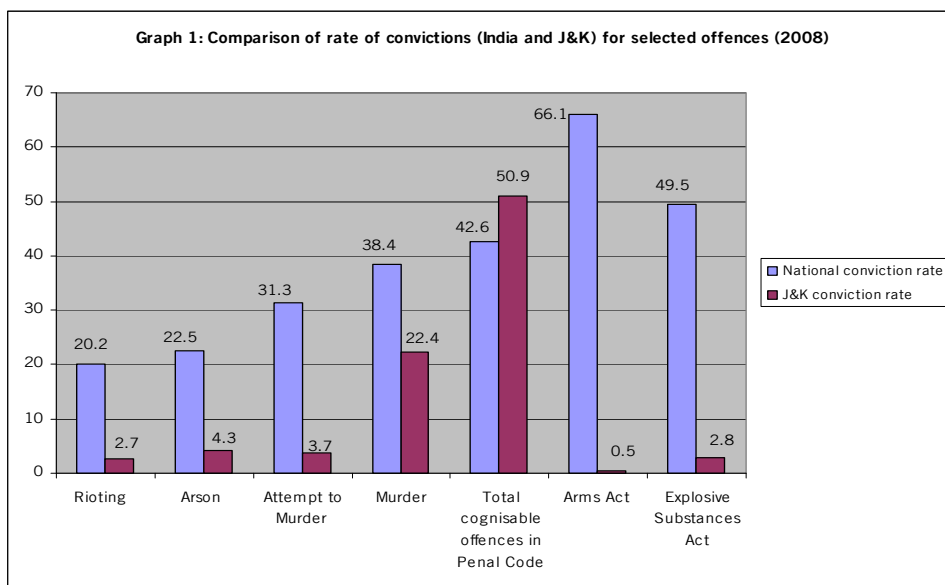
Over the past decade there has been a marked decrease in the overall numbers of members of armed groups operating in J&K. By the J&K Police's own estimates, only around 500 members of armed groups now operate in the Kashmir valley.² But in the last five years, there has been a resurgence of street protests. Some of the protesters, most of them young, have resorted to throwing stones at security forces, which have on many occasions retaliated with gunfire using live rounds. Despite this apparent shift in the nature of opposition to the Indian state, there does not appear to be a change in the approach of the J&K authorities. They

continue to rely on the extraordinary administrative detention powers of the PSA rather than attempting to charge and try those suspected of committing criminal acts. Between January and September 2010 alone, 322 people were reportedly detained under the PSA.

Many of these individuals may have been detained after being labelled as “anti-national” solely because they support the cause for Kashmiri independence or a merger with Pakistan and because they are challenging the state through political action or peaceful dissent. Some of the political activists detained under the PSA include lawyers and journalists. Besides Shabir Shah, a number of prominent political leaders have been detained under the PSA; many including Masarat Alam Bhat remain in detention.

Amnesty International opposes on principle all systems of administrative detention. The Indian Supreme Court has also described the system of administrative detention as “lawless law”. The PSA has become precisely such a “lawless law”, largely supplanting the regular criminal justice system in J&K. Criminal justice systems have developed procedures, rules of evidence, and the burden and standard of proof in order to minimize the risk of punishing the innocent and to ensure punishment of the guilty. It is unacceptable for any government to circumvent these safeguards by use of “preventive” or any other form of administrative detention: punishing those suspected of committing offences without ever charging or trying them.

The rate of conviction for possession of unlawful weapons – one of the most common charges brought against alleged supporters or members of armed groups – is 0.5 per 100 cases: over 130 times lower than the national average in India. Similarly the conviction rate for attempt to murder in J&K is eight times lower than the national average, seven times lower for rioting and five times lower for arson (see graph below). In contrast, the number of persons in administrative detention without trial in J&K is 14 times higher than the national average – a possible result of the monthly / quarterly “targets” or quotas of detentions apparently followed by the J&K police.



Many of the people detained under the PSA without charge or trial for periods of two years or more may have committed no recognizably criminal offence at all. Under the PSA, detention can be justified for undefined acts "prejudicial to the security of the State" and for extremely broadly defined acts "prejudicial to the maintenance of public order". The possibility of detention on such vague and broadly defined allegations violates the principle of legality required by Article 9(1) of the International Covenant on civil and Political Rights (ICCPR), to which India is a party.

Detainees also cannot challenge the decision to detain them in any meaningful way; there is no provision for judicial review of detention in the PSA; and detainees are not permitted legal representation before the Advisory Board, the executive detaining authority that confirms detention orders. The United Nations Working Group on Arbitrary Detention (WGAD), in a November 2008 opinion on 10 PSA cases from J&K, found that the detentions did not conform to the international human rights legal obligations that the Government of India is bound by.

BOX 1: NO WAY OUT

Police arrested Muneer Ahmad Sheikh on 29 July 2008 and charged him with possession of prohibited weapons. While in prison awaiting trial in this case, a PSA detention order was issued on 20 September 2008 (No. DMS/PSA/22/2008). At the same time he was also formally charged in three additional criminal cases of attacks on security forces carried out in 2001, 2004 and 2009 respectively. The PSA detention order was quashed by the High Court on 4 August 2009, which accepted his habeas corpus petition (HCP 240/09). Sheikh was granted bail in connection with the initial charge of possession of prohibited weapons in January 2010, but he remained in detention awaiting trial on the other charges.

On 24 February 2010, the trial court dismissed two of the three outstanding charges against Sheikh noting that the only evidence against him was a confession made by him while in police custody which was inadmissible in court (in India, confessions made to the police are inadmissible as evidence because of fears that they may be coerced). Sheikh's lawyers claim that he was indeed tortured by police during his interrogation. The court dismissed the third charge against Sheikh on 15 March 2010.

Despite having no further criminal charges or PSA detention orders pending against him, the prison authorities handed Sheikh to the police on 16 March who detained him illegally at the Joint Interrogation Centre (JIC) at Humhuma, Srinagar. He was not brought before a magistrate within 24 hours as required by law. Finally, a second PSA detention order (DMS/PSA/95/2010) was issued against him on 31 March 2010. The grounds of detention claimed that Sheikh had been released from prison on 28 March (while he was in fact still in detention) but had been rearrested immediately afterwards because he was forcing shopkeepers to close their establishments and inciting the public to support a call for a general strike. A habeas corpus petition (No. 123/10) is currently pending in the J&K High Court challenging Sheikh's detention under the PSA and seeking compensation for his illegal detention. His is just one of hundreds of such petitions heard by the High Court every year.

Furthermore, state officials often implement this law in an arbitrary and abusive manner, as numerous cases cited in this report demonstrate. Detaining authorities fail to provide material on which the grounds of detention are based to detainees or their lawyers. Detainees can approach (often successfully) to the High Court to quash their order of detention, but Amnesty International's research clearly shows that the J&K authorities consistently thwart

the High Court's orders for release by re-detaining individuals under criminal charges and / or issuing further detention orders, thereby securing their continued incarceration. The ultimate decision as to whether PSA detainees are allowed to go free lies with an executive Screening Committee made up of government officials, police and intelligence officials whose deliberations are not open to any public scrutiny.

Systems of administrative detention are notorious for facilitating human rights violations, including incommunicado and illegal detention and torture and other forms of ill-treatment in police and judicial custody. The PSA is no exception. Many of the PSA cases studied by Amnesty International for this report contained evidence of periods of illegal detention in violation of national and international law. Many alleged the use of torture and other forms of ill-treatment in coercing confessions. The PSA provides for immunity from prosecution for officials operating under it, thereby permitting impunity for human rights violations carried out under the law.

Amnesty International has previously called on the Government of India to reform its administrative detention system, as have other international human rights organisations and a number of UN human rights mechanisms. India has so far chosen to ignore such calls. In a meeting with Amnesty International delegates in Srinagar in May 2010, the then Additional Director General of Police (Criminal Investigation Department) of J&K asked, "What rights are you talking about? We are fighting a war – a cross border war."

Such opinions, and the practices that result (as documented in the current report), run directly counter to legal commitments made by India in ratifying international human rights treaties, and assertions regularly made by government officials at both the state and central level that the rule of law should prevail in J&K. The widespread and abusive use of the "lawless" PSA, far from building confidence amongst the Kashmiri population, further risks undermining the rule of law and reinforcing deeply held perceptions that police and security forces are "above the law."

Amnesty International calls upon the Government of Jammu and Kashmir to:

- Repeal the PSA and end the system of administrative detention in J&K, charging those suspected of committing criminal acts with recognizably criminal offences and trying them in a court of law with all safeguards for fair trial provided;
- As a means of demonstrating the government's commitment to the rule of law, end practices of illegal and incommunicado detention and immediately put in place safeguards to ensure that those detained are brought promptly before a magistrate, provided with access to relatives, legal counsel and medical examination, and held in recognized places of detention pending trial.

The Governments of India and Jammu and Kashmir must further:

- Carry out an independent, impartial and comprehensive investigation into all allegations of abuses against detainees and their families, including allegations of torture and other ill-treatment, denial of visits and adequate medical care, make its findings public and hold those responsible to account.

Amnesty International urges the Government of India to:

- Extend invitations and facilitate the visits of the UN special procedures including

particularly the UN Special Rapporteur on Torture and the Working Group on Arbitrary Detention.

BOX 2: METHODOLOGY

This report is based on research conducted by an Amnesty International team during a visit to Srinagar in May 2010 and subsequent analysis of government and legal documents related to over 600 PSA detentions issued between 2003 and 2010. These documents came from a variety of sources including the J&K High Court Bar Association, leading political parties, individual lawyers, former detainees and family members of current detainees.

Documents prepared by state authorities, in particular the “grounds of detention” required for a detention order to be issued under the PSA, form the main source of information for this report. The report analyzes the allegations against detainees but also the omissions and gaps in the government documents. Where possible, in addition to the government documents, the report also refers to habeas corpus petitions filed by detainees or their family members in the High Court of J&K, (hereinafter High Court) and the judgments / orders of the High Court and trial courts.

Documentary evidence has also been supplemented by testimonies of former detainees, family members of current detainees, journalists, lawyers and members of the State Human Rights Commission met by the Amnesty International team in Srinagar. Where requested, the names of some persons have been withheld. Amnesty International also met the Chief Minister of J&K and senior officials of the state administration including the Chief Secretary and the Home Secretary, Inspector General of Police and the Deputy Inspector General of Police – Criminal Investigation Department. Permission to visit Srinagar Central Prison and other prisons where detained persons are held was also sought, but refused by the government. Officials at India’s Ministry of Home Affairs in New Delhi declined Amnesty International’s request for a meeting.

2. BACKGROUND

'In order to overcome the menace of terrorism and secessionism, a holistic approach is needed to be adopted wherein besides legal action, preventive detention will be [a] very effective tool against the persons having potential, will, commitment and urge to challenge the integrity and sovereignty of the state.'

Excerpt from the grounds of detention of Masarat Alam Bhat issued by District Magistrate Srinagar (DMS/PSA/20/2008), 9 September 2008

2.1 POLITICAL BACKGROUND

The region of Kashmir has been a cause of dispute in South Asia for decades. Prior to the independence of India and Pakistan from British colonial rule in 1947, Kashmir was a princely state with a Hindu ruler – Maharaja Hari Singh – but a predominantly Muslim population. As a princely state not under direct colonial rule at the time of independence, the Maharaja had an option of joining either India, Pakistan or remaining independent. Indecisive over which path to choose and facing a Pakistani backed rebellion in October 1947, the Maharaja ultimately sought military assistance from India and signed an instrument of accession to join India.

With war breaking out over Kashmir in late 1947, India filed a complaint against Pakistan at the United Nations in January 1948. A number of resolutions were passed by the UN in 1948-1949 calling for a ceasefire, for Pakistan to withdraw all forces, and for a plebiscite that would determine the future of the entire state of J&K.³ Although a ceasefire did take place, India sought the withdrawal of Pakistani forces from the territories it occupied before holding the plebiscite. Pakistan claimed that the forces were required to ensure a free and fair plebiscite and refused to withdraw. The plebiscite was never held.

The former princely state was thus divided, with Pakistan retaining control of the mountainous western and northern areas of Kashmir (which it calls Azad, or "free", Kashmir) and Gilgit-Baltistan respectively (part of which was subsequently ceded to China). India retained control of the central region around Srinagar – the Kashmir valley with its overwhelmingly Muslim population – and the Hindu majority region of Jammu and Buddhist

majority Ladakh in the south and east respectively. All three regions together constitute the Indian state of J&K. The 1949 ceasefire line monitored by the UN was eventually renamed the Line of Control (LoC) after wars between India and Pakistan in 1965 and 1971. A limited war was also fought in 1999 between the two countries over the LoC in the Kargil region of Ladakh.

Pakistan continues to call for implementation of UN resolutions adopted in the late 1940s urging a plebiscite; India argues that the dispute over Kashmir should be settled bilaterally in accordance with the 1972 Simla Agreement between India and Pakistan. The failure by the Indian state to hold a plebiscite became a source of mounting discontent among Kashmiris. The first of a number of armed groups seeking independence for Kashmir emerged in the late 1960s but general resentment increased as a result of persistent reports of irregularities in elections in J&K, notably the 1987 state elections. Many observers see the alleged rigging of these elections as a turning point in the growth of Kashmiri nationalism.

From mid 1989, the Jammu and Kashmir Liberation Front (JKLF) and other armed opposition groups led a popular movement and armed uprising for independence. The state was racked with violence and remained under President's Rule (direct rule by the central Government of India) between 1990 and 1996. Over the years the JKLF lost its pre-eminent position to the Hizbul Mujahidin, an armed group that supported the merger of the region with Pakistan. At the same time, the involvement of foreign nationals in the conflict increased, particularly within armed groups like the Lashkar-e-Taiba and Harkat-ul-Mujahidin. India has consistently claimed that Pakistan is engaged in a "proxy war" and providing military support to armed opposition groups, especially those that favour Kashmir seceding to Pakistan.

The armed uprising and its suppression by Indian security forces have resulted in grave human rights violations. In 1990 the oft-criticised Armed Forces Special Powers (Jammu and Kashmir) Act (AFSPA) was promulgated to provide armed forces personnel with special powers to use force when operating in notified "disturbed areas" in the state as well as immunity from prosecution.⁴ Amnesty International has previously documented extensive human rights violations carried out by security forces in J&K during counter-insurgency operations with almost total impunity, including torture and custodial deaths, rape, enforced disappearances and extra-judicial executions.⁵ On the other side, the early 1990s witnessed a number of attacks by armed opposition groups on the Hindu minority Kashmiri-pandit community leading to hundreds of thousands fleeing the valley to live in displacement camps in Jammu and Delhi. Amnesty International has also documented a number of other abuses by armed groups including hostage taking, targeting of minority groups and indiscriminate violence against civilians.⁶

Over the past decade, there has been a marked decrease in the level of violence in J&K. By the J&K Police's own estimates, only around 500 members of armed groups now operate in the Kashmir valley.⁷ Regular local and national elections have taken place, notably in 2002 and 2008, with increased voter turnout. While the mainstream political parties – particularly the Indian National Congress, the National Conference and the Peoples Democratic Party - shared the electoral support, there was also support for those who rejected the electoral process. One such political group is the All Party Hurriyat Conference (APHC) – a conglomeration of 26 political, social and religious groups that was formed in 1993 as a joint

Kashmiri front for self-determination and which now has two factions led by Mirwaiz Omar Farooq and Syed Ali Shah Geelani respectively. Another is the JKLF, which renounced armed struggle and transformed itself into a political party in the mid 1990s, but which has faced internal divisions since then.

Between 2005 and 2008, tentative steps were taken towards a dialogue between India and Pakistan with "confidence-building measures" initiated. As part of these steps, dialogues were established between the Government of India and some of the pro-independence political leaders in the Kashmir valley. A breakdown in the relationship between India and Pakistan following the terrorist attacks in Mumbai in November 2008 and an escalation in protests in J&K have stalled these moves.⁸

Popular protests against the state and security forces operating in the valley have been a feature of life in J&K throughout the past two decades. Protesters' demands range from the removal of particular security force camps and bunkers, accountability for alleged incidents of rape, extra-judicial executions and other human rights violations by security forces, to broader demands such as repeal of the AFSPA and demilitarisation of the region, along with an underlying demand for "azaadi" (independence / freedom). In 2008, the transfer of land to a Hindu shrine by the authorities was the catalyst for a number of protests that have continued to date. In recent years, particularly in parts of Srinagar and North Kashmir, protests have taken the form of marches that often turned violent with young people throwing stones and security forces retaliating with gunfire. More than 100 protestors, some who engaged in stone pelting, were killed in shootings by security forces in the summer of 2010. A further 3500 persons were reportedly arrested and 120 detained under the PSA.⁹

In September 2010, the Government of India announced the appointment of a group of interlocutors to "begin the process of a sustained dialogue with all sections of the people of Jammu & Kashmir".¹⁰ It also advised the State Government to immediately release all students and youth detained or arrested for stone pelting and withdraw the charges against them, and immediately review the cases of all PSA detainees and withdraw the detention orders in appropriate cases. While the group of three interlocutors is reported to have included recommendations on the PSA in their first report submitted in November 2010, it is unclear how many detainees have been released and detention orders withdrawn by the J&K Government as a result of these recommendations.

2.2 ADMINISTRATIVE DETENTION IN J&K

While a number of laws applicable in J&K allow for administrative detention, the most commonly used is the PSA.¹¹ Administrative detention is also provided for in other forms such as house arrest, as well as Section 107 read with Section 151 of the J&K Code of Criminal Procedure (1989).¹² As the period of permissible detention is limited in these provisions due to availability of bail, they are sometimes used in J&K only to detain individuals while the paperwork for PSA detention orders or criminal charges are being prepared.

Chapter IV of the PSA is entitled "Power to Make Orders Detaining Certain Persons" and regulates such detentions. Unlike the National Security Act 1980 (NSA) - a similar law in force in other states of India, which limits detention to a maximum period of one year, the PSA provides for detention for a maximum of two years "in the case of persons acting in any

manner prejudicial to the security of the State.”¹³ It further allows for administrative detention of up to one year where “any person is acting in any manner prejudicial to the maintenance of public order”.¹⁴

Detention under the PSA can be ordered by either of two executive officers – the Divisional Commissioner or a District Magistrate.¹⁵ Once a PSA detention order has been issued, the grounds of detention must be provided to the detainee within five to ten days of the detention, but without the necessity to disclose facts that the detaining authority “considers to be against the public interest to disclose.”¹⁶ The detaining authority is also required to inform the State Government of the detention as well as the grounds for it and the State Government must approve the detention order within 12 days of the detention for it to remain in force.¹⁷ Within four weeks from the detention, the State Government must place the grounds before a non-judicial Advisory Board, which must report within eight weeks from the date of detention. The State Government must act in accordance with the Advisory Board’s conclusions in either confirming or revoking the detention order.¹⁸

BOX 3: EXTENSION OF SCOPE OF PSA

The usefulness to the state of the powers of administrative detention under the PSA is demonstrated not just in the numbers of those detained, but also in the broad range of offences for which people are detained under the act. In 1985 an amendment was made to the PSA (section 8(a-1) (iii) to include the offence of “engaging in transporting or concealing or keeping smuggled timber.” Amnesty International is aware of at least two individuals - Mohd Shafi Bhat (DET/PSA/06/215) and Parvaiz Ahmad Malik (74/DMB/PSA/10) - who have been detained without trial under the PSA for up to 12 months since 2006 on allegations of timber smuggling. Further reference is made elsewhere in the report to the detention of people under the PSA for a range of offences that should have been prosecuted under the ordinary criminal law (see 6.1).

THE SCALE OF DETENTIONS

Despite the significant reduction in the number of members of armed groups operating in the region in recent years, there appears to be little change in the state’s reliance on the use of administrative detention without trial—overwhelmingly through the PSA. As the quote at the beginning of this chapter from a government record in the case of one particular political leader reveals, administrative detention is seen as an integral part of the “holistic approach” adopted by the authorities in response to the challenges of “terrorism and secessionism.” In the past, administrative detention in J&K has been used in conjunction with security legislation whose provisions also fall far short of international human rights law and standards.¹⁹

The reliance of the authorities on administrative detention is evident from the high ratio of administrative detainees to those undergoing trial or convicted for criminal offences in the state. At its lowest, the percentage of administrative detainees (within the overall prison population) in J&K prisons was 11.5% (2008). This is over 14 times higher than the national average.²⁰

The exact number of detainees held in administrative detention has remained a disputed issue over the years, as the table below shows. Regardless of the exact numbers, the scale of administrative detentions is indisputably high: estimates range from 8,000 to 20,000 detentions over the past two decades. Unfortunately, the Government of India has not acted

upon the United Nations Human Rights Committee's (HRC) 1997 recommendation that it maintain a central register of detainees held under preventive detention legislation.²¹

The number of detentions under the PSA appears to be on the increase again after a gradual fall over the past decade from the peak of the early and mid-1990s. The Chief Minister (who also holds the post of Home Minister) informed the J&K Legislative Assembly in October 2010 that 724 people had been detained in 2009 and 2010, of which 322 had been detained between January and September 2010.²² The real numbers may be even higher. In response to an opposition legislator's question in the Legislative Assembly in March 2010, the J&K Home Department was reported to have provided details of 334 persons booked under the PSA during the period 5 January 2010-14 February 2010 alone.²³

Table 1 – Number of persons held under administrative detention in J&K 1990-2008
 (Statistics from the Government of India's National Crime Records Bureau and Greater Kashmir Newspaper)²⁴

Source	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
NCRB (detainees as of 31 Dec)	NA	NA	NA	NA	NA	799	1022 ²⁵	725	303	269
Greater Kashmir (‘Year Wise Detentions’)	942	1070	976	1112	2118	1819	1560	414	460	441
	2000	2001	2002	2003	2004	2005	2006	2007	2008	
NCRB (detainees as of 31 Dec)	497	416	444	397	451	377	369	275	266	
Greater Kashmir (‘Year Wise Detentions’)	503	318	504	401	510	402	920	NA	NA	

Note: Amnesty International does not consider either source entirely reliable. Statistics prepared by the ‘Greater Kashmir’ newspaper appear to have been compiled with the assistance of lawyers. Government statistics are often inconsistent. For example, although the central government data in the above table notes 725 detainees as of 31 December 1997, in a reply to a petition before the National Human Rights Commission, the Central Government counsel submitted on record that as of 19 December 1997, 1016 persons were held under preventive detention in J&K.²⁶

BOX 4: WOMEN DETAINEES

Only four of the over 600 PSA cases studied for this report are women detainees. Although this proportion is noticeably low, it is corroborated by data provided by the National Crime Records Bureau which records only 16 detentions of women in the period 1995-2008. However, one woman repeatedly detained is Dukhtaran-e-Millat leader Asiya Andrabi. The Dukhtaran-e-Millat is a Muslim women's organisation classified by the Government of India as a "terrorist organisation" under Section 35 of the Unlawful Activities (Prevention) Act. Andrabi has been detained under the PSA on a number of occasions in the past. She and her associate Fahmida Soofi were most recently arrested on 28 August 2010, reportedly accused of being instrumental in organizing protests against the government through the summer of 2010. They are presently held in detention under the PSA at Kot Bhalwal Jail, Jammu.

By and large women appear not to be targets of administrative detention in J&K. In an interview with Amnesty International, Srinagar-based activist Khurram Parvez explains, "with the exception of Asiya Andrabi and a few others like Zamrooda Habib of the Muslim Khawateen Markaz, women although involved are not at the forefront of the various political movements in Kashmir. Women have also traditionally not been a significant part of the armed groups. Although women take part in protests against the authorities, the police and security forces do certainly think twice about arresting or detaining women, as they know that this has the possibility of stirring trouble and bringing attention to themselves. Unfortunately this has not stopped women from continuing to face other human rights violations, particularly rape and other forms of sexual assault."

3. PSA VIOLATES INDIA'S INTERNATIONAL HUMAN RIGHTS LEGAL OBLIGATIONS

'The Working Group is aware of the political sensitivities regarding the state of Jammu and Kashmir and the complex law and order situation ensuing in that part of the country. As a part of its crisis management system, the Government is using laws of preventive detention, including the PSA Be that as it may, any legal, administrative or other mechanism employed, must conform to international human rights standards and obligations undertaken by the Government of India.'

United Nations Working Group on Arbitrary Detentions opinion on 10 PSA cases from J&K, 26 November 2008 ²⁷

The PSA violates international human rights law and standards by providing for detention without trial while denying the possibility of judicial review and other safeguards for those in detention required under international human rights law. It also violates the principle of legality by defining offences so broadly as to allow security officials to detain individuals on extremely vague grounds including for exercising their rights to peaceful assembly and freedom of expression.

In 2008, the UN WGAD ruled that 10 individuals detained under the PSA in J&K had been arbitrarily detained in violation of articles 7, 9, 10 and 11(1) of the Universal Declaration of Human Rights and Articles 9 and 14 of the ICCPR. It called on the Government of India to bring its laws in conformity with its international human rights obligations.

Article 9(1) of the ICCPR, which India ratified in 1979, states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

In its authoritative General Comment on Article 9, the UN HRC, the expert body charged under the ICCPR with overseeing its implementation, has specifically clarified that Article 9 would also apply in cases of preventive or administrative detention.²⁸ At the time of acceding to the ICCPR, India made a reservation to Article 9, declaring that it "shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India."²⁹ Furthermore, 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.

Article 22, clauses 1 and 2 of the Constitution of India lay down a range of rights granted to those arrested.³⁰ These include the right to be produced before a magistrate within 24 hours of arrest and to be represented by a lawyer of their choice. However, Article 22(3) of the Constitution of India excludes persons detained under any law providing for administrative detention from the protections available to arrested persons in Article 22(1). The Article goes on to provide a framework for such detention and its regulation.³¹ The Indian reservation to Article 9 at the time of accession to the ICCPR reflected this exclusion.

States parties to a treaty may make reservations restricting the extent to which they intend to comply with one or more of its provisions. However, under general or customary international law, reservations must not be "incompatible with the object and purpose of the treaty."³² In its authoritative General Comment on issues relating, amongst other things, to reservations to provisions of the ICCPR, the UN HRC has stated clearly, "The absence of a prohibition on reservations does not mean that any reservation is permitted." The UN HRC explained that the "object and purpose test... governs the matter of interpretation and acceptability of reservations."³³ Specifically, the UN HRC clarified that states may not reserve the right, among other things, "to arbitrarily arrest and detain persons."³⁴ The UN HRC further explains that invalid reservations would be severable, that is, the state party which made an invalid reservation to an ICCPR provision would be bound by it "without benefit of the reservation."³⁵

India therefore remains bound by Article 9, despite its reservation, as reflected in the WGAD's 2008 opinion referred to above. Indeed the Government of India itself seems to have acknowledged this when it responded to the WGAD on the merits of the cases rather than referring to its reservation under Article 9.

3.1 VIOLATIONS OF THE PRINCIPLE OF LEGALITY

The PSA violates the principle of legality, that is, that laws should be clear and their grounds and procedures be as established by law. The PSA's operative provisions are so broad and vague that they fall foul of this basic principle.

Section 8(1) (a) of the PSA, under which the majority of people are detained, allows for detention on grounds including "acting in any manner prejudicial to the security of the State." However, the PSA does not define 'security of the State'.³⁶ Section 8(3) (b) allows for detention for "acting in any manner prejudicial to the maintenance of public order," and

lists a number of activities that fall under this definition:

- (i) promoting, propagating, or attempting to create, feelings of enmity or hatred or disharmony on grounds of religion, race, caste, community, or region;*
- (ii) making preparations for using, or attempting its use, or using, or instigating, inciting, or otherwise abetting the use of force where such preparation, using, attempting, instigating, inciting, provoking or abetting, disturbs or is likely to disturb public order;*
- (iii) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of mischief within the meaning of section 425 of the Ranbir Penal Code where the commission of such mischief disturbs, or is likely to disturb public order;*
- (iv) attempting to commit, or committing, or instigating, inciting, provoking or otherwise abetting the commission of an offence punishable with death or imprisonment for life or imprisonment for a term extending to seven years or more, where the commission of such offence disturbs, or is likely to disturb public order.*

These vague and broad definitions in the PSA grant the authorities sweeping powers, whilst also seriously diminishing any real possibility for detainees to contest the legality of their detention. This adds to the arbitrariness already integral to the practice of administrative detentions in J&K (see 4.6 below for information on the practice of detaining individuals on the basis of vague and general allegations).

As noted, Article 9(1) of the ICCPR provides that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” In the context of national security laws, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has explained that the principle of legality means that legal provisions “must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct.”³⁷ Similarly, the WGAD has expressed particular concern about “extremely vague and broad definitions of terrorism in national legislation”, stating, “[i]n the absence of a definition of the offence or when the description of the acts or omissions with which someone is charged is inadequate ... the requirement of a precise definition of the crimes - the key to the whole modern penal system - is not fulfilled and that the principle of lawfulness is thus violated, with the attendant risk to the legitimate exercise of fundamental freedoms.”³⁸

3.2 DELAYED AND SECRET REASONS FOR DETENTION

The PSA allows authorities to delay providing the grounds or reasons of detention to the detainee. Article 9(2) of the ICCPR provides that “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” As discussed above, the UN HRC has clarified that “so-called preventive detentions” would also be bound by this provision. Despite the requirement of “promptness”, Section 13(1) of the PSA ordinarily allows the detaining authority five days to communicate the grounds of detention. In “exceptional circumstances” this can be extended to 10 days. Again the PSA does not indicate what such exceptional circumstances might be – it only requires that reasons be recorded in writing by the detaining authority.

Further, Section 13(2) provides that the detaining authority may choose not to disclose “any

facts which it considers to be against the public interest to disclose.” Article 22(6) of the Constitution of India also provides a similar provision. Such provisions of non-disclosure of facts relevant to the grounds of detention are in violation of the aforementioned Article 9(2) of the ICCPR and add a further layer of arbitrariness. Members of the UN HRC when considering India’s third and most recent periodic report in July 1997, clarified that India’s reservation to Article 9 did not exclude, “*inter alia*, the obligation to comply with the requirement to inform promptly the person concerned of the reasons for his or her arrest” (i.e. Article 9(2)) and recommended that this Article be complied with in full in relation to special powers of detention.³⁹

3.3 NO ACCESS TO JUDICIAL AUTHORITY

The PSA does not allow for ordinary access to a judicial authority. Under Article 9(4) of the ICCPR, all persons deprived of their liberty, whether arrested or detained must be “entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” It should be emphasised that the ICCPR requires such proceedings to take place before an independent and impartial body, a point that was reiterated by the UN HRC in its hearing on India in 1997 when it noted that, “the decision as to continued detention must be considered as a determination falling within the meaning of article 14, paragraph 1, of the Covenant, and that proceedings to decide the continuation of detention must, therefore, comply with that provision.” Accordingly it recommended, “The question of continued detention should be determined by an independent and impartial tribunal constituted and operating in accordance with article 14, paragraph 1, of the Covenant.”⁴⁰

ADVISORY BOARD

The PSA does not make any provision for judicial review of the grounds of detention or provide any appeal process to detainees. Instead, Section 15 of the PSA provides only for the detention order to be referred within four weeks of the date of detention to an Advisory Board headed by a sitting or former judge of a High Court or a person qualified to be one. Section 16 allows the Advisory Board another four weeks within which to provide its report to the Government. The Advisory Board examines the case only once - in the initial stages of the detention. There is no process of appeal against the decision of the Advisory Board. However despite the reference to “advisory” in the name of the Advisory Board, the Government is bound to release a detainee if the Advisory Board finds “no sufficient cause for the detention” (Section 17(2)).

A former detainee described his Advisory Board process thus:

Every 15-20 days, a team visits the prison. No prior information is given to the detainees. They are called and made to appear before the board – there is a special courtroom. No documents are given to the detainee. The team asks the name, father’s name and address and put it down into a pre-printed form. Sometimes they ask a few questions – most times they don’t. The team doesn’t tell the decision. We only know when the form is later sent to the prison. I was detained four times, but only got the letter from the board once. The other three times the guard in the jail told me verbally that my detention had been confirmed. I was not surprised – I had no expectations of justice anyway.

Even though the PSA provides for the possibility of the board being headed by a sitting judge of the High Court, this has not been the practice in J&K over the past decade: The PSA Advisory Board in J&K has been headed for the past 10 years by retired High Court Judge M.L. Koul. Yet, even were a sitting judge appointed, it would not be sufficient to transform the Advisory Board into a judicial oversight mechanism given that it acts as a government appointed board applying the PSA, not as a court applying Indian law generally, nor do proceedings before the Advisory Board qualify as anything resembling fair judicial procedures.

Section 16(5) of the PSA provides a bar on legal representation for the detainee and further requires the proceedings of the Advisory Board, other than the final part of the report giving its opinion, to be confidential.

Amnesty International was informed that in many cases, detainees refuse to file representations before the Advisory Board, as they see no hope of a proper hearing. According to Mir Shafqat Hussain, a senior lawyer taking up a number of PSA cases in Srinagar, “the Advisory Board is an eyewash. Out of 100 cases, maybe in one or two cases they may recommend revocation of the [detention] order.”

In his 2002 report, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment warned that, “It has been reported that... lengthy periods of detention without judicial review might lead to their misuse by security and other forces for the aims of preventive detention and may thus facilitate the use of illegal methods to obtain confessions and other evidence.”⁴¹ This is clearly evident in the PSA detention regime (see 4.2).

BOX 5: HABEAS CORPUS PETITIONS

While as stated above, the PSA does not include a provision granting the detainee a right to judicial review of the grounds of detention or the right to appeal their detention, the Constitutions of India and J&K ensure that all persons have the right to seek remedy for violation of their rights via the extraordinary process of petitioning the High Court of the state or the Supreme Court of India.⁴²

Hundreds of individuals have sought to challenge their detention under the PSA through habeas corpus petitions. According to the High Court registry at Srinagar, 367 habeas corpus petitions were filed in Srinagar in 2008, 272 in 2009 and 159 up to 19 May 2010.⁴³ It is estimated that about 70% of these refer to cases of administrative detention under the PSA.⁴⁴ The availability of this avenue of redress is however dependent on the financial and other resources of the detainee and their family and the access of lawyers to detainees (see below). Writ petitions can be filed only before the High Court benches situated at Jammu and Srinagar, making it a difficult, costly and inconvenient process for families who live outside those two cities for example. In addition, the failure of the authorities to act on the orders of the High Court and their ability to circumvent judicial processes, severely limit the impact of this judicial remedy (see Chapter 7).

SCREENING COMMITTEES

The J&K government has established Screening Committees to review the detention of individuals under the PSA. These committees are comprised of representatives of the Home Department, police, intelligence agencies, army and other security forces whose deliberations are not public—in effect, allowing the executive agencies to decide the fate of detainees.

The Screening Committees have no legal basis and are purely executive bodies; the PSA itself does not refer to such mechanisms (similar Screening Committees have previously been established under other security legislation in India). These committees exist at both state and district level (the latter comprising the District Magistrate and local police and intelligence services) and make the effective decision on whether a person should be released or continue to remain in detention. Decisions of the Screening Committees as to the desirability of continued detention or release of detainees are referred to in a number of PSA detention orders studied by Amnesty International.⁴⁵ These demonstrate the important role that the Criminal Investigation Department (CID) – the intelligence arm of the police headed by a Director General of Police (DGP) and made up of the Special Branch Kashmir / Jammu and Counter Intelligence Kashmir / Jammu (CIK / CIJ) – play in ordering or extending detentions.

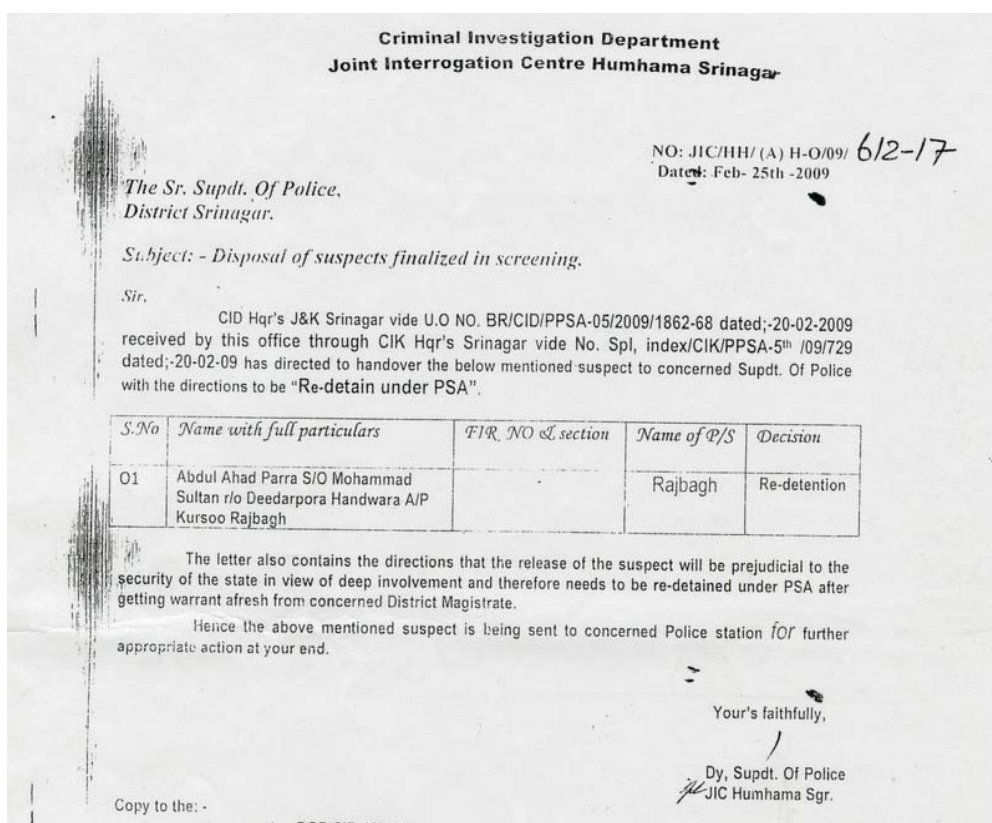


Photo 2: Letter from CID-JIC Humhama to the police communicating the decision of the screening committee to re-detain Abdul Ahad Parra (© Private)

3.4 RESTRICTIONS ON ACCESS TO LEGAL COUNSEL

As noted above, Section 16(5) of the PSA explicitly bars detainees from being represented by legal counsel before the Advisory Board. Detainees are often unable to contact lawyers in the initial stages of their detention and thus the detainees' family members bear the onus on filing habeas corpus petitions to challenge their detention in the courts (see box 5 above). This not only undermines the right to challenge the legality of detention set out in Article

9(4) of the ICCPR but flouts the right to communicate with and be represented by counsel of one's own choosing in the determination of criminal charges guaranteed by Articles 14(3)(b) and (d) of the ICCPR.

The UN HRC has emphasized, "The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications."⁴⁶ Commenting on Article 2 of the UN Convention against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment (Convention against Torture), the UN Committee against Torture (CAT) has emphasized "the right to promptly to receive independent legal assistance" as one of the "basic guarantees" that "apply to all persons deprived of their liberty."⁴⁷ The UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment similarly recognize the right of detainees to prompt and confidential access to legal counsel.⁴⁸

3.5 INDEFINITE DETENTION OF FOREIGN NATIONALS

The PSA also allows for detention of foreign nationals and residents of "the area in the State under the occupation of Pakistan." Section 18(2) further provides that the authorities can hold foreign nationals for indefinite periods "in case his expulsion from the State has not been made possible."

A number of foreign nationals, many of them Pakistanis, have been detained indefinitely under the PSA pending deportation. For example Sajad Ali Jat (sic, Bhat) (Home/PB-V/119/2006) was detained in Jodhpur Jail, Rajasthan under the above provisions to facilitate his deportation that took place four years later in May 2010 following the intervention of the Supreme Court (see below).⁴⁹ Ghulam Nabi (Jammu, 1993/PSA/2009), a Pakistani national accused of being a guide and cross-border smuggler for armed groups was previously detained in 1987 and deported after two years in detention. He was arrested again in 1995 in possession of prohibited weapons, tried and convicted of various criminal offences. Released after serving his term in March 2009, he was detained under the PSA in July 2009 and is awaiting deportation.

At least two writ petitions (one from 2005 and one from 2010) relating to the detention of a large number of foreign nationals, most of whom have served their sentence, are currently pending in the Supreme Court of India.⁵⁰ Although a number of foreign nationals have already been deported, Tajik national Abdul Qadeer still awaits deportation despite the Supreme Court directing it, as there is confusion over his nationality.⁵¹ The UN WGAD in its opinion of November 2008 found Abdul Qadeer's detention arbitrary as he had been acquitted of the criminal charge against him in June 2006 (after spending 11 years in prison undergoing trial) but remained in prison under the PSA pending deportation.⁵² Unfortunately the Government of India chose not to respond to the WGAD with respect to this case.

The UN HRC has consistently found that indefinite detention is "contrary to the provisions of article 9 of the Covenant."⁵³ Indefinite detention also raises serious concerns about the physical and mental health of detainees.⁵⁴ The UN CAT, which monitors the implementation of the UN Convention against Torture, has stated that, "detaining persons indefinitely without charge, constitutes per se a violation of the Convention."⁵⁵ The Indian authorities are currently engaged in discussing legislation to prevent torture with an explicit view to

complying with the UN Convention against Torture ahead of ratifying it. The repeal of laws allowing individuals to be held indefinitely would be just one requirement.

3.6 IMMUNITY OF OFFICIALS FROM PROSECUTION

Section 22 of the PSA provides a complete bar on criminal, civil or “any other legal proceedings... against any person for anything done or intended to be done in good faith in pursuance of the provisions of this Act”, in common with other legislation in force in J&K and other areas of India granting special powers to security forces to use force or detain individuals. This provision protects the state authorities and officials against prosecution, even in cases where provisions of the PSA have been blatantly abused, depriving people of remedies to which they may be entitled under Article 2(3) of the ICCPR. Referring generally to legislation providing such immunity, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment noted, “such provisions may effectively constitute an offer of impunity to law enforcement agents.”⁵⁶



Photo 3: 14-year old Mushtaq Ahmad Sheikh (DMS/PSA/05/2010) was held in administrative detention for nearly 10 months from 21 April 2010 to 10 February 2011. He was arrested on 9 April 2010 in a criminal case of rioting and attempt to murder, allegedly as part of a stone-pelting mob. Released on bail eight days later, he was detained under the PSA on 21 April. The grounds of detention state his age to be 19 although his family told Amnesty International that he was born in 1996 and is only 14 years old. Prison records confirmed the family's claim of Mushtaq being a child. (© SHOME Basu)

BOX 6: VIOLATION OF CHILDREN'S RIGHTS

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Article 40(1) of the United Nations Convention on the Rights of the Child

Under the Convention on the Rights of the Child, which India ratified in 1992, states are required to establish laws, procedures, authorities and institutions specifically applicable to children (defined as those under the age of 18). Specifically, states are required to use detention of children "only as a measure of last resort and for the shortest appropriate period of time" (article 37(b)). In addition, it requires that "[...] every child deprived of their liberty shall be separated from adults unless it is considered in the child's best interest not to do so." The UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") adopted by the UN General Assembly in November 1985, stipulate in particular that proceedings for children should be conducive to the best interests of the child.

The PSA makes no reference or any special provisions for the detention of children. The J&K Juvenile Justice Act, 1997 (J&K JJA) covers bail, custody and inquiry (trial) of juveniles suspected of committing an offence, but is silent on administrative detention.⁵⁷ Furthermore, as per the J&K JJA (Section 2(g)), juveniles are defined as boys under the age of 16 and girls under the age of 18. The Juvenile Justice (Care and Protection of Children) Act 2000 operating in the rest of the country defines children as those under the age of 18 in line with the UN Convention on the Rights of the Child (CRC).⁵⁸ Unfortunately legislation in J&K has not been brought up to date, thereby ensuring that children in the state of J&K are accorded less protection in law than those in the rest of the country. When considering India's second periodic report under the CRC, the Committee on the Rights of the Child specifically recommended the application of the Juvenile Justice (Care and Protection of Children) Act, 2000 to the state of J&K.⁵⁹

In practice, the J&K state authorities appear to treat boys above the age of 16 as adults and detain them without trial under the PSA and ordinary criminal law, holding them in regular prisons along with adult prisoners. Amnesty International is aware of a number of cases of children detained during demonstrations in which stones were thrown.⁶⁰ For example, Nayeem Ahmad Dar (DMS/PSA/21/2009), aged 17, was apprehended in June 2009 for alleged involvement in stone pelting. He was detained without trial till September 2009 when the High Court quashed his detention under the PSA (HCP 120/09). His family told Amnesty International that he was kept with adults in a jail in Poonch.

In November 2008, the UN WGAD found that the detention under the PSA of 16-year-old Mehraj-ud-din Khanday was not only arbitrary, but also further violated Article 14(4) of the ICCPR, which requires that all proceedings against juveniles shall take into account their age and the desirability of promoting their rehabilitation. The UN WGAD noted that in their response, the Government of India had "not commented on or provided a reason for not extending the rights accorded under international law to a minor."⁶¹

It was reported in June 2010 that the High Court of J&K, hearing a public interest petition had observed that a large number of children were held in regular prisons in the state awaiting trial or in administrative detention.⁶² The High Court reportedly directed the state government to implement the J&K JJA. Given the shortcomings of the J&K JJA, such an order would fall far short of India's international obligations to protect children, but even this order does not appear to have been acted on.

4. VIOLATIONS IN THE PSA DETENTION REGIME

Security forces in J&K routinely use the PSA to trample international fair trial standards and ignore even the limited safeguards afforded in the PSA. PSA detainees are regularly detained illegally and / or held incommunicado before detention orders are issued, resulting in an increased risk of torture or ill-treatment in police custody. Further, Amnesty International's research established that police have to meet monthly and quarterly "targets" or quotas of detention. As a result, security forces detain persons on the basis of vague and general allegations.

BOX 7: MONTHLY DETENTION TARGETS

On 10 March 2005, a "special security meeting" was held at the Srinagar headquarters of the Army discussing in part the issue of supporters or sympathizers of armed groups (referred to as Over Ground Workers or OGWs). The minutes of the meeting note, "proactive action to neutralize them [OGWs] needs to be initiated". Two Army generals who were commanding counter-insurgency forces recommended the setting of monthly targets for detaining OGW's. The below action points were agreed upon and are excerpted from the minutes of the meeting:⁶³

"(i) Lists of OGWs to be prepared in mutual consultation between JKP [JK Police], Civil Administration and the Security Forces

(ii) Quarterly targets for OGW neutralization to be decided upon and all actions to book them to be initiated well in time

(iv) The police and the District Magistrates must informally discuss the actions required to book the OGW targeted for the month

(v) Dossiers on the OGWs should be prepared in advance. The requirements of booking them under PSA as well as under Section 87, 88, 107, 108, 133, 145, 151 and 512 of RPC should be deliberated and decided upon."

Excerpted

A majority of those detained under the PSA are described as OGWs. Of the approximately 600 PSA cases studied by Amnesty International, 356 persons (59%) were detained as OGWs of various armed groups. Amnesty International has been informed that similar "targets" or quotas currently remain in place.

Those few safeguards contained in the PSA – the provision of review of police evidence against the suspects by executive officers, provision of the grounds of detention to the detainee to enable them to defend themselves – are reduced to a mere formality, allowing the state to order detentions on the basis of vague and general allegations, with the risk of officials fabricating evidence, and without giving detainees the opportunity to effectively challenge the facts.

According to the UN WGAD, deprivation of liberty is arbitrary if a case falls into one of the following three categories:

A) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an

amnesty law applicable to him)(Category I);

B) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR (Category II);

C) When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (Category III).⁶⁴

While section 4.3 below discusses the particular instances of cases of arbitrary detention that would fall under Category I, virtually all detentions under the PSA could be classified as arbitrary in the sense of the UN WGAD's Category III as the practice of PSA detentions reveals the undermining of fair trial standards.

4.1 INCOMMUNICADO DETENTION

"It had been over three weeks since I had been able to contact anyone – no one even knew where I was. I was confused when the policeman told me I could leave. I looked outside the door of the police station and saw 20-25 armed men standing there with their guns. A few were pointing them towards me. I was scared and remember thinking that this was the end. I thought I would be taken somewhere and killed. Officially I was not even in their custody and no one knew where I was – the police could just make up some story about my death... The policemen were literally pushing me out of the police station. I resisted but they forced me into the jeep [vehicle]. I relaxed only when I realised we were heading back to the jail – they had got a new detention order against me, but at least I was still alive."

Jamali Khan, a former PSA detainee, in a meeting with Amnesty International in Delhi, 13 May 2010

Amnesty International delegates interviewed Jamali Khan in May 2010. He had been detained under the PSA in December 2007 (PSA/2007/19) and jailed in Jammu. In September 2008 the High Court quashed the detention order. Instead of being released, he was moved from the jail to the Joint Interrogation Centre (JIC) at Jammu. He was held incommunicado at the JIC from 19 September to 6 October 2008. He was not produced before a magistrate and was unable to contact anyone. He was not aware of the legal basis under which he was continuing to be held. On 6 October, he was moved to a police station in the nearby town of Udhampur where two days later he was told he could leave. His testimony highlights his fear on "release" and the sense of relief that he was being formally detained and was therefore "safe." This is not surprising given the history of enforced disappearances in the state.⁶⁵

Incommunicado detention most commonly takes place immediately after the police or security forces (usually the J&K Police's Special Operations Group (SOG)), first apprehend a suspect.⁶⁶ Instead of being formally detained under the PSA or even arrested for particular offences, detainees are taken for "unofficial" interrogation either to a local police station or to the interrogation centre at "Air Cargo" building near Police Station Shergari in Srinagar. They are kept for periods ranging from two to 12 days. No formal arrest or detention proceedings are conducted and no information is provided to the family at this stage, although families may be aware of the fact that the person is in the custody of the security forces if they or others witnessed them being taken away. Families thus have no option but to

visit various police stations, military camps and the better-known interrogation centres in the hope of obtaining information about the detainee. At times, incommunicado detention takes place in secret facilities – usually in camps of the SOG or other security forces.

Incommunicado detention is strictly prohibited under international human rights law. The UN General Assembly has stated that “prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment.”⁶⁷ The UN HRC has stated that provisions should be made against the use of incommunicado detention,⁶⁸ and the Committee against Torture has consistently called for its elimination.⁶⁹ The UN Special Rapporteur on torture, recognising that “torture is most frequently practised during incommunicado detention”, has also called for such detention to be made illegal.⁷⁰

In their February 2010 “Joint study on global practices in relation to secret detention in the context of countering terrorism” the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and other UN human rights mechanisms referred to consistent allegations from parts of India, including J&K of long-term unacknowledged detention in interrogation centres and transit camps but noted that they had not been able to examine allegations of secret detention in India for over a decade because of India’s failure to engage with them.⁷¹

4.2 TORTURE DURING INTERROGATION AND COERCED CONFESSION

“I had never thought that I would be beaten to pulp after being tied with ropes. I had not expected that I would be pushed to the hilt in the torture cell of a jail...”

Journalist and former detainee Mohd. Maqbool Khokhar (alias Maqbool Sahil) who wrote of his interrogation experience in a book authored after release from administrative detention ⁷²

The PSA lacks a significant safeguard against torture and ill-treatment of detainees: while confessions made to the police can play no role in the regular criminal process in India, there is no such restriction in processes of administrative detention. The Indian Evidence Act provides that a confession made to a police officer is not admissible as evidence in a court of law.⁷³ This provision sought to prohibit the police practice of using torture to produce a confession, recognising that torture in police custody is endemic in India. Unfortunately, the vast majority of PSA detention orders are based on interrogation reports prepared by the police on the basis of confessional statements made by the detainee, often obtained after “sustained interrogation”, invariably during periods of illegal and often incommunicado detention.

It is widely understood amongst the legal community in Srinagar that confessions and disclosure statements made in police custody are a result of torture and other ill-treatment. This follows a pattern of torture and ill-treatment of detainees in J&K documented by Amnesty International and others throughout the recent decades of the conflict.⁷⁴ In December 2010, A US embassy cable referring to a confidential briefing by the International Committee of the Red Cross (ICRC) to US diplomats in New Delhi in 2005 was published by Wikileaks. According to this cable, the ICRC had made a confidential assessment, based on visits to detention centres in J&K between 2002 and 2004, that there was systematic prisoner abuse in the state, and that the Government of India condoned the torture.⁷⁵ Allegations of torture contained in numerous habeas corpus petitions studied by Amnesty

International for this report reinforce concerns that torture and other ill-treatment continue to be widely practiced. References in PSA detention orders to police “breaking down suspects” after “sustained interrogation” raise alarm in this context.

Torture and other cruel, inhuman and degrading treatment are absolutely prohibited in international law, including by Article 7 of the ICCPR, and by the Convention against Torture. Article 15 of the Convention against Torture provides that “any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

In its General Comment on the right to equality before courts and tribunals and to a fair trial under the ICCPR, the UN HRC, using a slightly different formula but to an identical effect, stated the following:

... as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred.⁷⁶

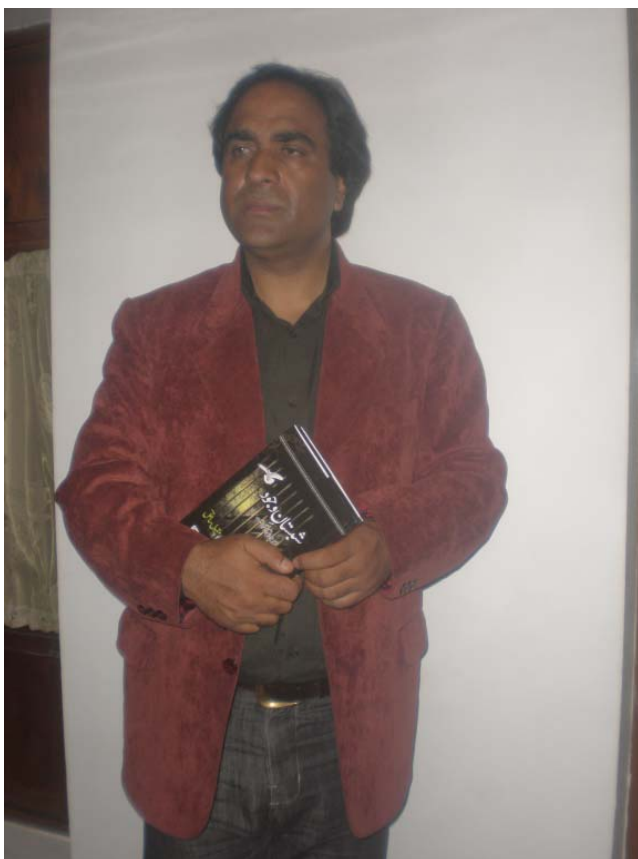


Photo 4: Journalist Mohd. Maqbool Khokhar with a copy of his book (© Amnesty International)

Amnesty International is concerned that the administrative detention process in J&K facilitates the practice of torture and other ill-treatment by basing detention orders on evidence which may have been obtained under torture or ill-treatment. The fact that the PSA provides immunity from prosecution for those carrying out duties under it makes this doubly alarming.

Journalist Mohd. Maqbool Khokhar (quoted above) writes how his interrogation consisted of being asked the same question – about his contacts with a man in Pakistan – over and over again for over 15 days, interspersed with beatings (see Chapter 5 for an account of his detention).

A petition filed by lawyers on behalf of Mohammad Wasim Malik (Det/PSA/06/227) refers to “third degree methods and brutal inhuman torture” during 19 days of illegal detention before he was eventually formally detained under the PSA. A petition filed on behalf of Mohammad Ramzan Dar (DMS/PSA/114/2006), a former police officer himself, also makes similar allegations of “third degree methods and torture” while being held “incommunicado [and] in solitary confinement” (HCP no. 153/06). Although a large number of petitions filed in the High Court make references to torture during interrogation or in police custody, they are generically worded and do not provide details of the torture suffered. One lawyer told Amnesty International that this was because lawyers saw no point in providing details, as judges were not interested in pursuing complaints of torture.

A rare exception appears to be the case of female PSA detainee Khalida Akhtar. Torture in her case was documented in a jail visit report of the J&K High Court Bar Association: “She stated that during her 8 days stay in SOG [Special Operations Group Camp] Handwara, she was brutally interrogated due to which, one of her teeth was broken. She was given electric currents. Her head used to be drowned in the buckets of water for extracting confession from her. Sticks used to be put into here [sic, her] fingers and then pressed. Rollers were also used on her body...”⁷⁷ Press reports indicate that the lawyers informed the High Court of the torture during the habeas corpus petition hearing and in response the judges directed the state authorities to produce her in court at the next hearing.⁷⁸

Javaid Ahmad Najar (DMS/PSA/70/2009) was an alleged former member of an armed group who had served many years in prison undergoing trial for killing a police constable, a crime for which he was ultimately acquitted. On release from prison after being acquitted he was taken by the Counter-Intelligence Kashmir (CIK), Police unit “for questioning in various pending cases.” The grounds of his PSA detention note: “during sustained questioning [over a case from 2004] you broke down.” He was rearrested on the basis of his alleged disclosure that led to the recovery of three hand grenades and 10 rounds of ammunition from a graveyard. His lawyer (and the President of the J&K High Court Bar Association) Mian Qayoom told Amnesty International that Najar had been tortured in police custody and forced to make false confessional statements as the police had little else to rely on.

At least 30 PSA cases analyzed by Amnesty International specifically referred to suspects confessing their involvement in various “anti-national” activities. In a further 25 cases studied by Amnesty International, detainees are alleged to have made “disclosure statements,” following which the police “recovered” arms and ammunition.⁷⁹ Although Amnesty International was not able to follow up on all these cases, many of the writ petitions

in the above cases contained allegations of torture during interrogation.⁸⁰

4.3 DETENTION WITHOUT ANY LEGAL BASIS

Even where the detention may not be secret or incommunicado, PSA detainees are often held illegally – for lengthy interrogation without any legal basis and without being formally detained under the PSA or arrested in a criminal offence. Such detentions without legal basis are deemed arbitrary (Category I) by the UN WGAD.

As no PSA detention order is issued at this stage, the interrogation period cannot be considered part of the PSA detention regime. Article 22(2) of the Constitution of India requires that all persons apprehended in criminal proceedings be produced before a magistrate within 24 hours from the time they were apprehended. Lawyers have informed Amnesty International that this rarely takes place during the 2-12 day period of interrogation that is standard, thus making the custody not only unlawful under international law but also illegal and unconstitutional under India's own laws.

Amnesty International has been informed that after a period of interrogation, suspects are handed to a police station where they are formally arrested on a criminal charge. The charge might relate to a new First Information Report (FIR) or one filed some time previously (in some cases several years ago) under which there is an ongoing investigation.⁸¹ They are then produced before a magistrate as required under Article 22(2) of the Constitution of India and invariably remanded to police custody. The period of interrogation does not feature on any police or judicial record.

PSA detainees may be subject to a number of periods of illegal detention as a result of the way in which the authorities combine the PSA and the ordinary criminal law to prevent their release. Periods of illegal detention can follow an individuals' release on bail or the quashing of a PSA detention order, and will precede a further PSA detention order or formal arrest on a criminal charge (see Chapter 6 for a fuller explanation of this process).

Allegations of illegal detention feature in a number of habeas corpus petitions filed by lawyers on behalf of PSA detainees before the High Court. The petition filed on behalf of Nissar Ahmad Bhat states that even though he had secured bail in a criminal case against him and the High Court quashed his PSA detention order on 3 February 2010 (HCP 171/09), he was not released from jail in Jammu. Instead he was handed over to officials of the specialist CIK unit from Jammu and illegally detained at the JIC, Jammu till 8 April 2010 when he was moved to CIK-Srinagar and held for another week.

On 15 April 2010 he was handed over to Police Station Maisuma and held there for five days until eventually a new PSA detention order was issued and he was taken to the District Jail Udhampur. He was not produced before a magistrate at any stage and given an opportunity to seek bail. In all, he was held in illegal detention for a period of two months and 17 days. The grounds of detention under the PSA issued to him on 20 April 2010 (DMS/PSA/07/2010) make no reference to this period of detention and simply notes, "in compliance with the directions of the Hon'ble court you were released", further claiming that he was re-detained under the PSA as reports received indicated that he was contemplating a return to militancy. Importantly, the grounds do not mention any date of alleged release or re-arrest. The petition challenging Nissar Ahmad Bhat's administrative detention and seeking exemplary damages

(of INR 10,000 (USD \$225)) and compensation (of INR 5,00,000 (USD \$11,000)) for his period of illegal detention was reportedly pending in the High Court when his lawyer Ghulam Nabi Shaheen was himself detained under the PSA in July 2010 (see 5.3).

A petition filed on behalf of Abdullah Sheikh (HCP 246 of 2009) also alleges that he was illegally detained from 15 October 2009 – when his first PSA detention order was quashed by the High Court – till 19 November 2009, when a second PSA detention order was issued. The petition states that he was detained at a number of different police stations during this period but at no stage was he produced before a magistrate. The grounds of detention in the second PSA order do not refer to him being arrested in any criminal case or to any period of detention subsequent to his previous release. In fact the new grounds justify his detention on the basis that he incited a mob on 30 October 2009, at which time, his petition claims, he was being illegally detained by police. Amnesty International has been informed that his detention order was revoked by the J & K Government on 19 November 2010 before the High Court could rule on a petition challenging his detention that contained allegations of illegal detention.

4.4 LACK OF INFORMATION AND ACCESS TO FAMILY

With detainees unable to easily meet with legal counsel (see 3.4 above), family members are most commonly required to act as conduits between detainees and lawyers, but this is by no means straightforward. According to Mir Shafqat Hussain, an experienced criminal defence lawyer in Srinagar:

In the initial stages while the person is being illegally detained or is arrested in some FIR before the PSA detention order is passed, the families approach the police station and are told to meet with the Senior Superintendent of Police (SSP) [the most senior police officer in the District]. Sometimes the approach to the SSP is made by the lawyers and sometimes by the families. Family members also try and get support from political parties and local leaders at this stage. About 10% of all persons held are released at this stage and the dossier prepared by the police is never sent to the District Magistrate for the detention order to be issued. They are the lucky ones who can manage a deal or swing enough political pressure.

Principle 16(1) of the UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment⁸² requires, “[p]romptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.”

In 1997 the UN HRC recommended to the Government of India that the notification of relatives of the arrest of individuals be made mandatory without delay.⁸³ The UN CAT (in its General Comment on Article 2 of UN Convention against Torture) has emphasized the right to contact relatives as among the “basic guarantees” that “apply to all persons deprived of their liberty.”⁸⁴ Similarly the UN Body of Principles recognise the right of detainees “to be visited by and to correspond with, in particular, members of his family” and “to communicate with the outside world” more generally.⁸⁵

In its opinion on 10 cases from J&K, the UN WGAD particularly noted, “as part of due

process, it is important that upon detention, legal counsel and family members be informed as soon as possible and that whereabouts of the detained persons be made known to them. In the present cases, the detainees have been moved to different locations unbeknown to their family. This places them at a clear disadvantage in accessing justice.”⁸⁶

4.5 FAILURES OF THE EXECUTIVE DETAINING AUTHORITY

“Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law.”

Justice Arijit Pasayat, Supreme Court of India, judgment in *Union of India v. Yumnam Anand M*, 2007⁸⁷

Detention under the PSA is purely an administrative / executive exercise and falls completely outside the ordinary judicial sphere. There are limited safeguards within the PSA that could provide some protection to detainees if they were applied appropriately by the authorities. Amnesty International’s research demonstrates that the executive authorities responsible for applying these safeguards routinely fail to do so.

Under the PSA, detention is overseen by two mechanisms: the District Magistrate / Divisional Commissioner who issues the detention order on the basis of information provided by the police, and the Advisory Board (see 3.3). Both the Divisional Commissioner and the District Magistrate are executive officers who act on behalf of the state authorities. Despite the name, the District Magistrate (DM) is not a judicial magistrate. Like the Divisional Commissioner, he is a purely executive officer (also called District Collector or Deputy Commissioner) and responsible for administration of a district, with some powers related to “law and order.”

The role required of the executive officer issuing detention orders has been set out by Justice M Yaqoob Mir in a High Court judgment in *Ghulam Nabi Sumji v. State and others* (2010) as follows: “The duty is cast on the Detaining Authority both to issue preventive orders and also to safeguard the human rights. The authority has to balance the two. The authority has to shun the path of casualness and arbitrariness.”⁸⁸ In practice however, as is evident from the cases cited in this report, the executive officers do not play such a balancing role and tend to accept claims made by the police without questioning them. According to Parvez Imroz, a human rights lawyer in Srinagar, “The detaining authority is effectively only like a post-office, doing little more than approving and passing-along the allegations prepared by the police. This is a huge problem as there is therefore no check on the police who can get away with whatever they wish to allege.”

FAILURE TO SCRUTINISE EVIDENCE IN PREPARING GROUNDS OF DETENTION

In the cases of Mushtaq Ahmad Khatana and Mohammad Altaf Khatana (Det/PSA/05/95 and Det/PSA/05/97 respectively), not only the grounds but even the recoveries allegedly made by the police from the detainees at the time of arrest are identical. Police allegedly apprehended both suspects with exactly 13 rounds of ammunition each. Similarly Abid Hussain War and Muzaffer Ahmad Najar (28/DMK/PSA/2006 and 25/DMK/PSA/2006 respectively) were alleged to be carrying the same five mobile-phone SIM cards bearing the same five phone-numbers. Instead of the DM / DC questioning such claims, the grounds of detention appear to have been faithfully copied from the police dossiers. In some cases this has led to inevitable errors. The grounds of detention for Farooq Ahmad Pir (54/ DMK/PSA/2005) make a reference to construction of a hideout for members of armed groups “by you and your

brother Nazir Amhad Pir". Identical grounds were issued to his brother, Nazir Ahmad Pir (53/DMK/PSA/2005), alleging that "you and your brother Nazir Amhad Pir" constructed a hideout.

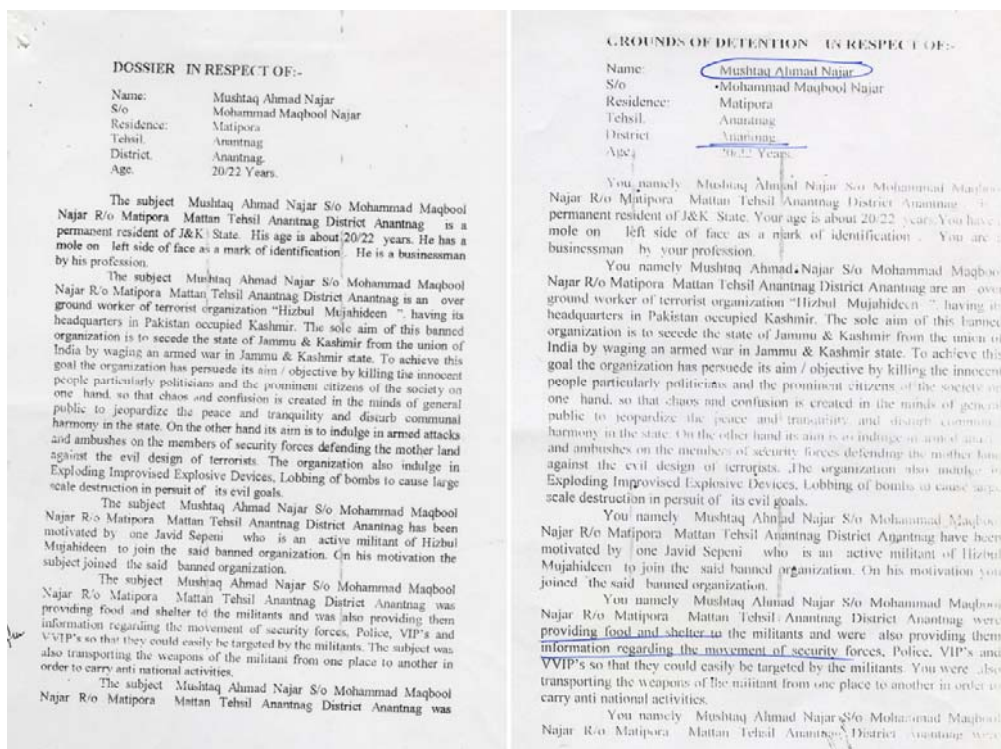


Photo 5: On the left is the police dossier and on the right are the District Magistrate's grounds of detention in the case of Mushtaq Ahmad Najar (Det/PSA/05/47). The two are identical except for minor differences in grammar: the police dossier speaks to the detaining authority and refers to the detainee-to-be as "the subject"; this is changed to "You" in the grounds, as it is directed to the detainee; similarly references to "he / him" are changed to "you / your". (© Private)

As the senior most executive officer in the District, in practice the DM is the primary detaining authority under the PSA (most detention orders are issued by DMs although Divisional Commissioners (DC) also have the same power). The DM / DC is therefore required to carefully scrutinize and evaluate the material information presented to him in the form of a dossier by the district police and prepare the grounds of detention under the PSA. The role of the DM / DC is to act as a check on the arbitrary use of the extensive powers of administrative detention.

However, instances of DMs / DCs acting as an effective check on the application of the PSA are extremely rare. An analysis of the cases studied for this report confirms the above view, showing a routine lack of scrutiny and due diligence by the DM / DC as the detaining authority. At best, the grounds of detention prepared on the basis of the dossiers provided by the police provide some specific allegations. At worst, the grounds of detention provide nothing more than general allegations, contradictions and errors.

Mir Shafqat Hussain, a lawyer who has conducted a large number of challenges to PSA

detentions in the High Court told Amnesty International, "In my 18 years experience of dealing with PSA cases, I have seen the work of hundreds of District Magistrates but only came across two who took their role seriously and seriously examined the police version, returning it if necessary." (see also 4.7)

As is evident from the cases above, it is common for the DMs / DCs to merely copy the dossier prepared by the police as the grounds of detention, changing the odd word to reflect their role as the detaining authority. In the case of Aijaz Ahmad Mir (67/DMP/PSA/06), one reason given by the High Court to quash the detention order was that the police dossier had been simply reproduced by the DM in the PSA grounds of detention (HCP 374/06).

FAILURE TO PROVIDE GROUNDS OF DETENTION TO DETAINEE

Section 13(1) of the PSA reflects a safeguard contained in Article 22(5) of the Constitution of India. This provides that, "when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which order has been made and shall afford him the earliest opportunity of making a representation against the order."

Although the requirement is limited only to providing the grounds of detention, this constitutional and statutory requirement has been interpreted much more broadly by the Supreme Court of India to require the detaining authorities to supply all relevant material to the detainee on the basis of which the detention was ordered, to enable an adequate representation to be made. In *Prakash Chandra Mehta v. Commissioner and Secretary Government of Kerala and others* (1985), the Supreme Court stated, "The 'grounds' under Art 22(5) of the Constitution do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences."⁸⁹ This direction is rarely followed in practice however, with detaining authorities only providing the grounds of detention to the families, if at all.

The result of these practices by the detaining authorities is that "non-application of mind" [due diligence] by the DM / DC and "non supply of material" to the detainee are amongst the most common reasons for the High Court to quash detention orders.

4.6 DETENTION ON VAGUE AND GENERAL GROUNDS

With the PSA itself providing for broad powers to detain and in the absence of effective scrutiny of evidence against detainees by the detaining authority, it is not surprising that most PSA detentions are ordered on the basis of vague and general allegations. This has also become one of the major reasons given by the High Court for quashing detention orders.

The requirement to provide specific allegations in the grounds of detention was explained in a judgment of the High Court in April 2010: "The Detaining Authority in order to make Constitutional and statutory right to file representation against the detention order meaningful and effective for the detenu, is expected to spell out grounds of detention with utmost clarity... If the grounds of detention are vague and unspecific the detenu indisputably is deprived of making an effective representation against the detention order."⁹⁰ Similarly, the September 2009 judgment of the court in the case of Mohammad Sharief Kachroo (Det/PSA/DMA/09/12) observed, "without knowing about the date, month and year of the alleged activities, the detenu may not be expected to make requisite representation

against the detention to the Government as contemplated by Article 22(5) of the Constitution of India and Section 13 of the [PSA]" (HCP no. 33/09).

Vague allegations are common across the board in PSA detentions. None more so than in relation to those accused of being OGWs. In at least 77 PSA cases studied by Amnesty International where persons were detained as OGWs, these individuals were detained on the basis of vague and general allegations. No reference is made in the grounds of detention in these cases to any specific act, date or event. Instead a general wide-ranging allegation is made as grounds for detaining the person, effectively denying the detainees the possibility of defending themselves against such allegations. In another 111 cases, vague allegations were supplemented by alleged recovery of equipment used by armed groups.⁹¹ Fabrication and concoction in such cases cannot be ruled out, particularly in the context of the pressure of monthly detention targets on the district police and executive authorities (see box 7).

In the case of Shahzada Saleem Ganie (PSA/06/423/2007), the grounds merely assert, "You have been reportedly acting as courier of arms and ammunition for the terrorists of the said [Hizbul Mujahidin] outfit. Being local of the area you have been reportedly providing information to the terrorists about movement of security forces besides arranging food and shelter for them." Details of when the food and shelter was arranged or who the "terrorists" were are not provided. In the case of Shameen Ahmad Dar (10/DMP/PSA/07), the grounds merely allege, "You are providing every logistic support like food, shelter, dissemination of information about the movements of security forces." Others including Gulzar Ahmad Malik (DMA/PSA/DET/2007/37) were detained on allegations that they are "reportedly involved in harbouring the militants and providing them all sort of assistance like food, shelter, information regarding movement of Security forces / VIPs."

For some, including Nazir Ahmed Bangay (DET/PSA/06/211), the entire allegation consists of a statement that he had joined the banned Hizbul Mujahidin armed group. No details relating to when he joined or his alleged activities in the group are provided. In February 2011 the Supreme Court of India reiterated its previously stated position in two separate cases of individuals detained under security legislation, that mere membership of a banned organisation would not make a person criminal "unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence."⁹² Criminalising membership in this way, the Supreme Court argued, would violate Articles 19 and 21 of the Constitution of India.

In the case of Aijaz Ahmad Mir (67/DMP/PSA/06), a detention order issued in June 2006 was quashed by the High Court in December 2006 on the grounds that insufficient material had been provided in the grounds of detention and that the detaining authority had not applied its mind (the judge also found that the grounds of detention was merely a reproduced copy of the police dossier). The new detention order of February 2007 mentioned only the older allegations along with Aijaz Ahmad Mir's alleged "deep involvement [with armed groups] and the security scenario of District Pulwama" at the time before concluding, "You are likely to indulge again in subversive activities."

In the case of Abdul Waheed Bhat (02/PSA of 2007), the authorities appear to believe that mere suspicion and speculation were sufficient to detain him. He was arrested and interrogated after being picked up "in suspicious condition" near where the police found a

large haul of weapons. The remainder of the document provides a narrative gleaned from his interrogation and eventually concludes, "If you ha[d] not been arrested, you could definitely [have] crossed IB [international border] in order to get training in militant camps in Pakistan and after your return to India/J&K, you would have definitely designed your nefarious activities into action, proving highly pre-judicial to the security of the state."

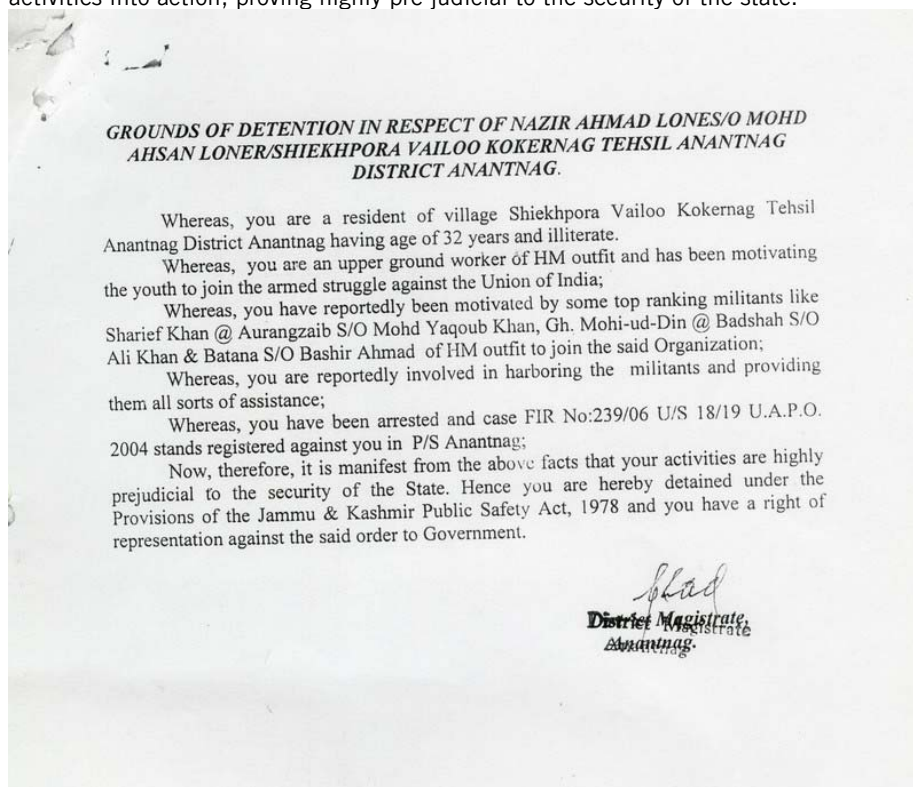


Photo 6: Grounds of detention are not only vague but also often extremely scant. The document above shows the extent of "evidence" against the detainee Nazir Ahmad Lone (Det/PSA/06/198-203). (© Private)

In a recent judgment, the High Court illustrated the difficulty faced by detainees:

The detainee is informed that he "always incites disaffection amongst masses and against the Government" and that he is "hell-bent to strike terror amongst masses" without being informed of the details of the attributed activities i.e. when and how did the detainee "incite disaffection amongst masses" or was "hell-bent upon to strike terror amongst masses". Again the detainee is informed that he is providing information regarding movement of the security force in Ramban district without telling him what, when and to whom did he transmit such information. The detainee is alleged to have allowed the militants of various Organizations to stay at his residence and to have planned with such militants to target security forces and plant IED on National Highway. The detainee is not made aware of the names and other details of the militants whom he allowed to stay at his residence and when they were allowed to stay at his residence and what installations were intended to be targeted. These are only few instances to illustrate that the grounds of detention are vague and ambiguous and bound to keep the detainee guessing about what really was intended to be conveyed by the Detaining Authority.⁹³

This point has also been made by the Special Rapporteur on the promotion and protection of human rights while countering terrorism who has raised concern about “the use of “administrative detention” as a counter-terrorism tool against persons on the sole basis of a broadly formulated element of suspicion that a person forms a ‘threat to national security’ or similar expressions that lack the level of precision required by the principle of legality. Much of the information concerning the reasons for such detention is often classified, so that the detainee and his or her lawyer have no access to this information and thereby no effective means of contesting the grounds of the detention. This form of administrative detention appears to be at odds with numerous aspects of the right to a fair hearing under article 14 of the Covenant, and of access to an independent and impartial court, especially when there is no possibility for a review of the detention on the basis of substantive grounds.”⁹⁴

In addition, the Special Rapporteur has emphasized that a court must always be empowered to review the merits of the decision to detain, and decide, by reference to legal criteria, whether detention is justified, and, if not, to order release. It is therefore of crucial importance that the court has the power to review the evidence on which the individual is held.⁹⁵

4.7 RISK OF FABRICATED GROUNDS OF DETENTION

“[T]his office is being misled (sic) by doctoring and concealing of facts... [i]t is therefore, crystal clear that the Senior Superintendent of Police, Srinagar, is seeking detention of these individuals on fabricated grounds without having any specific or solid proof.”

Order of District Magistrate Srinagar number DMS/Misc/26-27/2005 dated 19 April 2005 in cases of Munawar-ul-Zaman, Gh. Mohammad Tantray, Firdaus Ahmad Sheikh and Manzoor Ahmad Baba

The above excerpt is a rare instance in which police fabrication of evidence came to light. The District Magistrate performed his proper role as a safeguard against abuse and refused to issue detention orders, accusing police of “doctoring and concealing of facts” with respect to four police dossiers placed before him. The police dossiers had claimed that after being released from prison, the suspects were continuing to meet with “militants” detained in prisons. When the District Magistrate sought a response from the Superintendent of the Jail, he was informed that none of the individuals had even visited the jail after their release, let alone met with any members of armed groups detained in the prison. This led the District Magistrate to conclude that the police authorities were framing the four individuals.

With administrative detention under the PSA possible without the need to provide much evidence or even detailed allegations, it would not be surprising that such power is open to misuse and abuse by the local police authorities. Even when habeas corpus petitions allege fabrication of evidence the High Court has been reluctant to rule on the merits of cases and simply quashed detention orders. Mushtaq Ahmad Shah (07/DMS/PSA/2010) was granted bail by the court in a criminal case on 5 May 2010. The police did not release him in accordance with the bail order and upon Shah’s application to the court, were asked to explain their position to the court the next day. Instead of explaining their failure to release Shah, the Senior Superintendent of Police (SSP), Shopian, produced a PSA detention order dated 6 May. The grounds of detention allege that he was an OGW of the Lashkar-e-Taiba armed group and involved in an extortion case in November 2009. In challenging Shah’s detention under the PSA his lawyers have claimed in their writ petition that the SSP who sought Shah’s detention has a personal grudge against him because he intervened when the

SSP harassed some girls in another town. Shah's lawyers pointed out that the allegation of being an OGW is particularly suspect because Shah holds a valid passport (passports are not issued unless a person is cleared by both the state and central government intelligence agencies). The petition is still pending judgment in the High Court.

A number of petitions filed in the High Court challenging grounds of detention under the PSA claim that cases have been fabricated by police. For example it is claimed that in 2006, in response to complaints about human rights violations as well as corruption in the distribution of earthquake relief material, the Additional Divisional Commissioner threatened Ghulam Mohammad Bangi and Ghulam Nabi Daga (DMB/PSA/3068/2006 and DMB/PSA/3069/2006 respectively) with imprisonment in a public meeting if they continued to criticize the administration. Shortly thereafter they were both detained under the PSA as OGWs of the Hizbul Mujahidin on vague and general allegations of harbouring and being informers for the armed group.

Fabrication may be particularly easy in the case of surrendered members of armed groups who have turned sides and become informers for the security forces. Known as *Ikhwanis* they are under the often arbitrary control of security forces and in danger of retribution from armed groups. Mukhtar Ahmad Mir (PSA/DMB/2007/107) is said to have surrendered to the Army at the LoC sometime in 2006. He was handed over to the police and charged under the Egress & Ingress Movement (Control) Ordinance (E&IMCO). Grounds for his detention under the PSA issued in 2007 merely state, "After your release you were working with different security forces as source and were threatening the law abiding citizens without any cause as a result of which people of various villages started protest against your tyranny." No attempt seems to have been made to pursue criminal charges against him on the basis of the allegations.

Vague and general allegations made as a justification for detaining persons under the PSA are often supplemented by allegations that equipment and ammunition have been recovered at the time of arrest. In 120 PSA cases (20% of the total cases) studied by Amnesty International for this report, recovery of equipment and ammunition (other than guns or explosives) was alleged. The recovery of ammunition and other equipment is a serious allegation indeed. However, lawyers interviewed by Amnesty International claim that it is a well-known practice of the security forces that when a real cache of arms is seized or found during a military operation, a part of it is not officially recorded and reported but instead hidden away for use later when it can be planted in another case. In a few of the cases studied by Amnesty International, the grounds of detention do not specify any details of the alleged recovery, e.g. the detention grounds of Mohd Yousuf Parchoo (Anantnag 2004, order no. illegible) merely mention seizure of "aforementioned arms/ ammunition". Nazir Ahmad Khan (DMB/PSA/239/2005) was detained for "acting as an informer for the [Hizbul Mujahidin]" and allegedly apprehended with unspecified "arms and ammunition."

It is interesting to compare police claims of such recoveries with the extremely low rate of conviction of individuals under the Arms Act in J&K. Only 0.5% or 1 in 200 of all persons tried for possession of unlawful arms and ammunition in J&K are convicted (see Chapter 6). In the vast majority of the 120 PSA cases studied for this report in which arms and ammunition were recovered, the detainees were also charged under the Arms Act and prosecuted in regular courts. The courts appear unconvinced by the evidence in such cases.

4.8 ILL-TREATMENT AND CONDITIONS IN PRISON

“The poor conditions of detention are a clear attempt to degrade the detainees and to add to their punishment with the hope of eventually breaking them.”

Prof. Hameedah Nayeem, wife of detained leader Nayeem Ahmad Khan in a meeting with Amnesty International, 18 May 2010

Conditions of detention in prisons in J&K are reportedly poor, although they are believed to have improved since the Government of India and the ICRC signed a memorandum of understanding (MoU) in 1995 allowing the ICRC to monitor conditions in prisons within the state. As per the MoU, the ICRC can meet with “any persons detained or arrested by the authorities in relation with the situation prevailing in Jammu and Kashmir.” In practice, the ICRC can interview detainees in private and also assist in restoring family links between detainees and their family members. During their visit to Srinagar in May 2010, Amnesty International’s delegation was refused permission by the J&K Government to visit the Srinagar Central Jail and other prisons in the state.

The J&K High Court Bar Association filed a writ petition regarding conditions in prisons in the state in 2004, and subsequently in 2006.⁹⁶ Granted permission by the High Court to conduct visits to various prisons in the state, the Bar Association conducted visits in 2009 including to Srinagar, Jammu, Amphalla, Udhampur and Kathua. Their reports particularly indict the District Jail at Kathua for regular violations of prisoners’ rights, although conditions in other jails are said to have improved.

On their initial visit to Kathua jail on 3 February 2009, the team of the Bar Association was not granted permission by the Superintendent of the Jail to meet with prisoners despite the order of the High Court. They were only permitted to meet Nayeem Ahmad Khan, a political leader held in detention, who informed them the conditions of the detainees and undertrials were “very pathetic.” According to Nayeem Khan, new detainees and undertrials from the Kashmir region suffered “severe thrashing by the jail staff.” The report states (citing Nayeem Khan), “The beard of some detenuess, namely Peer Aizan Ahmad, Imran Jamai Masjid Baramulla, Zia-ul-Islam and Javed Ahmad... were forcibly cut / shaved off by the subordinate staff on the jail under the instructions of jail superintendent.”⁹⁷ The Bar Association team was also informed that the jail superintendent had forced Kashmiri prisoners to participate in Indian Republic Day celebrations and chant Indian nationalist slogans.

The account provided by Nayeem Khan in February 2009 was corroborated by testimonies of other prisoners met by the Bar Association on a subsequent visit to Kathua jail in October 2009.⁹⁸ Ghulam Nabi Wagay told the visiting Bar Association team that he had been moved to Kathua and was beaten and abused by one jail official. Wagay believed that the jail staff was anti-Kashmiri and recommended that no Kashmiris should be sent to that jail. Another detainee, Mufti Aejaz Ahmad, who had previously been held in Kathua Jail met the Bar Association team during their visit to Udhampur Jail on 15 October 2009. Their report relates the experience of Mufti Aejaz Ahmad in Kathua:

During the first days of his arrival he was repeatedly given good thrashing to subdue his spirits and break his will. No[t] content with this, after few days he was taken to solitary confinement and one Barber was called. Two other boys Zahoor Ahmad and Fayaz Ahmad were brought to this room and their hair trimmed. Then came his turn, and the barber insisted on trimming his beard also, which he tried to resist. There were men in uniform

ready on his flanks, who had earlier given him heavy doses of beating, and forcibly his beard was shaven without his consent. They told him that they were under order... Barber told him if he didn't obey the orders, he will also be beaten. He [Mufti Aejez Ahmad] has reported this matter to other inmates and a visiting team from ICRC also.⁹⁹

Other complaints made to the Bar Association teams were about lack of adequate medical services in many of the jails (Kathua, Udhampur) that do not have a regular doctor, and occasional complaints of insufficient and unhygienic food. One concern that was raised by a few detainees was their being mixed with convicted prisoners in violation of prison rules, particularly in Kathua District Jail and District Jail Jammu (Amphalla). Article 10(2)(a) of the ICCPR requires that “[a]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.”

International human rights standards, including Article 10 of the ICCPR, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹⁰⁰ and the UN Standard Minimum Rules for the Treatment of Prisoners,¹⁰¹ require that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. In addition they require that all complaints of torture and other ill treatment in prisons be investigated promptly, independently, impartially and thoroughly and that prison officials and others found responsible be prosecuted, irrespective of rank.

BOX 8: DISTANT DETENTION

Principle 20 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides: “If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.” Under section 10 of the PSA, detainees may be held in any particular place within J&K state and may be moved from one jail to another. Between 1990 and 2002, there was no provision restricting detention of PSA detainees to within the state. During this period detainees from J&K were regularly held in prisons outside the state, often in states far away from J&K. According to Dr. Bilqees, wife of long-time detainee Shabir Shah, “the Government hoped that distance from their families and the unfamiliar heat of in the plains would increase their discomfort, making the detainees more malleable.” Following a 2002 amendment to the PSA, detainees who are permanent residents of J&K can no longer be held in prisons outside the state. However, it appears that the state authorities have attempted to achieve both the above objectives by detaining Kashmiris largely in jails in the Jammu region.

Travelling times are between 6-8 hours between Srinagar and Jammu, and much higher from Srinagar to other jails in the Jammu region (8-10 hours to Kathua, 12-16 hours to Rajouri and Poonch etc) and family members of detained persons face an uphill struggle to meet with the detainees. A journalist told Amnesty International that the authorities also preferred to hold sensitive detainees outside Srinagar because while the staff at the Srinagar prison was largely Kashmiri and could be sympathetic to the independence cause, this was not the case with jails in the Jammu region. In a large number of PSA cases where detainees are held in far-away prisons in J&K, families often seek transfer of the detainee to the closest possible prison. The High Court has held that detainees should generally be held close to their place of residence, but the decision is usually left to the state authorities.



Photo 7: Sisters of Mushtaq Ahmad Sheikh (DMS/PSA/05/2010). They told Amnesty International that for many months they could not visit their 14-year-old brother who had been held in Udhampur and Jammu prisons. Due to the distance and the limited visiting hours, the visit effectively required an overnight stay, making it too expensive for them. Although Amnesty International was informed that the ICRC provides limited financial assistance for families unable to afford the cost of travel to meet their detained relatives, it is unclear how many families, especially those outside Srinagar, were able to avail of this support. (© SHOME Basu)

5. DETENTION FOR POLITICAL ACTIVISM

'You have never participated in operational wings but remained engaged with organizing political awareness camps and prepared youth to fight against "INDIA" with non-violent activities'.

Grounds of PSA detention in the case of Siraj-ud-din Mir issued by District Magistrate Baramulla (PSA/DMB/2009/175), dated 19 December 2009

The PSA has been used to detain both those against whom there are specific allegations of involvement in armed violence as well as those against whom the allegations do not relate directly to violence. Many individuals may be detained after being labelled as "anti-national" solely because they support the cause for Kashmiri "azaadi" and because they are challenging the state through political action or peaceful dissent. Such cases could involve individuals detained solely because of their peaceful exercise of their human rights - individuals that Amnesty International would consider prisoners of conscience.¹⁰²

In relation to Belarus, the UN WGAD has recommended that the government reconsider the legal framework regarding administrative detention and give priority to: "[E]nsure that administrative detention is not used to repress peaceful demonstrations, the dissemination of information or the exercise of freedom of opinion and expression."¹⁰³ This principle applies equally to India.

Some of the political activists detained under the PSA include lawyers and journalists. Senior members of the J&K Bar Association have remained in detention under successive PSA detention orders and on a variety of criminal charges since 2010 (see 5.3 below). Journalist Mohammad Maqbool Khokhar from Anantnag was arrested on 16 September 2004 and detained under the PSA on 20 October 2004 (Det/PSA/337). He was accused of passing on "photographs of press conferences organised by army officials at BB camp, photographs of Army ammunition displayed by Army authorities at Manasbal... photographs of press conferences organised by APHC, Srinagar and snaps of various processions, hartals called by different secessionist and militant organisation" to Pakistan's Inter Services Intelligence agency. The grounds themselves clarify that some of the photos were taken during an air show while others were taken during a tour in an Army helicopter.

Khokhar told Amnesty International that the information he had collected was all for his work

– with most coming from the Army itself in the form of press-releases or the result of official invitations. He admitted to being in touch with a Pakistani journalist with whom he often shared professional information. The High Court quashed the detention order on 27 October 2005 in response to a habeas corpus petition filed by the detainee's lawyers (No. 349/04). The court quashed it on grounds of non-application of mind by the magistrate and did not comment on the merits of the case. Khokhar was released only to be rearrested immediately, this time for “waging war against the state” and other offences under the Official Secrets Act and Enemy Agents Ordinance, based on the same alleged offences. He was moved from Jammu prison to the JIC at Jammu and then Srinagar where he was held for two months until a second PSA detention order was issued in January 2006 (Det/PSA/05/201).

The High Court quashed this order in August 2006, observing that the grounds were the same as they had been in the previous order and no fresh activity had been attributed to the detainee (HCP 126/06). Khokhar was moved from the Prison in Jammu to the JIC and then the Srinagar JIC for a few months till a third PSA detention order was issued in November 2006 (Det/PSA/06/104). This order contained additional information that Khokhar was also being investigated in another criminal case dating back to 1998. The High Court quashed this detention order in March 2007, noting there was no connection between the activities attributed to the detainee in 1998 and the detention order issued eight years later (HCP 583/06). Again Khokhar was moved between various JICs till 19 July 2007 when a fourth PSA detention order was issued (DMA/PSA/DET/2007/14). Unlike the previous three orders, this was not based on espionage claims but instead on routine vague and general allegations of harbouring and assisting members of armed groups. In addition the authorities had added that he was involved in an attack on jail officials and jail property while inside the prison. This too was challenged in the High Court but before a decision could be made, the Government of J&K revoked the detention order in November 2007.

Despite the revocation, Khokhar was not released until two months later in January 2008. He told Amnesty International that he was illegally detained during this period as there was no valid detention order against him and he had secured bail in all other cases against him. Khokhar's trial is ongoing but he has not been detained since his release. In a meeting with Amnesty International in May 2010 he said, “I was targeted for merely doing my job as a journalist and expressing political views relating to J&K. Even though I am free now, my diaries, computer and other equipment have still not been returned to me – these are essential for my work as a journalist.” Concerns relating to Khokhar's detention were also raised by the United Nations Special Rapporteur on the right to freedom of opinion and expression in 2006, but the Government of India does not appear to have responded to the concerns.¹⁰⁴

5.1 DETENTION OF POLITICAL LEADERS

A number of political leaders have been detained under the PSA in J&K, suggesting that the PSA is being used to disable the first and second tiers of the leadership of the major pro-independence political parties, taking them “out of circulation” and thereby preventing political mobilisation. The grounds of detention are often based on allegations that they have made “anti-national” statements and inflammatory speeches, although in a number of cases more serious allegations of instigating mobs to rioting and violence. Typically the allegations against political leaders and activists are impermissibly vague and general, with few details of time and place provided. There is little attempt on the part of the police to make out a

criminal case against the detainee.

SHABIR AHMAD SHAH

Shabir Ahmad Shah is the leader of the Jammu and Kashmir Democratic Freedom Party and a prominent member of the APHC-Mirwaiz faction. He has spent over 25 years in prison – either in administrative detention or undergoing trial – due to his expression of the political demand for an independent Kashmir. Shabir Ahmad Shah was recognised as a prisoner of conscience by Amnesty International in 1992.

In the most recent round of detentions, Shabir Shah was detained under the PSA on 30 August 2008 on the order of the DM Srinagar (DMS/PSA/19/2008). The grounds state that he was directly responsible for instigating the general public to resort to unlawful activities in relation to “azaadi” and the agitation against the transfer of land to a Hindu shrine that was ongoing in the Kashmir valley. He is alleged to have led a rally that sought to march from Sopore across the LoC to Muzaffarabad, thereby instigating the general public to cross the LoC. The grounds further state, “During these unlawful assemblies you delivered highly objectionable and inflammatory speeches and exhorted the general public to join the secessionist movement and resort to unlawful activities which the public eventually did resulting in a number of casualties and destruction of public property.”

On 8 December 2008, the High Court (HCP 62/08) quashed the detention of Shabir Shah and three others as it found the allegations against them vague and general. The court observed that “the allegations are made but the details of these activities is not given anywhere.” On release, Shah was however rearrested just outside the prison and taken to a police station where he was arrested in an ongoing criminal investigation. Before a court could rule on his bail application in this case, a second order of administrative detention under the PSA was issued on 15 December 2008 (Home/PB-V/734/08). This order provided details of some of the allegations against him. A writ petition (HCP 1/09) was filed challenging this detention order but before the court could rule on it, the J&K government revoked the detention order. Shah was not released on the basis that he was also undergoing trial in three other criminal cases.

Shah was eventually released on 22 May 2009 and placed under house arrest. The police rearrested him on 3 June 2009 when he was allegedly leading a rally. According to the police he was released on 6 June but he and his colleagues immediately rallied in a public place and raised anti-India slogans and were therefore re-arrested. A third detention order was eventually issued on 8 June (DMS/PSA/05/2009). The grounds this time included references to his “objectionable” activities while in prison including writing to the UN Secretary General regarding “alleged atrocities perpetuated by Israel in Palestine but the underlying intention is to equate the so called Kashmir problem with that of Palestine”. Other such “objectionable” activities included issuing a statement to the press hailing a statement of the British Foreign Secretary, another paying tribute to the hanged former leader of the pro-independence Jammu Kashmir Liberation Front (JKLF) Maqbool Butt, thereby “ridiculing the judicial system of the country.”

A writ petition was filed on behalf of Shah (HCP 99/09) and the High Court quashed the detention order on 4 August 2009 on the ground that material relating to the allegations was not given to Shah to enable him to adequately make a representation against the detention.

He remained in police custody, albeit in a Jammu hospital where he had to be admitted due to his deteriorating health. As he was named in an FIR registered in Jammu, his lawyers sought bail in Jammu but were informed that he had also been arrested with respect to a case in Udhampur. While bail was being sought from the Udhampur Court, a fourth detention order was issued on 5 September 2009 (DMS/PSA/36/2009).

Although the fourth detention order provided details of alleged unlawful activities inside prison, it contained no reference to any unlawful activities carried out after the quashing of the previous detention order. The detention order appears to have been issued merely to prevent Shabir Shah from being released on bail. Another writ petition was filed in the High Court, but when the matter was listed in court on 3 November, the court was informed that the J&K government had revoked the detention order on 14 October 2009 and that Shah was now being held as an under-trial in relation to some other criminal case. Eventually Shah's lawyers were able to secure bail in that case as well and he was released on 21 October 2009.

Out of prison for nearly three months, Shah was again arrested on 2 February 2010 for allegedly "instigating the general public to observe [a] strike" taking place the next day as also "to resort to violence." An administrative detention order under the PSA was issued on 9 February 2010 (DMS/PSA/73/2009). It accused Shah of "indulging in anti-national and secessionist activities which are primarily responsible for creating the present breach of law and order." It also referred to press statements made by him alleging the killing of a young man by security forces and calling for young people to "take to the streets," claiming that his statements were responsible "for the growing incidents of stone pelting and other antinational activities in different parts of the old city."

On a petition filed by Shah's lawyers, (HCP 40/10) the High Court quashed this fifth detention order on 2 April 2010 as the allegations were once again found to be vague and no relevant material had been furnished to the detainee in support of the allegations. Shah was however not released. Police arrested him in connection with an open investigation relating to an offence committed in 1991. Bail in this case was secured from the trial court on 15 April, but Shah was again detained under a fresh PSA order on 16 April 2010 (DMS/PSA/03/2009). In this detention order it was claimed that the particular police station could not interrogate him in relation to the 1991 offence till that time because he was invariably arrested in some other case. His detention was therefore being sought to prevent his release on bail. This sixth detention order was also challenged in the High Court. While the petition was pending hearing the J&K government revoked the detention order and Shabir Shah was released on 3 November 2010.

Despite six successive detention orders being struck down by the High Court, the state authorities have been able to keep Shabir Shah in detention for most of the past two years by moving him between administrative detention and pre-trial detention. By pursuing old criminal investigations in different cities and towns throughout the state, the authorities appear to be trying to make it more difficult for his lawyers to secure bail from various trial courts and to challenge the various allegations made against him.

Given his prominent position in J&K politics, Shabir Shah has been by-and-large safe from incommunicado detention, torture and ill treatment in recent years although his health has

suffered in prison. Yet even when not incarcerated, Shah continues to be subject to regular deprivations of liberty either through arbitrary executive orders of house arrest or through periods of arrest, interrogation and release.

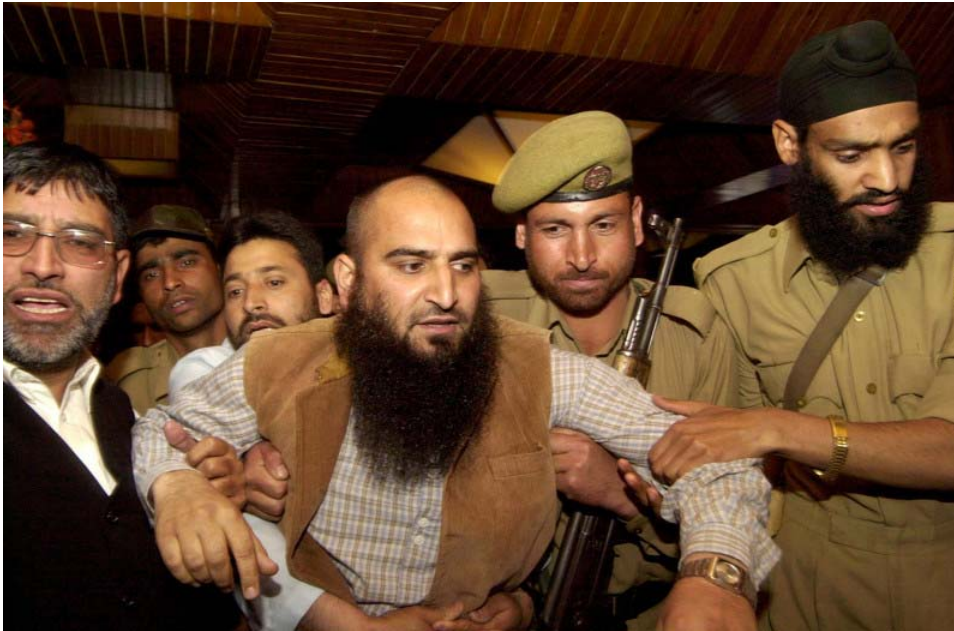


Photo 8: Chairman of J&K Muslim League, Masarat Alam Bhat, detained by policemen in Srinagar, 26 April 2007.
(© AP/PA Photo/Mukhtar Khan)

MASARAT ALAM BHAT

Masarat Alam Bhat is the chairman of the Jammu and Kashmir Muslim League and general secretary of the APHC-Geelani faction. Bhat had previously been detained without trial for a total of over nine years on various occasions between October 1990 and July 2005. In a recent round of detentions between April 2007 and April 2010, he spent a further two and a half years in detention under eight separate PSA detention orders. He was arrested again in October 2010 and has been in PSA detention since December 2010.

The first ground for detention under the PSA dated 28 April 2007 (DMS/PSA/03/2007) accused him of being the chief organizer of a public meeting of the APHC in Srinagar, allegedly raising anti-India slogans and inciting the general public to do the same and to join a violent struggle against Indian occupation. The High Court quashed his detention (HCP 108/07) on 1 October 2007, noting that relevant material had not been supplied to the detainee to allow him to make an effective representation. Bhat was re-arrested by the police outside the prison in connection with a number of FIRs and held on remand until 16 January 2008 when a second PSA detention order was issued (DMS/PSA/26/2007). In hearing the petition challenging his detention (HCP 30/08), the High Court observed that this detention was “almost on the same grounds on which he was detained earlier” and that this was not permissible when the court had quashed a previous detention. Further, the court noted yet again that the material on the basis of which detention was directed had not been furnished to the detainee. The detention order was thus quashed on 23 May 2008. Bhat was in fact released on 27 May. Over three months later, on 5 September 2008, he was arrested in

connection with a number of criminal cases in which he was allegedly named as an accused. A third PSA detention order was issued dated 9 September (DMS/PSA/20/2008), which alleged his involvement in organizing anti-national demonstrations that subsequently turned violent. Specific mention was made of organizing an illegal violent demonstration comprising around "500 rioters" who resorted to stone pelting and damaged public property in June 2008. In this instance upon a petition filed (HCP 223/08), the High Court quashed the detention on 27 December 2008 noting that the detention grounds displayed non-application of mind by the detaining authority.

The prison authorities released Bhat into the custody of police officers who arrested him in another ongoing criminal case. His lawyers applied for bail, which they secured on 22 January 2009. In the meanwhile however, a fourth PSA detention order dated 21 January 2009 had already been issued (DMS/PSA/41/2009). Bhat therefore remained in custody. The grounds of this fourth detention order provide details and specific instances in which Bhat is alleged to have acted unlawfully. These included allegations that he "addressed a press conference... informed the media persons about your experience at the jail..."; addressed a prayer congregation where he condemned the move of the Government to lease land to a Hindu shrine and that while in prison he also motivated other inmates to continue "jihad" to "liberate" J&K. Upon a petition filed on his behalf (HCP 30/09), the High Court on 25 May 2009 noted that the record showed that the grounds of detention "are replica of dossier made available by SSP [Senior Superintendent of Police] Srinagar" and that this alone was sufficient to show complete lack of application of mind on the part of the detaining authority. The court, referring to Supreme Court jurisprudence, also observed that new allegations had to relate to activities after the detainee's release and not during his detention: offences committed in prison should come under the jurisdiction of prison authorities and therefore these grounds for further detention would cast "a serious reflection on the functionaries of the Jail." The detention order was quashed.

Bhat was released on 6 June 2009 once he had secured bail in all pending criminal cases. However, he was arrested again on 7 June after it was alleged that he appeared in a part of Srinagar and forced shopkeepers to close their business establishments and also disrupted traffic. A fifth PSA detention order was issued on 9 June 2009 (DMS/PSA/14/2009). The High Court (HCP 108/09) quashed this detention order on the grounds of non-supply of material on 18 August 2009.

With bail being granted in an outstanding criminal case on 21 August 2009, Bhat was released from prison on 22 August. Police immediately rearrested him and took him to the JIC, Jammu. For three weeks he was held at various JICs – Jammu, Humhama as well as in Srinagar. Bhat's lawyers have claimed that he was not produced before a magistrate throughout this three week period or informed of any charges against him, thereby rendering his custody during this period illegal. A sixth PSA detention order was eventually issued on 12 September 2009 (DMS/PSA/39/2009). This time around the grounds alleged that "reports received from discreet sources" indicated that Bhat was "going to play a very pro-active role in taking the violent protests, organizing and leading illegal marches" as part of a planned programme of activities by "secessionist" groups. Before the court could rule on the petition challenging this detention order (HCP 191/09), the J&K government revoked it on 29 October 2009.

Despite his detention order being revoked by the government itself, Bhat was “released” only for police to immediately detain him illegally at JIC Jammu till 12 November 2009, when he was officially arrested in connection with an old criminal case. Bhat was able to secure bail from the magistrate but again the police arrested him in connection with a 2006 criminal case. While he was held at the police station, a seventh PSA detention order dated 19 November 2009 (DMS/PSA/54/2009) was issued on the grounds that it was likely that Bhat would receive bail in the criminal cases against him. The High Court quashed this seventh detention order on 30 December 2009 upon a writ petition filed by his lawyers (HCP 239/09).

Bhat was again transferred from prison to a police station and arrested again – this time for allegedly threatening a police officer. He remained in police custody till the eighth PSA detention order dated 3 February 2010 was issued (DMS/PSA/65/2009). These grounds do not even allege any criminal activity – they refer to Bhat being an “incorrigible secessionist” creating not only law and order problems but also creating “various socio economic problems because you are mentor for enforcing hartals, strikes and other such activities which hamper the growth and development.”

The eighth detention order was also quashed by the High Court on 9 April 2010 (HCP 25/10), the court noting that Bhat had been in continuous custody since 5 September 2008. The judgment observes, “The grounds of detention ex facie are vague, ambiguous and sketchy... have deprived the detainee of his constitutional and statutory rights.” Less typically, the court also chastised the detaining authority noting that he “has acted in a callous and irresponsible manner while ordering preventive detention of the detainee.”

After reportedly being arrested under further criminal charges including the Enemy Agents Ordinance and Officials Secrets Act, Bhat was eventually released on bail on 8 June 2010. He is reported to have failed to present himself in court as per his bail conditions and was declared an absconder. According to the police he went “underground” to evade arrest and was one of the key leaders of the wide-scale protests in the Kashmir valley in the summer of 2010. Eventually rearrested on 18 October, a new PSA detention order was issued in mid December 2010 and is currently under challenge in the High Court.

NAYEEM AHMAD KHAN

“You are going to lead the anti-election rallies and exercise undue influence over people to boycott the elections and if allowed to remain at large, you may prove [a] main hurdle in the peaceful conduct of the elections.”

Grounds of detention of Nayeem Ahmad Khan issued by District Magistrate Srinagar, 27 October 2008

Nayeem Ahmad Khan is the Chairman of the Jammu Kashmir National Front and a senior leader of the APHC-Mirwaiz faction. Initially detained under the PSA on 27 October 2008 (DMB/PSA/DET/08/562), the grounds of detention included reference to organizing processions and leading rallies with pro-independence and pro-Pakistan slogans, instigating people to violence, crossing the LoC and more. He is also accused of playing a pivotal role in uniting the two factions of the Hurriyat. Before a habeas corpus petition challenging the detention could be decided, the Government revoked the detention order on 20 February 2009 and Khan was released.

He was arrested again in early June 2009 for allegedly enforcing a strike and forcing shopkeepers to close their shops. A detention order followed on 9 June (DMS/PSA/15/2009) on the ground that he had "recycled into secessionist fold and are carrying out various anti-national activities unabated." His petition to the High Court was heard on 16 September and his detention quashed, with the court noting the relevant material relied upon by the detaining authority was not supplied to the detainee to enable him to make a representation (HCP 113/09). Khan was released again.

A few months later, he was arrested, allegedly while attempting to enforce a strike called on 3 February 2010. His wife, Professor Hameedah Nayeem however told Amnesty International he was arrested from his house around 10 pm. A PSA detention order was issued on 11 February (DMS/PSA/76/2009) with grounds for detention similar to the previous order. This time however the grounds listed several press statements allegedly made by Nayeem Khan in which he alleged human rights violations by security forces and indulged in "glorification of terrorists." A writ petition filed to challenge the detention order was pending when Amnesty International met with Professor Hameedah Nayeem in Srinagar in May 2010. The court subsequently quashed the detention and Khan was again released on 25 May 2010 (HCP 37/10). However he was rearrested on 28 June, reportedly when he was on his way to meet with the families of four men killed by security forces. He was held in police and judicial custody but it is unclear whether any PSA detention order was issued during this period. He was finally released on 23 October 2010.

A number of other political leaders have been detained or continue to remain in detention under the PSA.¹⁰⁵ Amongst the cases studied by Amnesty International are: Mohammad Yousuf Mir, Ghulam Nabi Sumji, Abdul Ahad Parra, Shakeel Ahmad Bhat, Firdous Ahmad Shah, Abdul Rashid Peer, Sonallah Mir, Mohammad Shafi Lone, and Abdullah Sheikh. In most of these cases, allegations were by and large similar, related to making "secessionist" and "anti-national" speeches and "sloganeering", organizing protests and rallies and "inciting" crowds. Many of the grounds of detention cite their involvement in various incidents which often took place a number of years previously. This makes it particularly difficult to challenge the detention orders effectively. For instance, in the case of Gh. Nabi Gundana (Kishtwar 2008, order no illegible), he is alleged to be involved in 12 different criminal cases over a 19 year period from 1989 to 2008 as well as in seven instances of "other activities" deemed unlawful and "anti-national" but where presumably no FIRs were lodged.

In some cases the state has detained individuals under the PSA when they were actively engaged in armed violence but has continued to detain them after they have renounced violence and become political activists. For example, Abdul Aziz Dar, a.k.a. General Moosa, spent over 12 years in prison from May 1987 both awaiting trial on criminal charges and under administrative detention, accused of being a prominent commander of the Hizbul Mujahidin armed group. After his release in 2002, he is reported to have joined the APHC-Geelani faction and was instrumental in the formation of a pro-independence political group. Since 2004, he has been detained under the PSA and arrested on criminal charges a number of times. The PSA grounds of detention issued in October 2009 stated that he had "acted as incharge chairman of Hurriyat (G) during the detention of its former chairman... and was indulging in highly objectionable activities."¹⁰⁶

Similarly, Mohammad Saleem Zargar spent 13 years in prison (1989-2002), both awaiting trial on criminal charges and under administrative detention, as an alleged member of the J&K Students Liberation Front. According to the grounds of his PSA detention issued in June 2009, after release, he “realized the changing scenario” and joined the political outfit “Mass Movement”. He is now reported to be the convener of another political outfit, “Tehreek-e-Mazahmat”. Yet, he was detained under the PSA in June 2009 (DMS/PSA/25/2009) on grounds that he was organizing strikes, instigating youth to join such strikes and resort to violence during agitations in 2008 and 2009.

5.2 DETENTION OF ‘STONE PELTERS’

As referred to earlier in this report (Chapter 2), in recent years J&K has witnessed an increasing number of street protests, many of which have turned violent, with large groups of youth resorting to pelting stones at police and security forces. The PSA has been used to detain many young men and even children allegedly involved in violent activities during these protests (see Chapter 3).

Nayeem Ahmad Dar (DMS/PSA/21/2009) - a child aged 17 at the time - was held in administrative detention under the PSA for over three months from June to September 2009. He had previously been arrested in May 2008 in a criminal case of rioting and other related offences for being part of an alleged unlawful assembly that was “pelting stones on vehicles and attacked the police party which was on duty.” Dar was released after 10 days, as the authorities did not pursue criminal prosecution. Dar’s family told Amnesty International that while he, along with many other local boys, was indeed involved in some of the protests in 2008 over the transfer of land to a Hindu shrine, he had stopped taking part after his initial arrest. They said that this did not stop the police from regularly visiting the house after each incident of stone pelting in the area, harassing the family and threatening to arrest Dar. Even though the family members told them that their son had learnt his lesson and stopped such activities, the police said to his parents that he was a “born criminal.” The PSA detention order was ultimately quashed by the High Court and he was released. See also the case of 14 year old Mushtaq Ahmad Sheikh (Chapter 3).

As is typically the case with other PSA detentions, few detainees accused of “stone-pelting” are given grounds of detention with sufficient detail for the detainee to challenge the allegations made about their participation in unlawful assemblies and “rioting”. Irshad Ahmad Zargar (Srinagar 2010) was accused of having formed a new organisation, the J&K Youth Forum, to organize protests. His detention grounds only specified that “during the land row agitation in the year 2008, you participated in a number of violent protests...” The document further goes on to say that his name came up during investigations into another stone pelting incident of February 2008. There is no indication however of which protests the detainee engaged in or the nature of the violence alleged or his particular role in the violence.

In some grounds of detention, in addition to the vague and general allegations of “secessionist” and “anti-national” speeches and “incitement” etc, the commission of specific criminal offences is also alleged, but dating back to several years earlier. The grounds for the PSA detention of Akhter Rasool Gura (DMS/PSA/78/2009) in 2010 refer to him being charged in one case of stone pelting and investigated in two others, but both cases are from 2008 – two years prior to the issuance of the PSA detention order. Similarly Owais

Ahmad Shounda was detained under the PSA in June 2009 on grounds of alleged stone pelting in that month as well as three incidents that took place over a year before.

In a number of cases, even though the PSA detention grounds refer to various incidents of stone pelting and resultant criminal proceedings being initiated, it appears that the authorities have made no attempt to pursue criminal charges. Instead, administrative detention appears very often to have been the first resort by the authorities.¹⁰⁷ In the case of Mudasir Ahmad Teli (DMS/PSA/62/2010), three such incidents are mentioned all of which are referred to as being “under investigation.” Ajaz Ahmad Shah’s case (DMS/PSA/87/2009) is particularly revealing. Although the PSA detention order itself bases his detention on an incident that took place on 3 February 2010 in which he was allegedly engaged in inciting youth to resort to stone pelting and other unlawful actions, the order also specifically notes that an FIR was lodged in relation to that case and that Shah was already arrested and released on the same date in that case.



Photo 9: 17-year-old Nayeem Ahmad Dar detained under the PSA for “stone pelting” from June to September 2009.
(© Private)

In some cases general allegations of stone pelting made in PSA detention orders are supplemented by references to specific damage caused and offences committed. For example, Bilal Ahmad Badyari (DMS/PSA/82/2009) is alleged to have been part of a

particular protest march on 11 February 2009, whose participants are alleged to have committed unlawful activities. Abdul Hai Lone (72/DMS/PSA/09) is accused of heading a "violent mob" on 30 May 2009 that not only pelted stones at the police but also pelted stones and caused damage to the local fire station. Mohammad Shaban Dar (016/DMK/PSA/08) is alleged to have been leading protests in which stones were thrown a police bus, damaging it and causing injuries to a number of policemen. Similarly Nasir Ahmad Khan (DMS/PSA/86/2009) is accused of throwing stone at a police jeep, damaging it and seriously injuring a policeman. Mohammad Rafi Fazili (DMB/PSA/191/2010) is accused of being part of the protesting "mob" that on 31 July 2010 surrounded a security force camp and tried to set it on fire, causing injuries to a number of policemen, and that also caused damage in many parts of Budgam town.

Where, as in these cases, the allegations include clear and specific criminal offences, it is unclear why the J&K authorities have not actively sought to prosecute and follow through with criminal charges. Amnesty International is concerned that the J&K authorities are effectively using detention without trial as a punitive measure and have little or no intention of actively prosecuting such persons. This is in sharp contrast with the view taken by the Supreme Court that three decades ago quashed the PSA detention of a youth suspected of a knife attack and other similar threats, observing, "One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer."¹⁰⁸

5.3 DETENTION OF BAR ASSOCIATION LAWYERS

Mian Abdul Qayoom, the President of the J&K High Court Bar Association, Ghulam Nabi Shaheen, the General Secretary and Mohammad Shafi Reshi, a senior lawyer and member of the Bar Association, have all been detained under the PSA during 2010. Amnesty International met with Mian Qayoom, Ghulam Nabi Shaheen and other members of the Bar Association during a meeting in Srinagar in May 2010 in which the lawyers provided a large number of PSA cases eventually studied for this report.

The J&K High Court Bar Association plays an important role in challenging a large number of PSA detention orders in the courts, undertaking jail visits and more generally taking up cases of human rights violations. The detention of the President and the General Secretary of the Bar Association may be an attempt by the state authorities to intimidate the Bar Association as well as other lawyers who take up cases of human rights violations in the courts. The United Nations Working Group on Enforced or Involuntary Disappearances (UN WGEID), jointly with three other UN special procedures mechanisms, sent a intervention letter to the Government of India in July 2010 regarding the arrests and detentions of the lawyers from the Bar Association, "reportedly based on, *inter alia*, their work on alleged human rights violations including enforced disappearances in Kashmir."¹⁰⁹

Mian Qayoom was detained under the PSA on 7 July 2010. The grounds of detention prepared by the Srinagar District Magistrate allege he is attempting to turn the Bar Association into "a secessionist outfit" indulging in "illegal activities." Four previous criminal cases involving Mian Qayoom registered between October 2008 and June 2010 are also mentioned in the grounds of detention, which also accuses him of instigating protests. With a petition filed on his behalf in the High Court and the quashing of the detention order likely, the Government revoked it on 16 September 2010. Qayoom was held in a criminal case for a few days before another detention order was issued on 22 September. This time around, the

grounds of detention were far more detailed and made wide-ranging allegations relating to secessionist activities and also alleged involvement in six criminal cases. This detention order was struck down by the High Court on 27 November, but the police arrested Qayoom three days later, on charges of sedition and "waging war against the state." He remains in prison pending trial and awaiting decision on his bail applications.

The General Secretary of the Bar Association, Ghulam Nabi Shaheen, is being held in administrative detention, reportedly on similar grounds as well as for organizing public rallies seeking the release of Mian Qayoom. He has been in detention since 18 July 2010. Although the High Court quashed his detention on 18 September 2010, he was detained under a second PSA detention order that was also quashed on 29 December 2010. However he was immediately rearrested from the prison itself in connection with an FIR registered in Jammu and taken to JIC Jammu. A third detention order was issued in February 2011 and a habeas corpus petition challenging the detention is pending in the High Court. Another lawyer, Mohammad Shafi Reshi, was also detained in September 2010. Although the Government is reported to have revoked his detention order on 23 November, the police also immediately rearrested Reshi outside the prison on a criminal charge. Reshi was reportedly released on 28 January 2011 on bail.

6. AN 'INFORMAL' CRIMINAL JUSTICE SYSTEM

'It has... been reported that by enacting laws providing for indefinite administrative detention as an alternative to prosecution, States have created informal criminal justice systems in which detainees are denied rights that they would normally have in the ordinary judicial systems.'

Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/57/173, 2 July 2002, para 7

The cases studied by Amnesty International indicate that the authorities in J&K have used the PSA to create a parallel or "informal" criminal justice system – bypassing the regular criminal justice system to secure the long-term detention without trial of individuals, depriving them of human rights protections otherwise applicable in Indian law.

6.1 PSA DETENTION INSTEAD OF CRIMINAL CHARGE

"It is not that the Government or its officers... may at any time at their whim and caprice use preventive detention as a tool to find solution to the problems that are to be dealt with in a routine and normal manner"

Justice Hasnain Massodi, High Court judgment dated 8 April 2010 in *Masarat Alam Bhat v. State of J&K and others*, Habeas Corpus Petition 25/10

The PSA, which allows police to detain individuals with little evidence and no requirement for prompt judicial review of that evidence, is not only used against political activists but is being used by local police officials to detain suspected criminals who appear to have little or no involvement with the political struggle or the armed movement for independence. In February 2011 the J&K government reportedly decided to use PSA against persons who had encroached on public lands.¹¹⁰

The PSA grounds of detention with respect to Reyaz Ahmad Hajam (63/DMB/PSA/10) allege that he is "a known anti-social element of the area, reportedly involved in gambling, extortion and eve-teasing." It refers to two ongoing investigations for similar offences dating back to 1997 and 1999 respectively as also a 2009 investigation relating to vandalism and

ransacking of a private phone company's office. It further alleges, "You are reportedly involved in drug-peddling... and organized a gange (sic) of young criminals who are engaged in selling drugs to the youth". Seeking to somehow connect his activities with the political situation, the authorities claim, "You are reportedly luring the youth to drug menace, who would under the effect of drugs indulge in stone pelting and thus create an atmosphere of suffocation (sic) for the general masses." A habeas corpus petition filed by his wife challenging his detention and refuting the charges argues that if true, he should be charged under the Drug Control Ordinance rather than being detained under the PSA. Sameer Ahmad Mir (68/DMB/PSA/10) was detained on similar charges to Reyaz Ahmad Hajam at the same time. In his case however, the authorities did initially resort to a criminal charge under the Drug Control Ordinance but he was granted bail by the court. Instead of releasing Mir, a PSA detention order was issued. Petitions filed seeking the release of both Hajam and Mir are presently pending before the High Court.¹¹¹

Suhail Ahmad Mandoo's (DMS/PSA/52/2005) PSA detention order accuses him of being "a nuisance in the society... a road Romeo... a cancer in the society", "manifesting criminal behaviour against young teenaged girls." It also accuses him of "vexing" one girl in particular, "uttering obscene words" and attempting to abduct her. He was arrested on a criminal charge in relation to the above offences but was issued with a PSA detention order when he was granted bail by a local court. His lawyer told Amnesty International that his client was being harassed and intimidated as he had a romantic liaison with the daughter of a police officer in the city. The detention order was stayed by the High Court before Mandoo could be detained.

The PSA has been used to detain those who have crossed the LoC between India and Pakistan (which divides a number of extended Kashmiri families) despite the fact that there is legislation specifically designed to charge individuals with illegally crossing the LoC: the Egress and Internal Movement (Control) Ordinance (E&IMCO). Rafiq Ahmad Chechi (Baramulla, order 158 of 2004), a resident of the border area of Uri, is alleged to have crossed the LoC along with his sister and some other family members at the start of the armed uprising in 1989-1990. While the others are reported to have settled in the Pyne Muzaffarabad migrant camp in "Azad Kashmir", Chechi returned to his village and continued his studies. In 1999, he is reported to have again crossed the LoC. This time he was arrested by Pakistani authorities and released to his sister's custody after 27 days in jail. Indian security forces apprehended Chechi while he was attempting to cross back to his original village in 2004. He was subsequently charged under the E&IMCO but also subsequently detained without trial under the PSA. The authorities acknowledged that he was unarmed but the grounds of detention concluded that his extended stay with his sister "is objectionable and suspicious and implies that you surely remained active with MJF [Muslim Janbaz Force] outfit."

6.2 PSA DETENTIONS AND CRIMINAL PROCEEDINGS IN PARALLEL

Unlike in other jurisdictions where the administrative detention process is distinct from the ordinary criminal justice process, most detainees in J&K are held under the PSA alongside proceedings under security legislation or the ordinary criminal law based on the same or similar allegations. The PSA therefore acts as a safety net for police. Where a criminal conviction cannot be secured and the suspect is acquitted or released on bail, he can still be held in detention under the PSA. Similarly, if a PSA detention order is quashed by the High

Court, the person can be detained on a criminal charge until bail is secured and then arrested in another case if necessary, to prevent release (see 5.5 below).

As a matter of practice, the J&K police do not favour criminal proceedings, which requires such due process considerations as a court of law with independent judges, defence lawyers and requirements of evidence. Not surprisingly, the J&K police prefer to use the PSA, which is overseen by executive officers with almost no evidentiary requirements or possibility for independent review. This preference for a parallel or 'informal' detention system is confirmed by a comparison of trial-conviction statistics and administrative detention statistics for J&K with those in the rest of the country. The table below compares the rate of conviction for serious criminal offences (persons convicted per 100 persons charged for the offence) in J&K with the national average.

Table 2 – Comparison of rate of convictions (India and J&K) for selected offences¹¹²

	Rioting	Arson	Attempt to Murder	Murder	Total cognisable offences in IPC/ RPC	Arms Act	Explosive Substances Act
National conviction rate	20.2	22.5	31.3	38.4	42.6	66.1	49.5
J&K conviction rate	2.7	4.3	3.7	22.4	50.9	0.5	2.8

Many of those detained under the PSA are arrested on charges relating to the offences referred to in the table. Alleged stone-pelters are arrested for rioting and arson, while attempt to murder is used commonly against alleged members of armed groups. While the number of persons detained without trial in J&K is 14 times higher than the national average, the conviction rate for attempt to murder is eight times lower, for rioting approximately eight times lower and five times lower for arson.

Particularly revealing are the statistics relating to the Arms Act, where convictions are over 130 times lower than the national average. A substantial percentage of persons detained under the PSA are also charged under the Arms Act. Out of the over 600 cases studied by Amnesty International, approximately 290 detainees were also booked in FIRs that included Arms Act offences. Of these, in approximately 160 cases, detainees were alleged to be in possession of guns or other serious weapons when arrested. Yet, only about 2 or 3 out of the 290 detainees would eventually be convicted for possession of weapons.

Importantly, low rates of conviction in J&K are not necessarily indicative of a failing criminal justice system – the percentage of convictions in all cognisable (relatively serious) penal code offences in J&K (50.9) is higher than the corresponding national figure (42.6). Similarly for the most serious offence of murder, which does not feature with respect to most PSA

detainees, the J&K conviction rate (22.4) is not significantly lower than the national average (38.4). The low conviction statistics in relation to the offences typically the subject of PSA detentions, such as possession of illegal weapons, arson and rioting, suggest that the J&K authorities either do not seriously pursue criminal charges in these cases or are unable to convince the courts of the evidence against suspects.

In its recent opinion on 10 PSA cases from J&K, the UN WGAD questioned the inconsistency between serious allegations against individuals on the one hand, and the abject failure of the state authorities to be able to substantiate these allegations in any judicial forum. The cases reviewed by the UN WGAD allege serious crimes including attacking security forces with grenades (Manzoor Ahmad Waza, Reyaz Ahmad Teli) and harbouring members of armed groups and hiding arms and ammunition (Nishar Ahmad Wani and Farooq Ahmad Kana). Alleged recoveries of weapons are serious too including 20 kgs of RDX (Research Department Explosive) and a pistol (Nishar Ahmad Wani), 5 Kg of RDX, (Umar Jan). A few are accused of active membership of armed groups and arrested with guns including rifles, grenades etc (Mehraj-ud-din Khanday, Nazir Ahmad Dar, Mohammad Younis Bhat).

After examination of the cases and evaluation of the response of the Government of India, the UN WGAD raised doubts about the vague allegations and alleged recoveries claimed by the police in J&K stating: "All detained persons are alleged by the Government to be members of militant outfits and engaged in acts of omission and commission that constitutes a threat to security forces as well as the public at large. Charges by the Government include attacks on security forces, providing shelter to militants as well as being in possession of arms and ammunition. These are very serious charges indeed. But, if these persons are accused of such dangerous offences, why have they successfully challenged their detention despite the alleged recovery of contraband material (including grenades, explosives, pistols, rifles etc.)?"¹¹³ The UN WGAD concluded: "The Working Group is not convinced that the detentions of these [10] persons are indeed triggered by anti-State and terrorist activities posing a threat to the State as the detentions (except in two cases) were not followed to their logical conclusion of sentencing and end up being let off by the Judiciary every few months."¹¹⁴

6.3 CONTINUED PSA DETENTION DESPITE ACQUITTAL OR BAIL

Instead of appealing the decision of the courts to release detainees on bail or to acquit them in a higher court, the state authorities issue PSA detention orders against individuals to continue detaining them. Amnesty International has discovered numerous examples of the practice of detaining individuals under the PSA as soon as they are granted bail by the courts. In a number of cases the grounds of detention explicitly state that the detention is being ordered because there is a likelihood that the suspect will be released on bail by the courts. In these cases, the J&K authorities appear to resort to administrative detention under the PSA in an all but open defiance of the judiciary, at the expense of the human rights of the individuals concerned, and the rule of law.

Irfan Rasool Bhat (41/DMB/PSA/2010) was initially arrested in August 2007 and charged with murder. The trial court rejected two prior bail applications before it finally released him on bail on 29 December 2009. In the reasoned 13 page bail order, the trial judge noted that nine of the 13 witnesses for the prosecution had already been examined and that the remainder were not important witnesses.¹¹⁵ Since there was not a prima facie case

established against the accused and the accused had already spent over two years undergoing trial, the judge allowed bail. Bhat was "released" from prison and immediately handed over by the prison authorities to the police. According to a writ petition filed by his lawyers, police held Bhat in custody for two months without bringing him before a magistrate. On 10 February 2010 his family members came to know of a PSA detention order against him. The grounds of detention provide no evidence against him other than his alleged involvement in the murder case and makes clear that his detention is sought solely because of his release on bail by the trial court. The PSA detention order has been challenged in the High Court and is pending hearing.

Mir Saddam Hussein (15/DMK/PSA/2009), an 18 year old school student was arrested on 22 June 2009 for allegedly setting fire to a mobile phone tower at the behest of an armed opposition group. The magistrate allowed his release on bail on 3 August 2009 with the order concluding, "there are reasonable grounds to believe that the accused are not involved with the commission of offence..."¹¹⁶ Despite this, Hussein was not released. His family members returned to the court, which sought a report from the police. The police informed the magistrate that Hussein was again arrested on charges of possession of prohibited weapons in relation to an earlier incident, the investigation of which was ongoing. On 31 August 2009, noting that the police report did not even specify the date of the arrest nor "does it spell out anything which could justify for retention of the accused in custody for a further period," the court ordered that Hussein be released on temporary bail.¹¹⁷ Regular bail was granted on 30 September 2009. In response to bail in this second case, the authorities issued a PSA detention order on 8 October 2009. However before Hussein could be detained, the order was challenged in the High Court and remained pending when last information was available to Amnesty International (HCP 250/2009).

On 22 February 2010, Bakhtiyar Ahmad Malla (PSA/2010/854-55/2010) was arrested from his house and accused of possession of prohibited weapons. The trial court granted him bail on 31 March 2010.¹¹⁸ A PSA detention order was issued on the same day based on the same allegation of possession of prohibited weapons as well as undated allegations of helping members of armed groups. His detention order has been challenged in the High Court (HCP 131/10).

Not only have the authorities ignored the findings on facts made by trial courts in ordering bail or acquittal and continued to hold people in administrative detention, in some cases the authorities have passed new detention orders against persons previously acquitted by the courts on the same facts.

Mehraj-ud-din Khanday (DMS/PSA/61/2010) was arrested in August 2005 and charged with murder. He was subsequently also charged in two other cases of murder. While he was being detained on the criminal charges, a PSA detention order was issued in February 2006. The detention order was quashed by the High Court in October 2006 (HCP 163/06) but he remained in detention in connection with the criminal charges. During his time in prison awaiting trial, the UN WGAD examined his case, finding that his detention had been arbitrary and calling for his release, not least because he was a child aged 16. He was not released however. In November 2009 he was acquitted on one of the charges of murder against him. The acquittal order of the trial judge in November 2009 notes that although the 16 witnesses produced by the prosecution established that an explosion took place, there was no evidence

at all against Khanday himself or any of the other four accused persons. The trial judge concluded, "Even the prosecution witnesses could not identified (sic) the accused persons in the Court. So the prosecution has miserably failed to prove its case..."¹¹⁹ On 12 December 2009 Khanday received bail in another of the murder cases. He was acquitted in the third murder case two days later. This acquittal order dated 14 December 2009 stated that other than an inadmissible confession to the police, there was no evidence against the accused persons despite the 18 witnesses produced. The judge in this case also concluded, "without any hesitation that the prosecution has miserably failed to prove its case against the accused persons..."¹²⁰ Khanday was finally released from prison in mid December 2009 but police immediately detained him again under a PSA detention order issued on 2 January 2010. The grounds for this detention under the PSA cite the two murder cases against Khanday in which he was acquitted by the trial court, referring to him as "active co-conspirator and an accused" in them. A petition filed on his behalf before the High Court (HCP 16/10) notes that after being picked up by police after his release from prison he was held illegally at Joint Interrogation Centre (JIC) Humhuma for a week without being produced before a magistrate.

Mohammad Iqbal Fanda (DMS/PSA/47/2009) was arrested in May 2005 as an "Al Badr terrorist" suspected of murdering three police informers earlier that year and charged with murder. While in prison awaiting trial a PSA detention order was issued against him in April 2006 to prevent any possibility of his release on bail. The detention order was quashed by the High Court on 30 October 2006 (HCP no. 212/06). Fanda remained in prison awaiting trial and was finally acquitted on 3 September 2009.¹²¹ Fanda was handed over by the prison authorities to the police, ostensibly for interrogation in another criminal case dating back to 2006. A month later, another PSA detention order dated 9 October 2009 was issued. No new grounds were specified in the new detention order, which merely stated that he had been released on bail by the trial court. Amnesty International has been informed that this detention order too was quashed by the High Court (HCP 49/10), but a third detention order was issued in 2010 on the same grounds. Fanda has spent over five years in prison either awaiting trial or under administrative detention.

6.4 REPEAT AND SUCCESSIVE DETENTION ORDERS

While Amnesty International believes that systems of administrative detentions should never be used, and that the PSA itself is incompatible with India's international human rights legal obligations, it is important to note that the practice of issuing repeat detention orders violates even India's own already problematic law.

The authorities use Section 19(2) of the PSA to issue repeat detention orders as a means of delaying the release of a detainee. This provision specifically allows for repeat detention orders to be issued on the same facts but limited to certain circumstances. It provides, "there shall be no bar to making of a fresh order of detention against a person on the same facts as an earlier order of detention" where the earlier order of detention "is not legal on account of any technical defect" or where the order "has been revoked by reason of any apprehension, or for avoiding any challenge that such order or its continuance is not legal on account of any technical defect."

The authorities use this provision to issue new detention orders on the same grounds by arguing for the existence of a "technical defect" to avoid the release of detainees and ensure their continued detention under the PSA. In numerous cases the authorities revoke a

detention order just when a detainee's habeas corpus petition is to be finally decided on by the High Court and they fear the court will order release. This tactic avoids the quashing of the order but starts the process all over again when a new detention order is issued on the same or similar grounds. For instance, in Mian Abdul Qayoom's case, the Government revoked the detention order due to technical defects just a few days before the High Court was to deliver judgment on the habeas corpus petition filed on Qayoom's behalf. A repeat detention order was then issued, requiring a fresh petition in the High Court.

The Supreme Court of India has in the past limited the ability of the state to issue repeat administrative detention orders. In its judgment in *Chotka Hembram v. State of West Bengal and Others* (1973), the court observed that allowing repeat detentions on the same grounds effectively "set at naught the restriction... relating to the maximum period for which a person can be in detained in pursuance of a detention order."¹²²

In its judgment in the case of *Ibrahim Bachu Bafan v. State of Gujarat and Ors* (1985) the Supreme Court ruled that where an administrative detention order was quashed by a court in a writ petition, the power of making a fresh order on the same grounds was not available to the detaining authority.¹²³ The court observed that although the law allowed a repeat order where the Government revoked the previous order, this could not be done after a quashing of the order by the court as revocation by the government and the quashing by a court were entirely different procedures. Although this judgment was passed in the context of another law that allows preventive or administrative detention – the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 – the provisions relating to repeat detention are similar to those found in the PSA. The Supreme Court's latter decision was cited by Justice M. Yaqoob Mir in the High Court in *Mst. Zahida v. State of J. and K. and Ors* (2008).¹²⁴ Despite this jurisprudence, the authorities in J&K regularly issue repeat detention orders.

Zahida (DMS/PSA/29/2006) was arrested on charges of providing accommodation to members of an armed group, Lashkar-e-Taiba and assisting in transporting arms and ammunition to carry out a suicide attack. While in police custody a detention order was issued under the PSA. The High Court quashed her detention in December 2006 (HCP No. 481/06) but she was detained under the PSA again on new grounds in January 2007. This detention order was also quashed by the High Court in May 2007 (HCP No. 12/07). Although she received bail in the criminal case against her, she could not be released as she was detained under the PSA for a third time in July 2007. In February 2008 the High Court also quashed this detention, noting that all the detention orders were based on virtually the same facts.¹²⁵

Even beyond the general human rights concerns of administrative detention under the PSA, a repeat detention order would be impermissible unless a prior one was not legal due to a "technical defect." However, in practice, the detaining authorities in J&K continue to issue repeat detention orders even where the High Court quashes the detention order due to significant and substantive rather than "technical" failures on the part of the detaining authority.

In order to get around the limitations on issuing repeat detention orders and fall within the exemptions permitted by the PSA (if not Indian jurisprudence), the detaining authority has

asserted that the previous detention order was quashed on “technical grounds” even where it was not. Thus in the case of Nazir Ahmad Khan (01/DMK/PSA/2006), the first PSA detention order was quashed by the High Court on 27 September 2005 for failing to furnish material in a language understood by the detainee and thereby violating his constitutional right to make a representation (HCP 37/05). The second detention order, however, claimed that the first was quashed on technical grounds. Similarly the High Court quashed the first PSA detention order in the case of Mohammad Ahsan Dar (117/DMB/PSA//2009) when it found no compelling evidence for his administrative detention given that he was already in custody in connection with a criminal case (HCP 78/09). The second detention order dated 29 December 2009 claimed that the High Court had quashed the first detention order due to a “technical defect” and that police were now seeking his detention under the PSA because he had filed for bail in the criminal case against him.

SUCCESSIVE DETENTION ON ‘NEW GROUNDS’

In other cases, once the High Court has quashed a PSA detention order, the detaining authority continues to hold the detainee by issuing a new detention order on the basis of “new grounds,” which are often made up of extremely vague allegations. This practice appears to be unique to J&K: lawyers defending those detained under similar legislation in other parts of India expressed astonishment that the J&K authorities could issue new detention orders for the same individual based on “new grounds” immediately after a detention order had been quashed by the High Court.¹²⁶ This has been the fate of many detainees in J&K. Shabir Ahmad Shah, Masarat Alam Bhat and others referred to above have been detained under up to eight successive PSA detention orders.

A senior lawyer explained the process to Amnesty International:

The detaining authorities know well that the detention orders will be challenged in the High Court and will be often quashed, but they also know that the entire process will usually take about six months. The police therefore know that irrespective of what they write in the grounds, the detainee cannot be released before six months. Earlier, this used to be one year, but it doesn't really matter to the police – if they want to hold the person further, they will get another detention order passed. The order may be for two years but even if it gets quashed, their objective will be achieved as the person is in jail for six months. They can keep on doing this as no one holds them accountable.¹²⁷

In some cases studied for this report, the detaining authority has simply added another alleged offence to the new grounds of detention or referred to offences allegedly committed before even the first detention order was issued. For example Mohammad Sharief Kachroo (Det/PSA/DMA/09/12) was arrested on 3 October 2008 from a relative's house in a case of wrongful possession of weapons. While in police custody, a PSA detention order was issued on 4 November repeating the allegations of wrongful possession and further alleging that he was a supporter of an armed group. On 15 September 2009 the detention order was quashed by the High Court (HCP no. 33/09). A new PSA detention order was issued on 3 October 2009 repeating much of the previous order but adding: “You are also involved in bomb blast which occurred on 9th July 2008 at Bus Stand Banihal... You have not changed your ideology even after earlier detention and remained in constant touch with the terrorists during your detention.”

New grounds of detention issued against Bashir Ahmad Dar (DMS/PSA/02/2010) on 20 April 2010 after his previous detention order was quashed by the High Court on 25 March 2010 on grounds of “non-supply of material” (HCP No. 175/09), claimed that “reports received in your respect reveal that you are contemplating to recycle into militant and have already made some moves in this direction.” A second detention order issued against Aijaz Ahmad Mir (67/DMP/PSA/06) in February 2007 repeated allegations made in a previous detention order along with allegations of his “deep involvement [with armed groups] and the security scenario of District Pulwama” at the time, before concluding, “You are likely to indulge again in subversive activities.” His previous detention order of June 2006 was quashed by the High Court in December 2006 on the substantive grounds of non-supply of material and non-application of mind as the judge found that the detaining authority had merely reproduced the police dossier in preparing the grounds of detention.

The Indian jurist AG Noorani, writing on successive detentions of veteran Kashmiri leaders Syed Ali Shah Geelani and Abdul Ghani Lone observed, “If this ploy of re-detention is allowed to succeed, it will make a mockery of the few safeguards sub clause (4) of Article 22 of the Constitution of India provides to detainees.” He also called for greater safeguards: “One is that the court must subject the second order to greater scrutiny. The other is that no second order must be permitted to pass muster if made after a judicial hearing of the first. It is palpably malafide and should be deemed to be so.”¹²⁸ In 2008 the UN WGAD found “a deficit of due process in the manner in which the law enforcement authorities apply the mechanism of ‘serial detention’ in order to deprive these persons of their liberty.”¹²⁹

6.5 REVOLVING DOOR DETENTIONS

Once the High Court has quashed a detention order and assuming an individual has also secured bail in any ongoing criminal case, the state is required to release him or her. In practice, as numerous cases referred to above have shown, detainees are regularly released straight back into the hands of police.

With hundreds of detention orders quashed every year, the continuing detention of individuals by the state requires careful coordination amongst the various agencies involved. In its report on the PSA published in 2000, Amnesty International observed that the “release” and immediate re-arrest or illegal detention of detainees was a matter of state policy.¹³⁰ The report referred to a number of communications issued by senior state government officials and prison authorities in J&K indicating that prison authorities were being directed (and issuing instructions accordingly) not to release PSA detainees without informing the government and police authorities and to hand them directly over to police so that cases pending against them could be pursued.

A directive faxed on 19 March 1999 by the Principal Secretary of the Home Department, J&K Government, to the Superintendent Central Jail Srinagar contains the following:

It has been reported that some detenues have been released from PSA detention on quashment of their detention orders by the Hon'able High Court, without obtaining clearance from home Department as well as Addl. DPG CID resulting the government could not file LPA [Letters Patent Appeal – an appeal to a larger bench in the High Court] in those cases. ... You are as such directed not to release any PSA detainee on quashment of their detention orders by the Hon'ble High Court without obtaining clearance from Home Department and CID.

Further a list of detainees be provided to this department through Incharge Detention, Home Department Camp Srinagar who have been released on court orders since last two years giving particulars/ECP number/date of detention/period of detention/date of court order and date of release from jail.¹³¹

On 13 August 1999, in response to a petition filed by the J&K High Court Bar Association raising concerns about these communications, the High Court disposed the matter noting that the Home Department had informed the Superintendent Central Jail that its directions regarding PSA detainees had been withdrawn. Unfortunately, recent cases of PSA detainees referred to in this report clearly show that the practice of the J&K authorities has not changed. For example, the dossier of the Senior Superintendent of Police, Anantnag in the case of Parvaiz Ahmad Tantray (Det/PSA/06/01) explains the process that took place in his case in 2006: "after quashing [of] his detention order by Hon'ble Court, the subject was taken in to JIC Humhama for further preventive action under law through CIK Srinagar and was later on handed over to SHO P/S Ang [Station House Officer, Police Station Anantnag] with the directions that the release of the suspects can be prejudicial to security of the State and needs to be redetained." When Amnesty International questioned this practice in a meeting with government and police officials in Srinagar in May 2010, the officials claimed that there was no "technical" violation of the law, as the prison authorities released persons once they received court orders and the police only re-arrested them outside the prison gate.

7. BARRIERS TO JUSTICE

'The state ... shall seek to secure a judicial system which is humane, cheap, certain, objective and impartial whereby justice shall be done and shall be seen to be done...'

Article 18, Constitution of Jammu and Kashmir

7.1 THE LIMITS OF HABEAS CORPUS AND THE HIGH COURT

In its response to queries by the UN WGEID, the Government of India has claimed, "...at the judicial level, the independent judiciary acts as a check on the Executive Power and has the power to order investigations."¹³² In practice, the J&K authorities show little regard for the judiciary.

The lack of respect shown by J&K state authorities for the judicial process in habeas corpus petitions in PSA detention cases demonstrated in the previous chapter is also reflected in the number of petitions in which lawyers for the state do not appear, do not file counter-affidavits, do not produce relevant documents or wait long periods before providing relevant information to the courts. These obstructive tactics have the effect of prolonging hearings and thereby the detention period of the detainees. The result is also that numerous PSA detention orders are quashed by the High Court due to lack of material provided or other similar reasons, but this does not seem to concern the authorities who simply issue new detention orders.

In the context of preventive or administrative detention in India, the UN HRC has stated, "the decision as to continued detention must be considered as a determination falling within the meaning of article 14, paragraph 1, of the Covenant."¹³³ This Article provides, among other things, for the equality of all persons before the courts. It further stipulates "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Furthermore, referring to Article 9(4) of the ICCPR (right of person in detention to take proceedings before a court), the UN HRC has stressed that the "decisive" factor in determining whether this provision has been complied with is whether "such review is, in its effects, real and not merely formal."¹³⁴

By ignoring and circumventing the orders of the High Court in habeas corpus petitions (see 6.4 and 6.5), the authorities not only undermine the rule of law but render the judicial review of detention orders a "mere formality." In its opinion on 10 PSA cases from J&K in

November 2008, the UN WGAD noted: "A more robust control over implementation and respect for detention decisions taken by courts is imperative to prevent arbitrariness in detention."¹³⁵

While there is little doubt that the High Court does play an important role in quashing detention orders where the constitutional rights of detainee have been violated, the reluctance of the court to both secure the liberty of the detainees in practice and hold the state authorities accountable suggests a focus on the procedural and nominal aspects of detention at the expense of substantive protection of human rights of the detainees.

The cases discussed in this report provide evidence of the systematic manner in which the state uses and abuses the PSA detention regime to circumvent not only the requirements of the law, but by and large the entire criminal justice system. Despite this, judges have largely failed to hold to account police officials and District Magistrates when illegal detention, fabrication and failure to exercise due diligence are evident. Officials already protected from any prosecution (under immunity provisions present in the PSA) are further emboldened by such hesitation from the High Court. Amnesty International is unaware of High Court judgments directing action to be taken against officials for non-observance of court orders or that have ordered investigations into claims of torture and illegal detention of detainees. High Courts in India have vast constitutional powers and are commonly known to enforce their decisions through fines, strictures and other penalties.

The reluctance of the court to enforce its decisions is demonstrated in the case of Mohd Akram Parry (PSA/DMB/2008/127). In a judgment dated 13 October 2009 on a habeas corpus petition challenging his detention, the court stated: "the facts detailed in the writ petition reveal that the detenu was never released despite grant of bail and quashing of the earlier order of detention. These facts have not been rebutted by the respondents [the state]. [Prison] Record has also not been produced inspite [sic] of speaking direction dated 11-08-2009." The Judge also records, "Learned counsel for the petitioner... urges for a finding of breach of law on the part of the respondent no. 2 [Police officials] because of wrongful confinement of the subject and entitlement of compensation" (HCP 71/09). Despite recording the claims of illegal detention and the failure of the state to rebut these, the court did not order investigation or make judgment in this regard.

Most lawyers who spoke with Amnesty International in Srinagar believe the High Court's practices are peculiar to the state: "Will a judge in any other High Court allow the police officers to get away with this sort of behaviour? The government and police behave this way because they know they can," said one senior lawyer in a meeting at the J&K High Court Bar Association.

"The entire approach of the High Court is lackadaisical and procedural", a human rights lawyer in Srinagar told Amnesty International, "This is evident in their approach to habeas corpus petitions as well. PSA detention petitions are generally heard in the High Court on Tuesdays, with four or five different judges hearing about 35-40 petitions each. These are at different stages – some for admission, others for notice and a few for arguments. The state lawyers appear in a few, ignore some cases altogether and seek to delay others. The judges usually dispose of all the cases in about one hour. What can the judge manage in that little time? Doesn't that say a lot?"

BOX 9: PROCEDURAL PROBLEMS

The process of bringing a habeas corpus petition and having it heard is a lengthy one. As per the new 2010 rules of the High Court, all habeas corpus petitions are to be initially heard within four days of being filed, with hearings completed within a period of 15 days.¹³⁶ Members of the High Court Bar Association informed Amnesty International that in practice when a writ petition challenging a detention order is filed in the High Court, although it is usually admitted in two to three days, it is listed for hearing after two weeks as the state is given time to respond to the petition. Invariably the state seeks more time to reply and petitions are delayed by weeks at a time. A rebuttal is then permitted to the petitioner before a date is fixed for final argument. On average, they said, habeas corpus petitions take close to six months to be decided – far more than the 15 days envisaged in the rules.

Other procedural hurdles are common. Manzoor Ahmad Wani (DMS/PSA/81/2009) was successful in getting a February 2008 detention order quashed by the High Court in September 2009. However, the prison authorities did not release him as they claimed that the number of the detention order was not mentioned in the High Court order. It took another three months for Wani's lawyers to get the High Court to provide a clarification order. He was released from prison on 18 December 2009 and immediately rearrested by the police who were waiting for him at the prison gate. He has since been detained without trial again and his petition challenging the detention is pending in the High Court.

OTHER AVENUES OF REDRESS

Although the Supreme Court has issued judgments regarding "preventive detention" on a number of occasions over the past 60 years and even upheld the constitutionality of the PSA in 1981,¹³⁷ its specific engagement with the PSA has been extremely limited since 1989-1990. The Supreme Court of India has quashed a handful of PSA detention orders over the past two decades, but as these orders are unreported it is not possible to know whether the court made any comment on the PSA or its implementation.¹³⁸ Amnesty International is aware that the Supreme Court was approached with habeas corpus petitions in the cases of senior political leaders Abdul Ghani Lone and Syed Ali Shah Geelani in 1994. However, the Government revoked the detention orders before the Supreme Court could rule on the matter, rendering the petition redundant.¹³⁹ The Supreme Court is currently (in early 2011) hearing a petition seeking the release of a number of foreign nationals detained under PSA. It is unclear why there have not been other petitions concerning PSA detainees filed with the Supreme Court. Possible reasons may include reluctance of J&K lawyers and residents to file petitions in the Supreme Court or reluctance of the Supreme Court to admit such petitions from J&K.

The National Human Rights Commission has also been silent on the PSA. It appears to have acted in only one case calling for comments from the J&K Government in 2004 on the basis of a newspaper report that referred to successive detentions. Passing the order, "the NHRC Chairperson observed that if the content of the report are true, it raises serious issues of violation of human rights."¹⁴⁰ Amnesty International is unaware of the response from the J&K state authorities or any further action taken by the NHRC.

7.2 RIGHT TO COMPENSATION

No compensation has been awarded in any of the approximately 160 writ petitions analyzed by Amnesty International for this report, even though High Courts regularly quashed PSA detention orders.

Article 9(5) of the ICCPR provides that “[a]nyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.” More generally, the ICCPR requires effective remedy for human rights violations under Article 2(3).¹⁴¹ The UN HRC has emphasised the duty of states parties to ensure reparations to victims of torture and other ill treatment.¹⁴²

Although India’s reservations while acceding to the ICCPR specifically state that there is no enforceable right to compensation for wrongful arrest and detention, the Supreme Court of India has in the past often awarded compensation for human rights violations. In its judgment in *DK Basu v. State of West Bengal* in December 1996, the Supreme Court specifically observed that the reservation to the ICCPR “has now lost its relevance in view of law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen.”¹⁴³

Compensation has been directed specifically in illegal detention cases also. In a case of illegal arrest and detention of one Member of the J&K Legislative Assembly, the Supreme Court of India in 1986 directed compensation of Rs. 50,000 (USD \$1100) to be paid observing that, “If the personal liberty of a Member of the Legislative Assembly is to be played with in this fashion, one can only wonder what may happen to lesser mortals.”¹⁴⁴

This judgment does not appear to have been followed in J&K. Lawyer Mir Shafqat Hussain, who regularly takes up PSA cases, told Amnesty International that although the issue of compensation is raised in almost every petition, he is only aware of two to three cases in his long legal career when it was ordered by the judge.¹⁴⁵ In a few judgments of the High Court, judges have even recorded that the detainee sought compensation for illegal detention, but made no further mention of the issue in the judgment.¹⁴⁶ In one rare instance where the High Court awarded compensation of Rs.10,000 (USD \$220) after quashing a detention order in a writ petition in 1997, the order was appealed by the state and a larger bench of the High Court overturned the previous decision stating that as the quashing of the previous detention order was only on legal grounds and no malice were alleged or proved, the award of compensation was incorrect.

8. CONCLUSION

'If every infraction of law having a penal sanction by itself is a ground for detention, danger looms large that the normal criminal trials and criminal courts set up for administering justice will be substituted by detention laws often described as lawless law.'

Justices D.A. Desai and P. N. Bhagwati of the Supreme Court of India in *Jaya Mala v. Home Secretary, Government of Jammu & Kashmir* (1982)

The Indian Supreme Court's observation in a PSA detention case in 1982 – well before the eruption of the popular uprising and armed movement for independence – was prophetic. As documented in this report, the PSA is a “lawless law” that has largely supplanted the normal criminal justice system in J&K.

Hundreds of people are detained under the PSA in J&K, many of them political activists and youth suspected of throwing stones at security forces. Instead of charging and trying persons suspected of committing offences in a fair trial in a court of law, the J&K authorities continue to circumvent the rule of law by resorting to the PSA. Repeal of the PSA would send a strong signal to the residents of J&K about the government's commitment to the rule of law and human rights.

Repealing the PSA and ending the system of administrative detention in J&K would also bring India into conformity with its international human rights legal obligations. Successive international human rights mechanisms, such as the UN HRC, the Committee on the Elimination of Racial Discrimination,¹⁴⁷ and most recently the Special Rapporteur on the situation of human rights defenders¹⁴⁸ have criticized India's administrative or “preventive” detention legislation including the PSA. They have called for the PSA to be brought in line with International human right standards, notably articles 9(3) and 14(1) of the ICCPR to which India is a party. When the UN HRC examined “preventive” detention in India in 1997, it expressed regret “that the use of special powers of detention remains widespread.” The UN HRC recommended that:

...the requirements of article 9, paragraph 2, of the Covenant be complied with in respect of all detainees. The question of continued detention should be determined by an independent

*and impartial tribunal constituted and operating in accordance with article 14, paragraph 1, of the Covenant. It further recommends, at the very least, that a central register of detainees under preventive detention laws be maintained and that the State party accept the admission of the International Committee of the Red Cross to all types of detention facilities, particularly in areas of conflict.*¹⁴⁹

India has allowed the ICRC access to detention facilities in J&K, in line with the UN HRC's recommendation, but it has refused to reform the system of administrative detention. Unfortunately India has not reported on its implementation of the ICCPR to the UN HRC since 1997, a fact that Amnesty International regrets and hopes may soon be rectified.

In 1998 the UN HRC expressed similar concern about the system of administrative detention employed by Israel in the Occupied Territories (which, like India, had made a reservation to Article 9 at the time of ratification). It recommended that, "the application of detention be brought within the strict requirements of the Covenant and that effective judicial review be made mandatory."¹⁵⁰ In view of the fact that human rights violations had continued under the system since that time, in its subsequent review of implementation of the ICCPR in 2010, the UN HRC effectively abandoned its line of recommending improvements to the administrative detention system, calling on Israel to "... Refrain from using administrative detention, in particular for children, and ensure that detainees' rights to fair trial are upheld at all times."¹⁵¹

A similar recommendation was also made recently in relation to the system of administrative detention in Egypt by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. He urged the Government of Egypt "to abolish any legal provisions allowing for administrative detention and to take effective measures to release or bring to trial all detainees currently subjected to that regime."¹⁵²

India has so far chosen to ignore the calls of UN human rights mechanisms in relation to its administrative detention regime. The above recommendations hold not just for Israel or Egypt but also for India and all other states exercising systems of "preventive" and other types of administrative detention in the name of security, anti-terrorism and similar causes. Such systems should be abandoned and those suspected of committing offences, including planning and conspiring to commit such offences, should be charged and prosecuted in proceedings that meet international standards of fairness.

In response to concerns raised about human rights violations by UN human rights mechanisms, the Government of India recently claimed, "... despite continuing provocations, the security forces continue to exercise their utmost restraint because of the Government's emphasis on human rights protection and the adverse impact that human rights violations by security forces can have on the work being done by them in countering terrorism in the State."¹⁵³ Yet, these claims do not appear to be backed up by the J&K authorities. In a meeting with Amnesty International delegates in Srinagar in May 2010, where concerns about PSA detentions were raised, the then Additional Director General of Police (Criminal Investigation Department) of J&K asked, "What rights are you talking about? We are fighting a war – a cross border war."

Such opinions, and the practices that result, run directly counter to commitments made by India in ratifying international human rights treaties, and assertions regularly made by government officials at both the state and central level that democracy and the rule of law should prevail in J&K. The widespread and abusive use of the "lawless" PSA further risks undermining the rule of law and reinforcing deeply held perceptions that police and security forces are above the law.

RECOMMENDATIONS

Amnesty International calls upon the Government of Jammu and Kashmir to:

Repeal the J&K Public Safety Act and any other legislation facilitating the use of administrative detentions;

Abolish the system of administrative detentions in J&K and either release or charge persons accused of committing criminal acts for recognizably criminal offences and try them in a regular court with all safeguards provided;

Implement court rulings ordering release of detainees without delay;

Immediately and unconditionally release all detainees deprived of liberty solely for the peaceful exercise of their rights of freedom of thought, conscience, religion, opinion or expression;

In the period before repealing the PSA, strengthen protection during detention by:

- Ending immediately the use of incommunicado detention;
- Ending detention in unofficial places of detention;
- Ensuring officers carrying out the initial arrest inform the families of the place where the detainee is held;
- Ensuring all detainees are brought before a judicial magistrate within 24 hours of arrest;
- Ensuring that detainees have access to their families and legal counsel and all detainees are able to exercise their right to be examined by an independent doctor as soon as they are arrested and after each period of questioning; and monitor the quality of medical reporting;
- Ensuring that the families of those detained are informed of subsequent transfers to other places of detention, without delay;
- Maintaining a centralized register of all detainees available for public access, detailing the date of order or arrest and detention, authority issuing such orders and all transfer, release and revocation orders;

Take all necessary measures to improve prison conditions, including by: (1) ending overcrowding and providing adequate food and medical care, in accordance with the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and (2) adopting a mechanism that provides for the mandatory independent, unrestricted and unannounced monitoring of all places of detention (which include confidential interviews with any detainees of the visiting body's choice);

Amend the J&K Juvenile Justice Act to make it compatible with the UN Convention on the Rights of the Child and implement its provisions in full.

The Governments of India and Jammu and Kashmir must further:

Carry out an independent, impartial and comprehensive investigation into all allegations of abuses against detainees and their families, including of torture and other ill-treatment, denial of visits and adequate medical care, make its findings public and hold those responsible to account;

Take all appropriate criminal or administrative measures against officials who fail to comply with safeguards against human rights abuses;

Ensure all victims of human rights violations have access to effective reparations.

Amnesty International urges the Government of India to:

Extend invitations and facilitate the visits of the UN special procedures including particularly the UN Special Rapporteur on Torture and the Working Group on Arbitrary Detention;

Ratify without reservations, and fully implement in practice the UN Convention against Torture and its optional protocols;

Withdraw its reservation to Article 9 of ICCPR.

ENDNOTES

¹ Although Indian law and the J&K Public Safety Act refer to preventive detention, this report uses the term administrative detention for situations of detention without charge or trial.

² See "Only 500 militants active in Kashmir: J&K police chief", *The Times of India*, 15 June 2010 <http://timesofindia.indiatimes.com/india/Only-500-militants-active-in-Kashmir-JK-police-chief/articleshow/6049472.cms>, accessed on 10 February 2011.

³ Security Council Resolution 47 of 21 April 1948 called for a plebiscite that would provide Kashmiris the choice to accede to either India or Pakistan. There was no option of independence.

⁴ For a general briefing on the AFSPA see, Amnesty International, *India: Briefing on the Armed Forces (Special Powers) Act, 1958*, (Index: ASA 20/025/2005)

⁵ The following is an illustrative list - Amnesty International, *India: An unnatural fate – disappearances in the Indian states of Jammu and Kashmir and Punjab* (Index: ASA 20/42/93); Amnesty International, *India: Summary of human rights concerns in Jammu and Kashmir*, (Index: ASA 20/02/95); Amnesty International, *India: Torture and deaths in custody in Jammu and Kashmir* (Index: ASA 20/01/95); Amnesty International, *India: Torture continues in Jammu and Kashmir* (Index: ASA 20/33/95); Amnesty International, *India: Human rights abuses in the election period in Jammu and Kashmir* (Index: ASA 20/39/96); Amnesty International, India "If they are dead, tell us", "Disappearances" in Jammu and Kashmir (Index: ASA 20/02/99); Amnesty International, *India: Impunity must end in Jammu and Kashmir*, (Index: ASA 20/023/2001).

⁶ While abuses by armed groups are referred to in the majority of reports by Amnesty International focusing on J&K, the following are some documents referring specifically to armed opposition abuses: Amnesty International, *India: Hostages must be released as armed group's deadline approaches*, (Index: ASA 20/19/95); Amnesty International, *India: Government and armed opposition groups should respect human rights during Jammu and Kashmir elections*, (Index: ASA 20/09/96); Amnesty International, *India: Appeal to armed opposition groups in Jammu and Kashmir to abide by humanitarian law*, (Index: ASA 20/038/1997); Amnesty International, *India: Civilians must not be pawns in political process in Jammu and Kashmir* (Index: ASA 20/037/2000); Amnesty International, *India: More civilians targeted in Jammu and Kashmir*, (Index: ASA 20/006/2002); Amnesty International, *India/Kashmir: Safeguard the lives of civilians*, (Index: ASA 20/013/2003); Amnesty International, *India: Armed groups in Jammu and Kashmir targeting civilians violate humanitarian standards* (Index: ASA 20/016/2005); Amnesty International, *India: Targeted killings of members of minority groups must stop*, (Index: ASA 20/013/2006).

⁷ See 'Only 500 militants active in Kashmir: J&K police chief', *The Times of India*, 15 June 2010

⁸ See International Crisis Group Update Briefing, *Steps Towards Peace: Putting Kashmiris First*, Asia Briefing No.106, 3 June 2010, <http://www.crisisgroup.org/en/regions/asia/south-asia/kashmir/B106-steps-towards-peace-putting-kashmiris-first.aspx>, accessed 10 February 2011.

⁹ Wasim Khalid, "3500 arrests, 120 PSA detentions", *Greater Kashmir*, 30 December 2010, <http://greaterkashmir.com/news/2010/Dec/30/3500-arrests-120-psa-detentions-51.asp>, accessed 15 January 2011

¹⁰ Government of India, Ministry of Home Affairs, “*Decisions Taken by CCS Regarding Jammu & Kashmir on Saturday*”, 25 September 2010, <http://pib.nic.in/newsite/erelease.aspx?relid=65989>, accessed 15 January 2011.

¹¹ Other laws include the Jammu and Kashmir Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1988 and the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.

¹² As part of its special constitutional status in India, J&K has its own Code of Criminal Procedure, although it is largely similar to the Indian Code. J&K also has its own Penal Code – the Ranbir Penal Code. Again its provisions are virtually identical to the Indian Penal Code.

¹³ Section 18(1)(b) of the PSA.

¹⁴ Section 18(1)(a) of the PSA. Although the PSA also provides restrictions with respect to “prohibited” and “protected” areas and documents, its main use appears to be “preventive detention” of persons. This report limits the discussion to the administrative detention aspect of PSA.

¹⁵ Section 8(2) of the PSA. Despite the name, a District Magistrate is not a judicial, but an executive officer.

¹⁶ Section 13 of the PSA.

¹⁷ Section 8(4) of the PSA.

¹⁸ Section 17 of the PSA.

¹⁹ In the past, the Terrorist and Disruptive Activities (Prevention) Act (TADA) and its successor, the Prevention of Terrorism Act (POTA), effectively allowed the authorities to detain people for up to six months or a year without charge or trial and with even fewer safeguards than under legislation that provides for administrative detention. With the lapse of TADA in 1995 and the repeal of POTA in 2004 following sustained pressure from civil liberties groups, the Unlawful Activities Prevention Act 1967 was amended in 2004 and 2008 to replace them. The UAPA is now sometimes used in parallel with the PSA (see Chapter 5).

²⁰ The national average of administrative detainees in prison in 2008 was 0.8%. Prison Statistics 2008, National Crime Records Bureau, Ministry of Home Affairs.

²¹ UN Human Rights Committee, “Concluding Observations of the Human Rights Committee, India”, UN Doc. CCPR/C/79/Add.81, 4 August 1997, para 24.

²² Abid Bashir, “Govt confirms 322 PSA detentions in 9 months”, *Rising Kashmir*, 6 October 2010, <http://www.risingkashmir.com/news/govt-confirms-322-psa-detentions-in-9-months-2191.aspx>, accessed 10 February 2011.

²³ Of them, 238 are state subjects and 96 foreign nationals including six Bangladeshi nationals. The home department in the written reply to Veeri had also appended a list containing names of persons booked under the PSA besides giving a comprehensive break-down of individuals arrested under various categories. Reply by Home Department to starred question no. 260 raised by People’s Democratic Party Legislator Abdul Rehman Veeri, cited in Syed Junaid Hashmi, “Numbers just don’t add up in Home Dept”, *Kashmir Times*, 18 March 2010, at <http://kashmirtimes.com/archive.htm>, accessed 10 February 2011.

²⁴ Statistics in row one of the table are from Prison Statistics Annual Reports 1995 to 2008 published by the National Crime Records Bureau, Ministry of Home Affairs, <http://ncrb.nic.in/prisonstat.htm>, accessed 10 February 2011. Statistics in row two are from Naseer A Ganai, "16,000 Kashmiris jailed under draconian PSA in 17 years", *The Greater Kashmir*, 3 June 2007.

²⁵ The figure given for administrative detainees for 1996 is 0, but 1,022 are recorded as detained in prisons in the "other" category. The figure for the "other" category in 1995 was one and in 1997 was 0, suggesting that the 1996 figures have mistakenly classified administrative detainees as "other". See Prison Statistics Annual Reports of 1995, 1996 and 1997.

²⁶ Reply by the Union of India dated 19 December 2007 filed through AK Vali, Central Government Standing Counsel before the National Human Rights Commission in Case no. 802/94-95/NHRC Panun Kashmir Movement; Case No. 938/94-95/NHRC Panun Kashmir Movement; Case No. 1081/96-97/NHRC All India Kashmiri Sama. On file with Amnesty International.

²⁷ Opinion no. 45/2008 (India) adopted on 26 November 2008, Opinions adopted by the Working Group on Arbitrary Detention, Human Rights Council Thirteenth Session, 2 March 2010, UN Doc. A/HRC/13/30/Add.1, at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-30-Add1.pdf> (UN WGAD 2010), para 51, accessed 10 February 2011.

²⁸ Human Rights Committee, General Comment No. 8: Right to liberty and security of persons (Art. 9), 30 June 1982, <http://www.unhcr.org/refworld/docid/4538840110.html>, accessed 10 February 2011.

²⁹ United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en, accessed 10 February 2011.

³⁰ The Constitution of India, 1950, granted J&K a degree of autonomy unique in India. Although largely curtailed subsequently, J&K is the only state in India to have its own Constitution. Article 10 of the Constitution of Jammu and Kashmir, 1957, provides that all permanent residents of the state have the same rights as those in the Indian Constitution. Part Three of the Constitution of India titled 'Fundamental Rights' is therefore applicable to J&K, albeit with some changes. The Constitution (Application to Jammu and Kashmir) Order, 1954 provides the extent of the modifications, <http://lawmin.nic.in/coi/APPENDIX-1.pdf>, accessed 10 February 2011.

³¹ Administrative detention in the form of "preventive detention" is provided for in various laws in India ranging from the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 to the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. However the most commonly used central legislation for "preventive detention" in India is the National Security Act, 1980. In addition there are a large number of state-specific laws that allow for administrative detention.

³² Vienna Convention on the Law of Treaties, A/CONF.39/27 (1969), adopted 22 May 1969, entered into force 23 May 1980, para. 19(c). The provisions of this treaty are considered to reflect rules of customary international law applying irrespective of whether or not states have ratified it.

³³ Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 6. The Committee cites Article 19(3) of the Vienna Convention on the Law of Treaties.

³⁴ Human Rights Committee, General Comment No. 24, para. 8.

³⁵ Human Rights Committee, General Comment No. 24, para. 18. Such a view is reinforced by state practice: See Martin Scheinin, "Reservations to the International Covenant on Civil and Political Rights and Its Optional Protocols – Reflections on State Practice," at <http://www.nuigalway.ie/sites/eu-china-humanrights/seminars/ds0411/martin%20scheinin-eng.doc>, accessed 10 February 2011.

³⁶ Although the original act provided a definition, it was deleted in an amendment of the PSA in 1988. Section 8(3)(a) of the original act read: "acting in any manner prejudicial to the security of the State" means making preparations for using, or attempting to use, or using or instigating, inciting, provoking or otherwise abetting the use of force, to overthrow or overawe the Government established by law in the State." In a 1980 judgment the Supreme Court had quashed the detention of Shabir Ahmad Shah on the grounds that the allegations made in the grounds of detention did not make out any act "prejudicial to the security of the State", *GM Shah v. State of Jammu and Kashmir*, AIR 1980 SC 494.

³⁷ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report to the Commission on Human Rights, UN Doc E/CN.4/2006/98, 28 December 2005, para 46.

³⁸ Working Group on Arbitrary Detention, Report to the Commission on Human Rights, UN Doc E/CN.4/2004/3, 15 December 2003, paras 64-65.

³⁹ The observation was made in a discussion on an identical provision in the National Security Act. Concluding observations of the Human Rights Committee, UN Doc. CCPR/C/79/Add.81, 4 August 1997, para 24.

⁴⁰ The Human Rights Committee was considering a similar advisory board established under the NSA. With no difference in the advisory boards under the NSA and the PSA and with no improvements in over a decade since the Human Rights Committee last reviewed India's adherence to the ICCPR, the criticism remains valid even now in the context of the PSA. Concluding observations of the Human Rights Committee: India, UN Doc. CCPR/C/79/Add.81, 4 August 1997, para 24.

⁴¹ UN Doc. A/57/173, 2 July 2002, para 7.

⁴² Article 32 of the Constitution of India provides for writ petitions to be filed before the Supreme Court of India. Article 226 of the Indian Constitution and Section 103 of the Constitution of J&K provide a similar right to remedy at the High Court.

⁴³ Statement no. 21204/RJS dated 19 May 2010 provided by the Registrar-Judicial of the High Court of J&K at Srinagar to the President of the High Court Bar Association. On file with Amnesty International.

⁴⁴ A study on enforced disappearances in J&K collected 259 habeas corpus petitions from the High Court at Srinagar and found that 70% (185) of the petitions collected for that study dealt with PSA detention orders. Ashok Agrwaal, *In search of Vanished Blood*, South Asia Forum for Human Right, Kathmandu, 2008, footnote 32, page 11.

⁴⁵ The grounds of detention of Javid Ahmad Lone (DMB/PSA/95/2006) state, "Keeping in view your previous activities the screening committee vide PPSA 3rd/2007 has come to conclusion that there is every likelihood that you will recycle your activities ..." Similarly Shabir Ahmad Sheikh's grounds of detention (Det/PSA/06/23) note, "after completion of your interrogation, you have been handed over to P/S Anantnag on 06.04.2006 for re-detention vide Hqrs. Screening Committee order No. BR/CID/PPSA/04/04706/22-34 dated 04.04.2006" while Nazir Ahmad Sheikh's grounds (11//DMP/PSA/04) state, "As per the interrogation report of DYSP [Deputy Superintendent] JIC Harinivas

Srinagar your case was reviewed in the Screening Committee meeting held in CID Hqrs...” Mohammad Yaseen Yattoo’s case (Budgam various) reveals the close working between the various intelligence agencies within the Screening Committee. His 2006 detention order states, “The CID Hqrs also requested his re-detention in view of deep involvement in subversive activities.” A subsequent grounds states, “The DGP, CID, J&K Srinagar/ Screening Committee recommended that you be re-detained...” A 2009 detention order also states, “Given the track record of the your misdemeanour (sic), Screening Committee of Police department has also, upon consideration... recommended your preventive detention.” CID/CIK is also referred to in a number of other detention cases including Mohd Aslam Najar (Det/PSA/09/617), Gh. Hassan Mir, Mohd. Hussain Mir and Rayaz Ahmad Teli (Det/PSA/06/07, Det/PSA/06/10 and Det/PSA/06/09 respectively).

⁴⁶ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para 34.

⁴⁷ UN Committee against Torture, General Comment No. 2: Implementation of article 2 by States parties, UN Doc CAT/C/GC/2, 24 January 2008, para 13.

⁴⁸ Principles 11(1), 15, 17, 18. See also UN Standard Minimum Rules for the Treatment of Prisoners, Rules 93 and 95.

⁴⁹ See order dated 12 July 2010 in *Bhim Singh v Union of India & Ors.* W.P. (CrI.) No. 310 of 2005 (on file with Amnesty International). Sajad Ali had been in prison since 1997 when he was detained under the PSA on grounds of being a Pakistani national and an “active dedicated” member of an armed group who crossed the border illegally.

⁵⁰ *Bhim Singh v Union of India & Ors.* W.P. (CrI.) No. 310 of 2005 and W.P (CRL.) NO. 82 of 2010.

⁵¹ According to the government lawyer, Pakistan had refused to accept him as he was not a citizen of that country and the Government of India was now checking with the Government of Afghanistan. The UN WGAD however has specifically noted that he is a national of Tajikistan. Order date 12 January 2011 in W.P. (CrI.) No. 310 of 2005 (on file with Amnesty International). This order also indicates that the Government of India has already deported about 85 foreign nationals, largely Pakistanis.

⁵² UN WGAD 2010, para 52(b).

⁵³ Concluding observations of the Human Rights Committee: Zambia, UN Doc. CCPR/C/79/Add.62, 3 April 1996, para 14. See similarly, for instance, Concluding observations of the Human Rights Committee: Cameroon, UN Doc. CCPR/C/79/Add.33, 18 April 1994, para 22; Concluding observations of the Human Rights Committee: Cameroon, UN Doc. CCPR/C/79/Add.116, 4 November 1999, para 19, Concluding observations of the Human Rights Committee: Finland, UN Doc. CCPR/C/79/Add.91, 8 April 1998, para 18.

⁵⁴ A J&K High Court Bar Association report of 2006 refers to Shabir Hussain, a national of “Azad Kashmir” who has “turned mad and does not respond to any query”. Hussain has no criminal case or sentence pending but had been in various jails for the last nine years awaiting deportation. See Jammu and Kashmir High Court Bar Association, “Jail Visit Report (Jammu Province), District Jail Udhampur”, 17 November 2006, at http://kashmirbarassociation.com/reports/jail_visits/jail_report_jmu_udh.html, accessed 10 February 2011.

⁵⁵ Conclusions and recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, 18 May 2006, para 22. See similarly Conclusions and Recommendations of the

Committee against Torture: United Kingdom of Great Britain and Northern Ireland, UN Doc. CAT/C/CR/33/3, 10 December 2004, para 4(e).

⁵⁶ Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/57/173, 2 July 2002, para 25.

⁵⁷ Various high courts in India have differed on whether similar juvenile justice laws would override special legislation providing for administrative detention. For a summary of the conflicting judgments see *Prabakaran v. State of Tamil Nadu*, MANU/TN/0347/2003. However, when the UN WGAD sought a response from the Government of India in the case of Mehraj-ud-din Khanday – aged 16, the government did not raise any such defence that the JJA did not protect juveniles from administrative detention (UN WGAD 2010). In any event, PSA detention of a child would be violative of Article 37(d) of the UN Convention on the Rights of the Child - to which India is a state party.

⁵⁸ Previous legislation defined a child as a boy under the age of 16 and a girl under the age of 18.

⁵⁹ Committee on the Rights of the Child, Concluding observations: India, UN Doc. CRC/C/15/Add.228, 26 February 2004, para 80(b).

⁶⁰ In addition to those cases cited in the report, Amnesty International is aware of the following further cases: Showket Ahmad Chard (Det/PSA/05/14) and Sajad Ahmad Geelani (DMB/PSA/2937) (age shown on PSA detention order as 17). Gowhar Ahmad Bhat's age (Anantnag 2005, order no. unavailable) shown to be 17-18 years. Barkat-ullah-Dar (DET/PSA/08/577) is described in the PSA detention order as 18 years old. The High Court judgment on a petition challenging his detention on 27 May 2009 observes that he is stated to be 18 years old although it notes the date of birth as 05 May 1992 – making him 17 years old at the time of the judgment and 16 years and 3 months when arrested on 25 August 2008.

⁶¹ UN WGAD 2010, paras 47 and 52(c).

⁶² Samaan Lataaf, "Implement Juvenile Justice Act: Court to Govt", *Greater Kashmir*, 19 June 2010, at <http://www.greaterkashmir.com/news/2010/Jun/19/implement-juvenile-justice-act-court-to-govt-27.asp>, accessed 10 February 2011.

⁶³ Minutes of the meeting prepared by Colonel Rajbir Singh, Colonel General Staff (Internal Security), numbered 1271/1/GS (IS) and marked "Confidential". On file with Amnesty International. The meeting was chaired by Dr SS Bloeria, Chief Secretary, Government of J&K and attended by Lieutenant General Nirbhay Sharma UYSM, AVSM, VSM General Officer Commanding 15 Corps and Mr Gopal Sharma, IPS Director General of Police, J&K. Other participants included senior officers from the Army, other security forces and civil administration.

⁶⁴ <http://www2.ohchr.org/english/issues/detention/complaints.htm>, accessed 10 February 2011.

⁶⁵ While the number of enforced disappearances have dropped considerably in recent years, thousands of cases remain unresolved. See for example for cases in the last decade, Human Rights Watch, "'Everyone Lives in Fear,' *Patterns of Impunity in Jammu and Kashmir*", September 2006, pp.86-92.

⁶⁶ Persons may also be initially apprehended by other security forces including the Army and other security forces, but they are required to hand suspects to the local police who then proceed with a formal arrest and/or PSA detention.

⁶⁷ UN General Assembly resolution 62/148, 17 December 2007, para 15; UNGA res. 63/166, 12 December 2008, para 20.

⁶⁸ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), para 11.

⁶⁹ See for instance Report of the Committee against Torture, UN Doc. A/52/44 (1997), paras 121(d) (re Georgia); 146 (re Ukraine); UN Doc. 44(A/55/44) (2000), para.61(b) (re Peru); UN Doc. A/58/44 (2003), para 42(h) (re Egypt); UN Doc. A/59/44 (2004), para 146(d) (re Yemen).

⁷⁰ UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.

⁷¹ UN Doc. A/HRC/13/42, 19 February 2010.

⁷² Maqbool Sahil, *Shabistan-e-Wajood* (Jail diary of a journalist), Meezan Publishers, Srinagar, 2009.

⁷³ Section 25, Indian Evidence Act, 1872.

⁷⁴ See in particular, Human Rights Watch, "'Everyone Lives in Fear,' Patterns of Impunity in Jammu and Kashmir", September 2006, Amnesty International, *Torture and deaths in custody in Jammu and Kashmir*, (Index: 20/001/1995), Amnesty International, *Torture continues in Jammu and Kashmir*, (Index: 20/033/1995).

⁷⁵ The US embassy cable states that ICRC staff made 177 visits to detention centers in J&K and elsewhere (primarily the Northeast) between 2002-2004, meeting with 1491 detainees, 1296 of which were private interviews. The cable records, "In 852 cases, detainees reported what ICRC refers to as "IT" (ill-treatment): 171 persons were beaten, the remaining 681 subjected to one or more of six forms of torture: electricity (498 cases), suspension from ceiling (381), "roller" (a round metal object put on the thighs of sitting person, which prison personnel then sit on, crushing muscles -- 294); stretching (legs split 180 degrees -- 181), water (various forms -- 234), or sexual (302). Numbers add up to more than 681, as many detainees were subjected to more than one form of IT." According to the US embassy cable, the ICRC stressed that all the branches of the security forces used these forms of ill treatment and torture. The full text of the cable is at <http://www.guardian.co.uk/world/us-embassy-cables-documents/30222>, accessed 10 February 2011.

⁷⁶ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para 6 (footnotes omitted).

⁷⁷ J&K High Court Bar Association, "Jail Visit Report (Jammu Province), District Jail Jammu", 18 November 2006, at http://kashmirbarassociation.com/jail_report_jmu_jammu.html, accessed 10 February 2011.

⁷⁸ 'HC quashes Khalida's 3rd PSA', *Greater Kashmir*, 22 December 2006.

⁷⁹ Section 27 of the Indian Evidence Act states, "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

⁸⁰ For instance Mushtaq Ahmad Sheikh (HCP no. 209/06), Reyaz Amhad Ganai (HCP no. 199/06) and Manzoor Ahmad Waza (HCP no. 214/06).

⁸¹ A First Information Report is a document prepared by police which records information relating to an offence received or witnessed. It is the first step to set the criminal justice system in motion in relation to a crime.

⁸² Adopted by General Assembly resolution 43/173 of 9 December 1988.

⁸³ Concluding observations of the Human Rights Committee: India, UN Doc. CCPR/C/79/Add.81, 4 August 1997, para. 23(c).

⁸⁴ UN Committee against Torture, General Comment No. 2: Implementation of article 2 by States parties, UN Doc CAT/C/GC/2, 24 January 2008, para 13.

⁸⁵ Principle 19 (and see Principle 15). See also UN Standard Minimum Rules for the Treatment of Prisoners, Rules 37, 92 and 95.

⁸⁶ UN WGAD, March 2010, para 50.

⁸⁷ *Union of India v. Yumnam Anand M*, (2007) 10 Supreme Court Cases 190.

⁸⁸ MANU/JK/0227/2010.

⁸⁹ All India Reporter 1986 Supreme Court 687.

⁹⁰ Judgment dated 30 April 2010 in *Mohammad Yaseen Bohru v. State and others*, HCP no. 17 of 2009.

⁹¹ Grounds of detention are vague even where more serious allegations of being members of armed groups are made. In approximately 10 cases seen by Amnesty International, in which those detained are described as “terrorists,” there was no attempt whatsoever by the detaining authority to provide detail of the allegations against the suspects. E.g. Shabir Ahmad Bhat (DMB/PSA/109/2007), Nazir Ahmad Mir (Det/PSA/052653-55).

⁹² *Arup Bhuyan vs. State of Assam*, Criminal Appeal No.889 of 2007 dated 3 February 2011 and *Sri Indra Das vs. State of Assam*, Criminal Appeal No.1383 of 2007 dated 10 February 2011. The Supreme Court set aside the conviction by the TADA court of the two men on the grounds that the only material produced by the prosecution against them were alleged confessional statements made to police which were subsequently retracted, and that there was no evidence that they had been active members of the United Liberation Front of Assam.

⁹³ Judgment dated 30 April 2010 in *Mohammad Yaseen Bohru v. State and others*, HCP no. 17 of 2009.

⁹⁴ UN Doc. A/63/223, 6 August 2008, para 19.

⁹⁵ UN Doc. A/63/223, 6 August 2008, para 20.

⁹⁶ J&K High Court Bar Association v. State of J&K and others, OWP no. 675/04, OWP no. 210/06 and OWP 235/04.

⁹⁷ J&K High Court Bar Association, ‘Report of the lawyers who visited Central Jail Kotebalwal, District Jail Jammu & Kathua from 02.02.2009 to 04.02.2009,’ available at http://kashmirbarassociation.com/reports/jail_visits/jail_report_kotebalwal_kathua02_02_09_04_02_09.html, accessed 10 February 2011.

⁹⁸ J&K High Court Bar Association, ‘Report of the Members of the Bar Team who Visited the District Jail Kathua on 16-10-2009,’ available at http://kashmirbarassociation.com/reports/jail_visits/jail_report_kathua_16102009.html, accessed 10 February 2011.

⁹⁹ J&K High Court Bar Association, 'Annual jail visit conducted by a team of lawyers from the High Court Bar Association on 15.10.2009.' On File with Amnesty International.

¹⁰⁰ Adopted by General Assembly resolution 43/173 of 9 December 1988, UN Doc. A/RES/43/173.

¹⁰¹ Rules 84-93 and 95, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

¹⁰² However, because of the broad definitions of offences under the PSA, and the meagre information available due to the absence of any serious attempt by the J&K authorities to make out criminal charges against individuals and pursue these through a fair trial before a court of law, it has not been possible to confirm whether individuals discussed in this chapter are detained solely because of their political beliefs. The unquestionable fact remains that these individuals have not been charged with a recognizably criminal offence and been granted a fair trial.

¹⁰³ Report of the Working Group on Arbitrary Detention - Mission to Belarus, UN Doc. E/CN.4/2005/6/Add.3 dated 25 November 2004, para 86(b).

¹⁰⁴ Report of the Special Rapporteur on the right to freedom of opinion and expression, Mr. Ameybi Ligabo, UN Doc. A/HRC/4/27/Add.1, 26 March 2007, para 265-266.

¹⁰⁵ At the start of 2011, the Greater Kashmir newspaper suggested that 25 political leaders were being detained under the PSA. See Salman Lateef, "25 PSA detainees languish", *Greater Kashmir*, 1 January 2011, at <http://www.greaterkashmir.com/news/2010/Jan/1/25-psa-detainees-languish-58.asp>, accessed 10 February 2011.

¹⁰⁶ The High Court quashed the detention order in February 2010 (HCP 227/09) but Amnesty International understands that another PSA detention order was issued shortly thereafter.

¹⁰⁷ Zubair Hussain Khanyari (DMS/PSA/77/2009), Firdous Ahmad Malik (35/DMB/PSA/09), Mudasir Ahmad Karnai (20/DMB/PSA/09), Irfan Ahmad Gojri (42/DMB/PSA/10), Tariq Ahmad Dar (54/DMB/PSA/10) and Majid Gulzar (100/DMB/PSA/2010).

¹⁰⁸ *Jaya Mala v. Home Secretary, Government of Jammu & Kashmir*, AIR 1982 Supreme Court 1297.

¹⁰⁹ Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/16/48, 26 January 2011, Para 231.

¹¹⁰ Press Trust of India, "Jammu and Kashmir govt to slap PSA against land grabbers", *Daily News and Analysis*, 16 Feb 2011, http://www.dnaindia.com/india/report_jammu-and-kashmir-govt-to-slap-psa-against-land-grabbers_1508814, accessed on 20 Feb 2011.

¹¹¹ News reports from J&K suggest that PSA detention in drug peddling cases is a common practice. See for instance, "5 drug peddlers booked under PSA: Police", *Greater Kashmir*, 1 January 2011, at <http://www.greaterkashmir.com/news/2010/Jan/1/5-drug-peddlers-booked-under-psa-police-12.asp>, accessed 10 February 2011.

¹¹² Table 4.12 and 4.16, Crime in India – 2008, National Crime Records Bureau, Ministry of Home Affairs, at <http://ncrb.nic.in/cii2008/home.htm>, last accessed on 10 February 2011. The rate of conviction is the percentage of convicted persons of all persons charged for the offence.

¹¹³ UN WGAD, March 2010, para 43.

¹¹⁴ UN WGAD, March 2010, para 44.

¹¹⁵ Order of Court of 1st Additional Sessions Judge, Baramulla dated 29 December 2009 in Case FIR no. 248/06, PS Baramulla u/s 302, 120-B RPC and 7/27 Arms Act.

¹¹⁶ Order of Additional Sessions Judge, Kupwara dated 3 August 2009 in Case FIR no. 26/2009, PS Lalpora, u/s 212, 436, RPC.

¹¹⁷ Order of Court of Principal Sessions Judge, Kupwara dated 31 August 2009 in Case FIR no. 23/2009, PS Lalpora, u/s 7/25 Arms Act.

¹¹⁸ Order of Chief Judicial Magistrate Sopore dated 31 March 2010 in case FIR no. 65/10, PS Sopore u/s 7/25 Arms Act.

¹¹⁹ Order of Court of Additional Judge POTA/TADA Kashmir, dated 6 November 2009, above.

¹²⁰ Judgment of Court of Special Judge (TADA/POTA) Srinagar, dated 14 December 2009, above.

¹²¹ Judgment of Court of 2nd Additional Sessions Judge Srinagar dated 3 September 2009 in Case FIR no. 37/05, PS Harwan u/s 302.

¹²² All India Reporter 1974 Supreme Court 432, para 8.

¹²³ All India Reporter 1985 Supreme Court 697.

¹²⁴ 2008 Criminal Law Journal 3486.

¹²⁵ Press reports indicate that she was eventually released on bail in July 2008 and Amnesty International has been informed that the trial court acquitted Zahida in 2009.

¹²⁶ Amnesty International conducted interviews with lawyers in Manipur State where administrative detentions under the National Security Act are common.

¹²⁷ When a writ petition challenging a detention order is filed in the High Court, it takes two days for the judge to decide whether to admit the petition or not. Almost all petitions in PSA cases are admitted. They are then listed two weeks later and the state is asked to respond to the petition. Invariably the state seeks more time to reply and petitions get delayed by weeks at a time. A rebuttal is then permitted to the petitioner before a date is fixed for final arguments.

¹²⁸ A G Noorani, "The Detentions of Lone and Geelani," *Economic and Political Weekly*, 4 June 1994.

¹²⁹ UN WGAD 2010, para 45 and 46.

¹³⁰ Amnesty International, *India: Punitive use of preventive detention legislation in Jammu and Kashmir* (Index: ASA 20/10/00).

¹³¹ Reference number HOME/DET/Gen/M/98/J, and copied to the Additional Director General Prisons Jammu and Kashmir, the Additional Director General Police Crime Investigation Department (CID), Jammu and Kashmir and the in charge Detention Section, Home Department, Camp Srinagar.

¹³² Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/16/48, 26 January 2011, Para 233.

¹³³ Concluding observations of the Human Rights Committee: India, UN Doc. CCPR/C/79/Add.81, 4 August 1997, para. 24.

¹³⁴ *A v. Australia* (1997), UN Doc CCPR/C/59/D/560/1993, at para 9.5.

¹³⁵ UN WGAD 2010, para 49.

¹³⁶ J&K High Court Case Flow Management Rules 2010.

¹³⁷ *AK Roy and others v. Union of India and ors*, AIR 1982 SC 710.

¹³⁸ Since 1990, there has been only one reported order of the Supreme Court that deals with the PSA - *State Legal Aid Committee, J&K v. State of J&K and ors*, (2005 Criminal Law Journal 677). The cryptic Supreme Court order dated November 2004, which quashes the PSA detention order, does not even provide the name of the detainee. The judgment in fact refers to the detention of Farooq Ahmad Dar – a former member of the JKLF armed group who had been in administrative detention under successive detention orders from 1990 till 2006. He was finally released after the Supreme Court quashed a second detention order on 6 October 2005 and a third on 15 September 2006. Both these Supreme Court orders are unreported. Although Farooq Ahmad Dar was charged in relation to 22 FIRs alleging serious offences, he has been acquitted in the majority of these and remains on bail in the 3-4 remaining cases. After release in 2006, Dar joined the JKLF-R political party and was detained in September 2008 for “instigating the general public to resort to violence”. He spent another year in detention under two successive PSA detention orders (first order quashed by the High Court on 2 Jan 2009 in HCP 2/09; second PSA detention order issued on 21 Jan, quashed by the High Court on 6 July in HCP 29/09). After his release, a third order was issued against him on 31 August 2009 but not executed for a few weeks. This was stayed by the High Court in Jan 2010 on a petition filed by his lawyers (OWP 1036/09).

¹³⁹ A G Noorani, “The Detentions of Lone and Geelani,” *Economic and Political Weekly*, 4 June 1994.

¹⁴⁰ National Human Rights Commission, “PSA detainee freed and rearrested; Comments sought from J&K Government”, New Delhi, 8 September 2004, at <http://nhrc.nic.in/disparchive.asp?fno=794>, last accessed on 10 February 2011.

¹⁴¹ Article 2, ICCPR.

¹⁴² Human Rights Committee, General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras 15 and 16; and General Comment 20: Article 7 (1992), para 14. See similarly UNCAT Articles 14 and 16 and UN Committee against Torture, General Comment No. 2: Implementation of article 2 by States parties, UN Doc CAT/C/GC/2, 24 January 2008, para 3.

¹⁴³ All India Reporter 1997 Supreme Court 610, para 42.

¹⁴⁴ *Bhim Singh v. State of J&K*, All India Reporter 1986 Supreme Court 494. In the same judgment, the Supreme Court also noted, “If the personal liberty of a Member of the Legislative Assembly is to be played with in this fashion, one can only wonder what may happen to lesser mortals!”

¹⁴⁵ One rare instance is *Nawaz-ul-Haq v. State of J&K and Ors*, (2000) Criminal Law Journal 420, where the court granted compensation of Rs. 20,000 (US\$ 450) for one month’s illegal detention.

¹⁴⁶ *Mohammad Javed Naik v. State and Ors*, (2009) Criminal Law Journal 762, *Davinder Singh v. State of J&K and Ors*, (1998) Criminal Law Journal 3179.

¹⁴⁷ Concluding observations of the Committee on the Elimination of Racial Discrimination: India, UN Doc. CERD/304/Add. 13, 17 September 1996.

¹⁴⁸ 'Statement of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, as she concludes her visit to India,' 21 January 2011, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10664&LangID=E>, accessed 10 February 2011.

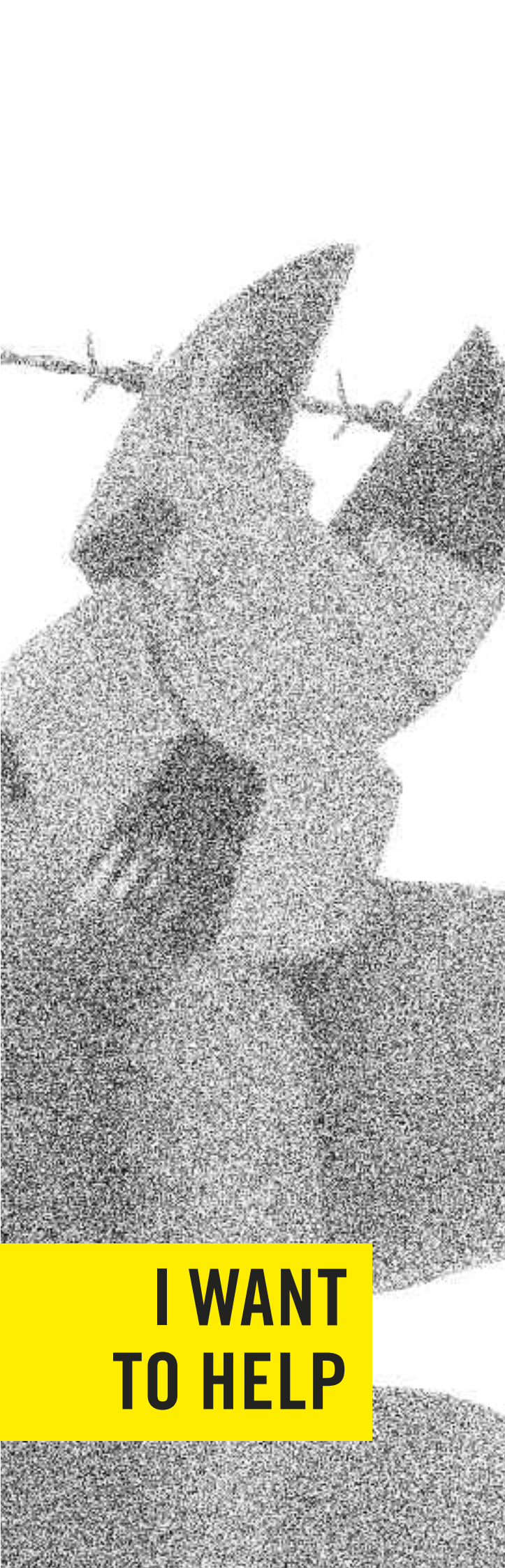
¹⁴⁹ Concluding observations of the Human Rights Committee: India, UN Doc. CCPR/C/79/Add.81, 4 August 1997, para 24.

¹⁵⁰ Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93, 18 August 1998, para 21.

¹⁵¹ Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/ISR/CO/3, 3 September 2010, para 7(b). See similarly, Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR, 5 August 2003, para12.

¹⁵² Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Mission to Egypt, UN Doc. A/HRC/13/37/Add.2, 14 October 2009, Para 53.

¹⁵³ Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/16/48, 26 January 2011, Para 233.



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A 'LAWLESS LAW'

DETENTIONS UNDER THE JAMMU AND KASHMIR PUBLIC SAFETY ACT

Hundreds of people are locked up on spurious grounds under the Public Safety Act in Jammu and Kashmir every year. They are held without charge or trial in administrative or “preventive” detention on vague allegations of acting against “the security of the State” or against “the maintenance of public order”.

Detainees are mainly political activists and suspected members or supporters of armed groups, sometimes including children. Before their formal detention, they are often held illegally, denied access to a lawyer, the courts and their families, and may be tortured during interrogation.

The Jammu and Kashmir authorities can hold detainees without charging or prosecuting them for up to two years at a time. Detention orders are often repeated and habeas corpus orders ignored, meaning that detainees are held for much longer than the maximum two-year period provided.

This report exposes a catalogue of human rights violations associated with the use of administrative detention under the Public Safety Act. It highlights how these run counter to India’s obligations under international human rights law. If India is serious about meeting these obligations, then it must ensure that the Public Safety Act is repealed and that detainees are released immediately or tried in a court of law.

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