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**CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF:
DISAPPEARANCES AND SUMMARY EXECUTIONS**

**Written statement* submitted by the South Asia Human Rights Documentation Centre
(SAHRDC), a non-governmental organisation in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[13 February 2006]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Disappearances in Jammu and Kashmir

The practice of enforced disappearances is widespread in Jammu and Kashmir (J&K). The coalition government comprising the People's Democratic Party and the Congress Party, which assumed power in J&K 2002, had stated in its Common Minimum Programme that "[a]ll cases of custodial killings and violations of [h]uman [r]ights shall be investigated and persons responsible for them will be identified and punished appropriately". This pledge, however, remains unfulfilled. Violations continue to occur, among them a large number of enforced disappearances.

Enforced disappearances entail "arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law". As they are outside the protection of the law, the "disappeared" are often subjected to torture and abuse, or are killed. Meanwhile, their families face the anguish of uncertainty and loss.

Unsurprisingly, there are no definitive figures on the number of disappearances or disappeared in J&K. However, several sources indicate the numbers involved. According to the well-respected *Kashmir Times*, there have been more than 10,000 cases of people who have disappeared in J&K since 1989. In 2003, the then Chief Minister Mufti Mohammad Sayeed admitted to the State Assembly that "3744 persons had gone missing since 2000". The US State Department report on human rights practices in India in 2004 also cited human rights groups as reporting that "in Jammu and Kashmir and in the northeastern states, several hundred persons [are] held by the military and paramilitary forces in long term unacknowledged detention in interrogation centers and transit camps that normally were intended only for short term confinement". The latest annual report of the J&K State Human Rights Commission (2002-2003) states that the Commission received 73 complaints of disappearances during that period. Whilst many of these incidents occurred some years ago, they provide an insight into the nature and effect of disappearances, and indicate the extent of unresolved cases. The UN Working Group on Enforced or Involuntary Disappearances has stated that the cases it has transmitted to the Government of India "were primarily attributed to the police authorities, the army and paramilitary groups". A report by the J&K High Court Bar Association on the condition of political detainees in jails, indicates that since 1990 more than 60,000 habeas corpus petitions were filed before the J&K High Court of which 3000 were still pending as of 2004.

In the name of preserving the security and maintaining order, laws such as the Jammu and Kashmir Armed Forces Special Powers Act (AFSPA) 1990, the Jammu and Kashmir Disturbed Areas Act 1992, the Public Safety Act 1978 and others legitimise the exercise of arbitrary and unbridled powers by the security forces without any legal safeguards. In its latest report, the UN Working Group on Enforced Disappearances states that the majority of complaints it has received are "related to wide powers granted to the security forces under emergency legislation, in particular the Terrorist and Disruptive Activities Act and the Public Safety Act, which allow for both preventative and prolonged detention in the absence of normal safeguards available under the criminal codes". Under Section 8 of the Public Safety Act, a person can be detained "with a view to preventing him from acting in any manner prejudicial to the security of the State or the maintenance of public order." While the reasons for detention must be conveyed to the detainees, Section 13(2) operates as an arbitrary shield for officers ordering detentions as it

enables them to withhold disclosure of facts, which they consider would be detrimental to “public interest”. Under the AFSPA, in an area that is declared to be disturbed, the armed forces have been vested with the power to arrest without a warrant a “person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence.” Similar powers are vested with the police under the Disturbed Areas Act.

Declaring an area “disturbed” essentially amounts to declaring a state of emergency while bypassing the safeguards such a declaration would normally entail. The UN Human Rights Committee noted this problem almost a decade ago, in 1997. In its response to India’s third report on compliance with the International Covenant on Civil and Political Rights (ICCPR), the Committee expressed concern that some parts of India had remained classified as “disturbed areas” for many years, and observed that in these areas, India “is in effect using emergency powers without resorting to article 4, paragraph 3, of the Covenant.” The Committee recommended, “that the application of these emergency powers be closely monitored so as to ensure its strict compliance with the provisions of the Covenant.” Unfortunately, such monitoring does not seem to have taken place, and the result is a reprehensible breach of the civil and political rights of the citizens in J&K. Further, all the above laws extend protection against prosecution to all officers by virtue of the requirement of prior sanction from the Central Government before the launching of prosecution. This form of insulation along with extraordinary powers of arrest and detention, in practice, enables the security forces to operate with virtual impunity.

Official recalcitrance and the undermining of the legal process are evident from the increasing number of contempt petitions before the High Court of J&K. Despite court orders for investigations into habeas corpus petitions, the authorities have failed to take corrective steps. In the case of *Mst Jana v. Feroz Ahmad Qadu* (Contempt Petition No. 53/2005 in OWP No. 288/02) filed in 2005, the petitioner stated that her husband had been “lifted by [the] Rashtriya Rifles, from his home, during the intervening night of 18/19 Jan 2002”. Despite a court order dated 24 July 2004, stating that an investigation must take place, and the expiry of over eight months, the petition alleged, the respondent “has conducted no investigation in the matter” and had therefore “disobeyed and defied the orders of the [honourable] court”. The petitioner therefore sought the prosecution of the respondent for contempt and the implementation of the original order by other coercive means.

Security concerns are no justification for the continued occurrence of enforced disappearances in J&K or for India’s failure to punish those responsible or to investigate reported cases. This is set down in Article 1(2) of the Draft International Convention for the Protection of All Persons from Enforced Disappearance. Many of the rights violated as a result of enforced disappearances are non-derogable according to Article 4 of the ICCPR and are not limited to the “extent strictly required by the exigencies of the situation”, as required by Article 4(1) of the ICCPR, as the lawful detention and other powers available to security forces are more than sufficient. They also constitute a violation of both the fundamental right to life (Article 21) and protection against arrest and detention (Article 22) as stipulated in the Indian Constitution. Enforced disappearances constitute a crime against humanity under international criminal law, as prescribed by the jurisprudence of the international criminal tribunals and stated expressly by the Rome Statute of the International Criminal Court. Article 5 of the Draft Convention on Enforced Disappearances reiterates this categorisation, and states that all consequences provided for under the relevant applicable international law shall be attracted. For all these reasons, and because

India has not declared, and is not facing, a “public emergency which threatens the life of the nation”, its derogations from internationally protected human rights are unlawful.

The Indian government must, without further ado, provide for the offence of enforced disappearances within the existing criminal law and ensure that its application is not suspended under any circumstances, including during the state of war or other public emergency. Simultaneously, the legal framework that facilitates the breach of human rights law and perpetuates impunity must be reviewed. Guidelines pertaining to the manner in which arrests and detentions should be carried out must be strictly observed and accountability must be imposed for violation of such guidelines. Provisions that allow members of the armed forces and the police to make arrests on mere suspicion, detain a person without disclosing the grounds, and which extend protection against prosecution are unsustainable in the light of India’s obligations under international law and the Indian Constitution.
