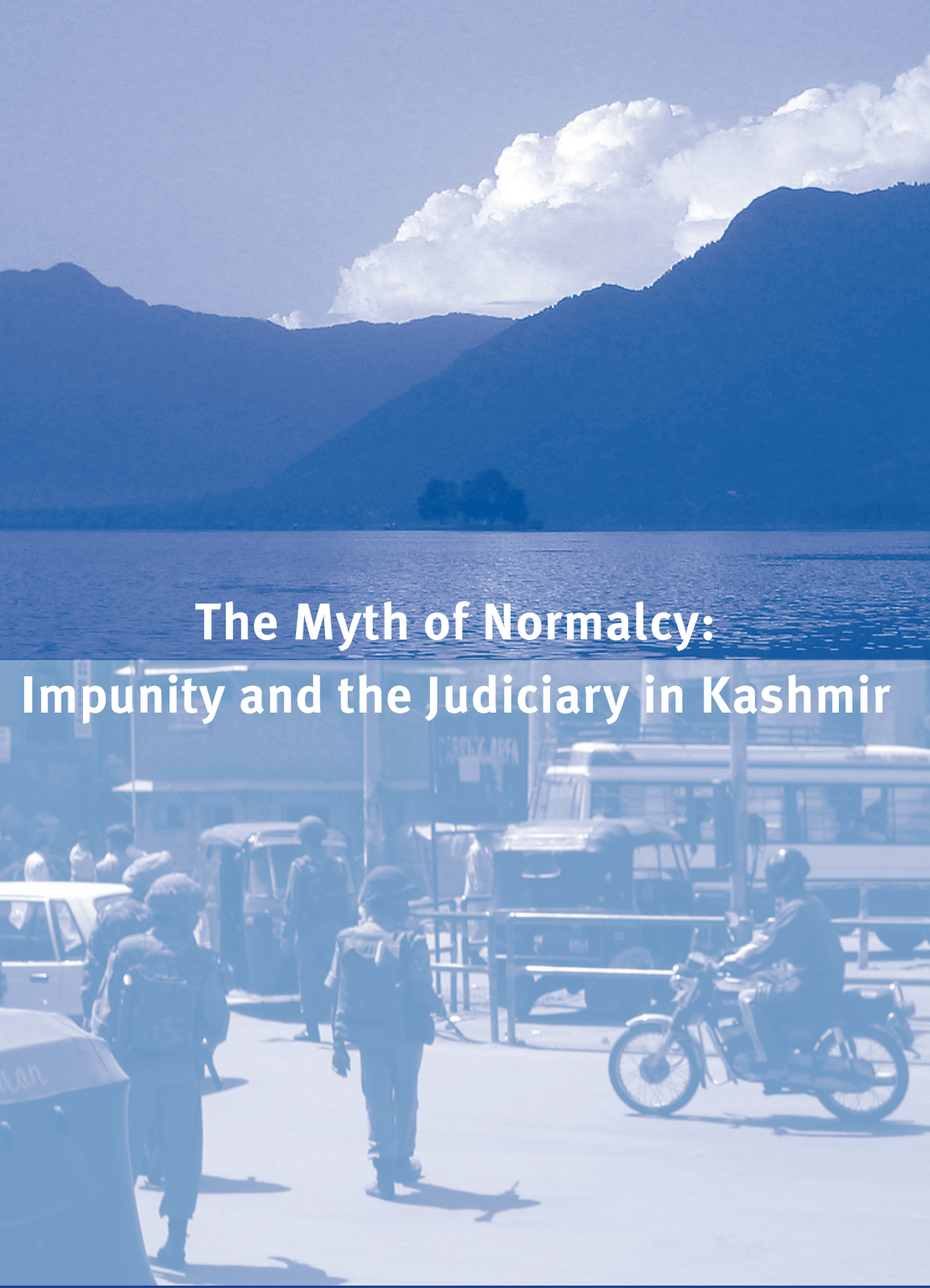

The Myth of Normalcy: Impunity and the Judiciary in Kashmir

Allard K. Lowenstein International Human Rights Clinic
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LIST OF ACRONYMS

AFSPA	Armed Forces Special Powers Act
BSF	Border Security Force
CBI	Central Bureau of Investigation
CID	Criminal Intelligence Department
CIK	Counter-Intelligence Kashmir
CJM	Chief Judicial Magistrate
CrPC	Code of Criminal Procedure
CRPF	Central Reserve Police Force
DC	District Commissioner
DM	District Magistrate
FIR	First Information Report
IB	Intelligence Bureau
IGP	Inspector General of Police
ITBP	Indo-Tibetan Border Police
J&K	Jammu and Kashmir
POTA	Prevention of Terrorism Act
PSA	Public Safety Act
RR	Rashtriya Rifles
SHRC	State Human Rights Commission
SHO	Station House Officer
SIT	Special Investigation Team
SP	Superintendent of Police
TADA	Terrorist and Disruptive Activities Prevention Act

Part I: Introduction

Indian-administered Kashmir appears to consist of two markedly different states. The contrast between the majestic snow-capped Himalayas and crowds of tourists on the banks of the famed Dal Lake, on one hand, and bunkers draped with grenade-proof mesh and armed soldiers lining the streets, on the other, could not be starker. Paradoxically, both images of Kashmir exist simultaneously, never separated by more than a few miles. The debate over which image is representative has often focused on the idea of "normalcy."[1] Those sympathetic to the traditional position of the Indian government have attempted to emphasize the normalcy of Kashmiri life: projecting images of tourists, floating *shikara* boats, and lotus gardens. Those critical of the Indian claim to Kashmir have attempted to expose normalcy as a myth, instead projecting Kashmir as a heavily militarized and occupied territory. Whether normalcy is a reality or myth in Kashmir has been vigorously debated, both sides marshaling data on tourist influxes, violence levels, death counts, and election turnouts. This report examines the notion of normalcy in a specific context—the Kashmiri legal system, particularly the judiciary—by using international human rights standards to evaluate the adequacy of the process through which human rights claims are brought against the government.

A. Background

The role of the Kashmiri judiciary, and arguably Kashmir itself, within the Indian Union presents a paradox of democracy. India is often hailed as the "world's largest democracy" and boasts a judiciary known for its commitment to public interest litigation.[2] The Kashmiri judiciary not only operates under

[1] *See, e.g.*, Arun Joshi, *J&K Separatists Join Hands to Welcome Tourists*, Hindustan Times, Apr. 18, 2007 (cautioning against invoking the rhetoric of normalcy in response to a successful tourist season); Sandeep Joshi, *Withdraw Army from Kashmir, says Arundhati Roy*, The Hindu, Aug. 31, 2005 ("[The] Indian media is busy painting a rosy picture of normalcy [in Kashmir]."); *Kashmir Returning to Normalcy: BSF*, Tribune India, Aug. 15 2004, *available at* http://www.tribuneindia.com/2004/20040816/j&k.htm#1; *Signs of Normalcy in Jammu & Kashmir*, Tribune India, Feb. 16 2002, *available at* http://www.tribuneindia.com/2002/20020217/j&k.htm#1; Indian Army in Kashmir, http://www.armyinkashmir.nic.in/v2/index.html, (last visited April 3, 2008) (displaying of a shikara and other tourist-related photographs on the official page of the Indian Army in Kashmir); Jammu and Kashmir Government: J&K Towards Normalcy, http://jammukashmir.nic.in/normalcy/welcome.html (last visited April 3, 2008) (highlighting the state of "normalcy" on the official government website).

[2] *See* M.J. Antony, Social Actions Through Courts: Landmark Judgments in Public Interest Litigation 1, 11 (Indian Social Institute) (1993) (noting that "Public Interest Litigation (PIL) . . . [evolved from a] constitutional revolution unparalleled anywhere in the world . . ." and that "[o]ne of the main characteristics of public interest litigation in India is that is has been

the same structure and fundamental laws as courts in the rest of India,[3] but was also brought under the jurisdiction of the Indian Supreme Court in 1954. Article 32 of the Jammu and Kashmir Constitution grants the state's High Court[4] the power to issue and enforce writs to protect fundamental rights, including habeas corpus and mandamus. Kashmiri lawyers and judges have, in fact, praised the effectiveness of the High Court in taking decisive action on public interest issues, including environmental regulations, the Dal Lake clean-up effort, and public transportation initiatives.[5] Although there are enormous backlogs in Kashmiri courts, they are not unique,[6] as similar backlogs are common throughout India.[7]

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initiated and led by the judiciary itself"). *But see* South Asian Human Rights Documentation Centre, *Collective Rights in India: A Re-assessment*, May 4, 2001, *available at* http://www.hrdc.net/sahrdc/hrfeatures/HRF36.htm (arguing that India's commitment to PIL has not been consistent but has depended on the personal views of the judges instead of a legal framework).

[3] Although the basic structure and laws are the same, a crucial exception is the application to Kashmir of counter-insurgency laws, such as the Armed Forces Special Powers Act, Disturbed Areas Act, and Public Safety Act.

[4] In theory, High Courts are the highest court for each state of the union. In total, however, there are only 21 High Courts as three of them exercise jurisdiction over more than one state.

[5] *See, e.g.*, Arif Shafi Wani, *13,000 Trees Axed in Dal Lake on Court Orders*, Greater Kashmir, Jan. 5, 2006 (lake clean-up); Anil Bhatt, *7,300 Vehicles To Go Off the Road,* Rediff India Abroad, Nov. 11, 2005, *available at* http://us.rediff.com/news/2005/nov/11jammu.htm (transportation-related pollution control); Aziz Timber Corp. v. State, of J&K O.W.P. No. 568-84/96 continuing petition No. 51/96, May 10, 1996 (deforestation and illegal logging); *Jammu & Kashmir High Court Asks Government to Set up Committee to Examine Waste Disposal*, http://www.indlawnews.com/B9FD314C33DD559B9097D7FFA804F188, Mar. 11 2007 (last visited May 1, 2007) (waste disposal); *Jammu & Kashmir High Court Critical of Centre's Failure to Assess Flood Damage*, http://www.indlawnews.com/D3C7B6A83D148E1CEC156232BEF2DA1E, Dec. 27 2006 (last visited May 1, 2007) (flood damage); *Jammu & Kashmir High Court Seeks Fresh ATR on Polythene Ban*, http://www.indlawnews.com/5A01A33EBECD7E4EF1B67F360F5245F6, Nov. 16 2006 (last visited May 1, 2007) (polythene ban); *Jammu & Kashmir High Court Hails Azad Government for Steps to Save Wullar, Manasbal Lakes*, http://www.indlawnews.com/70FFBDD6382A7126EF93A33AEC83860D, Oct 20. 2006 (last visited May 1, 2007) (plantation encroachments on lake boundaries); *Eighty Shatoosh Shawls Seized in Delhi*, http://www.tew.org/archived/antelope.poachers.html, Mar. 18, 2002 (last visited May 1, 2007) (issuing a court order to ban sale of Shatoosh shawls made with the hair of antelopes).

[6] Still, it is important to differentiate – as this report does – the delays in the Indian court system caused by backlogs and the unique nature of delays for human rights claims that are brought in Kashmiri courts.

[7] *See* A.S. Anand, *Indian Judiciary and Challenges of 21st Century*, *in* Indian Judicial System: Need and Directions of Reforms 1, 17-18 (S.P Verma ed., 2004) ("One of the greatest challenges that stares us in the face . . . is the failure of judiciary to deliver justice expeditiously . . . [because there are] over-flowing dockets of the courts all over the country . . . ."); *Judicial Reforms – Need of the Hour, in* Indian Judicial System: Need and Directions of Reforms 190, 192 (S.P Verma ed., 2004) ("Essentially, the failure of the civil and criminal justice system is manifesting in abnormal delays in litigation and huge pendency in courts . . . . [I]t is estimated

Despite the level of normalcy that such a description may suggest, the Kashmiri justice system—both the courts themselves and the legal process for victims seeking to bring human rights claims—falls short of international standards. Even a government lawyer admitted that although "the system is the same [as the rest of India], governed by the same constitution, [and] the same set of laws, [there is a] difference in outcome [in Kashmir]."[8] Although the Kashmiri judiciary attempts to review independently the actions of other branches of government, the judiciary exists within a highly sensitive conflict situation, where executive and military prerogatives are regarded as sacrosanct. Many lawyers of the Jammu and Kashmir Bar Association reiterated that the judiciary functioned as if it were a branch of the Indian executive, whose long-standing official position is that Kashmir is an *atoot ang*, or integral part, of India.[9] As such, the Kashmiri judiciary, despite its purported independence, has played an instrumental role in ensuring the Indian government's ability to maintain its control over Kashmir and combat militant separatist groups operating in the region. A prominent Kashmiri human rights lawyer went as far as to suggest that after the security forces,[10] judges were the second most culpable group for the human rights situation in the state.[11]

This report examines the adequacy of legal process afforded to victims bringing human rights claims against the government; it seeks to assess whether the Kashmiri judicial system operates in accordance with international human rights standards. The report examines two types of human rights claims—affirmative claims against the military[12] and habeas corpus petitions—by describing the legal process required to bringing such claims and identifying where the legal system falls short of international human rights norms in adjudicating these claims. The failures of the judicial system

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that approximately 38 million cases are pending in district courts, High Courts, and Supreme Court . . . .").

[8] Interview with Government Lawyer in Srinagar (Mar. 21, 2007).

[9] *See generally* Sumantra Bose, Kashmir: Roots of Conflict, Pathways to Peace (2003).

[10] When broadly referring to government actors that have committed human rights abuses in Kashmir, this report uses the term "security forces"—unless otherwise specified, the term includes the broad range of armed government actors deployed in Kashmir for peacekeeping, border protection, counter-terrorism, or other military or law and order purposes. Such groups include, but are not limited to, the Territorial Army, Border Security Force (BSF), Central Reserve Police Force (CRPF), Indo-Tibetan Border Police (ITBP), Special Task Force (STF), Rashtriya Rifles (RR), Special Operations Group (SOG), Village Defence Committees (VDC), and Ikhwanis (non-governmental counter-insurgency organizations).

[11] Interview with Senior Lawyer in Srinagar (Mar. 17, 2007).

[12] "Affirmative claims" is a term used in the report to encompass all direct charges of human rights violations brought by victims or their families against the military. These include claims, for example, for wrongful death, rape, and torture.

are both structural, such as jurisdiction requirements and misallocation of resources, and operational, such as the failure of courts to enforce their orders. Yet the failure of the judicial system is also the responsibility of actors beyond the courts. At various points during the legal process, military and executive agencies act to undermine its efficiency and equity.[13] Legal proceedings brought against security forces rarely reach a trial; nearly all claims end, usually against the wishes of the plaintiff, long before the parties enter a courtroom. This report attempts to identify the nature of these failures and how the judiciary could act to remedy them.

B. Relationship to Current Human Rights Reporting

International human rights organizations have written extensively on the conflict in Kashmir since the outbreak of violence in 1989. Many groups, including Amnesty International and Human Rights Watch, have released reports on Kashmir that have contributed to the international understanding of the conflict's impact. Human rights reports on Kashmir have comprehensively documented the range of abuses committed,[14] studied

[13] The circumvention of judicial orders by the executive and military will be discussed below. *See infra* Part II (B)(1). At times, judges have expressed frustration at circumvention. *See, e.g.*, Justice Syed Mustafa Risvi, High Court Petition Number 850/94 (Oct. 2004) ("[T]here is a total breakdown of the law and order machinery [in Jammu and Kashmir] . . . . [T]he [High Court] has been made helpless by the so called law enforcing agencies. Nobody bothers to obey the orders of this court."); Abdul Aziz Dar v. State of J&K, HCP No. 43 / 2000, (2001) 1 J & K Law Reporter 76 ("The attitude and conduct of the police forces and the security apparatus in the state has told [sic] upon the concept of Independence and Supremacy of [the] Judiciary in the State of J&K which has been turned into a Police State and is being run by a Fascist Police regime which does not respect the judicial orders and do [sic] not care a fig to implement the same. The courts have been made subservient and subordinate to . . . police officers who are bent upon to [sic] defeat the process of law and have openly given an impression to the world that they don't care for the judicial orders.").

[14] Many reports have publicized the results of fact-finding missions and case studies in order to document the wide range of human rights violations occurring in Jammu and Kashmir. *See* Amnesty International, Impunity Must End in Jammu and Kashmir 2 (April 2001), *available at* http://web.amnesty.org/library/pdf/ASA200232001ENGLISH/$File/ASA2002301.pdf (documenting "deaths in custody, extrajudicial executions by state agents and unlawful killings" as well as widespread rape, torture, and disappearances); United States Department of State, Report on Human Rights Practices – India (March 2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61707.htm (noting the prevalence of abuses such as arbitrary and unlawful deprivation of life, disappearance, torture, and denial of fair public trials). This deep concern with the human rights violations committed by members of security forces has not flagged with the passage of time. The most recent Human Rights Watch report on Kashmir, *see* Human Rights Watch, Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir Section III (September 2006), *available at* http://hrw.org/reports/2006/india0906/index.htm, documents a number of recent violations in order to show a continuing trend of violence and impunity.

the impact of militarization,[15] and analyzed the draconian laws[16] that have enabled such abuses to be committed with impunity.[17] However, there are additional problems in the way that available legal remedies are implemented and enforced. These problems, which result from the failures of the legal process, have received less attention in previous reports but also play a role in depriving Kashmiris of their rights.

This report seeks to complement existing human rights reporting on Kashmir in three ways. First, instead of focusing on *de jure* impunity—or how existing draconian laws enable security forces to commit human rights abuses with impunity—this report focuses on *de facto* impunity by highlighting the ways in which the legal process, in practice, fails to adequately respond to human rights claims once they have been brought. Second, in contrast to the victim-centered nature of previous reports that focus on documenting

[15] The number of Indian security forces and police officers on the ground, the activities of militant groups, and the use and abuse of state authority all serve to destabilize the everyday lives of innocent Kashmiri civilians. In July 1999, Human Rights Watch published a report titled *Behind the Kashmir Conflict: Abuses by Indian Security Forces and Militant Groups Continue*. The report underscored the impact of military abuses: "Despite the election in September 1996 of a civilian government in the state of Jammu and Kashmir, and Indian government claims that 'normalcy' has returned there, abuses by the army, federal paramilitary forces and a newly constituted police force are rife." Human Rights Watch, Behind the Kashmir Conflict: Abuses by Indian Security Forces and Militant Groups Continue (July 1999), *available at* http://www.hrw.org/reports/1999/kashmir. A 2006 European Parliament Committee on Foreign Affairs report also acknowledges the enormous influence of mass militarization in Jammu and Kashmir and states that the Committee "[r]ecognises and supports the aspiration of the Kashmiri people for a significantly reduced military presence in the area." European Parliament Committee on Foreign Affairs, Draft Report on Kashmir: Present Situation and Future Prospects (Nov. 23, 2006) *available at* http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/640/640763/640763en.pdf.

[16] For strictly legal analyses of the Armed Forces Special Powers Act, *see* South Asia Human Rights Documentation Centre, Armed Forces Special Powers Act: A study in National Security tyranny (Nov. 1995), *available at* http://www.hri.ca/partners/sahrdc/armed/fulltext.shtml; Amnesty International, Briefing on the Armed Forces (Special Powers) Act, 1958 (May 9, 2005), *available at* http://web.amnesty.org/library/index/engasa200252005. Other draconian Indian national security laws, such as the Public Safety Act (PSA), Terrorist and Disruptive Activities Prevention Act (TADA), and Prevention of Terrorism Act (POTA), have also been roundly criticized. TADA and POTA have been repealed, but many individuals detained under their provisions still languish in prisons. The most recent Human Rights Watch report provides a list of "Legal Causes of Abuses and Impunity," which explains the role that laws such as the Armed Forces Special Powers Act (AFSPA) and PSA play in facilitating human rights abuses by immunizing state actors from legal liability. Everyone Lives in Fear, *supra* note 14.

[17] Criticism of Indian counter-terrorism laws has been articulated in previous reports. *See supra* note 16. This report's focus on the ways in which the state exceeds the bounds of those laws is not meant to legitimize them but rather to highlight another aspect of the legal system—the process of judicial enforcement—that has implications for the human rights of Kashmiris.

abuses, it offers a process-centered approach that tracks how human rights claims travel through the legal system. Third, it proposes incremental recommendations targeted at Kashmiri actors that supplement those in previous reports, which have primarily been directed to the governments of India and Pakistan.

C. Methodology

This report is based on field research conducted during the spring of 2007 in Indian-administered Kashmir, primarily Srinagar. More than twenty interviews were conducted with lawyers, judges, government officials, human rights advocates, victims, journalists, and politicians. The report also relies on legal documents and records of judicial proceedings compiled and maintained by local organizations. Although the research for this report uncovered many cases that suggest a pattern to legal breakdowns, the report relies on a core set of cases that are cited to support a number of propositions. These cases are well known and clearly illustrate the breakdowns discussed in the report. Some of them, including the murder of Jalil Andrabi[18] and the aftermath of the Chattisinghpora massacre,[19] have been comprehensively covered in previous reports. Yet, given their salience to the issue of *de facto* impunity, this report would be incomplete without examining them. For reasons of security and confidentiality, the sources of some information have been withheld in this report.

D. Overview of Abuses and Human Rights Standards

The pattern of legal breakdowns in Kashmir violates basic tenets of international human rights law. Litigants routinely ask the Kashmiri court system to respond to claims against security forces for human rights violations that include allegations of assault, torture, rape, extrajudicial killing, and arbitrary detention. In becoming a party to key international human rights treaties, India undertook to ensure that effective remedies were available to the victims of such human rights abuses.[20] As part of a remedy for gross human

[18] *See infra* note 48.

[19] *See infra* note 46.

[20] For example, India acceded to the International Covenant on Civil and Political Rights (ICCPR) on April 10, 1979. India agreed to undertake to:

> ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities . . . and to develop the possibilities of judicial remedy; [and] to ensure that the competent authorities shall enforce such remedies when granted.

rights violations, India may be required to effectively prosecute perpetrators.[21] Research for this report indicates that India fails to meet its international obligations in Kashmir. Government actors systematically fail to investigate claims, refuse to participate in investigations and prosecutions, and ignore the contempt orders of courts attempting to force their participation in proceedings concerning human rights claims. The Kashmiri court system is riddled with delays and backlogs that deny victims effective remedies. It also applies procedural double standards for claimants and the military that are favorable to the latter. By failing to ensure effective remedies to the victims of human rights abuses in Kashmir, India violates its international treaty obligations.

International law also gives all detained persons the right to challenge in court the lawfulness of their detention.[22] In Kashmir, detained persons may challenge their confinement by seeking a writ of habeas corpus, which requires the legal system to respond to claims of illegal detention.[23] India has ratified international conventions that require it to ensure that no one is subjected to arbitrary arrest or detention or deprived of liberty, except in accordance with grounds and procedures established by law.[24] India is also obligated under international human rights law to bring all detained persons before a judge "promptly" and to give all persons the right to trial "within reasonable time" or to release them.[25]

ICCPR art. 2(3). By signing (but not yet ratifying) the Convention Against Torture, India stated its intention to refrain from violating the objects and purposes of the treaty, one of which is to ensure that competent authorities promptly and impartially examine all alleged cases of torture. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 13.

[21] For example, the U.N. Human Rights Committee, which was established by the ICCPR to monitor compliance with the treaty, has required signatory states to effectively prosecute gross human rights abuses such as attempted murder, arbitrary detention, torture, and forced disappearance. *See* Chongwe v. Zambia, Communication No. 821/1998, ¶ 7, U.N. Doc. No. CCPR/C/70/D/821/1998 (Nov. 9, 2000); Vicente et al. v. Colombia, Communication No. 612/1995 ¶ 10 (1997); Rodriguez v. Uruguay, Communication No. 322/1988, ¶ 14 (1994); Tsiongo v. Zaire, Communication No. 366/1989, ¶ 7 (1993); Tachahua v. Peru, Communication No. 563/1993, ¶ 10 (1995). In several of these holdings, the Human Rights Committee rejected the states' arguments that disciplinary sanctions or monetary damages would suffice as an alternative remedy. *See* Bautista v. Colombia, Communication no. 563/1993, ¶ 8.2 (1995); Vicente v. Colombia, Communication No. 612/1995 ¶ 10 (1997) ("[P]urely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.").

[22] *See* ICCPR, art. 9(4).

[23] *See* Part III(a), *infra*.

[24] *See* ICCPR, art. 9(1).

[25] ICCPR, art. 9(3). The Human Rights Committee has reminded state parties to the ICCPR

The rights of detained persons are systematically ignored in Kashmir. The government disregards its own standards governing detention, refuses to honor court orders quashing detention, and exploits procedural impediments to avoid presenting detainees in court.[26] The court system is slow to process detainees' claims, and judges routinely fail to question the government's authority to detain. They also fail to issue contempt citations to government actors who ignore orders to release detainees. India violates its treaty obligations and basic principles of human rights law by detaining people for lengthy periods without allowing them an opportunity to effectively challenge their detention in court.

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that any delay in producing a detainee before a judge "should not exceed a few days." Human Rights Committee General Comment 8, ¶ 2. In one case that came before it, the Human Rights Committee held that a delay of one week from the time of arrest to the point at which the detainee was brought before a judge was incompatible with the ICCPR. McLawrence v. Jamaica, ¶ 5.6, U.N. Doc. CCPR/C/60/D/702/1996, Sept. 29, 1997.

[26] *See infra* notes 112-113.

Part II: The Legal System Fails to Respond to Claims Against Security Forces

A. The Legal Process for an Affirmative Human Rights

This section follows the trajectory of a human rights claim brought against security forces. It seeks to highlight the ways in which the legal system, primarily the judiciary, fails to respond adequately to such claims. Human rights abuses for which individuals seek legal relief include assault, torture, rape, extrajudicial killing, and arbitrary detention.[27]

Stage One: Filing of a First Information Report

The first step that victims or the families of victims must take to seek justice for abuses is to go to the local police station and request that the authorities file a First Information Report (FIR) about the alleged incident.[28] The FIR is an official police document that records information provided by a complainant regarding an alleged criminal act. There are no strict guidelines on who can ask the police to file an FIR—a victim, victim's family, witness, or concerned individual can approach the police. Section 154 of the Code of Criminal Procedure (CrPC) sets forth rules governing the process of filing an FIR. Section 154 requires that: a) information given orally must be converted into written form by the presiding officer; b) the statement of the informant must be read back to him after delivery; and c) the statement, whether given in writing or converted by the police officer, must be signed and authorized by the informant.[29] If the police refuse to file an FIR, victims may file a

[27] For further discussion of the range and nature of abuses committed in Kashmir, *see* Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir , *supra* note 14; Report on Human Rights Practices – India, *supra* note 14; Impunity Must End in Jammu and Kashmir, *supra* note 14; and Behind the Kashmir Conflict: Abuses by Indian Security Forces and Militant Groups Continue, *supra* note 15.

[28] Victims and their families may also file a claim for compensation with the State Human Rights Commission. The State Human Rights Commission (SHRC) was founded in 1997 and directly receives complaints alleging human rights abuses by the government. After receiving a victim's complaint, the SHRC can request the police to conduct an investigation of the alleged abuse. The resulting police report and findings are shared with the complainant. If the complainant accepts the accuracy of the report, the SHRC makes recommendations for compensation to the chief secretary of the state government, who then forwards the recommendation to the District Commissioner (DC). If the complainant disputes the accuracy of the report, the SHRC asks the police to re-investigate the issue and can, at its discretion, hold an evidentiary hearing before submitting its recommendation for compensation. The DC has the option of accepting the recommendation in full or in part or to disregard it altogether. The SHRC is a strictly recommendatory body with no power to enforce its orders.

[29] India Code Crim. Proc., ch. 20, § 154(1).

mandamus petition with the High Court,[30] seeking to compel the police to file an FIR. Because the vast majority of FIRs filed in Kashmir are written in Urdu or Kashmiri, these FIRs must be translated into English when the claims go to trial or are submitted to the central government for review.

Stage Two: Investigation and Arrest

Once the police have filed an FIR, and if the alleged offense falls within their jurisdiction, the police are required immediately to investigate "the facts and circumstances of the case, and if necessary, take measures for the discovery and arrest of the offender."[31] The police may decline to investigate only if the alleged offense is not serious enough to warrant investigation or if the alleged facts do not provide sufficient grounds for an investigation.[32] If the police decide not to conduct an investigation, they are required to immediately notify the party who requested the FIR, and the official police report must describe the reasons for the decision.[33]

Without the sanction of the federal government, the police are powerless to arrest or prosecute security forces accused or suspected of committing abuses. Section 7 of the Armed Forces Special Powers Act (AFSPA), which was extended to Jammu and Kashmir in 1990, provides that "[n]o prosecution, suit or other legal proceeding shall be instituted" against a member of the security forces "except with the previous sanction of the Central Government."[34] To apply for the central government's sanction to proceed with the arrest and prosecution of security personnel, Kashmiri police departments must submit a case file to the state home secretary, who forwards the request to the central Home Ministry.[35]

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[30] The Jammu and Kashmir High Court is the highest court within the state, subordinate only to the Supreme Court of India. The High Court is comprised of eight justices, including a Chief Justice, and rotates between Jammu and Srinagar based on the season. During the summer months (May to October), it is located in Srinagar, but it moves to Jammu during the winter (November to April). There are two levels of courts subordinate to the High Court: First, the District (civil cases) and Sessions (criminal cases) Courts are trial courts of original jurisdiction – each district, the primary subdivision of a state, has one of each. At the sub-district level, lesser civil cases are heard in Munsif courts and lesser criminal cases in Magistrate courts.

[31] India Code Crim. Proc., ch. 20, § 157 (1).

[32] India Code Crim. Proc., ch. 20, § 157 (1) (a), (b).

[33] India Code Crim. Proc., ch. 20, § 157 (2).

[34] Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, *available at* http://www.satp.org/satporgtp/countries/India/states/jandk/documents/actsandordinances/J&K_Specialpoweract.htm (last accessed July 10, 2007).

[35] The Home Ministry, also known as the Ministry of Home Affairs, exists at both the central and state level. The Home Minister is responsible for internal administration, including law and order affairs – thus, counter-intelligence and police matters fall under the Ministry's

Similarly, section 197 of the CrPC states that when officers of the central government are "accused of any offence alleged to have been committed by [them] while acting or purporting to act in the discharge of [their] official duty no court shall take cognizance of such offence except with the previous sanction . . . of the Central Government."[36] Section 45 of the CrPC places a more specific prohibition on the arrest of Armed Forces members; it requires that "no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government."[37]

Stage Three: Trial

If the central government consents to prosecution, the accused may be tried in front of the Chief Judicial Magistrate or Sessions Judge. Yet, even after the sanction requirement has been met, the accused can still invoke the AFSPA during trial as an affirmative defense by claiming that the abuse in question was an act carried out in good faith or was part of an official duty.[38]

B. Failures of the Legal Process

1. Procedural Impediments

Procedural impediments—both those inherent in the judiciary and those imposed by the executive and the military—undermine the ability of courts to respond effectively to human rights claims brought against security forces. This section tracks these procedural impediments in relation to the process for affirmative claims described in Section A.

Stage One: Filing of a First Information Report

Victims intending to seek legal remedies for human rights abuses are often prevented from filing an FIR by police officers who decline to issue one. A 1992 circular instructed Kashmiri police stations, contrary to the requirements of the Code of Criminal Procedure, to stop filing FIRs against security forces without the approval of higher authorities.[39] A human rights activist from southern Kashmir suggested that many of the hundreds of victims he has interviewed, particularly those from rural areas, are unaware of their legal rights and options and abandon legal recourse after the police

jurisdiction.

[36] India Code Crim. Proc., ch. 20, § 197.

[37] India Code Crim. Proc., ch. 20, § 145 (1).

[38] Interview with Senior Lawyer, *supra* note 11.

[39] Letter No: SP (5Exg/267881 dated 14.4.1992).

refuse to issue an FIR.[40] Another lawyer in Srinagar recalled a client who approached the police to request an FIR; the police denied the request and informed him that they would cooperate if he changed the FIR to name "unidentified gunmen," and not security forces, as the perpetrators.[41]

Stage Two: Investigation and Arrest

Even when the police file an FIR, a lack of cooperation from security forces often prevents the police from conducting a complete investigation.[42] Lawyers recounted conversations with police officers who complained that the disparity in rank between them and the military officers being investigated deprives them of the leverage needed to compel cooperation.[43] For example, Station House Officers (SHOs), low-ranking police officers who run the equivalent of a local precinct, are, in some cases, dispatched to investigate Army Commanding Officers. Lawyers interviewed for the report suggested that the success rate of human rights investigations could be increased if a Superintendent of Police (SP) or the Inspector General of Police (IGP) conducted investigations involving the army.[44]

Even if an investigation produces sufficient evidence to support prosecuting security personnel for alleged human rights abuses, the requirement that the central government approve any arrest or prosecution of a member of the security forces is likely to prevent prosecution. Victims encounter two kinds of hurdles. First, the police sometimes do not even make the request for central government approval. In one case, the police told a victim that they would not be able to forward the case to the State Home Secretary, the state official responsible for forwarding the case to the central government, because they did not have the resources to translate the paperwork

[40] Interview with Members of the Association of Parents of Disappeared Persons (APDP) in Srinagar (Mar. 20, 2007). For example, the police are bound to follow the procedure for issuing FIRs set forth in the Code of Criminal Procedure, and victims who are denied at this stage can seek to compel cooperation by filing a writ of mandamus.

[41] Interview with Senior Lawyer, *supra* note 11.

[42] This failure of the legal system is not limited to victims who seek legal remedies through the civilian legal process. Since the SHRC lacks an independent investigatory agency, they rely on the police to conduct factual investigations—thus, even victims who seek compensation or relief from the SHRC are affected by problems relating to the police investigation.

[43] Journalists and lawyers interviewed for the report suggested that police officers do not always investigate in good faith. Low-ranking police officers interacting with high-ranking army officials have an incentive to make a good impression in order to advance, or at least not hinder, their future career prospects.

[44] Interview with Senior Lawyer, *supra* note 11.

into English.[45] Second, the national Home Ministry may refuse to consent to arrest and prosecution. Human rights lawyers interviewed in Kashmir could recall only rare instances since the conflict renewed in 1989 in which the central government consented to prosecution. In cases in which the government had granted consent, generally, the crime was egregious, the evidentiary foundation strong, and the media attention high. In such cases—i.e., the Pathribal extrajudicial killing case,[46] the Sex Scandal case,[47] and the Jalil Andrabi murder case[48]—the government has approved the prosecution and the police filed a *challan* (charge sheet), which allows an arrest and prosecution to ensue.[49]

In the majority of cases submitted to the central government, according to several lawyers interviewed, the government does not formally deny the request to prosecute. Several lawyers cited the example of a boy from the district of Baramulla who was taken into custody by the army and killed. After an investigation yielded information implicating three army personnel in the killing, a request for sanction was submitted to the central government. The central government never responded to the sanction request; as a result, the three identified perpetrators were never arrested or tried in court.[50] Even in those limited cases in which the government officially denies the request, it typically does so only after many years.

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[45] Interview with Senior Lawyer in Srinagar (Mar. 18, 2007).

[46] Although the facts of the case are contested, media coverage suggests that there is consensus on the basic narrative: On March 21, 2000, unidentified gunmen slaughtered 36 Sikhs in the village of Chattisinghpora to coincide with the visit to India of U.S. President Clinton. Years later, Clinton wrote that he believed the attacks were carried out by Hindu militants. *See* Madeline Albright, The Mighty and the Almighty, vi (2006). Four days later, on March 25, 2000, five militants were allegedly killed by security forces in an encounter in Pathribal. In response to the encounter, which was widely perceived as a fake encounter, civilians took the streets in protest, and eight were killed in Brakpora when police opened fire on them on April 3, 2000. Under heavy public pressure, on April 7, 2000, the government exhumed the bodies, which were determined, through DNA testing, to be local residents—not foreign militants. All three events—Chattisinghpora, Pathribal, and Brakpora—are related. *See* "Fresh Probe into Sikh Massacre" BBC News, Nov. 1, 2000, *available at* http://news.bbc.co.uk/2/hi/south_asia/1001479.stm.

[47] For coverage of the Sex Scandal case from initial reporting to present legal status, *see* "Full Coverage: J&K Sex Scandal," Indian Express *available at* http://www.indianexpress.com/full-coverage/44.html (last accessed Dec. 2, 2007).

[48] For a comprehensive summary of the Jalil Andrabi murder case, *see* Everyone Lives in Fear, *supra* note 12, at Section IV (D) *available at* http://www.hrw.org/reports/2006/india0906/5.htm.

[49] In some of these cases, however, the central government or courts conducted their own investigations. For example, the central government authorized the Central Bureau of Investigation (CBI) to investigate the Pathribal killings, while the courts ordered a Special Investigative Team (SIT) to conduct an inquiry into the Andrabi killing.

[50] Interview with Mohammed Bhat, Lawyer, in Srinagar (Mar. 23, 2007).

In the few cases in which the sanction is granted, it is often after years of delay. In the Bashir Ahmed Mir murder case, the police investigation eventually resulted in a sanction request despite delayed proceedings that resulted from extension requests by the government counsel, Anil Bhan, on July 21, 1998, and October 3, 1998. On October 5, 2005, seven years after the request was forwarded to the central government, the petitioner received notice that the government had consented to the prosecution, and a trial date was assigned for later that month.[51] There is no formal legal mechanism for victims to challenge the central government's inaction or decision to deny its consent to the arrest and prosecution of a member of the security forces.

Investigations of alleged human rights abuses are not limited to cases in which victims have brought an affirmative claim against security forces. In fact, courts can, on their own initiative, order inquiries into human rights violations. Research conducted for this report revealed that courts rarely exercise this power. When they do, it tends to be in high-profile cases. There are two primary types of inquiries. The first type is a statutory inquiry that can be called under the Commission of Inquiry Act of 1962. These are rare; only three statutory inquiries have been called by the state government since 2000.[52] The second type is a judicial inquiry called by the High Court and conducted as an independent investigation by a District Judge or Chief Judicial Magistrate outside of his official capacity as a judge.[53] The scope of the inquiry power is limited, however; the District Judge or Chief Judicial Magistrate that is assigned to oversee the inquiry has the power only to solicit testimony and report findings, not to recommend action.[54] Lawyers interviewed for the report—both human rights lawyers and members of the Bar Association—expressed the view that the inquiries, whose recommendations are not binding, are used to pacify the public by giving the impression that the government is taking decisive action.[55]

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[51] Interview with Arshad Andrabi, Lawyer, in Srinagar (Mar. 20, 2007).

[52] The three instances of inquiries ordered under the Commission of Inquiry Act were in response to: (1) the Bragpura incident, which led to an indictment; (2) the Pathribal killings, leading to the Kuchey Commission's exhumation of the bodies for DNA testing; and (3) the Haigam firings on a procession protesting the Pathribal killings, which the commission found to be justified. *See* interview with Senior Lawyer, *supra* note 11; interview with Senior Lawyer, *supra* note 45.

[53] These types of inquiries are rare, but the High Court has ordered inquiries for the Sex Scandal case and the Jalil Andrabi murder case (by appointing a Special Investigative Team).

[54] Interview with Senior Lawyer, *supra* note 45.

[55] Interview with Senior Lawyer, *supra* note 11; interview with Members of the Jammu and Kashmir High Court Bar Association in Srinagar (Mar. 20, 2007).

Stage Three: Trial

Failure to Convict

Although information about the disposition of internal military investigations and trials is not available to the public, human rights lawyers unequivocally stated that they could not remember a single case in which security personnel were convicted and imprisoned for human rights abuses. Similarly, within the civilian legal system, there have been no convictions to date, even in the most high-profile cases in which the central government has granted sanction.

Human rights lawyers identified two factors that impede convictions. First, the military does not cooperate in handing over security force members for prosecution; in some cases, the military has taken active steps to prevent prosecution. In the Jalil Andrabi murder case, the alleged perpetrator, Major Avtar Singh, was transferred from Kashmir to a railway regiment located in Ludhiana, Punjab. When the court-appointed Special Investigation Team (SIT) attempted to arrest him in Ludhiana, the military denied his presence at the camp, despite documentation establishing that he was there.[56] Second, the failure of courts to hold trials and hearings in a timely fashion enables defendants to remain free for long periods pending a resumption of the legal process.

In the Sex Scandal case, a Kashmiri court initially denied the defendants' bail applications; after the case was transferred to Chandigarh, however, the new court granted the motion for bail, and, at the time of writing, the accused perpetrators remained free nearly a year after they were charged.[57] Similarly, after both the Sessions Judge and Chief Judicial Magistrate rejected the defendant's appeal in the Pathribal killings case, the High Court granted a hearing but did not set a date for it. Several lawyers interviewed for this report criticized this as a political decision. As a result, at the time of writing, the accused perpetrators remained free because their arrest and prosecution must await the resolution of their appeal, which had not been scheduled.[58]

[56] Interview with Senior Lawyer, *supra* note 45; interview with Journalist in Srinagar (Mar. 18, 2007); interview with Arshad Andrabi, *supra* note 51.

[57] Interview with Aijaz Hussein, Journalist, and Parvez Bukhari, Journalist, in Srinagar (Mar. 18, 2007).

[58] Interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55.

Granting the Option of Military Trial

Courts offer criminal defendants who are members of the security forces the option of removing their cases to military courts.[59] These courts martial are not transparent, as victims rarely learn of the results or findings. Judges sometimes permit defendants to transfer their cases from civil to military courts in the middle of their criminal trials. Human rights lawyers stated that the practice has continued despite a Jammu and Kashmir High Court ruling that offenses against civilians must be prosecuted in a civil court.[60] Lawyers interviewed for this report stated that defendants prefer a court martial because they expect greater leniency from a military court.[61] Allowing members of security forces to evade punishment by electing to be tried before military courts in this manner may violate international human rights law that requires access to an effective remedy for victims of human rights abuses.[62]

The lack of transparency in military trials leads to a lack of accountability. This is illustrated by a 1996 murder case in which an investigation identified four BSF soldiers as perpetrators; in 2000, the central government granted sanction for prosecution, but the Sessions Judge gave the defendants the option of a military trial. A BSF court assumed jurisdiction of the case in 2000 and contacted relatives of the victim in 2005, requesting them to testify as witnesses. However, the documents sent to the family at the time of the request revealed that two of the original four defendants had been replaced with new names—thus, two of

[59] For example, in the Jalil Andrabi murder case, the Sessions Judge in Budgam, Judge Hari Om, offered the defendant's lawyers the option of proceeding in a court martial; the lawyers accepted the offer. *See* interview with Arshad Andrabi, *supra* note 51. In the Bashir Ahmad Mir case, even when the central government granted sanction seven years after the police submitted the request, the police never filed a *challan*. The case was taken up by a Border Security Force court, and, at the time of publication, the victims had still not heard from the government or BSF. *See* interview with Arshad Andrabi, *supra* note 51.

[60] Interview with Senior Lawyer in Srinagar, *supra* note 11.

[61] *See, e.g.*, Interview with Javed Mohammed Huba, Lawyer, in Srinagar (Mar. 22, 2007).

[62] *See, e.g.*, *supra* note 20. The U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions has expressed concern that "trials of members of the security forces before military courts . . . [enable them to] evade punishment because of an ill-conceived *esprit de corps*, which generally results in impunity." Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, UN Doc. A/51/457, at para 125, 7 October 1996. The U.N. Human Rights Committee has echoed this concern. *See* Human Rights Committee Final Report on Lebanon, UN Doc. CCPR/C/79/Add.77, para.131. Furthermore, according to the Human Rights Committee, the ICCPR requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to such individuals, the obligation to provide an effective remedy is not discharged. Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 16, 26 May 2004.

the original perpetrators had been removed from the legal proceeding. Later, the BSF court notified the family that all four defendants—both the two originally charged and the two added later—had been acquitted.[63]

Influence of Intelligence Agencies in Judicial Appointments and Transfers

In addition to the formal requirements for judicial nominees to the High Court, unofficial requirements regarding loyalty to the government and commitment to national security interests clearly play an important role in the appointment of judges.[64] According to a former judge of the High Court, the Jammu and Kashmir High Court's Chief Justice is responsible for recommending candidates for appointment as High Court judges. Each recommendation is approved by the Governor and Chief Minister, state law department, and Chief Justice of India before being sent to the Home Ministry, where the CBI, CID, and other intelligence agencies vet the candidate. Lawyers and judges interviewed for the report stated that the Intelligence Bureau (IB) and Counter-Intelligence Kashmir (CIK), in particular, review Kashmiri nominees.[65] If candidates' nominations are approved by the intelligence agencies, they are sent back to the Chief Justice of India, who forwards them to the Prime Minister and the President of India, who formally appoint them.[66]

There was near unanimous consensus among the lawyers and journalists interviewed for this report that, as a punitive measure, the executive transfers judges who are routinely sympathetic to human rights claims. Lawyers repeatedly mentioned two examples of punitive transfer: Bilal Nazqi, who was transferred to a court in Andhra Pradesh, and Bashir Ahmed Khan, who was transferred to Madhya Pradesh. Both judges were transferred in 1997, soon after they issued separate orders that were adverse to the government position in the Jalil Andrabi murder case.[67] However,

[63] Interview with Arshad Andrabi, *supra* note 51.

[64] Interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55; interview with Justice Kawoosa, Chairman of the State Human Rights Commission, in Srinagar (Mar. 22, 2007). There is a strong perception amongst lawyers—both independent human rights attorneys and those affiliated with the Bar Association—that while the judicial selection process tends to block judges sympathetic to human rights from reaching the bench, even those sympathetic judges who do make it through are forced to moderate their views because their career advancements and promotions depend on their track record from the bench. These pressures do not cease after judges retire, as they continue to jockey for other positions in government commissions and inquiries.

[65] Interview with Justice Kawoosa, *supra* note 64; interview with Senior Lawyer, *supra* note 45.

[66] Interview with Justice Kawoosa, *supra* note 64.

[67] Interview with Arshad Andrabi, *supra* note 51.

Bashir Ahmed Khan's eventual appointment as the Acting Chief Justice of the High Court in 2005, and later as the Chief Justice, suggests that the reality of punishment may be less extreme than the conventional perception among lawyers. Nevertheless, several lawyers and a former judge stated that the Chief Justice regularly makes decisions about transfers in consultation with intelligence agencies.[68] A group of human rights lawyers suggested that although sympathetic judges are not always permanently transferred, they are sometimes transferred for short periods. Those lawyers recalled cases of their own in which sympathetic judges were transferred for just one week; as a result, the judge hearing the case missed a specific hearing and another judge, more sympathetic to the government position, presided.[69]

2. Cause and Effect of Judicial Delays

Under international law, victims of human rights abuses who bring claims against members of security forces have the right to an effective remedy.[70] Although minor delays in the judicial process do not necessarily threaten the ability of victims to obtain a remedy, significant delays and the cumulative effect of multiple minor delays may undermine the effectiveness of available remedies. All of the human rights lawyers interviewed for this report maintained that the courts in Kashmir routinely permit defendants in the security forces to extend and delay the judicial process for long periods of time without justification. For example, a case against police officers accused of wrongfully arresting a group of protestors under TADA in 1987 has been pending for more than nineteen years. In that time, sixteen of the forty-six protesters who were wrongly arrested have died.[71] Such an egregious delay effectively means that victims of human rights abuses do not obtain a remedy.[72] These types of inordinate delays create evidentiary problems, frustrate and fatigue victims and sap them of their faith in the system, deter claims by other victims, undermine the legitimacy of the judiciary, and reinforce a culture of impunity.

Because courts may have legitimate reasons to grant extensions, human rights lawyers in Kashmir face a challenge in trying to prove that excessive delays violate their clients' human rights.[73] Identifying the point at which

[68] Interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55.
[69] Interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55.
[70] *See* Part I, *supra*.
[71] Interview with Arshad Andrabi, *supra* note 51.
[72] *See also* Naseema case OWP No. 896/2006 ("[A]ccording to [Respondent's] statement[,] . . . the investigation of the case was taken up in the year 1993 and more than 13 years have passed[;] yet no action has been taken . . . .").
[73] Interview with Mohammed Bhat, *supra* note 50 ("Yes, sometimes . . . during the proc-

additional delays deprive victims of potential remedies, including judicial relief, is difficult. Many litigation tactics employed by the government are, viewed in isolation, perfectly reasonable. However, they become problematic when either the tactics are intentionally designed to deprive victims of a remedy or the cumulative effect of the tactics is to deny remedies as a practical matter. Most of the human rights lawyers interviewed stated that the delays in judicial proceedings have two causes: first, the government engages in a practice of strategically delaying the judicial process; second, courts in individual cases rarely deny the government's requests or hold the government accountable for unlawful delays. These mechanisms cause delays so lengthy that they may violate international human rights standards concerning a speedy trial and the right to a remedy.

The impact that such delays have is evident from the record of the Jalil Andrabi murder case. The Jammu and Kashmir High Court granted a government request for an extension from November 26, 1998, to September 8, 2000, to produce Major Avtar Singh's personnel file. After the government originally failed to produce the file, the court subsequently adjourned the matter for twenty-one months.[74] Without any public justification, the government stopped progress on the case until it finally produced the personnel information.[75] The court's willingness to grant extensions and adjourn the matter in the Andrabi case caused a multiple-year delay in the proceedings—a deprivation of the right of victims to a remedy.

A group of human rights lawyers provided another clear example of how government requests and judicial complicity delay and deny the administration of justice. They recalled a case in which a judge granted the security forces' request for a four-week extension on the grounds that the government attorney did not have the postage stamps he needed to send the report on time.[76] Decisions like these have created a perception that the judicial process is not a viable avenue to pursue remedies for human rights violations. One attorney of the Bar Association explained the mounting frustration with the judiciary: "What contributes to the backlog are the host of adjournments and extensions that prevent cases from being completely disposed of. The court is a tool of exhaustion and forces you to concede on its terms."[77]

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ess . . . [as a] complainant [needing] to produce evidence, you have to get witnesses, [and] depend[ing] on how long you need, [you] can get extension[s].").

[74] Interview with Arshad Andrabi, *supra* note 51.

[75] Interview with Arshad Andrabi, *supra* note 51.

[76] Interview with Shafat Ahmad, Lawyer, in Srinagar (Mar. 21, 2007).

[77] Interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55.

The appeal process presents more opportunities for the government and courts to delay victims' access to a remedy. In the Pathribal case[78] in 2006, the CBI filed a *challan* against security officers; the officers then filed a motion claiming that they had a right to a court martial. The Chief Judicial Magistrate, Mohammed Yusuf Akhoon, rejected the request, and the officers' appeal was denied by Sessions Judge Nissar. However, Justice J.P. Singh of the Jammu and Kashmir High Court effectively stayed the case by ordering a hearing on the motion that the lower courts had denied. Despite ordering a hearing, Justice Singh has not scheduled a date for the hearing, which has resulted in the case being stalled as of the time of publication.[79] Those charged with the crimes remain free. When a reversal of a lower court decision leads to an indefinite interruption of proceedings, it may unlawfully deprive victims of a remedy.

Although the government necessarily relies upon the courts to rule favorably upon requests for extensions, courts also make independent decisions that lead to human rights violations. Courts, for example, sometimes fail to decide issues that have been brought before them. According to one attorney,[80] a petition challenging the Jammu and Kashmir Public Safety Act has remained undecided for three years. The petition was filed by a number of people accused of giving shelter to foreign militants who had detonated an improvised explosive device near Qazigund. The charge brought against the petitioners made them eligible for the death penalty. The court held a summary trial, despite the provision in the Code of Criminal Procedure that limits summary trials to cases in which the potential punishment is less than two years.[81] Although the backlog of cases in the Indian judicial system often results in cases not being decided for long periods of time, this type of delay—three years, in this case—on a critical issue is unusual. According to one lawyer, the court may be avoiding ruling in this case, because it cannot find a legal foundation on which to uphold the decision but does not want to strike down the law and thereby compel the release of 2,000 detainees.[82] In the highly sensitive national security context of Kashmir, judicial delay may be due to more than the government's efforts to keep cases against security forces

[78] For factual history of the case, *see supra* note 46.

[79] The President of the J&K High Court Bar Association asserts that there is no justification for the court's actions and that the court does not intend to ever hold a hearing. Interview with Mian Qayoom, President of the Jammu and Kashmir High Court Bar Association, in Srinagar (Mar. 23, 2007).

[80] Interview with Syed Tassaduq Hussein, Lawyer, in Srinagar (Mar. 18, 2007).

[81] India Code Crim. Proc., ch. 21, § 260 (c)(1).

[82] Interview with Syed Tassaduq Hussein, *supra* note 80.

from moving forward; courts may be acting on their own initiative to avoid appearing to be undermining national security.

Unjust delays create obstacles to determining liability and providing effective remedies to victims. As time between an alleged violation and a trial passes, the likelihood that evidence will be lost, witnesses will forget details, and suspects will be untraceable grows.[83] A number of examples illustrate the complications that arise from long delays in the judicial process in Kashmir.

Delay may allow a known suspect to escape the jurisdiction of the state. In the Jalil Andrabi murder case, the failure to swiftly charge and apprehend Major Avtar Singh after he was identified as a key suspect enabled him to leave India and escape prosecution.[84] Because gathering evidence against the accused years after the incident is difficult, delays can also make it more difficult to prove a defendant's guilt; further, given the constant movement and transfers of military personnel and units, the inaccessibility of witnesses and defendants further undermines successful prosecution. In one case, filed in 1990, the government did not carry out an official inquiry into the allegations until 2004. The inquiry found that two members of the army were responsible for the crime. In response to the victim's petition against these individuals, the state claimed that one of the accused was on leave at the time of the crime and the other was not posted in the region where the crime occurred. Since so much time had passed since the time of the violation, the victim was unable to point to, and the state was unable to locate, evidence or witnesses to rebut the army's assertions.[85]

3. Judicial Failure to Enforce Orders

The victim's right to an effective remedy requires that the remedy be enforced and implemented by state authorities. Courts possess a wide range of enforcement powers that they can wield to compel cooperation and compliance with their orders. The failure to exercise these powers when state authorities are intransigent is an abdication of judicial duty and often results in a denial of the right to an effective remedy. Although the courts do not bear full responsibility for the failure to make rights effective, the judiciary's

[83] In the habeas context, the High Court has recognized that evidence collected after the passage of many years lacks credibility. *See* Abdul Aziz Dar. v. State of Jammu & Kashmir ("It was also pointed out that there was no evidence on record to substantiate the allegations leveled against the accused persons and after a lapse of nineteen years there is no chance of any credible evidence to come before the court.").

[84] *See supra* note 48.

[85] Interview with Members of the Centre for Law and Development in Srinagar (Mar. 20, 2007).

failure to do what is in its power contributes to the culture of impunity in Kashmir. The judiciary has often failed to fully exercise its powers in cases in which human rights violations have been committed by state forces responsible for ensuring India's national security.

The state's failure to comply with court orders is a fundamental impediment to protecting the right to a remedy. Every human rights attorney interviewed for this report noted that the state rarely complies with court orders and that the courts rarely use the full ambit of their authority to bring the state into compliance. In the Abdul Rashid Beigh disappearance case, for example, the government failed to comply with two High Court orders requiring compliance with an SHRC decision recommending that the state open an FIR and pay Mr. Beigh *ex gratia* relief[86] for the disappearance of his son.[87] As of March 2007, the state had not paid Mr. Beigh.

In the Jalil Andrabi murder case, the Jammu and Kashmir High Court ordered the SIT to arrest Major Avtar Singh before filing a *challan*. The SIT disregarded the order and, without Singh in its custody, filed a *challan* with Judge Hari Om in the criminal court. Despite the High Court's order, Judge Hari Om accepted the *challan*. Attorney Arshad Andrabi filed a petition with the High Court asking it to require the criminal court to follow the original High Court order, but the court declined.[88] Major Singh evaded custody and, because the government also failed to comply with court orders that prohibited the validation of travel documents for Major Singh, left the country for Canada.[89] The court imposed no sanction on the state for its failure to comply.

The state also commonly fails to comply with judges' orders to produce the accused in court. In the Jalil Andrabi murder case, the army claimed that it could not determine the location of the accused, Avtar Singh.[90] Eventually, the SIT discovered Singh's location but failed to arrest him. Similarly, in the Pathribal case, the state presented the commanding officer of the accused, instead of the accused himself, thus precluding direct examination of the defendant and an assessment of his credibility.[91] The failure to present the

[86] *Ex gratia* relief is money the state pays a victim without recognizing any liability for the harm being relieved.
[87] *See* SHRC order (on file with the Lowenstein Clinic for International Human Rights, Yale Law School). The Division Bench reduced the order from five to two lakh rupees on appeal.
[88] Interview with Arshad Andrabi, *supra* note 51.
[89] Interview with Arshad Andrabi, *supra* note 51.
[90] Interview with Arshad Andrabi, *supra* note 51.
[91] Interview with Mian Qayoom, *supra* note 79.

accused prevents the judicial process from functioning properly and contributes to the failure to provide remedies to victims of human rights abuses.

The Kashmiri judiciary is not powerless when the state fails to present the accused. The state failed to present the accused in the Handwara case even though the judge had summoned the army and the victims' families to court for a hearing on the deaths of several school children killed by armed forces. A magistrate judge's order noted that

> the Captain and Army personnel of 33 RR . . . against whom prima-facie material appeared, were called up to appear, either in person, or through Advocate/s to explain their conduct and submit statements in their defence on affidavits and supporting materials, besides, oral evidence in support of their defence. Neither statements in defence to explain their conduct, nor oral evidence was produced by the army personnel . . . .[92]

Rather than appearing and providing a defense, the attorneys for the state filed a second application challenging jurisdiction. Although the court rejected the state's jurisdictional challenge,[93] the state continued to disobey the court's order to produce the accused. The inquiry officer did not abandon the inquiry and stated:

> As regards intention of the army not to participate in the inquiry is concerned [sic], it is rather unfortunate and sad. Had the army participated in the inquiry, it could have put forward its version regarding the incident of firing but having chosen not to do so, it has lost an invaluable opportunity of putting forward its defence. The inquiry shall now go ahead . . . [94]

In this case, the inquiry officer moved the process forward despite the government's unwillingness to participate. It remains to be seen whether the victims will be able to secure a remedy or the process will break down at another point.

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[92] Order by District & Sessions Judge Syed Tariq Ahmad Naqshbandi announced December 13, 2006 in Dodipora Incident.
[93] Order by District & Sessions Judge Syed Tariq Ahmad Naqshbandi announced December 13, 2006 in Dodipora Incident.
[94] Order by District & Sessions Judge Syed Tariq Ahmad Naqshbandi announced December 13, 2006 in Dodipora Incident.

Judges experience real and perceived constraints in their ability to follow up on the implementation of their orders. A judge in Kashmir explained that getting compliance is difficult because the court does not have the resources or capacity to ensure that every single judgment is followed.[95] Judges often receive assurances from the police that an order is being implemented. According to a judge interviewed for this report, a judge might not be aware that there has been a failure to comply with the order, unless the petitioner brings another claim.[96] Such admissions of ignorance concerning the implementation of court orders are a testament to the ineffectiveness of courts in ensuring compliance by other branches of the government.

Courts possess tools to obtain information and enforce orders to bring about state compliance. In particular, courts can hold state actors in contempt and enforce contempt petitions with imprisonment and substantial fines. The Contempt of Court Act gives the High Court the authority to imprison or fine individuals who do not comply with the court's orders.[97] Although this legislation provides the court with a potentially powerful tool to ensure compliance with its orders and the court sometimes issues orders of contempt, few members of the security forces are punished for failure to comply with High Court orders.[98]

Courts also possess the inherent authority to prohibit specific executive actions. This power of the court can be a potent enforcement tool in human rights litigation. For example, in the Jalil Andrabi murder case, the court intervened to prevent individuals in the government from giving instructions to the SIT. According to the court's order,

> the Special Investigating Team is directed not to take any instructions from anybody in the Government pertaining to investigations of the case. The instructions shall be taken only from this court and no final conclusions shall be arrived at by the Investigating team, without first making a report to this court.

Orders like this enable the court to control the judicial process. However, courts have largely failed to take similar actions in other cases to stop illegal executive activity.

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[95] Interview with Justice Kawoosa, *supra* note 64.
[96] Interview with Mohammed Bhat, *supra* note 50.
[97] The Contempt of Courts Act, 1971, (12) *available at* http://www.nwmindia.org/Law/Bare_acts/contempt_act.htm.
[98] Interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55.

4. Lack of Impartial Judicial Decisionmaking

In adjudicating human rights claims against members of the security forces, the Kashmiri judiciary often grants procedural and substantive leniency to the government. Kashmiri courts have accepted frivolous motions and justifications for procedural failures presented by the government and military. They have effectively created procedural double standards for claimants and the military.

A lawyer who has practiced in the Jammu and Kashmir High Court recalled a case in which the police failed to forward a request for sanction to the State Home Secretary, because they were unable to procure a translator to translate the document.[99] Another attorney described a case in which the High Court instructed the police to file *challans* in the criminal court against four BSF soldiers accused of murder but accepted the BSF's claim that, since the four soldiers were working, they could not appear in court.[100] A group of human rights lawyers recalled a case that they litigated in which government lawyers justified their failure to file their objections by claiming that they had no stamps. The human rights lawyers noted another case in which the court granted the government defendants an extension on a filing deadline because an official was not available to sign documents that the defendants needed to file.[101]

Kashmiri courts have routinely accepted the government's substantive arguments even when they are facially invalid or lacking in proof. A group of human rights lawyers alleged that in the case of the Naseema disappearance,[102] the court accepted the government lawyer's narrative of events, which denied that the 75 Battalion of the BSF was in Tekipora during an alleged abduction, despite the production of a battalion document showing that the battalion was indeed in the area on the night of the abduction.[103] A Bar Association lawyer recalled a case he litigated in which the court accepted the military's accusations that the victim had attempted to escape from detention, despite military records showing that the victim had been lodged in the government hospital on the day of the alleged escape.[104]

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[99] Interview with Senior Lawyer in Srinagar, *supra* note 45 (referring to the Javaid Ahmed Magrey case).
[100] Bashir Ahmed Mir case. *See* Interview with Arshad Andrabi, *supra* note 51.
[101] Interview with three Members of the Centre for Law and Development in Srinagar, *supra* note 85.
[102] Naseema case OWP No. 896/2006.
[103] Respondent's Objections to OWP 896/2000.
[104] Interview with Shafkat Hussain, Lawyer, in Srinagar (Mar. 23, 2007).

Part III: The Legal System Fails to Respond to Habeas Corpus Petitions

A. The Process for a Habeas Corpus Petition

The Indian Constitution gives the Supreme Court and the High Courts the power to "give appropriate relief," including writs of habeas corpus, "to a person who is found to have been detained illegally."[105] Habeas corpus petitions are usually filed with the High Court, which has original jurisdiction to hear such cases.[106] In the early 1990s, the Jammu and Kashmir High Court set aside each Tuesday and Friday to hear habeas corpus petitions exclusively; the court now reserves only Tuesday of each week to hear habeas corpus petitions and has also begun hearing other kinds of matters on that day.[107] Official court records show that over the last two years, the High Court has decided between seventy and eighty habeas cases a month, although thousands of detainees are in jails and the court has a backlog of several hundred habeas cases.[108] Victims can file habeas corpus petitions in response to both illegal detentions and disappearances. However, as explained below, the legal bases for seeking habeas relief for detentions and disappearances are distinct.

1. Filing a Habeas Corpus Petition for Illegal Detention

Individuals arrested on militancy-related suspicions are detained primarily under the Jammu and Kashmir Public Safety Act (PSA). The PSA allows two-year preventive detention without trial for individuals "acting in any manner prejudicial to the security of the state or the maintenance of public order."[109] The District Magistrate[110] has the authority to approve detentions under the PSA. The District Magistrate evaluates the police's detention

[105] Constitution of India, art. 32; Constitution of India, art. 226.
[106] Although habeas cases can be taken directly to the Supreme Court under Article 136 of the Indian Constitution, all the Kashmiri human rights lawyers interviewed have routinely filed their habeas petitions with the High Court.
[107] Interview with Senior Lawyer, *supra* note 11; interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55. If the habeas matter is urgent, however, it can be listed on the supplementary docket and heard by the court on any day of the week.
[108] Interview with Senior Lawyer, *supra* note 11; interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55. For backlog statistics, *see* Jammu and Kashmir High Court, *Pendency Statistics*, *available at* http://www.jkhighcourt.nic.in/penstat.html (last visited May 8, 2008).
[109] Jammu and Kashmir Public Safety Act (1978).
[110] There are fourteen District Magistrates in Kashmir, one for each district. Each District Magistrates also holds the post of Divisional Commissioner.

request in light of the sufficiency of evidence and issues an order that details the grounds for detention and stipulates the period of detention.[111]

To challenge the legality of detention by the government, a victim must file a *constitutional* habeas petition under Section 103 of the Jammu and Kashmir Constitution, which is an analog to Section 226 of the Indian Constitution. Constitutional habeas petitions challenge detentions by government agents that are made pursuant to authority provided by law—for example, detentions purportedly authorized under the PSA—as opposed to clearly non-legal detentions such as kidnappings or disappearances. Thus, constitutional habeas petitions filed against the state seek to challenge the *grounds* of detention carried out under the authority of law; they are filed only when an individual is known to have been detained by government agents.

The Indian Supreme Court, in *D.K. Basu*, held that habeas proceedings are of urgent importance because they involve matters of liberty. The Court articulated a series of guidelines governing how courts are to handle habeas proceedings, emphasizing the need to minimize delay and adjudicate immediately.[112] Lawyers consistently reported that the *D.K. Basu* guidelines were not being followed in Kashmir. The government also rarely follows the guidelines set forth in statutes governing preventive detention, despite a Supreme Court holding requiring that statutes that "provide[ ] for preventive detention are to be strictly followed, substantively as well as procedurally, and any deviation there from [sic] renders the detention illegal."[113]

2. Filing a Habeas Corpus Petition for Disappearances

To initiate an inquiry into a disappearance,[114] a *statutory* habeas petition must be filed in the High Court under Section 491 of the Code of Criminal Procedure, which provides for the filing of habeas petitions for extrajudicial detentions.[115] In response to these petitions, the state generally denies knowledge of the purported detainee. As a result, lawyers for

[111] Interview with Senior Lawyer, *supra* note 11.

[112] *See* Basu v. State of West Bengal, 2 LRC 1 (1997).

[113] *See* Rajesh Gulate v. Govt. of NCT of Delhi, 7 SCC 129 (2002).

[114] Families of victims can, in addition to filing a statutory habeas petition, request the police to issue a "Missing Persons Report." Such a report only documents that the person is missing and is not the basis for any legal action.

[115] These types of detentions include detentions by private actors and by the government when it acts outside the color of law or without an explicit detention order or explicit legal basis. A constitutional habeas petition would not be appropriate here, because there are no legal grounds of detention to challenge. Disappearances are extrajudicial; that is, they are not executed under the authority of any law.

petitioners must formally request a judicial inquiry. The judge leading the inquiry sends the findings to the High Court, which can either direct the police to file an FIR against the security forces or, if there is sufficient evidence of the state's responsibility for the disappearance, order the government to pay compensation to the victim's family for disappearance or death. The High Court has ordered district-level judges to oversee inquiries in more than 150 cases since 1990.[116] Human rights lawyers estimate that in nearly all of these inquiries, the Army was found to have disappeared the individual(s) in question; although official statistics are not available, lawyers suggested that victims received compensation in only a few cases, and the police filed an FIR in even fewer cases.[117]

3. Court Process for Habeas Corpus Petitions in Both Detentions and Disappearances

After a victim's representative files a habeas corpus petition, the High Court holds a hearing to determine whether the petitioner has been detained in violation of his or her constitutional rights. If the High Court finds a violation, it can issue an order of release to the prison authorities. In response to High Court orders for the release of those detained under ordinary suspicion, unrelated to national security, the government usually releases the detainees. For detainees who are political activists or detained under suspicion of terrorism or other security-related activities, however, prison authorities routinely ignore the orders quashing detention.[118] In such a case, instead of releasing the detainee, the government often issues a fresh detention order on new grounds, often listing the detainee as a suspect in an ongoing "open case"—a pre-existing but separate criminal case.[119] In the rare cases in which detainees' lawyers have persisted, judges have demanded that the government produce the detainees in court so they could be released publicly.[120] If the prison authorities do not comply with a High Court order quashing a detention, the legal recourse for a victim is limited to filing a contempt petition with the High Court to seek to compel release.

4. Contempt Proceedings

A petitioner initiates contempt proceedings by filing a motion for contempt with the High Court. The court then informs the government of the charge. More often than not, the government does not respond and the

[116] Interview with Senior Lawyer, *supra* note 11.
[117] Interview with Senior Lawyer, *supra* note 11; interview with Senior Lawyer, *supra* note 45.
[118] Interview with Senior Lawyer, *supra* note 11; interview with Shafat Ahmad, *supra* note 76.
[119] Interview with Senior Lawyer, *supra* note 45; interview with Shafkat Hussain, *supra* note 104.
[120] Interview with Senior Lawyer, *supra* note 45; *see generally* Khalida Akhtar case.

proceeding stalls there. A human rights lawyer stated that in one of his cases, a judge refused to accept the motion for contempt, telling the lawyer that it was a fruitless exercise since the government was unlikely to comply and that issuing the order would harm the judge's own political prospects.[121]

If the government responds to the contempt notice, the court conducts a hearing in which the petitioner must present proof of the order quashing the detention, proof of service of the order, and a written demand for compliance. If the court finds that the petitioner has established a plausible case of contempt, based on the submitted documents, it directs the government to file a reply demonstrating why it should not be found in contempt. If the government sufficiently rebuts the allegations, the court holds a second hearing on the merits of the claim. A recent Human Rights Watch report found that there were "no cases in which officials held in contempt of court have been jailed or fined for failing to respond in a timely manner to a court order in a habeas corpus case or for failing to release a detainee pursuant to a court order in Jammu and Kashmir."[122]

B. Failures of the Legal Process

The nature of the conflict in Kashmir, in addition to problems in the legal process generally, contributes to the difficulty of securing redress for detainees. First, the number of government-related and militant groups operating makes it difficult to ascertain precisely who has detained the individual in question.[123] Second, security forces rarely hold detainees in jails, instead preferring to hold them at interrogation centers and military camps throughout Kashmir, where the detention is not documented; as a result, families of victims often do not know whether the missing person is detained.[124] Although significant responsibility lies with the security forces, the judicial system compounds the problems that habeas petitioners face in obtaining relief.

1. Procedural Impediments

This section seeks to identify problems in the legal process that prevent individuals from successfully using habeas corpus petitions to obtain relief from unlawful detention or information about disappeared persons.

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[121] Interview with Senior Lawyer, *supra* note 11.

[122] Everyone Lives in Fear, *supra* note 12.

[123] Interview with Senior Lawyer, *supra* note 11; interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55.

[124] Interview with Senior Lawyer, *supra* note 11; interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55.

Initial Breakdowns: Detention Orders and Access to Courts

Legal authorities routinely grant the military broad discretion for its decisions to detain people. District Magistrates often "rubber stamp" detention orders without scrutinizing the military's claims. A group of human rights lawyers recounted that a magistrate, when pressured by lawyers to explain his decision to certify a detention order for a journalist, claimed that he did not know what he was signing at the time.[125] Other cases indicate that magistrates approve detention orders without determining the nature of the threat posed by the detainee.[126]

When Kashmiris file habeas corpus petitions, technicalities related to jurisdiction often cause extended delays. Human rights advocates from South Kashmir, primarily near the Banihal region, allege that because of the large military presence and lack of media attention, it is difficult to bring human rights-related cases in the local courts. Potential litigants are too afraid to approach the legal system, and there are few, if any, lawyers willing to take up their cases.[127] As a result, even though residents of that region fall under the jurisdiction of the Jammu courts, they file their cases in Srinagar because of a more sympathetic community of lawyers. However, cases from the Jammu courts filed in Srinagar must be heard by the Chief Justice of the High Court.[128] The Chief Justice's busy travel schedule, dual Jammu and Kashmir duties, and ceremonial responsibilities contribute to delays of months before the Chief Justice is able to hear such petitions.[129]

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[125] Interview with Shafat Ahmad, *supra* note 76.

[126] In the *Mohammad Ramzan Dar* case, Justice Hakim Imtiyaz Hussain held: "Perusal of the record would sow [sic] that the grounds of detention is almost a verbatim copy of the dossier submitted by SSP to the District Magistrate and that the District Magistrate, has mainly based his satisfaction on said dossier. Reproduction of dossier of police in verbatim in the grounds of detention would show that the detaining authority has not applied its mind to the facts of the case nor has considered any other relevant material for the purpose." Judgment, J&K High Court, HCP No. 153.06 (4.8.2006). In the Tanveer Ahmad Salay case, Justice Hussain similarly found that "[p]erusal of the record would show that the grounds of detention is a verbatim copy of the dossier of SSP of Police." Judgment, J&K High Court, HCP No. 421/2005 (18.7.2006). Justice Hussain reached the same conclusion In the Abdul Majid Sofi case—"[P]erusal of the record would show that the grounds of detention . . . is a verbatim copy of dossier of Sr.Superintendent [sic] of Police Baramulla submitted to the District Magistrate." Judgment, J&K High Court, HCP No. 422/05 (18.7.2006).

[127] Interview with Members of APDP, *supra* note 40.

[128] Interview with Members of APDP, *supra* note 40.

[129] Interview with Members of APDP, *supra* note 40.

Circumvention of Due Process

The Indian Constitution requires arresting agencies to bring a detainee before a judge within twenty-four hours of the arrest and to file a charge sheet before the matter can proceed to a trial.[130] When security forces suspect an individual of belonging to a militant group, the government detains him or her under the Public Safety Act (PSA), which limits the process to which detainees are entitled. During the height of the insurgency, PSA detentions accounted for more than half of the total number of detainees in Kashmir.[131] Due to delays in the Kashmiri courts – resulting from case backlog or intentional government tactics – many habeas corpus petitioners, detained under the PSA or otherwise, do not receive a ruling on their petitions until *after* their detention period has elapsed.[132]

The government routinely fails to comply with even the PSA's minimal protections. For example, although Section 10(b)(2) of the PSA provides that "detenues who are permanent residents of the State shall not be lodged in jails outside the State," imprisonment outside the state is a common practice.[133] Human rights attorneys explained that the government sometimes jails individuals outside of the state and claims that logistical impediments prevent production of the detainee in court.[134] The newspaper *Greater Kashmir* reported on May 16, 2006, "For want of escorts (and at times transport) the detainees are not produced in the courts on hearing days. Thus the trials make no headway and are protracted indefinitely."[135] Section 13 of the PSA requires that detainees be notified of the grounds of their detention; however, grounds are often not provided or are vague and in a language incomprehensible to the detainee.[136] In the Suhail Ahmad Kataria detention case, security forces held the detainee under the PSA for more than eighteen months before producing him in court – despite

[130] Indian Constitution, art. 22, cl. 1-2; interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55.

[131] United States Department of State, Report on Human Rights Practices – India (March 1996), *available at* http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_sasia/India.html. As of 2007, despite allegations that thousands of detainees were booked under the PSA, the State Government declared that only 272 PSA detainees were then lodged in Kashmiri jails. "Azad Says Only 272 Under PSA in Kashmir Jails," Kashmir Observer, Jul. 21, 2007, *available at* http://www.kashmirobserver.com/index.php?id=2945.

[132] Interview with Senior Lawyer, *supra* note 45.

[133] Interview with Mian Qayoom, *supra* note 79.

[134] Interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55. For discussion of "open cases," *see* text accompanying *supra* note 119.

[135] *SHRC Recommendations*, Greater Kashmir, May 16, 2006.

[136] Jammu and Kashmir Public Safety Act, sec. 13; *see also* Everyone Lives in Fear, *supra* note 14. The grounds for detention are provided in English, a language that most detainees do not understand.

the court, in response to a habeas petition filed by his lawyer, having issued more than sixty orders demanding his production.[137] In the case of Khalida Akhtar, after the High Court granted the victim bail, the police detained her under the PSA on the grounds that she "will indulge again in anti-social and subversive activities," despite the court's previous holding that "[t]aking recourse to preventive detention [to prevent release] is not proper."[138]

Human rights lawyers stated that the permissive approach that District Magistrates take to detention requests has enabled security forces to circumvent High Court release orders. For example, lawyers from the Bar Association explained that it was common practice, after the High Court quashes an individual's detention, for the police to subsequently book the detainee in another case, often by making a small change, such as changing the FIR number by one digit. The lawyers stated that most detentions relying on this tactic are authorized by the District Magistrates, who rarely question or deny such orders.[139] Another group of lawyers from the Bar Association asserted that the District Magistrates approve most detentions on the basis of evidence that would not sustain a conviction. They cited the case of Zaina, in which the police declared that an arrest was a major success, only to have the High Court reject the evidentiary basis of the detention after a habeas hearing. Facing the prospect of having the detainee released on bail,[140] the authorities, relying on the PSA, detained her under a preventive detention order.[141]

Breakdowns in Enforcement: Response to Court Orders

The most significant obstacle to the use of habeas corpus petitions as a tool to combat disappearances and arbitrary detentions is the failure of the military and the executive branch to comply with court orders to produce or release detainees. In cases of disappearances, government lawyers reportedly often respond to court orders by disavowing knowledge of the detention; for example, they file motions claiming that the alleged detainee is not in custody, submit evidence that security personnel were not in the area on the date of the alleged disappearance, or claim that the arresting officer has died.[142] In other cases, the circumvention of court orders occurs at the police level when

[137] *See* Interview with Shafat Ahmad, *supra* note 76 (discussing the *Suhail Ahmad Kataria* case, in which more than five dozen requests to produce the detainee were issued by the Magistrate to the jail superintendent but were ignored for eighteen months).
[138] Khalida Akhtar case, HCP No. 475/2006; Noor-uddin Shah v. State 1989 SLJ 1.
[139] Interview with Mian Qayoom, *supra* note 79.
[140] Zaina case, 491 CrPC Petition No. 21/2006.
[141] Detention Order No. DMS/PSA/37/2006, Oct. 12, 2006.
[142] Interview with Senior Lawyer, *supra* note 11.

officers add the detainee to a pre-existing FIR or book him or her under a new FIR, with the sole purpose of avoiding having to release him.

Even if government lawyers, the police, and jail authorities follow court orders requiring release of a detainee, the effectiveness of the order is still undermined in some cases by the intelligence agencies' and screening committees' power to veto detainee releases. The government's reluctance to release detainees is illustrated by three government communications that have instructed jail authorities to disregard High Court orders. First, in 1997, the Jammu and Kashmir Additional Director-General of Prisons instructed jail superintendents not to release detainees even if ordered to do so by the High Court; the communication instead instructed the superintendents to hand these detainees over to police.[143] Second, Counter-Intelligence Kashmir (CIK) issued a 1998 notice to the jail superintendents for Srinagar Central Jail and Baramulla District Jail instructing them to refrain from releasing detainees in response to High Court orders and to turn them over to CIK instead.[144] Finally, the Principal Secretary of the State Home Department issued a 1999 directive to the Superintendent of Srinagar Central Jail stating that since "[i]t has been reported that some detenues have been release[d] from PSA detention on quashment of their detention orders by the High Court without obtaining clearance," the superintendent is "directed not to release any PSA detainee on quashment of their detention orders by the High Court without obtaining clearance from Home Department and [Crime Investigation Department]."[145] The Jammu and Kashmir Bar Association challenged the 1999 directive, and the High Court instructed jails to consider the directive "withdrawn" and to ensure that "the court order(s) be implemented in letter and spirit."[146] Despite this decision, the jail superintendent of the Srinagar Central Jail told an attorney in late 2005 that representatives of the CIK and other intelligence agencies stand right outside the jail to illegally re-

[143] Government Communication No. 60896105, Additional Director-General of Prisons and Fire Services, Oct. 20, 1997.

[144] CIK Order No. CIK/989298, Additional Superintendent of Jails, Crime Investigation Department of Counter-Intelligence Kashmir (Srinagar), Jan. 4, 1998.

[145] Home Department Directive Ref. No. HOMEIDET/GEN/M/98/J, Mar. 19, 1999.

[146] Decision of the Jammu and Kashmir High Court, dated Aug. 13, 1999 (on file with the Lowenstein Clinic for International Human Rights, Yale Law School). *See also SHRC Recommendations*, Greater Kashmir, May 16, 2006 ("The arrogance of the executive can be gauged from the fact that the executive issued a written order in July 2000 directing the jail superintendents not to honour court orders seeking release of political prisoners. The impugned order was, however, withdrawn, when the Bar Association registered strong protest"). Despite the High Court ruling, several lawyers interviewed stated that the CIK continues to operate cells within Kashmiri jails in order to immediately intercept released prisoners and re-detain them. *See* interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55.

arrest detainees as soon as the court issues orders quashing detention. The superintendent also told the attorney that this was an accepted practice that is not likely to change. Thus, although jail authorities are required to comply with court orders, the decision to ignore these orders in practice suggests that there may be an implicit understanding between the jail authorities and the intelligence agencies calling for continued detention even in the face of court orders quashing detention.[147]

The lawyers, judges, and journalists interviewed for this report contended almost unanimously that government "screening committees" exist and have the final say on any prisoner release. The screening committees are rumored to be comprised of representatives of military agencies—including the Army, BSF, and CRPF—and have had the final say on any decision made by police or jail authorities to release a prisoner since the early 1990s.[148] Members of the Bar Association suggested that screening committees are an official body created by a Home Secretary-issued administrative order that is on file with the relevant jail authorities;[149] this account has been corroborated by coverage of screening committees by the Kashmiri media.[150] The screening committees also exist at lower levels—there are district-level screening committees, each comprised of the District Magistrate and local officers, as well as divisional-level screening committees.[151] A former government lawyer confirmed the existence of the screening-committee apparatus and noted that the committees closely monitor High Court orders related to detention.[152]

2. *Cause and Effect of Judicial Delays*

The state and judiciary often delay the habeas process unjustly, much as they do with affirmative claims against the government. Interviews with lawyers, judges, and victims indicated that such delays are common. Delays in the process of reviewing and acting on habeas petitions are exceptionally damaging because the liberty of individual detainees is at stake. By failing to handle habeas petitions expeditiously, the Kashmiri judiciary has failed to guarantee the fair-trial rights of many individuals detained under India's national security laws.

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[147] Interview with Human Rights Lawyer, Apr. 19, 2008.

[148] Interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55; interview with Mian Qayoom, *supra* note 79.

[149] Interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55; interview with Mian Qayoom, *supra* note 79.

[150] *SHRC Recommendations*, Greater Kashmir, May 16, 2006: "[T]he various agencies sit together to decide whether the prisoner can be released or not. If they decide against honouring the court order, nobody can help the poor prisoner."

[151] Interview with Mian Qayoom, *supra* note 79.

[152] Interview with Government Lawyer, *supra* note 8.

Delays commonly occur when the government requests extensions and courts allow them. Although some requests for extensions to respond to petitioners' claims are legitimate, the government also offers frivolous grounds, which judges often accept. A former government lawyer has confirmed that government lawyers intentionally attempt to delay adjudication of habeas petitions. The advocate stated that he and his colleagues often participated in cases in which the government received notice to appear and a brief from the petitioner but did not provide these documents to the government lawyers responsible for handling the cases. In fact, he once appeared in court and said that he needed a copy of the petitioner's brief; once the petitioner produced the brief, he asked for an additional four weeks to reply. The judge granted this request.[153] The advocate reported that such extension requests by government lawyers are routine.[154] Furthermore, he stated that the government's litigation strategy was to delay cases intentionally to prolong detentions and avoid findings of government liability for unlawful detentions. A current government lawyer confirmed this approach: He said that when a petitioner files a habeas claim, the High Court gives the government four weeks to respond, after which the court places the case on an administrative hold pending a new hearing. When the case is eventually scheduled for hearing, the government attempts to again delay the case by requesting an extension.[155]

Delays in habeas proceedings especially undermine the purpose of the PSA, since the time it takes for the court to complete proceedings may actually exceed the statute's two-year limit on preventive detention. The perverse result is that, by filing a habeas petition, individuals who are subjected to preventive detention may actually become more likely to languish in prison longer than the law allows.[156] The case of Suhail Ahmad Kataria, who has been in preventive detention since September 1996, is an example of the state detaining an individual for longer than two years due to court postponement of habeas proceedings. Due to excessive delays in the process, Kataria has not only been detained longer than the two-year limit under the PSA; he has languished in prison longer than the potential sentence for the crime for which he was originally arrested.[157] Attorneys in the

[153] Interview with two Members of the Jammu and Kashmir High Court Bar Association in Srinagar (Mar. 22, 2007).
[154] Interview with two Members of the Jammu and Kashmir High Court Bar Association in Srinagar (Mar. 22, 2007).
[155] Interview with Government Lawyer, *supra* note 8.
[156] Interview with two members of the Jammu and Kashmir High Court Bar Association, *supra* note 153.
[157] *See* Summary of Suhail Ahmad Kataria case, compiled by the Center for Law and Develop-

Jammu and Kashmir High Court Bar Association who file habeas petitions for individuals detained by the state maintain that, as of March 2007, there were habeas petitions from 2005 still pending before the High Court.[158] The court's willingness to postpone hearings and grant extensions leads to grave violations of human rights, depriving detainees of their fair-trial rights. The courts are not even enforcing the minimal rules that the PSA provides for protecting detainees' rights.

The government, by ignoring court orders and refusing to cooperate in habeas cases, delays the process and violates the victims' right to a remedy. In the Rah brothers' detention case, the court responded to a habeas petition by directing the state to allow a meeting between the detained brothers and their parents. When the parents traveled to Jodhpur, where they were told their sons were held, they were told the sons were not there. The parents filed a new habeas petition requesting the state to divulge the whereabouts of the brothers in 2005, and, as of March 28, 2007, the government had not replied.[159] The location of the Rah brothers remains unknown to the family and lawyers. In the Khalida case, in which the court granted a habeas petition and ordered the production of the detainee in court, court orders illustrate the government's failure to act in accordance with the law. One order, for example, noted that "[n]either the reply has been filed nor the record has been made available."[160] In an order dated December 21, 2006, the court further described the government's failure to cooperate, stating, "On the last date of hearing it was submitted by the learned counsel for the respondents that the record has been sent to the Advisory Board under the Public Safety Act but why the respondents could not file the reply during this period is not explained."[161] The state's failure to cooperate in habeas cases can unnecessarily extend the time it takes to resolve them. Although the court in the Khalida case ultimately succeeded in having the government bring the detainee into open court and releasing her, most courts do not object to or challenge either the state's failure to participate fully in proceedings or its delay tactics.[162]

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ment ("[T]he detenue has faced consecutive five detentions under Public Safety Act 1978 . . . . Even if the allegations made in charges sheet [sic] against the detenue would have [been] proved after a regular trial in due course of law, he may have by now completed his sentence.") (on file with the Lowenstein Clinic for International Human Rights, Yale Law School).

[158] Interview with Members of the Jammu and Kashmir High Court Bar Association, *supra* note 55.

[159] Interview with Mian Qayoom, *supra* note 79.

[160] Khalida Akhtar case, HCP No. 475/2006.

[161] Khalida Akhtar case, HCP No. 475/2006.

[162] *But see* interview with Mian Qayoom, *supra* note 79 ("No, you can release him. No bar to release him [sic] if it is pending in court. . . . I have not seen a case where having a case pend-

3. Re-Arresting and Re-Detaining Detainees to Prevent Release

Security forces and prison authorities often circumvent court orders to release detainees by preemptively re-arresting them before release or re-arresting them immediately after release. Rather than actually allowing the person to leave the custody of the security forces, the authorities continue the detention under a new detention order. This enables the state to reset the clock on the two-year time limit under the PSA and force a new round of legal proceedings. Case law suggests that immediate re-arrests are not unlawful *per se* but can be struck down by the court if the state does not provide information, as required by the PSA, indicating that the detainee is likely to prejudice the security of the state.[163]

When the state re-detains someone under preventive detention laws such as the PSA, courts can protect the detainees' rights by declaring the state's proffered justification for re-detention illegitimate. In many cases, human rights lawyers claim that the fresh preventive detention orders issued by the state are unfounded. For example, after the High Court had quashed Mohammed Rustum Lone's original detention order, [164] he was detained under a second PSA detention order[165] on the same grounds on which he had originally been detained.[166] The High Court quashed the second order, noting that the District Magistrate should not have approved an identical order. However, on November 20, 2005, the government charged Lone in another FIR[167] and booked him under the PSA on grounds identical to those in the first two preventive detention orders.[168] In at least four other cases reviewed for this report, the government added detainees to open FIRs and re-detained individuals on grounds already rejected by courts.[169] This pattern is also reflected in the Khalida case, discussed above, in which the government respondents, rather than complying with a court order to release the detainee, detained her pursuant to a new order. The practice not only frustrates judges' orders; it also violates the law. The

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ing in court was a problem.").

[163] *See* Noor-ud-Din Shah v. State of J&K & Ors., 1989 SLJ 1 ("Passing of an order without application of mind goes to the root of its validity . . . ."); *Cf.* Naba Lone v. District Magistrate, 1988 SLJ 300 (holding that when the grounds of detention are a verbatim copy of the dossier, the detaining authority has not applied its mind to the facts and the order is therefore invalid).

[164] Judgment HCP No. 209/2003.

[165] No.13 DMK/PSA of 2005.

[166] No.04 DMK/PSA of 2003.

[167] No. 19/2006.

[168] No.7 DMK/PSA of 2006.

[169] *See* Tanveer Ahmad Salay case, *supra* note 126. *See also* Fayaz Ahmad Lone case; Umer Jan Najar case; Ghulam Hassan Akhoon case (Court documents on file with the Lowenstein Clinic for International Human Rights, Yale Law School).

continuation of a preventive detention on fresh grounds is illegitimate because the detainee, while in state custody, simply could not have engaged in new conduct that justifies a new detention order.

The impact of the state's re-arrest and re-detention practice is sometimes obscured by the multiplicity of security forces and agencies operating in Kashmir. In response to a habeas petition filed by lawyer Arshad Andrabi, the Jammu and Kashmir High Court granted bail to his client on December 3, 2002. The court requested the superintendent of the jail to inform the court about the detainee's location but was told that the detainee had already been released. In response to subsequent petitions by the family—who had still not heard from the detainee—the court again ordered the detainee's release on February 21, 2007. A few weeks later, the police handed the detainee, who was still in custody, over to the CIK.[170] By shuffling detainees between different security and counterinsurgency agencies, the state prolongs detention, evades responsibility, and often infringes detainees' basic rights. The Abdul Aziz Dar case illustrates the state's abuse of its preventive detention power. Dar was arrested under TADA in 1987. He has been held for the past 20 years despite a bail order, re-detained under the PSA, shifted to different jails throughout the region, and, rather than being released in accordance with multiple court orders, handed over to the CIK.[171]

Judges, instead of seeking compliance with their release orders, tacitly accept the state's practice of re-arresting detainees on illegitimate grounds. Since *Farooq Ahmed Dar v. State of J&K*, judges have commonly phrased their orders in a manner that acknowledges and justifies the possibility of an immediate re-arrest; court orders often state that the detainee will be released so long as he is not implicated in another case.[172] One lawyer related a story of a judge who took him into chambers and told him not to file another habeas petition, because the state would simply detain his client under the PSA.[173] By acquiescing in re-arrests rather than giving teeth to its habeas orders, the High Court has missed an opportunity to strengthen the habeas remedy for curbing human rights abuses.

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[170] Interview with Arshad Andrabi, *supra* note 51.

[171] Interview with Arshad Andrabi, *supra* note 51; Habeas Petition in response to FIR No. 168/87, Abdul Aziz Dar v. State of Jammu and Kashmir (on file with the Lowenstein Clinic for International Human Rights, Yale Law School).

[172] Interview with two Members of the Jammu and Kashmir High Court Bar Association, *supra* note 153.

[173] Interview with three Members of the Centre for Law and Development, *supra* note 85.

4. Refusal to Acknowledge Custody of Detainees

The lawyers interviewed for this report expressed nearly unanimous concern that the state often denies that it retains custody over individuals who were last seen with state officials. In the Begum Jan disappearance case, for example, the wife of the disappeared individual saw him being taken away by the army and later saw him performing labor under the control of army personnel who were building barracks. When she asked soldiers at the base whether her husband would return home, she was informed that he was to be released that evening, but he never came home.[174] The state responded to the habeas petition filed on Jan's behalf by denying that it had custody and claiming that, despite Jan's track record of cooperating and assisting security forces, he was involved in activities that threatened state security.[175] Similarly, after the Rashtriya Rifles searched Manzoor Ahmad Dar's house and then detained him at a jail in the Haftchinar area of Srinagar, his wife's lawyers filed a habeas petition on his behalf. In response, the RR denied that the petitioner's house had been searched and that her husband had been taken into custody. In another case, the RR admitted that it had picked up Mohammad Hussain Ashraf on suspicion of terrorist activity, but the battalion claimed it had released him because he suffered from a mental infirmity.[176] In cases like these, security forces deceive the families of disappeared persons and obstruct justice when they deny knowledge of the missing persons' whereabouts and untruthfully deny that they have these persons in custody.

The state's refusal to acknowledge the custody of detainees is an especially difficult problem because most victims' families find it nearly impossible to muster the resources to track and locate detainees within the morass of security agencies. The activities of state security forces are not transparent. Victims' families often lack the information, and the resources to obtain it, to disprove the state's claims, and courts are left with no option but to accept the version of the facts offered by the government. Even in highly publicized cases that draw media attention, the state attempts to obstruct the production of detainees in open court. In the Zaina case, the Director General of Police hosted a press conference stating that the petitioner's son had been arrested and that it was a major success for the police. Later, however, the detaining authorities and the higher officials claimed ignorance of the detainee's whereabouts.[177]

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[174] Begum Jan case, 491 CrPC Petition No. 14/2005; *see also* interview with Shafat Ahmad, *supra* note 76.
[175] Begum Jan case, Respondent's Counter Affadavit in matter of *491 CrPC Petition No. 14/2005*.
[176] Contempt Petition No. 1/2004 in 491 No. 17 of 2003.
[177] 491 Cr.PC Petition No. 21/2006.

5. Failure to Issue Contempt Orders

Even where victims have been able to successfully petition courts to quash detention orders, they have been denied remedies that would effectively punish the non-cooperating authorities. In both the Tanveer Ahmad Salay and Abdul Majid Sofi cases, the petitions asked the courts to issue contempt judgments against the government authorities. In each case, however, although the court quashed the detention order, it refused to rule on the contempt claim or to take judicial notice of the relevant government agencies' lack of cooperation.[178]

In at least two other cases, the High Court has failed to hold the government and military in contempt when they openly flouted court orders. In the first case, the Rashtriya Rifles had taken a man named Ashraf into custody.[179] When approached by concerned relatives, Officer Bhopal Singh of the Rashtriya Rifles admitted to having Ashraf in custody. In 2003, the High Court ordered an inquiry into the case. The inquiry found that Ashraf had been taken into custody by the 7th Rashtriya Rifles, and the High Court directed the police to register an FIR and investigate the incident. When the police did not register the FIR or conduct an investigation, the petitioner filed a contempt petition on September 25, 2004; as of March 28, 2007, the court had not acted on the motion.[180] In the Jalil Andrabi case, the High Court issued an order on March 20, 1996, directing the Secretaries of the Union Home Ministry and Union Defense Ministry to file affidavits about their knowledge of Andrabi's whereabouts. After the government appealed the orders, the court observed that "this is a peculiar situation, because apparently the court orders have not been complied with."[181] The High Court again directed the ministries to file affidavits, and the government asked the Division Bench to modify the High Court's order. When the Division Bench responded by modifying the order, the High Court noted the modification and again directed the secretaries to file affidavits within two days. The government failed to file these affidavits and requested an extension. The High Court never issued a contempt order for this failure to comply with orders.

6. Failure to Monitor Release Orders

Nearly all detainees who are held on terrorism-related suspicions and brought to trial are acquitted.[182] In the interest of protecting the state and

[178] *See* Tanveer Ahmad Salay judgment, *supra* note 126; Abdul Majid Sofi judgment, *supra* note 126.

[179] Contempt Petition No. 1/2004 in 491, No. 17 of 2003.

[180] Contempt Petition No. 1/2004 in 491, No. 17 of 2003.

[181] Interview with Arshad Andrabi, *supra* note 51.

[182] Behind the Kashmir Conflict: Abuses by Indian Security Forces and Militant Groups Continue

minimizing the risk of formal acquittal, the military apparently seeks to avoid legal proceedings altogether by holding such individuals without trial. A government lawyer noted that in human rights cases, "[t]he government is on the defense. Detentions are invariably illegal. [Release orders and acquittals are] a threat to the security of the state."[183] When the government moves slowly or refuses to try detainees within an appropriate time period, detainees may seek relief by filing petitions for a writ of habeas corpus, as described above. Courts may issue writs of habeas corpus to quash detention orders when the government fails to inform detainees of the grounds of their detention.[184] However, the habeas writ, which could be a powerful form of protection for detainees, is being weakened by the failure of Kashmiri courts, including the Jammu and Kashmir High Court, to "give teeth" to their requirements by monitoring compliance with or enforcing their orders to release detainees.

According to a former district court judge, Kashmiri judges routinely fail to take advantage of the means that are available for monitoring compliance with release orders. Judges can request status reports from the parties or use contempt orders to sanction parties who do not comply.[185] However, the High Court does not use these powers during pending habeas cases. For example, in the case of Manzoor Ahmad Dar,[186] the Investigating Officer failed to act on an order from the High Court issued on July 24, 2004, directing him to examine the petitioner's claim. In 2005, when the matter had still not been investigated, Dar's counsel filed a contempt petition in the High Court.[187] The Investigating Officer replied by stating that the Rashtriya Rifles officials did not reply to any of his inquiries. A contempt petition was filed in 2005 and, at the time of publication, was still pending.[188] The court has taken no action and has failed to adjudicate the issue in a timely manner. Although it had the authority to issue orders to the Army Headquarters or issue an effective contempt sanction, it failed to do so.

Kashmiri human rights lawyers perceive the court system not only to fail to ensure compliance with its orders, but also to grant significant leniency to the government's position. For example, the High Court's acceptance of the state's frivolous excuses for continued detention represents a failure to redress

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n.53, *supra* note 15.

[183] Interview with Government Lawyer, *supra* note 8.

[184] For example, in the Fayaz Ahmad Lone and Mohammad Asgar Bhat cases, the court quashed detention orders because the state failed to give the grounds of detention; the government cited language barriers and failures to translate as excuses for not providing the grounds of detention.

[185] Interview with Mohammed Bhat, *supra* note 50.

[186] Mst. Jana case, OWP/HCP No. 299/2002.

[187] No. 53/2005 in OWP No. 288/02 (Apr. 19, 2005).

[188] Interview with Mian Qayoom, *supra* note 79.

violations of detainees' human rights. In the Mazur Zargar disappearance case, the arresting Army officer, when approached by Zargar's brother, had admitted in writing to Zargar's detention. While the habeas petition was pending, the arresting officer died, so the Army took the position that there could be no redress. Despite the availability of the arresting officer's written testimony, the court accepted the military's position and dismissed the petition.[189]

[189] Interview with Senior Lawyer, *supra* note 11.

Part IV: Recommendations

Previous human rights and advocacy reports on Kashmir have made many recommendations to the Indian government, the Pakistani government, the Jammu and Kashmir state government, the international community, civil society organizations, and local actors. These recommendations include, among others things, establishing an independent, impartial commission of inquiry into human rights abuses, repealing the Armed Forces Special Powers Act, the Disturbed Areas Act, and the Public Safety Act, strengthening the National Human Rights Commission, expanding the mandate of the International Committee of the Red Cross and other humanitarian organizations, and securing good-faith commitments by both India and Pakistan to resolve the conflict over Kashmir. All of these recommendations embody important goals, and their implementation would advance human rights and peace in the region.

The following recommendations address the *de facto* impunity with which security forces commit human rights violations in Jammu and Kashmir.

(1) Civil society organizations should monitor proceedings in which courts hear cases alleging abuses by the security forces. Court monitoring can promote judicial restraint and fairness. In order to promote judicial transparency and accountability, civil society organizations should collaborate to compile the findings of court monitors and create an index to record the performance and decisions of each High Court justice.

(2) The Jammu and Kashmir government should amend Section 8 of the Jammu and Kashmir Right to Information Act of 2004 to obligate intelligence and security organizations to respond to requests for information about the identity and location of detainees.

(3) Judges should ensure meaningful remedies to victims in cases involving abuses by security forces: They should respond promptly to habeas corpus petitions, make clear and specific orders, demand that the state produce detainees in court when appropriate, strictly enforce release orders, vigorously monitor and enforce compliance with court orders, and, when necessary, hold state representatives in contempt.

(4) Judges should no longer allow criminal defendants who are members of security forces to remove their cases to military courts. Offenses against civilians must be prosecuted in civil courts.

(5) The Jammu and Kashmir government or Justices of the Jammu and Kashmir High Court should promulgate standards to guide courts when parties in these cases request time extensions. These standards should enable courts to determine whether extensions have been requested in bad faith and to ensure that extensions are granted equitably.

(6) Courts should more strictly enforce the requirements that the Supreme Court articulated in its *D.K. Basu* decision. Officers responsible for arrests and interrogations should wear accurate, visible, and clear identification. Any person who has been arrested or detained shall be entitled to have one friend or relative informed, as soon as practicable, that he or she has been arrested and is being detained at the particular place. Further, to combat the practice of disappearing people, the army, police, and security agencies operating in Kashmir should confirm the detention of any individual by immediately sending notice to the detainee's family.

(7) The government of India, as a member of the United Nations Human Rights Council, should invite relevant UN rapporteurs and working groups to investigate the allegations of human rights abuses in Kashmir. The government should fully cooperate with such investigations and ensure the cooperation of military and Jammu and Kashmir state officials.

(8) The government of India should publish information detailing all of the arrests, prosecutions, and convictions of security personnel or other government employees or agents for conduct related to human rights violations since the beginning of the conflict. This information should be updated and published at least annually.

(9) The government of India should issue public notices of decisions by the Home Ministry to grant or withhold sanction to prosecution requests under the Armed Forces Special Powers Act. These notices should be issued in a timely manner, provide reasons for the decision, and be made available to the media, civil society organizations, and any other interested parties.

(10) The Jammu and Kashmir Police should stop its practice of assigning rank-and-file police officers to conduct investigations of abuses by the Army and security agencies. Instead, such investigations should be carried out by higher-ranking officers, such as Superintendents (SPs) and Inspectors-General (IGPs).

(11) To foster the independence of the judiciary, the government of India should modify the judicial nomination and appointment process by limiting the influence of the Army and security and intelligence agencies. This can be achieved by limiting their ability to vet candidates for the High Court or by filling the bench with judges selected through public elections.

(12) The state government of Jammu and Kashmir, in conjunction with the Justices of the High Court, should conduct a review of the court's operating procedures and rules in order to revise any requirements that have the effect of denying victims of human rights abuses timely access to remedies. For example, the rule that prevents cases filed by Jammu residents in Kashmir to be heard by a justice other than the Chief Justice unnecessarily delays adjudication of their claims.

(13) The governments of India and the state of Jammu and Kashmir should empower the State Human Rights Commission (SHRC) to issue binding decisions that require government institutions to provide relief to the families of human rights victims. The SHRC should also be empowered to make recommendations to the appropriate authorities to prosecute human rights violators.

Allard K. Lowenstein International Human Rights Clinic

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The Allard K. Lowenstein International Human Rights Clinic is a Yale Law School clinic that has three main goals: to provide students with the opportunity to gain practical experience that reflects the range of activities in which lawyers engage to promote respect for human rights; to help students build the basic knowledge and skills necessary to be effective human rights lawyers and advocates; and to contribute to current efforts to protect human rights through valuable, high-quality assistance to appropriate organizations and individual clients. Recent work has included involvement in human rights litigation in U.S. courts, preparing amicus briefs on international and comparative law for U.S., foreign, and international forums, advocacy before international and regional human rights bodies, and investigating and drafting reports on human rights situations.

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