Missing in Action

A Report on the Judiciary, Justice and Army Impunity in Kashmir

Public Commission on Human Rights (J&K)
and
People's Union for Democratic Rights (Delhi)
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"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law." Lord Atkins in Liversidge vs. Sir John Anderson (1942) A.C. 206 (UK)

Introduction

The long years of Army presence in Jammu and Kashmir as well as in the North East have demonstrated that the first casualty of military suppression is justice. Not only does this signal defeat of political-solution-seeking, but such a course aggravates the original problem by denying people justice when crimes are committed against them by the government forces. We in Democratic Rights Movement have long argued that impunity is inherent in Armed Forces Special Powers Act (AFSPA). And that while there are, theoretically, provision for judicial redressal, in actual fact they get circumscribed.

In a recent judgment the Supreme Court of India, in the case of *Masooda Parveen versus Union of India*[1], rejected a writ petition under Articles 32 (Right to Constitutional Remedies) and 21 (Protection of life and personal liberty) filed by the wife of one Ghulam Mohi-ud-din Regoo who died in Army custody, on the ground that the deceased was a militant. In the teeth of an admission that the death took place in Army custody, numerous contradictions and inconsistencies in the state version of events that led up to the death, compounded by the "loss" of the original file containing the inquest report and documents, the Supreme Court chose to believe the assertion of the state that the deceased was a militant and his death was accidental. This judgment is not only a quintessential example of the unwillingness of the legal system to deal with excesses committed by the armed forces in disturbed areas, it also represents a benchmark in the struggle for justice by the people of Jammu & Kashmir before the Indian legal system. The present report attempts to analyse this case and the judgment delivered by the Supreme Court of India and its implications for the struggle for justice and self-determination of the people of J&K.

The Masooda Parveen case is interesting, therefore, for more than one reason. The petitioner-widow chose to place her faith in the Indian Supreme Court and expressed her lack of confidence in the J&K High Court by alleging that the J&K Bar Association was "politicizing it". Whether this was a legal strategy to convey the impression that she was non-political or to underline the fact that justice would not be done to her case if it was taken up in J&K, are a moot point. But it is equally likely that she moved the petition for compensation for the custodial death of Ghulam Mohi-ud-din Regoo before the highest court in India believing that India's Supreme Court is not as helpless as the Courts have been made in J&K.

It could be argued that the Masooda Parveen judgment is at best an opportunity lost and an aberration in the jurisprudence of law relating to habeas corpus and custodial violence in India, and does nothing to overturn the body of law which exists on the subject. But we cannot ignore the implications of such a judgment, in one of the rare cases of army custodial deaths from J&K which found its way to the Supreme Court, and its potential for misuse as a precedent by Armed Forces in the hundreds of habeas corpus petitions pending before the J&K High Court. We need to keep in mind the 'culture of impunity' prevailing in Jammu and Kashmir. [*See Box 1*] The J&K High Court has on occasion gone on record to express its anguish at the degree of lawlessness which prevails in the State. Justice S.M. Rizvi of the Jammu and Kashmir High Court had observed[2] :

[1] Masooda Parveen vs. Union of India & Ors; (2007) 4 Supreme Court Cases 548.

Box 1: The Wider Context

The Indian state claims that even in the midst of war India's constitutional democracy offers protection against arbitrary powers of the state and there are enough correctives in the system beginning with supremacy of civil over military, parliamentary scrutiny and finally judicial redressal to ensure that people's right to live in dignity is not violated. But there is a hiatus between theory and practice.

Civil Liberties organizations have documented the intrinsic flaws of AFSPA which accords impunity to security forces in disturbed areas, and pointed out how this has resulted in proliferation of heinous crimes of enforced disappearances, massacres, sexual violence against women, torture, detention without trial, high incidence of custodial violence, use of civilians as human shields, and so on.

As recorded by the J&K Coalition of Civil Society in its compilation, "**State of Human Rights in Jammu and Kashmir 1990-2005**":

"Already faced with insubordination, the Judiciary has seen its jurisdiction and power infringed upon at the behest of the state government; in the fall of 1997 an executive order was issued that undermined the power of the judiciary by granting the police and military the final say on releasing detenues. This illegal usurpation of power by the executive was protested by the Jammu and Kashmir Bar Association and later withdrawn; yet this initial issuance demonstrates the disregard for the traditional conception of judiciary. A similar circular (Letter # SP [5Exg/267881 dated 14.4.1992]) was issued to Kashmiri police stations directing them to disobey the Criminal Procedure Code by refusing to file FIR against security forces without the approval of higher authorities; in addition they were instructed to refrain from reporting accusations of misconduct on the part of the security forces in their daily logs" (p 161).

Just to illustrate that regime of impunity continues even now consider this:

In Imam Showkat Ahmad Khan's fake encounter (the army then claimed to have killed a "foreign militant"), in which the dead body was exhumed from the grave in February last under public pressure, a charge sheet have been filed against personnel of 13 RR in the local court. In this case again the accused have contested the charge sheet on the ground that the sanction has not been acquired under section 7 of the AFSPA.

Another heinous incident which came up for scrutiny by the judiciary is the massacre of seven local people in Pathribal. The state labelled them as "foreign militants" responsible for the killing of Sikhs in the Chittisingpora massacre in December 2000. When the CBI filed a challan, the accused army personnel, Major Saksena, Major D.P. Singh, Company Commander S. Sharma and Captain Amit Saksena of 7 Rashtriya Rifles (RR) contested the charge sheet on the plea that sanction has not been granted by the appropriate authority as required under the Armed Forces Special Powers Act. This plea was rejected at the district level by the court of CJM by pointing out that commission of crime cannot be treated as an act committed in the course of duty and therefore does not require sanction of the appropriate authority. A revision petition filed by the accused / army officials in the district court was also rejected. At the J&K High Court also, their plea was thrown out. It is the Supreme Court which has, in a special leave petition filed by the same accused, granted stay of trial till the matter is decided. As a result, despite defeat of the plea regarding requirement of sanction before commencement of trial by three Court, today the trial of the accused army officials has come to a standstill as a result of this preliminary objection.

In the case of Javaid Ahmad Magray's a student was killed on May 1 – 2003, and the Assistant Commissioner Budgam was ordered to hold the enquiry in which the officers were indicted and police investigation also held Subedar S. Sinha and his associates responsible for killing the student but four years down the road no charge sheet has been filed. The High Court of J&K seized of the matter directed the Additional Advocate General to furnish the list of the cases awaiting sanction of the Indian Government. It is believed that more than 300 cases were sent to the Indian government by the state in which police investigation had resulted in indictment of the armed forces personnel. Whatever be the exact number of such cases the point is that in not a single case has the sanction been given so far. It is doubtful if such a system can curb the arbitrary acts of the State.

"All sorts of illegalities are being committed…The High Court is replete with such complaints and many of which stand substantiated. Hundreds of cases have been brought to my notice where the detenues are in illegal detention. Despite the strong directions of this Court they are not being released. Hundreds of cases are pending in which the whereabouts of the detenues are not known. Scores of cases are pending wherein the detenues have been illegally done away with after arrest.…In short there is total breakdown of law and order machinery. I should not feel shy to say that even this Court has been made helpless by the so called law enforcing agencies. Nobody bothers to obey the orders of this Court. Thousands of directions have been given to top administrative and law enforcing agencies, which have not even been responded."

Theoretically, even when the Armed Forces Special Powers Act (AFSPA) is invoked in a disturbed area, the Armed Forces of the Union are called "in aid of civil administration." This means that even while the armed forces have special powers, it is the civil administration, governed by the rule of law as contained in the Constitution, the Criminal Procedure Code, and other statutory laws, which reigns supreme.

Under ordinary circumstances, whenever the army is called for short duration, such as to quell a riot, it not only operates under a Magistrate's orders, but any arrest, seizure or recovery made by its personnel is promptly deposited and handed over to the police. Under Sec 45 of the CrPC an armed force personnel cannot be arrested "for anything done or purported to be done by him in the discharge of his official duties" without obtaining the consent of the central government. But investigation of any crime, interrogation of people, recording of evidence, prosecution of crimes continues to rest with the police and district authorities.

However, when armed forces are deployed in a region for long periods and AFSPA invoked, there is no requirement of a Magisterial order before military begins its operations, and the armed forces acquire considerable powers to search, arrest, seize property, and even kill. Although even under AFSPA there are some curbs placed on the exercise of such power. One such restraint, if it can be described as that, is the mandate under Section 6 of the AFSPA which states:

"Arrested persons and seized property to be made over to the police- Any person arrested and taken into custody under this Act.….shall be made over the officer-in-charge of the nearest police station with least possible delay, together with a report of the circumstances occasioning the arrest…"

This provision, is supposed to offer some protection against the overarching powers of the armed forces in disturbed areas, and has naturally been an area of intense struggle within the courts. It was considered in detail in the Naga People's Movement for Human Rights versus Union of India case in 1997 by a 5 judge Constitution Bench of the Supreme Court, and guidelines laid down for its operation. (*See Box 3*) The Masooda Parveen judg-

Box 2: Lawless Land

According to the Chief Minister of Jammu and Kashmir, speaking to reporters on 16 December 2006, number of cases of custodial killings, which were 24 between 2003-05, had come down to 4 in 2006. A month later between January 28, 2007 to February 14, 2007 five cases of custodial killings came to light. Of which four were from 2006. Thereby doubling the figure of officially acknowledged crime.

However, contrary to the CM's assertion PCHR's data shows that between 2 November 2002 to 30 June 2007 total number of custodial killings were 173 and that of Enforced Disappearances numbered 247. Keeping in mind the overlapping period between the two sets of data it can be said that well above 100 cases of custodial killings were not registered between 2003-2006. Which is to say that crimes committed by the security forces remain un-recorded and under-reported. In the matter of Enforced Disappearances the sharp variation in official data itself reveals how unreliable these are. For instance on June 21, 2003 the state government maintained before the state assembly that number of 'Missing' were 3931. When Ghulam Nabi Azad took control of the government in November 2005 the figure climbed down to 1017. And tumbled down to 700 by February 2007. Whereas APDP has maintained that the number of persons who are victims of ED is in excess of 8000. So there are huge gaps in recording of crime in J&K.

[2] In Petition Number 850/94, cited in "**State of Human Rights in Jammu and Kashmir 1990-2005**", J&K Coalition of Civil Society, Delhi 2006 Annexure p 331-332.

Box 3: Supreme Court Judgment on AFSPA (1997)

Naga People's Movement for Human Rights, People's Union for Democratic Rights, Delhi and Human Rights Forum, Manipur among others filed writ between 1980-82 challenging the constitutional validity of the Armed Forces (Special Powers) Act, 1958 in the Indian Supreme Court. The Act was challenged on the grounds of violating fundamental rights to life, liberty, equality, freedom of speech and expression, against peaceful assembly, move freely, practice any profession, protection against arbitrary arrests among other things. These petitions came up for hearing *after fifteen years* in August 1997. The judgment was delivered on November 1997.

Major portion of the judgment is devoted to an academic discussion of Parliament's right to enact such law and whether the enactment of the Act violated federal structure of the Indian Constitution. But it refused to go into the actual working of AFSPA. However, it sought to provide some relief to the people in the "Disturbed Areas". The most important of these are that every notification under AFSPA requires to be reviewed every six months. And allows seeking information about any notification which is reviewed and continued for same/substantially similar area more than two times.

Also through Para 53, S. No. 3 (d) of the judgment, it obliges the Armed Forces of the Union to hand over any suspect, whom they detain, with "least possible delay (which) may be 2-3 hours extendable to 24 hours or so depending upon a particular case."

And finally it also under para 53S. No 4.4 prohibits AFU personnel from interrogating a person arrested by them. And lays down that "power of interrogation is only with police".

Significantly, these form part of Dos and Don'ts "issued by the army authorities which are binding and any disregard to the said instructions would entail suitable action under the Army Act 1950". Thus time limit imposed under S. No.3 (d) of Dos and S. No 4 of Don'ts which were upheld by the Court, were ostensibly Army's own instructions to its personnel deployed in the Disturbed Area.

As PUDR reports in its "Illusion of Justice: Supreme Court Judgment on the Armed Forces (Special) Powers Act" [Delhi, May 1998] pointed out:

"There is, however, no procedure devised by the Supreme Court to redress violations of these Do's or Don'ts or of other judgments that have been incorporated."

This becomes manifestly clear in the case under review. Not only, as the accompanying text shows, was GM Regoo arrested and kept in their custody when the nearest police station was just about 4-5 kms, and no more than 12 kms from Srinagar. But as the army admitted he was interrogated by army personnel. This interrogation was justified by the Court as necessary under the circumstances. And this was used to justify GM Regoo not being handed over to the nearest police station without "least possible delay".

Moreover there is some evidence to suggest that there has not been any review or a fresh notification issued in Jammu and Kashmir to renew Disturbed Area under AFSPA after 10 August 2001. (See Greater Kashmir, May 5, 2007) In any case the J&K Home Department has denied any knowledge of such a review and issue of new notification. If this is confirmed then it manifests an ominous trend where even the legal provision can be given a good bye in clear violation of Supreme Court judgment of 1997.

However, as far as Masooda Parveen's petition is concerned the fact that her husband GM Regoo was not handed over to the nearest police station, which was no more than few kms away, as well as an admitted fact that he was interrogated by the army personnel shows how the Indian army was allowed to get away with violation of rules set by the Indian Supreme Court in so far as AFSPA is concerned.

[For details see "An Illusion of Justice: Supreme Court Judgment on the Armed Forces (Special) Powers Act", People's Union for Democratic Rights, Delhi, May 1998].

ment is perhaps the first case from J&K to rely upon the uncertain protection offered by the 1997 judgment in a case of army custodial death.

Arguably, a single case cannot become a measure of injustice. Therefore in critiquing the Masooda Parveen judgment we are mindful of the fact that we should not over-read it.

However, only few such cases reach the highest court and for this reason the judgments in such cases lay down a precedent and serve as the yardstick for future. While the Court is obligated to form its opinion on the basis of evidence placed before it, the Court cannot remain oblivious to the fact that in conflict areas violations of human rights is endemic. That is why, the manner in which the Court reads the evidence and reconciles contradictions as well as applies principles of jurisprudence and constitutional norms to a specific fact situation while exercising its habeas corpus jurisdiction under Article 32 becomes of utmost importance.

The Case

Ghulam Mohi-ud-din Regoo s/o Abdul Raheem Regoo, the deceased, was a resident of Chandhara village, Tehsil Pampore, District Pulwama in South Kashmir. At the time of his death he was an enrolled and practicing advocate of the Jammu and Kashmir High Court. Apart from practicing law, he began to trade in saffron in which he sustained heavy losses and failed to clear his dues with his suppliers. When this business ran into losses, his creditors chose to take the help of local militants to recover their claims. Consequently, he and his family shifted in 1992 to Rafiabad, Sopore in district Baramulla. They returned to Chandhara village in 1994 by when militancy in his native village had subsided. However, pro-government militants began to harass him and demanded ransom money which he refused to pay. He was then arrested by the Khre Shar Army camp on 6 October 1994 for being an alleged militant and kept in their illegal custody for *three months*. After "detailed interrogation" he was cleared of all charges by the army and released from their custody with a certificate declaring him 'white'. Significantly, this certificate is the only record of his illegal detention, and there is no record of any FIR/DD report filed by the army regarding this illegal detention for three months.

On 1st February 1998, which happened to be the day of Id, at around 8.30 pm a patrol party of 17 Jat Regiment, stationed at Lethapora, tehsil Pampore, along with few pro-government militants (Bashir Lengoo, Salim Zawara and others) came to the residence of Ghulam Mohi-ud-din Regoo. His house was searched and nothing incriminating was recovered. In spite of this, he was taken away by the patrol party of 17 Jat Regiment. At the time, another person had also been arrested by the same patrol party, allegedly a "militant". Both were taken away in the same army vehicle.

Two days later on 3d February 1998, Regoo's dead body in a brutally mutilated condition was handed over to Pampore Police Station by the unit of the 17th Jat Regiment stationed at Pampore. A Report # 24 dated 3.2.1998, filed with the police, alleged that Regoo had admitted during his interrogation that he was a Pakistan trained militant and an ex-Divisional Commander of Al Barq militant outfit, and had agreed to lead the Army to the hideout of the said group in the general area of Wasterwan Heights. At 3 a.m. in the morning on 3.2.1998, while he was removing the stones at the hideout there was an explosion, probably a booby trap, in which he died. As proof of genuineness of their claim the unit of 17 Jat Regiment said three members of its patrol party sustained "splinter injuries" in the explosion.

The Petitioner-widow said that her husband, Ghulam Mohi-ud-din Regoo, was taken to the Lethapora[3] army camp, by a party of the 17 Jat Regiment, on the day of Id (1.2.1998) where, she claimed, he was tortured leading to his death. It was only thereafter, in order to hide their crime, explosives were placed on his dead body and then detonated. She pointed out numerous subsequent acts of omission and commission which revealed that there was an attempt made by the Army as well as the Police to suppress the truth. In any event, she argued, her husband was illegally kept in custody by the armed forces for at least 30 hours and thereafter died in their custody, making them liable for his death.

[3] Lethapora is again in news in J&K as CRPF is trying to occupy 1000 kanals of saffron land to set up their new group headquarters and local zamindars are protesting this.

As a result of spontaneous public protests in Pampore and the swelling antagonism against the security forces, an FIR was registered based on DD no. 24 dt. 3.2.1998, which gives army's version of his death, and an inquest under section 174 CrPC commenced. More in keeping with the norm, no counter-affidavit was allowed to be registered by the wife and other family members of the deceased, nor were they allowed to participate in the inquest, leave alone give their statements. The investigation ran its course with the local police bending over backwards to provide a clean chit to the armed forces personnel involved, and presenting a "final report" to the local Magistrate that the death was "accidental", thus accepting the Army version of events in totality.

The wife of the deceased, left to look after two minor children, wrote letters to numerous state agencies, including the Chief Minister of J&K. One such letter was sent by her to the Prime Minister on 27 May 1998 for sanctioning "at least Rs 50,000…from Prime Minister's Relief Fund in my favour so as to sustain the starving family left by the deceased and to finance the education of my two minor sons". Failing to hear anything from any of these offices, including the office of the Prime Minister, she turned to the judiciary.

In June 1998 she sent letters/petitions to the Chief Justice of India at the Supreme Court. The Supreme Court referred the matter to the Supreme Court Legal Services Committee, which advised her to approach the J&K High Court. The Petitioner wrote back in October 1998 that "I am not interested to present my case before the J&K High Court under article 226 (Power of the High Court to issue Writs) as J&K Bar Association, Srinagar is politicising such cases and issues which I do not want, hence my inability to approach J&K High Court in the matter".

Almost a year after she first approached the Supreme Court, on 4th June 1999 her writ petition under Article 32 (Right to Constitutional Remedies) was filed seeking very humble reliefs against the Union Government (through the Ministry of Defence) and the State of Jammu & Kashmir. Alleging that her husband had been wrongfully done to death in the illegal custody of the Army, her writ petition in the nature of habeas corpus sought a direction to the respondents in the case to pay damages and compensation to the petitioner for causing the custodial death of Ghulam Mohi-ud-din Regoo, as well as ex-gratia payment of Rs. 1 lakh and appointment in a government job on compassionate grounds.

During the numerous hearings that took place in the Supreme Court over the nine year pendency of the writ petition, several orders were passed by the Court directing the State of Jammu and Kashmir to produce the original records relating to the inquest under section 174 CrPC. Not only did the State of J&K disappear from the scene for several years, when it re-surfaced, it produced a 'shadow file' (which did not contain several important documents/ records which are usually part of official police case file) on the pretext that the original file had been 'lost'.

Nine years later, on 2nd May 2007, the Supreme Court pronounced its judgment dismissing the writ petition on the ground that there was "not an iota of evidence to support the petitioners' plea". Disregarding the incomplete nature of the 'shadow' file it held that "we have the army and police record pertaining to the incident which clearly show that Regoo was indeed a militant and that the circumstances leading to his death were as per the circumstances put on record by the respondents".

Before making its opinion known, the judgment sets out its understanding of the political situation in Kashmir, and squarely places this case inside that context, with the following words:

> "Before we embark on an appreciation of the various contentions raised by the learned counsel for the parties, we must give a preview of the manner in which we intend to deal with this matter. We cannot ignore the fact that many in Kashmir who have gone astray are Indian citizens and it is this situation which has led to this incident. We do appreciate that a fight against militancy is more a battle for the minds of such persons, than a victory by force of arms, which is pyrrhic and invariably leads to no permanent solution. We cannot ignore that in this process

some unfortunate incidents do occur which raise the ire of the civil population, often exacerbating the situation, and the belief of being unduly targeted with a feeling in contrast of the law and order machinery that it is often in the dock and called upon to explain the steps that they have taken in the course of what they rightly believe to be the nation's fight. We however believe that the examination of a complaint, and the provision of an effective redressal mechanism preferably at the hands of the administration itself, or though a court of law if necessary, is perhaps one the most important features in securing a psychological advantage."

Having said that, the judgment did not refer to the several orders passed by itself directing production of original record relating to the s. 174 CrPC proceedings, including at least two occasions when the threat of summoning the Chief Secretary of the State govt. had to be resorted to. (*See Box 4*) Not only did the Court turn a blind eye to these antics of the state government, it compounded the injury by choosing to rely upon a file produced by the Army in the courtroom at the tail end of the final hearing of the writ petition, relating to an enquiry conducted by the Army's Human Rights Cell into the representation of the petitioner-wife seeking relief from the Prime Minister's Relief Fund. Interestingly, this record was never filed in the Supreme Court, nor shown to the petitioner's lawyers, nor communicated to the petitioner herself for nine long years, and quite casually handed over across the bar at the tail end of the final arguments.[4]

Since the question of violation of Section 6 of the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990 requiring that a person arrested by the Army be produced before the nearest police station "with least possible delay" was vociferously urged, the judgment took some pains to deal with this argument. While dealing with the provisions of the Act and the detailed directions in this regard given by a Constitution Bench of the Supreme Court in the NPMHR case, the judgment observed that:

"the guidelines referable to Section 6 and in the cited case cannot be mechanically applied and must of necessity relate to the facts of each case."

Therefore, according to the Court, in the present case it was "not feasible nor practicable to first inform police station Pampore". The judgment also goes on to state:

"We are also not un-mindful of the fact that prompt action by the army in such matters is the key to success and any delay can result in the leakage of information which would frustrate the very purpose of the army action."

In conclusion, the judgment observes as follows:

"We are therefore of the opinion that there is not an iota of evidence to support the petitioners' plea except for the statements that she has made in the present petition…We find no evidence to suggest that the petitioners' case was worthy of belief. On the contrary we have the army and police record pertaining to the incident which clearly shows that Regoo was indeed a militant and that the circumstances leading to his death were as per the circumstances put on record by the respondents. "

Accordingly, the Supreme Court dismissed the writ petition filed by the petitioner-widow. Conspicuous by its absence in this judgment is a discussion of the Right to Life under Article 21, the Right against Self-incrimination under Article 20(3) or the Rights of an Arrestee under Article 22, and a clarification on whether these rights apply, or why they do not. Nor did the Court advert to the Army's illegal detention of Regoo in 1994-5 for three months. The Court has proceeded, on the basis of a record which was not before it, to reach a conclusion without reference to the fundamental constitutional rights violated and by *carving out exceptions to directions laid down by a 5 judge Constitution Bench*.

It is noteworthy that, while recording at the outset that it was placing the present case within the current political context in Kashmir, the Court chose to turn a blind eye to the fact that illegal detention by the Army in J&K continues to be, not an aberration but the rule.

[4] The sequence of events around the submission of the file relating to the representation of the petitioner to the Prime Minister's Relief Fund have been documented in the Review Petition filed by the petitioner against the judgment dated 2.5.2007 before the Supreme Court, a copy of which is available with PUDR.

Box 4: Masooda Parveen's Case and various orders issued by the Supreme Court

1) 22.6.1998: Masooda Parveen sends her petition on 22.6.1998 and again on 20.7.1998 to the Chief Justice of India.

2) 4.9.1998: Supreme Court Legal Services Committee writes to the petitioner advising her to approach the J&K High Court under Article 226.

3) 19.10.98: Masooda Parveen writes back saying she was not interested in getting her case politicized which would happen were she to go to the High Court.

4) 4.6.1999: Writ Petition (Civil) No. 275 of 1999 under Article 32 filed by Masooda Parveen in the Supreme Court of India seeking compensation for the custodial death of her husband, and also exgratia and a compassionate appointment. The Petition arrays the Union of India (Ministry of Defence) and the State of Jammu and Kashmir as respondents.

5) 16.7.1999: The Court passes an order issuing notice on the writ petition to the respondents.

6. December 1999: On behalf of the Ministry of Defence and the 17 Jat Regiment, an affidavit in reply is filed by Major DS Punia of 17 Jat Regiment.

7) December 2000: Petitioner files her rejoinder affidavit to the affidavit of the Army, and points out that the police has that the police had closed the investigation and submitted a final report before the Magistrate to the effect that the death of her husband was accidental.

8) 2000 to 2001: Adjournments are granted by the Court on 3.1.2000, 28.2.2000, 17.4.2000, 17.7.2000 and 8.1.2001 to the State Government to enable them to file their affidavit in reply to the writ petition.

9) 19.2.2001: After hearing arguments, the Court passes order to "Issue Rule Nisi". This means that the writ petition under Article 32 was admitted by the Court, and the respondents were called upon to file their return to the allegations made in it. The State of J&K still did not file a reply affidavit.

10) 16.8.2001: Unknown to the Supreme Court or the petitioner, an DD entry no. 9 dt. 16.8.2001 is made in PS Pampore recording that the District Magistrate, Pulwama, disagreed with the final report on the s. 174 CrPC investigation presented before him by the police, and has observed that it is astonishing how an investigation under s. 174 has been conducted in a case where a cognizable offence is made out, and has sent the file back for re-investigation.

11) 22.3.2006: The Court directs the respondents to submit "inquiry report and the connected documents".

12) 19.4.2006: The Court notes that the state of J&K sought several adjournments to file their reply "has disappeared from the scene" and directs the state Chief Secretary to "pass appropriate directions and take necessary steps so that the State is represented before us in this writ petition." It further orders that all records connected with this case be "produced before us (the Court) on or before 5th May 2006 failing which we direct the Chief Secretary of the State of Jammu and Kashmir to be personally to be present on 11th May 2006 with all necessary records…"

13) 2.5.2006: In purported compliance with the order issued on 19.4.2006, the SSP Awantipora files an affidavit and presents as "Annexure D" to this affidavit a 'shadow file' of the inquest proceedings conducted by PS Pampore.

14) 11.5.2006: The Court is informed that the state government has still not filed the records as directed, and therefore it again directs the State of J&K to "procure the original file".

15) 12.9.2006: Again the Court directs the State Government to produce the original file.

16) 31.10.2006: Rejoinder affidavit filed by the petitioner to the affidavit of the SSP Awantipora. Apart from pointing out the numerous contradictions between the so called "shadow file" and the documents produced the Army, the petitioner also placed on record the NHRC guidelines on inquest in custodial death cases, and two sworn affidavits by so called eye witnesses denying that they have ever made any statements to the police.

17) 15.11.2006: The Court notes the following: "Despite orders of this Court the original record directed to be produced before this Court has not been produced by the State of Jammu and Kashmir. Our last order of 12th September 2006 records the fact that the original file is now available in the office of the District Magistrate, Pulwama……We issue a

direction to the District Magistrate, Pulwama to place the original record before this Court on or before December 1, 2006 failing which he shall appear personally and answer all questions pertaining to this case 'In Person' on December 4, 2006."

18) 20.11.2006: Report submitted by Sr Prosecuting Officer, Awantipora with a finding that the file has disappeared that three low level constables have been identified and a departmental enquiry is recommended against them in this connection.

19) 25.11.2006: An affidavit dated 25.11.2006 affirmed by the District Magistrate, Pulwama, is filed in response to the order of the Court dt. 15th November 2006. In this affidavit the DM, Pulwama states that he took over the post on 15th May 2006 and that massive search has been conducted but the file has not been found.

20) 1.12.2006: affidavit dated 30.11.2006 filed in compliance with the orders of the Court dated 12.9.2006 and 15.11.2006 and states that a shadow file was handed over to the counsel.

21) 4.12.2006 Court exempts the senior state officials from personal appearance in spite of the fact that no record is produced in accordance with its directions.

22) 17.4.2007: Final arguments commence, continue part-heard to 19.4.2007

23) 19.5.2007: After the conclusion of arguments by counsel for petitioner, the counsel for the Ministry of Defence produces a file pertaining to an application made by the petitioner to Prime Minister's Relief Fund in 1998, on which an enquiry was conducted by the Army. Although no privilege is claimed, this document is not filed, nor shown to the petitioner's counsel, but is handed over to the Court.

24) 2.5.2007: Judgment and order passed by the Supreme Court in Writ Petition (Civil) No. 275 of 1999, Masooda Parveen vs. Union of India and Ors, dismissing the writ petition of the petitioner widow. Reported in (SCC citation.)

25) 9.7.2007: Review Petition filed by the petitioner against the judgment and order dated 2.5.2007.

26) 11.10.2007: Review Petition against judgment and order dated 2.5.2007 is dismissed by the Supreme Court without assigning any reasons.

It is the recording of DD reports or registration of FIRs which are aberrations in J&K and the prevalent practice has been to ignore anything which could bring the Indian security forces in dis-repute, leave alone accountability. (*See Box 1*) Therefore records of illegal detention and custodial deaths are either not generated at all, and where such records exist, these are full of discrepancies. This was an unusual case where due to the initial response of the local administration in constituting an inquest under s. 174 CrPC, there was sufficient material on record to alert the Court to the necessity of viewing the original records. The judgment, however, chose to believe the version of events alleged by the state.

Although, the Supreme Court in the Masooda Parveen judgment avers that "in an investigation of this kind based only on affidavits, with a hapless and destitute widow in utter despair on the one side and the might of the State on the other, the search for the truth is decidedly unequal and the court must therefore tilt just a little in favour of the victims." Let us examine how the Supreme Court tilted in "favour" of the victim.

The Evidence

The time and date of arrest:

The time and date of arrest is important in view of the directions contained in NPMHR vs. Union of India[5]. The Constitution Bench of the Supreme Court had then ordained that the Army under Section 6 of the AFSPA is obliged to handover any person they arrest to the nearest police station with "least possible delay". The Court then explained that "least possible delay may be 2-3 hours extendable to 24 hours or so depending upon the particular case" (para 53 of the judgment). Significantly, 4 years later, in 2001 an application for modification/clarifi-

[5] Naga Peoples Movement for Human Rights & Ors vs. Union of India & Ors; (1998) 2 Supreme Court Cases 109.

cation filed by the Union of India in the judgment in the NPMHR case was considered by another 5 judge Constitution Bench which clarified that:

> "the army authorities need not consider themselves restrained from eliciting information for operational intelligence from an arrestee at the time of his arrest. We, however, wish to reiterate that while eliciting such information, the army authorities shall keep in view not only the observations made by this Court in the said judgment[6], but also the guide-lines given by this Court in various judgments about the rights of an arrestee, the extent applicable in each such case".[7]

Applying these principles for the case of Ghulam Mohi-ud-din Regoo ought to have been fairly straightforward. It is an admitted fact that Chandhara village, from where Regoo was picked up by the Army, is no more than 4-5 kms away from the nearest police station, being PS Pampore. The location of the alleged incident, Wasterwan Heights, lies to the South of the village, about 8 kms away in the opposite direction. The Lethapora Camp, where Regoo was tortured, is to the West of the village about 2 kms away. Indeed the judgment in Masooda Parveen says:

> "Concededly all four locations are very close to each other – the maximum distance being 4-5 kms, with village Chandhara virtually in the middle."

So how does the Supreme Court apply the principle of "least possible delay" in this instance? The Court contends that guidelines laid down by the Constitution Bench cannot "be mechanically applied" and goes on to say that six hours between Regoo's apprehension and death that followed "was clearly minimal". By doing so the bench overlooked what they had themselves observed namely the fact that the nearest police station was not more than 4-5 kms away and therefore the principle as established by the NPMHR judgment that the arrestee be produced in 2-3 hours could have very easily been applied. Thus the Court not only completely missed the point here but went on to say that army can keep a person in their custody for up to 24 hrs. .

The integral basis for the fundamental right to be produced before a Magistrate under Article 20, and the interpretation of 'least possible delay' under Section 6 of the AFSPA, is precisely because police/ custodial brutality in the guise of eliciting information is an endemic problem, and there is a need to ensure that the Armed Forces do not indulge in such atrocities in disturbed areas. Indeed, in the present case, not only did the Armed Forces not produce Regoo before the nearest police station with least possible delay, according to the wife, they tortured him and supposedly took him on an operation in the opposite direction, and then claimed exemption from the operation of section 6 by causing his death. Each of these actions amounts to an illegality, and yet the Court, reading all these facts together saw not only no illegality but no violation of constitutional rights.

Before arriving at this conclusion the Court ought to have been alerted by the records before it which clearly showed that the police and the army differed on the date of arrest as well as the date of the death, and therefore given credibility to the petitioner's assertion that her husband was, in fact, in illegal custody of the army for more than 30 hours before he died.

Circumstances of his arrest:

Masooda Parveen, wife of the deceased, has always maintained that her husband was picked up along with another unidentified person by the army personnel on February 1, 1998, which was also the day of Id, and that his dead body was handed over to police station Pampore on February 3, 1998.

According to the Police, as per the Daily Diary # 23 dated 2nd February 1998, Regoo was picked up on February 1 1998 and on questioning agreed to lead the army to a hideout and arms dump in Wasterwan Heights. On reach-

[6] That is, the decision dated 27.11.1997 passed by the Constitution Bench of the Supreme Court in NPMHR vs. Union of India

[7] Judgment and order dated 7.8.2001 in Crl. Misc. Petition no. 4198/ 1999 in Writ Petition (Crl.) No. 550 of 1982, for modification/ clarification of Court

's order dated 27.11.1997 in NPMHR vs.

Union of India. This clarification was also issued by a 5 judge Constitution Bench.

Event	Petitioner's version	Police version	Army version
Date of arrest	1st Feb. 1998	1st Feb. 1998	2nd Feb. 1998
Time of arrest	8.30 p.m	8.30 p.m.	8.30 p.m.
Time of death	Precise time not known; believed to be sometime on 3rd Feb 1998, the date the body was handed over to the family.	3 a.m. on 2nd Feb 1998	2.30 a.m. on 3rd Feb 1998
DD/ FIR number and date	DD No. 24 dt. 3.2.1998	DD No. 23 dt. 2.2.1998	DD No. 24 dt. 3.2.1998
Number of hours of detention before death	At least 30 hours	6 ½ hours	6 hours (but 24 hours later than police version)

ing the hideout at 0300 hours on 2nd February 1998 when removing the stones to effect entry a large explosion took place which killed him.

It is noteworthy that this is a different report from that quoted by the Army in its counter affidavit before the Court. According to the Army, the daily diary report # 24 dated 03 February 1998 [Time 07.35 hr, Police Station, Pampore] records that Regoo was taken into custody on 2nd February 1998 and died at 3 a.m. on 3rd February, a full 24 hours later (than what is given in the police version) .

These contradictions about the date of arrest and his death are part of the record of the Court, and yet the Court chose to overlook them completely. Even if the army version is accepted that Regoo was picked up on 2 February 1998 at 8.30 pm and died on 3 February 1998 at 3 am or thereabouts, the critical issue was that he remained for more than six hours in army custody and taken on an operation where he died in suspicious circumstances, when the terrain in which he was arrested shows the police station within 4-5 kms from the village or the army camp.

And even if the Court chose to believe the state version that the deceased was in army custody for a "mere" six hours before his death, it is inexplicable how it accepted that the Army not only admittedly interrogated him, but also admittedly took him on an operation without involving or even intimating the police. Thus violating the rights of an arrestee as established in the DK Basu case.[8]

The dead, injured and the missing:

The Army asserts that Regoo died in an explosion. Along with him three other soldiers suffered "splinter injuries" and were treated in the medical inspection room and discharged. But even this fact is disputed. Police records names of Havaldar Randhir Singh, Lance Naik Munim Singh and Sepoy Kashi Ram as the injured personnel. But a combined reading of the documentation produced by the Army, which includes the radio transcript, the Medi-

[8] D.K. Basu vs. State of West Bengal. SCC citation.

cal Register, the report to P.S. Pampore, and so on, reveals just one name of Sepoy Kashi Ram as having "got minor injury", and not three soldiers. Not one of these three sepoys was examined by the police during the inquest proceedings

The record also re-inforces the petitioner's submission that at the time of her husband's arrest another person had also been arrested by the same patrol party. In a radio transcript of the unit message to their base camp produced by the Armed Forces, while celebrating the death of Regoo as follows: "militant killed. ONE. Bravo." it is also stated: "*militant held with fmn. Ntl.*"

Obviously, this other apprehended "militant" was taken into custody without bothering to inform the police station or hand him over. But even so, the police investigation obviously did not bother to find this other man, and makes no mention of him. A key witness who could have provided eye-witness testimony regarding the events leading to Regoo's death disappears into oblivion.

When was the body and seized weapons handed over to the police?:

The Army version is that the dead body of the deceased was handed over to the Police station Pampore **after** getting the post mortem conducted at Civil Hospital, Pampore at 1.30 p.m. on 3.2.1998. The handing over was done by Major D.S. Punia of 17 Jat Regiment to one Sub Inspector T.K. Mark, Pampore Police Station.

The police, on the other hand, says that after receiving written intimation from the Army at 7.40 a.m. on 3.2.1998, the proceedings under section 174 CrPC was initiated and the SI appointed to investigate proceeded to the scene of the occurrence which he reached at 8.30 a.m. and found the dead body of the deceased lying on the spot. After examining the body, the memo of handing over and the injury memo was prepared, after which it was removed to sub-District Hospital, Pampore for postmortem at 10 a.m. The shadow file of this investigation (or inquest) produced by the state government refers to the Sub Inspector who conducted this investigation variously as Tahir Kouser, Tahir Ahmad Mir, and Tahir Salim, but no where is a SI T.K. Mark mentioned. Thus the army and police version clash as to the place where the body was handed over to the police, the time, whether it happened before or after the post mortem, as well as the identity of the person who took charge of the body.

It also seems that the inquest officer returned to the place of occurrence at 6 p.m. on the same day when he prepared the site plan and made it part of the proceedings. But the shadow file produced in Court contained no site plan. Again, while the army mentions that after the accidental death of Regoo they conducted a search and seized 3 AK magazines, 130 AK ammunition rounds, and 5 hand grenades there is no seizure memo of these weapons in the shadow file submitted by the police.

Post-Mortem:

The norm is that in all cases of custodial death, the state must demonstrate that it complied with law when conducting an enquiry into violent death, and utmost care therefore has to be exercised while conducting a post-mortem. Nearly a year before the death of Ghulam Mohiud-din Regoo, the National Human Rights Commission issued a directive through letter dated March 27th 1997 to all state governments to adopt a model autopsy form and procedure for inquest in custodial death cases. The then Chairperson of NHRC, Justice MN Venkatachaliah, observed:

> "A number of instances have come to the Commission's notice where the post-mortem reports appear to be doctored due to the influence/ pressure to protect the interest of the police/jail officials. In some cases it was found that the post-mortem was not carried out properly and in others, inordinate delays in their writing or collecting. As there is hardly any outside independent evidence in cases of custodial violence, the fate of the cases would depend entirely on the observations recorded and the opinion given by the doctor in the post-mortem report. If post-mortem is not thoroughly done or manipulated to suit vested interests, then the offender cannot be brought to book and this would result in travesty of justice and serious violation of human rights in custody would go

on with impunity."

The United Nations has also laid down guidelines for investigating deaths in custody through its "Principles of the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (UN Doc E/ST/ CSDHA/12 (1991)". These are expected to guide state's investigation and include photographing the body, describing the marks on the body, making incisions and dissections to identify injuries not visible on body surface and undertaking forensic, radiological and toxicological studies.

The moot point in the present case is whether a post mortem/autopsy was performed at all. According to the army a post mortem was conducted at Pampore Civil Hospital. But the report submitted before the Supreme Court is a study in apathy. The report does not contain any conclusion regarding cause of death, time of death, whether the injuries were post-mortem or ante-mortem, or if there were any shrapnel or explosive residue in the body consistent with death in an explosion. The name of the medical officer who conducted the examination is not known because there is no name or signature on the purported post mortem/ autopsy report.

On the other hand, the police claim in a document filed as part of the "shadow file" that the post mortem was conducted at SD Hospital Pampore and records the finding of the Asst. Surgeon, Pampore. But this report is different from the one submitted by the Army, even though it is nobody's case that two post-mortems were conducted! This report also does not answer any of the queries mentioned above. In addition, what is attempted to be passed off as a post-mortem report appears to be an injury report. But even this is a fragment and not a complete report.

Since there is no complete post-mortem report we do not know what caused the death of Ghulam Mohi-ud-din in Army custody. Therefore the question arises about the basis for the claim of the state that Regoo died an accidental death or even that he died in an explosion. In the absence of a proper post-mortem report, and confronted by two contradictory and incomplete injury reports, the Court has inexplicably chosen to believe the version of the state that the death was accidental.

Inquest proceedings under S. 174 CrPC and police record:

On 11th May 2006 the Supreme Court passed an order directing the state to procure the original police file since only a "shadow file" had been placed before the Court. On November 11, 2006 the Court said "despite orders of this Court, the original record directed to be produced before this Court has not been produced by the State of Jammu & Kashmir. Our last order of 12th September, 2006 records the fact that original file is now available in the office of the District Magistrate, Pulwama. This Court had directed the learned Counsel appearing for the State of Jammu & Kashmir to procure the original files for perusal of the Court…."

Yet, when the Supreme Court summoned the original file, a so called 'shadow file' was submitted by the state government with a supporting affidavit signed by the SSP Awantipora who stated on oath that it is a "true/ true translated copy of their respective originals." This absurdity was repeated in a subsequent affidavit filed before the Supreme Court and sworn by the SP, Awantipora who stated, again on oath, that "a shadow file of the said inquest proceedings was reconstructed on the basis of office records available …..That the said shadow file contains the Photostat/authenticated documents of the original inquest proceedings file of the case".

The shadow file did not contain a number of documents relating to the investigation itself, such as the memo taking custody of the body, the post mortem report, receipt taken from relatives while handing over the dead body, the seizure memo of the ammunition, the site plan. But most importantly the shadow file did not contain the order sheet of the proceedings before the Magistrate. The importance of this particular omission was to become apparent very soon.

Instead of filing the original record, the State government instituted an enquiry by one Aafaq Ahmad, Senior Prosecuting Officer, into

the 'disappearance' of the file, who submitted a report on November 20, 2006. While this long winded report concluded that the original file had, indeed, been lost, it made some startling revelations which came to light for the first time in the eight year pendency of the writ petition in the Supreme Court. The officer found **a DD entry no. 09 dated 16** August 2001 in the record of the Pampore police station which recorded that the **District Magistrate, Pulwama, when presented with the 'final report' of the police in the 174 investigation, disagreed with the finding, and observed that in fact a cognizable offence had been made out. With this comment, he sent the file back for re-investigation.**

Did the Court take a stern view of the studied nonchalance of the state government in the face of the numerous directions to produce the original record? Did the Court make a presumption in law against the state government in the light of its conduct? Did the Court refuse to accept the return of the state government in response to the writ petition filed by the petitioner which was in the nature of habeas corpus? Did the Court, in particular, express outrage at the suppression of the order passed by the Magistrate rejecting the final report of the Police that the death was accidental and directing further investigation? Did the Court lean in favour of the petitioner-widow?

Alarmingly, the Court did none of these things. Instead, it recorded that it had asked the counsel for the petitioner repeatedly what he expected to find in the original record, and had received no answer from him.

Eyewitnesses:

According to the army, apart from the members of the patrol party, no other eyewitnesses were present. The police, however, obliged them by filling this lacunae and producing two statements of purported witnesses to the entire incident, being the brother of the deceased, Jalaluddin Regoo, and a neighbour, Abdul Rashid Ganai. It is noteworthy that these are statements under section 161 CrPC, which are ordinarily not permitted to be entered into evidence in a criminal trial.

The Supreme Court chose to rely upon only the most convenient part of these statements, observing that "a statement of Jalaluddin Regoo, the brother of the deceased completely exonerate(ed) the army of any wrong doing".

It chose however to ignore two material facts about these eyewitnesses that ought to have merited its attention. Firstly the alleged S. 161 CrPC statements of the two were retracted by the witnesses through sworn affidavits filed by them before the Supreme Court in the writ petition. Both these so called witnesses stated that they had never made any statement at all to the police, leave alone the statements placed on record. Secondly, even these clearly concocted statements got the facts wrong! Both statements, which are practically identical, contradict the army version that the incident took place at Wasterwan Heights and instead say that it took place in the village Chandhara itself!

The confession of a militant:

Eventually, what convinced the Court that the writ petition of the petitioner-widow deserves to be rejected is that the deceased Ghulam Mohi-ud-din Regoo was a 'militant'. Perhaps in the fractured times we live in, an argument made by the Armed Forces that a militant who dies in its illegal custody while being taken on an illegal operation and illegally being compelled to open an arms dump without the benefit of minesweepers having cleared the area, is acceptable to the Court. But for even such a distorted viewpoint, the condition precedent must be that the person has to be proved to be a militant!

It is therefore necessary to examine what evidence was produced by the state and the Army in particular, that the deceased was a militant. The truth is that there was no such evidence.

To begin with, various statements made by the Army, as well as their counter affidavit in response to the writ petition claim that "hard intelligence" brought them to apprehend Regoo, even though the source of this intelligence, or even the person who received this intelligence was never brought on record. Yet, in the very next paragraph they claim that while they know he was a Pakistan Trained Militant and

an ex-divisional commander of Al Barq, but they did not know the citizenship of the deceased! If the Army can claim to know so much about Regoo, and yet claim not to know that he was a member of the J&K Bar Association and a practicing lawyer, even after they had both searched his house and interrogated him, a conclusion can be drawn that there is an attempt to pervert the truth. After all, identity of the person is the very first thing that any search or interrogation establishes.

The Army also repeated in numerous statements and in its counter affidavit before the Supreme Court that at the time of arrest, Regoo had "confessed" that he was a member of Al Barq, a militant outfit. This confession, whether in writing or in any other recorded form, was never brought on record, even though such a confession would be inadmissible under the Indian Evidence Act. The person to whom the confession was made never made a statement before the Court or before the inquest officer, far from being subjected to a cross examination. Even the statement leading to the so called recovery of arms, which might have been admissible as evidence against Regoo, was never produced. And finally, the person who swore the affidavit on behalf of the Army that such a confession was made by Regoo, Major D.S. Punia, was the officer in charge of the patrol party in whose custody Regoo's death occurred, whose testimony is less than credible since he is an interested party. On the basis of an affidavit sworn by the very person who would be held accountable for Regoo's death, and in the absence of a shred of corroborating evidence, the Court proceeded to accept the version of the state that Regoo confessed to being a militant.

The repeated assertion of the petitioner that relying upon such a flimsy "confession" to label a person a "militant" was a violation of the protection offered under Article 20 (3), was completely ignored by the Court, and has not even been dealt with in the judgment, even if only to be rejected.

On what ground can one accord greater weight to an illegitimate assertion that GM Regoo "confessed to being a militant" to unit of 17 Jat Regiment rather than to the admissible evidence which points in the direction of army's culpability in a crime? In fact it is apparent that "due of process of law" was missing in action.

In any case, militant or not, the case was about compensation for a death that occurred in the army's custody. The issue before the court was that was the army in any way responsible for Regoo's death, either through acts of omission or commission and therefore liable to pay compensation. In deciding such a case the court should have been governed by the right to life irrespective of the deceased political activities and beliefs.

Implications of the judgment

The nine year long search for justice by Masooda Parveen underlines the onerous nature of the battle for victims of gross injustice. The state can year after year, for 9 years, under one pretext or another get away with non-compliance of Court orders. Whereas the victims has to suffer the ignominy of waiting, watching her woes compounded, and finally find her husband labeled a 'militant' which makes his life expendable. No matter what happens after this, the judgment in Masooda Parveen's case exposes the lived reality of army occupation in J&K, as experienced by the people at the hands of Indian security forces. Just as the state perceives the people of Kashmir through the lens of "national security" where arbitrariness reigns, the Supreme Court of India too has chosen to view them through the same lens.

Ghulam Mohi-ud-din Regoo was apprehended by the armed forces, as nearly sixty thousand others such as he has been in J&K. Many, like him, were arrested at the behest of pro- government militia. Torture to extract "information" is well known and well recorded. In such a context, there is as much likelihood that Regoo's death occurred due to torture as to the possibility that he was used as 'human shield' during an operation. Finally, as in many other incidents of custodial killing and enforced disappearances, it is an admitted fact that the pro

government militia had got him arrested once before in 1994 and he was kept in illegal custody by the Army for three months.

It is an established principle in contemporary jurisprudence, both Indian and International, that in cases of custodial violence, especially deaths in custody, the burden of proof rests upon the state to show how death or act/s of violence occurred. This principle applies both to the jurisdiction of constitutional courts in the nature of habeas corpus, as well as to the criminal courts in the trial of such offences. It is an acknowledgment by the judiciary that there is a need for security forces to be accountable to the rule of law. The Supreme Court of India has in several cases asked for implementation of the recommendations of the 113th Law Commission report[9] which called for placing the burden of proof on the accused state actors in criminal prosecutions relating to death in custody.

International jurisprudence has moved even further to acknowledge that insufficiency of evidence led by a complainant, which may not establish the responsibility of the state, cannot be held against the complainant. Instead the international courts have refined the principle of burden of proof in such a way that adverse inferences can be drawn against the state in the following circumstances:

(a) state's failure to provide evidence rebutting the allegation of custodial killing or failure to present evidence in support of its version[10];

(b) failure of the state to give a plausible account for death or injuries sustained in its custody[11];

(c) state not submitting necessary documents and information which is in its control[12].

It would seem to be an unremarkable proposition that these jurisprudential principles apply across the board in all cases of custodial death. However, as this judgment reveals, different rules apply where the custodial death has occurred during a perceived threat to the Indian State, whether in army occupied states or where struggles have chosen to challenge the status quo. The judgment of the Supreme Court in Masooda Parveen, in choosing to ignore the established principles of jurisprudence, when dealing with a case of Army custodial deaths from Kashmir reinforces public perception among those at the receiving end of brutality and therefore has serious implications.

The Judgment claims that "in an investigation of this kind....the search for the truth is decidedly unequal and the Courts must therefore tilt just a little in favour of the victims." Far from tilting in favour of the petitioner and reading the acts of omission and commission of the state as an indicator of their guilt, the Court chose to accept the explanation offered by the army and police. So much so that the Court even rejected the plea for compensation because it agreed with the proposition advanced by the Army's Human Rights Cell that **"any compensation awarded to his (GM Regoo's) family would *lower the morale* of the security forces engaged in fighting militancy".**

By brushing aside all the contradictions in the official version of events, which were brought out during the hearing by the Petitioner, *the judgment has established a precedent of sharply lowering the threshold of evidence required to exonerate security forces*. In one stroke thereby it has closed the door of justice for those who are aggrieved by or are victims of the policy of military suppression. The grave implications of this judgment are attenuated by the fact that this judgment has (mis)interpreted the judgment of a Constitution Bench of the Court in the 1997 and by and large substituted "least possible delay" with *best possible excuse for delay*.

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[9] Full title.

[10] See *Ognyanova and Choban v. Bulgaria*, No. 4631/99 (Sect. 1) (Eng.)- European Court of Human Rights; and *Kismir v. Turkey*, no. 27306/95 (Sect. 2) (Eng)-(31.5.05)- European Court of Human Rights.

[11] See *Agnuelova v. Bulgaria* 38361/97 (Sect. 1) (bil.) ECHR 2002-IV- (13.6.02)- European Court of Human Rights; and *Valentin Zheikhov v. Russian Federation*, No. 889/1999, CCPR/C/86/D/889/1999 (2006), UN Human Rights ommittee.

[12] See *Aktas v. Turkey*, No. 24351/94 (24 April 2003)-European Court of Human Rights; and
Civil and Political Rights: The Human Rights Committee, Fact Sheet no. 15, p.17.

Box 5: Some Case Laws on Custodial Killings

While the courts had begun to intervene in cases of custodial violence in the early seventies, the watershed decision of *Sebastian Hongray vs. Union of India* (1984) 1 SCC 339 and (1984) 3 SCC 82 brought the law relating to custodial violence committed by the armed wing of the state to new level. This case involved the disappearance of 2 pastors in Manipur after they were taken into custody by 21 Sikh Regiment. In the first round of litigation the Supreme Court examined the facts in detail, and came to the conclusion that the law places the burden on the state to show what happened to the detenues. A writ of habeas corpus was issued by the Court, requiring the state to file its return.

In the second round the Court noted that failure to produce the missing persons is non-compliance with the writ of habeas corpus, and amounts to civil contempt. The Court also came to the conclusion that the only possible inference is that the missing persons are no longer alive and have met and unnatural death, even murdered. The Court proceeded to issue a writ of mandamus issued to the Superintendent of Police, Ukhrul, to conduct investigation, treating the writ as information of a cognizable offence. In addition, keeping in view "the torture, the agony and the mental oppression" undergone by the wives, the Court directed payment of compensation by the respondent state to the wives of the disappeared persons.

Another benchmark decision in *Peoples Union for Civil Liberties vs. Union of India* (1997) 3 SCC 433 also involved the death in a fake encounter of two persons in Manipur, this time by the police. Here the state government attempted to argue that since Manipur is a disturbed area, and there are several terrorist groups operating, encounters often take place between the terrorists and the state forces. According to the state this had been a successful encounter. This argument did not sway the Court. Instead, the Court observed that it is well aware that terrorism exists in Manipur, but in the present case it is clear that the 2 persons were shot dead, and there was no 'encounter'. The Court made it clear that this type of activity cannot be tolerated, and that "administrative liquidation" is not a course open to the State.

Perhaps the most well known of all cases relating to atrocities by state forces is *DK Basu vs. State of West Bengal* (1997) 1 SCC 416. This judgment takes pains to give detailed directives to be followed by the police during arrest and detention. It also makes it clear that these directions are equally applicable to governmental authorities other than the police when they arrest and detain person. Taking into consideration the deteriorating law and order conditions in parts of the country, including "terrorist" activities, the Court observed that the agencies employed to combat terrorism must act within the bounds of the law.

In addition, this decision for the first time approved the concept of constitutional tort as part of Indian jurisprudence, laying to rest once and for all the debate around the issue of sovereign immunity. The Court was of the view that:

> "The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer. …The relief to redress the wrong for the *established* invasion of the fundamental rights of the citizen under the public law jurisdiction is, thus, in addition to the tradition a remedies and not in derogation of them"

The liability of the state and the right of citizens to receive compensation in cases of custodial death was further established in *Nilabati Behera vs. State of Orissa* (1993) 2SCC 746. The Court observed that it is axiomatic that convicts, prisoners and undertrials, and therefore by extension, arrestees, are not denuded of the right to life and dignity under Article 21. In a telling observation, the Court expressed its view that it is sound public policy to punish the wrongdoer, in the interest of not only the individual, but the public as a whole, in order to ensure that public officials do not act unlawfully and do not violate fundamental rights of citizens.

The Court has in several decisions expressed its dissatisfaction with the refusal of the state to implement the recommendations of the 113th Law Commission report regarding shifting of burden of proof to the state in custodial death cases. For instance, in *Shakila Abdul Gafar Khan vs. Vasant Raghunath Dhoble* (2003) 7 SCC 749, the Court expressed its disapproval of exaggerated adherence to proof beyond reasonable doubt in cases of torture, assault and death in police custody. It advised the legislature to give serious thought to recommendations of 113th Law Commission Report.

More recently, in *Sube Singh vs. State of Haryana* (2006) 3 SCC 178 the Court approved the well settled position that award of compensation is one of the remedial measures to tackle custodial violence. It went further, however, to state that it is also necessary to take preventive measures, including setting up of an independent investigating agency for investigation into complaints of custodial violence and to take "stern and speedy action followed by prosecution wherever necessary". The Court observed that "the claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available…"

Indeed the Supreme Court has allowed "national security" needs to override the demands of justice. This does not entirely surprise us. Our findings, as well as official investigations which take place from time to time, have shown that once AFSPA comes into operation, civil administration begins to play second fiddle to the armed forces, quite the reverse of the stated objective of the Act where the armed forces are meant to act "in aid of the civil power". The clear meaning of this is that rather than the military it is the civil administration which retains overall control, and therefore rather than the military law, it is the ordinary law of the land which prevails. This would include the Constitutional provisions, the Criminal Procedure Code, the Penal law, and so on. The criminal law empowers only the police to make arrests, and therefore, any person arrested or detained by the army is expected, under the provisions of the civil law, to be handed over to the nearest police station along with any seizure or recovery affected by the army.

But reality is very different. Instead of playing a subordinate role by accepting the leadership and supervision of the civil administration, the armed forces virtually replaces the civil authorities. In other words whatever be the law, once an area is declared 'disturbed' and armed forces of the Union called in, civil administration begins to play second fiddle to the military. The 1997 judgment in the NPMHR case, while upholding the power of Parliament to enact a law which empowered the armed forces of the Union to curb the life and liberties of "people", also laid down that the armed forces were to remain subordinate to the civil administration, and operate under a number of guidelines restraining their powers. The Masooda Parveen judgment by shifting the onus on the complainant in case of a custodial killing whittles down even the minor relief provided in the 1997 judgment. When the highest Court of the land turns every legal, constitutional, and jurisprudential principle on its head, in order not to lower the morale of security forces and turns away empty handed the plea for justice in a case as clear cut as Masooda Parveen's, the message to the people of J&K is resoundingly clear. Amidst the clash of arms, the process of justice does become silent. Because, where impunity of the armed forces is at the level of lived reality, *the Masooda Parveen judgment raises such impunity, in form of precedent, to the level of written law.*

Conclusion

That this judgment was delivered by a Court which has played a pivotal role in the development of jurisprudence of law relating to habeas corpus in custodial deaths, not only in India but at the international level, is a cause for concern. There is an immense body of precedents delivered by the Supreme Court which obligate the state to provide plausible explanation to show its non-culpability and non-liability in cases of custodial death. These principles have been endorsed and developed by the United Nations Human Rights Committee, the Inter-American Court and Commission on Human Rights, as well as the European Court of Human Rights which also place the onus on the state to provide a complete explanation and provide a comprehensive account of the events leading to death and subsequent proceedings for a death in custody.

Unfortunately, while Masooda Parveen may have been the first judgment delivered by the Supreme Court regarding excesses committed by the Armed forces in Kashmir, it will not be the last. Soon after the delivery of this judgment, the Supreme Court stayed the trial of the army officials accused in the heinous Pathribal massacre. In this case, 7 Kashmiris were killed by security forces after being labeled "foreign militants". The chargesheet filed by the CBI was sought to be challenged by the accused army personnel on the ground that the necessary sanction under the AFSPA had not been obtained. While three tiers of subordinate courts rejected this argument, the Supreme Court chose to issue notice on a special leave petition filed by the accused, and stayed the trial. (*See Box 1*)

This poses a challenge for the Civil Liberties and Democratic Rights movement which

has sought to emphasize upon the practices of fair trial, presumption of innocence, equality before law, protesting against draconian legislations like AFSPA, along with the need to interpret rights beyond what are made available under Part III of the Constitution of India. We feel there is a need to go beyond this framework. What we consider a "disturbed area" is perceived by the people living there as "occupied" area, one in which Army says it is conducting a "sub-conventional operations". They claim that this is "a generic term encompassing all armed conflict (and includes) militancy, insurgency, proxy war and terrorism that may be employed as a means in an insurrectionist movement or undertaken independently"[13].

It is worth remembering that when post-colonial states deploy troops to bring to submission a rebellious/recalcitrant people, formally their "own people", and hand over an area to the military, then in actual fact the military acts as an alien force. The relationship that ensues between the military force and the people is akin to that between a subject people and their imperial masters. The military force seek to restore the authority of the State on a reluctant people, no matter what the means adopted to establish this authority and however long it takes to do so.

It is in such situations of war that the inadequacy of Indian law stands out. When a nation-state looks at the Kashmiri people from its "national interest" perspective, it considers it a sovereign right to crush any political aspirations which in their estimation questions the "unity and integrity" of the country. National security considerations then carry more weight than demands for justice and accountability, especially when such demands are made by those who do not necessarily share this overarching perspective of the nation-state to begin with.

In contrast, were such incidents seen as war crimes, justice may stand a better chance of prevailing. It is worth noting that common Article 3 of the Fourth Geneva Convention 1949, enjoins the parties to an internal conflict to respect some basic principles of humanitarian law and is binding on both governments as also the insurgents, without conferring any special status upon them. (*See Box 7: Article 8, clause 2 (c)).*

With the coming into force of the Rome Statute on **1 July, 2002** such acts fall within the definition of crimes falling within the jurisdiction of the International Criminal Court. (See Box 7). The Rome Statute defines *genocide* (Article 6), *crimes against humanity* (Article 7), *war crimes* (Article 8) and *crimes of aggression* (Article 9). While India is not a signatory to this treaty, it is nevertheless of relevance to the Civil Liberties and Democratic Rights movement, because it sets benchmarks against which to analyse and evaluate crimes committed in the course of war. Therefore, if we want to counter Indian State's propensity to take refuge under national security considerations to deny justice to victims of military operations, then perhaps it requires of us to perceive these acts of military as crimes committed during war.

For instance, GM Regoo's explosive death in army custody would have been seen as falling within Article 8, clause 2 (a) sub clause (i) and (ii) of the Rome Statute which speaks of willful killing and torture respectively. Quite apart from the fact that there is a body of international law which supports the claim of Regoo's wife that the state is liable for his custodial death, when such a custodial death is placed within the current political context of Kashmir, there is also a body of international jurisprudence which considers such crimes committed during armed conflicts as "war crimes".

Let us also not forget that ***war is everybody's concern, beyond borders and boundaries.*** Therefore, we should consider whether it is not incumbent upon the DR/CL movement to also use international conventions and law as a benchmark as well as to highlight internationally the crimes of the Indian State against the people of Jammu and Kashmir. There is need to help create not just an informed Indian public opinion but also an informed international public opinion, in order

[13] Doctrine for Sub Conventional Operations; brought out by Integrated Headquarters in the Ministry of Defense (Army). www.indianarmy.nic.in/indar_doctrine.htm

Box 6: Excerpts from the Report of the Committee on Draft National Policy on Criminal Justice, Ministry of Home Affairs, (May 2007)

The report in para 9.6.2 says:

"Finally, with the establishment of the International Criminal Court, municipal courts have an added responsibility to be effective and prompt, lest there should arise demands for bringing culprits to justice through the ICC (International Criminal Court)".

In the summary attached to the main report under #11 says:

"Though India has not yet acceded to the Treaty of Rome (this heralded setting up of ICC), we need to take note of the establishment of the International Criminal Court to deal with 'crimes against humanity'. Our criminal justice system must be able to give better justice than what any international court can possibly offer under prevailing circumstances".

While the committee fights shy of advocating India's accession to the Rome Statue it nevertheless wants Indian justice system to perform lest people turn to ICC. The point is that even this committee, set up by Ministry of Home Affairs, found it prudent to take note of this possibility.

to bring greater pressure to bear on the Indian state to adhere to Geneva Conventions and the Rome Statute so that they do not escape from their responsibility to punish the uniformed perpetrators of heinous crimes. (*See Box 6*). The Masooda Parveen judgment compels acknowledgement that, like the Indian government, the Indian judiciary too has conceded that the people of J&K are an occupied people, and therefore cannot claim anything more than rough justice. However, this case might yet turn the tables by bringing the Indian judiciary to the realization that people in conflict areas are, so to speak, are 'voting with their feet' by turning towards the international fora in their search for justice.

Box 7: Excerpts from The Rome Statute as Adopted on 17 July 1998

PART II. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
   (a) The crime of genocide;
   (b) Crimes against humanity;
   (c) War crimes;
   (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
   (a) Murder;
   (b) Extermination;
   (c) Enslavement;
   (d) Deportation or forcible transfer of population;
   (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
   (f) Torture;
   (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
   (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
   (i) Enforced disappearance of persons;
   (j) The crime of apartheid;
   (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
   (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or

organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8

War crimes

1.The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of

armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv)Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Elements of Crimes may be proposed by:
   (a) Any State Party;
   (b) The judges acting by an absolute majority;
   (c) The Prosecutor.

   Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

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