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Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action

Written statement* submitted by the International Human Rights Association of American Minorities (IHRAAM), a non-governmental organization on the roster

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

[18 August 2010]

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

Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action**

IHRAAM & ICHR at the Durban Review Conference submitted that people without nationalities and without states, and particularly those under occupation, suffer disproportionately and while this is often attributed to the pursuit of power, land and resources it cannot happen without tacit acceptance of racism by states and by the implementation of racist, xenophobic and intolerant policies. Those unrepresented peoples & minorities are denied basic and fundamental rights as outlined in the Universal Declaration of Human Rights; and many have lived for generations under oppressive regimes that offer no legitimate chance for people to decide their own fate.

In this regard the practice of the police and the armed forces using torture as a means to suppress the people under occupation and or to extract confessions is widely accepted as commonplace throughout India and the surrounding disputed territories. There is ample evidence that there is a culture of denial or a refusal to accept that torture is both commonplace and accepted as a legitimate tool by those that use it. This written statement will show that current laws are in place in India are contrary to international human rights norms, that they promote and encourage the use of torture by Indian police, military and para-military forces, that there is a lack of accountability for those who commit torture and that the penalties, in the rare instances that someone is prosecuted, are minimal.

It is telling that the government in India is yet to ratify the UN Convention Against Torture and other cruel, inhuman or degrading treatment (UNCAT) despite saying that this was a priority during its universal periodic review in 2008. The Indian government tacitly accepts that the problem of torture is so widespread that it is simply unable to ratify and follow the principles of the UNCAT. In an apparent attempt to make progress towards the signing of the UNCAT India has written a Prevention of Torture Bill which, as shown below, is deeply flawed and offers little hope that the judiciary will stop the use of torture in the near future.

The Indian National Human Rights Commission, despite questions over its impartiality and ability to function, has recorded some 16,836 custodial deaths in years from 1994 up until 2008. That amounts to over three custodial deaths per day across India. These figures apply only to deaths in police custody as there is no mechanism for the recording of deaths in military custody; this is of particular relevance in the disputed territories.

The experience of IHRAAM, and the International Council for Human Rights, indicates that in the state of Jammu & Kashmir, which is under Indian occupation, the number of custodial deaths in this time period is likely to be in the region of the 10,000. Therefore, in the experience of these organisations, the figure produced by the NHRC is woefully under represented despite its already high number. Worryingly the number of custodial deaths in India rose year on year from 2000 up until 2008 with the figures at 1,037 and 1,977 respectively.

Furthermore, the NHRC does not record, and has no power to act upon, instances where torture takes place but does not result in death. Our research in J&K is certainly in excess of 100,000 in the time period for which the NHRC has released statistics.

** The International Council for Human Rights, an NGO without consultative status also shares the views expressed in this statement.

Finally it is the practice of the NHRC to only accept a complaint of custodial death from one source. In practice this results in the seemingly obscure custom of the police making the complaint upon themselves before the family of the victim is aware of the death. The family are then unable to pursue the case and predictably they are often noted suicide or similar.

It is the experience of this organisation that those who are tortured and released are later intimidated by the armed forces should they express a desire to seek redress. Furthermore, those families that have taken possession of a loved one that has died in custody are subject to the same fear and intimidation in order to prevent them lodging a case either internally or with the mechanism of the OHCHR. This tragically promotes racism, racial discrimination, xenophobia and related intolerance.

UNCAT

It is useful to highlight Article 2 of the UNCAT:

Article 2

Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

An order from a superior officer or a public authority may not be invoked as a justification of torture.

Impunity for Armed Forces

Within Indian legislation there are a number of clauses that amount to impunity for any state official that may commit an act that is illegal under international law. Although the scope of this statement does not allow an in depth analysis below are several extracts from Indian legislation that give impunity to Indian military and para-military forces. It is this impunity that both encourages state officials to use torture upon civilians and demonstrates the current unwillingness of India to tackle the problem in any meaningful way.

Section 45 of the Criminal Procedure Code protects any member of the armed forces from arrest by civilian authorities for:

“Anything done or purported to be done by him in the discharge of his official duty after obtaining consent of the Central Government.”

Section 197 of the Criminal Procedure Code has been used to block the trial in civilian courts of members of the armed forces alleged to be responsible for human rights abuses.

It states that:

“No court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.”

Section 6 of the Jammu & Kashmir Armed forces special powers act states that:

“Protection of persons acting in good faith under this Act. No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the

Central Government, against any person in respect of anything done or the powers conferred by this Act.”

For a state official to be investigated for gross human rights violations permission must first be sought from Central Government. In the case of J&K this permission has been given in less than 1% of cases and often no disciplinary action is handed down in even those cases.

Prevention of Torture Bill

The prevention of Torture Bill is seen within India as a stepping stone to the eventual ratification of the UNCAT. However, the bill, comprising less than 500 words, falls short of the provisions set out the UNCAT on several key issues and will fail to adequately reduce instances of torture across India. Most notably there is no mention of the likely sentences or punishment for those convicted of causing death by torture, in fact there is no mention of death by torture at all.

The bill does not address, at any point articles 2, 3, 4, 5, 8, 12, 14 and 15 of UNCAT. Furthermore the penalties envisioned by the bill are often less than those that could potentially handed out by the very legislation that it seek to remedy such as the criminal procedure code. These contradictions will serve to increase the time taken to prosecute or resolve cases and will likely result in the continuation of the woefully inadequate conviction rate.

IHHRAAM, and the International Council for Human Rights, concludes that current measures being undertaken by the Indian government will fail to adequately reduce instances of torture, and death from torture, in police or military custody. Furthermore, while the efforts of the NHRC and the potential introduction of the Prevention of Torture Bill may appear to show promise at first glance the reality is somewhat different. The year on year increase in recorded custodial deaths is a worrying trend, a trend that is unlikely to be reversed with the Prevention of Torture Bill. A more positive trend would be to repeal those laws that allow immunity for the armed forces and to modify existing complaint procedures for the police.

Furthermore, punishment for those who commit torture should be considerably increased and amendments should be made to those procedures that significantly reduce the likelihood of the guilty being held to account. Critically, if the Government of India is to progress towards the ratification of the UNCAT, sweeping modifications to legislation will be required in order to meet the obligations of the convention.

In conclusion, IHRAAM & ICHR feel strongly that any aim to eliminate racism, racial discrimination, xenophobia and related intolerance should include a stronger reference to the rights of those under occupation than the existing one. Many peoples, particularly those of Indian Occupied Kashmir, are no closer to realising their right to self-determination than they were during the original Durban Conference. It is for that reason that, we feel that those least able influence this document - those under occupation - have been denied the voice they so richly needed and deserved at this Durban Review Conference.
