

General allegation

117th session (11–15 February 2019)

India

1. The Working Group received information from the source concerning alleged violations and obstacles encountered in the implementation of the Declaration on the Protection of All Persons from Enforced Disappearance (hereafter, the Declaration) in the Indian State of Jammu and Kashmir.

2. According to the sources, in Jammu and Kashmir the phenomenon of disappearances was one of the principal methods adopted by the State to suppress dissent, and therefore, students, political activists, human rights defenders, lawyers, members of armed groups and civilian populations were disappeared in significant numbers – frequently from custody of the State special agencies which operate in Jammu and Kashmir. It is reported that a conservative estimate, based on information collected from parents, relatives, friends and other sources, that the number of individuals who disappeared in custody since 1989 is as high as 8,000.

3. Sources allege that this phenomenon has been acknowledged by the State. Despite this acknowledgement, the Government has yet to show efforts towards the ratification of the Convention for the Protection of all Persons from Enforced Disappearance (hereafter, the Convention). On the contrary, certain actions of the Government of India contradict Convention intentions, although India signed the Convention in 2007 and thus accepted an obligation under international treaty law to not act contrary to its object and purpose. One recent example of such conflicting act, sources report, is the decision to revise the Public Safety Act, 1978 (hereafter, PSA). Reportedly, the Government has relied heavily on the PSA to enforce administrative detentions without trials and to detain individuals outside the State of Jammu and Kashmir, causing anguish for families who spend years searching for loved ones. Sources assert that revisions made to the PSA in 2018 strengthen the framework for these arrests and detentions. They are also contrary to the Declaration.

4. According to the sources, a related problem is that in contravention of both the Convention and the Declaration, Indian law does not contain an autonomous crime of enforced disappearance. Sources submit that this results in non-compliance with the international obligation to investigate, prosecute, and adequately punish any perpetrator of an enforced disappearance. Reportedly, when families lodge “missing persons” complaints against officers of Special Forces – military, paramilitary and State security, Indian law requires permission of the Government before they can be prosecuted. One example of such a law is the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (AFSPA), which classifies the State of Jammu and Kashmir as a “disturbed” area, and grants broad powers and immunity to security forces including the requirement to get prior permission or sanction from the federal government before a member of the armed forces can be prosecuted in a civilian court. While Jammu and Kashmir is administered under a different set of laws due to its special constitutional status, the Armed Forces (Special Powers) Act 1958, with identical terms, is applied to other areas of the country.

5. Secondly, sources assert that the absence of a crime of an enforced disappearance in Indian legislation obstructs the right to truth – a right which the criminal justice system plays an important role in safeguarding. The existing “right to information” frameworks in India (Right to Information Act, 2005) and in Jammu and Kashmir (Jammu and Kashmir Right to Information Act, 2009) provide for the right to obtain government information, including information about past disappearances. However, these frameworks are fraught with limitations which, sources assert, make it easy to deny families information about progress or results of investigations involving officers of special State services. Additionally, reports relay that where families have approached the High Court of Jammu and Kashmir with writs of habeas corpus to

determine the whereabouts of disappeared persons, most of these petitions have been dismissed. In cases where the judge rules in favour of an applicant, the Executive fails to comply with the order, according to the sources.

6. Sources report that other challenges faced by disappeared victims and their families include the lack redress and adequate compensation, including rehabilitation. Reportedly, the law in Jammu and Kashmir does not provide for compensation specifically for victims of enforced disappearances. Rather, an ex-gratia payment is available for families who can present evidence that a disappeared individual has been presumed dead for seven years and can prove that neither (s)he nor a family member was ever associated with militant activities. The local District Screening Committee then screens cases of “missing persons” for ex-gratia relief, decides which persons can be presumed dead, and issues a death certificate. According to the sources, the process burdens families with a need to produce several documents for consideration. The screening process is also prone to political influence as families must provide influential recommendation letters. Finally, sources assert, members of the Committee may also be the perpetrators of an enforced disappearance. In the end, the relief amount of 1 lakh rupees is quite small, though it remains the same since 1990.

7. Similarly, the scheme of compassionate employment in Jammu and Kashmir is only available on the presumption of death, and the screening process may be influenced by potentially complicit authorities, according to the sources. Since applications for compassionate appointment are not considered after one year of a presumed death of the disappeared individual, this rule contradicts the understanding of the concept of enforced disappearance being of a continuous nature.

8. Other issues which highlight the need for a law on enforced disappearances in India include, according to the sources, social status of wives and children of forcibly disappeared, economic burden on families of the disappeared, mental health of victims and their families, as well as legal regulations related to marriages and inheritance.