

Possibilities of Justice: Torture at the Indo-Bangladesh Border

Prachi Lohia

Researcher, Banglar Manabadhikar Suraksha Mancha (MASUM)

Introduction

This paper attempts to provide an overview of the nature of torture inflicted on people living near the Indo-Bangladesh border. India has expressed its commitment to adhere to international human rights standards and is party to the International Covenant on Civil and Political Rights which explicitly prohibits torture in any form. The Constitution of India and its Judiciary have also acknowledged the rights of all persons to equality, justice and dignity. By exploring the magnitude of torture, arbitrary restrictions and other degrading treatment at the border, this paper argues that India's legal provisions have consistently failed in fulfilling its obligations to prevent torture in the country. The objective of the paper is to examine the loopholes in India's domestic laws that allow for torture to be perpetrated with impunity and to reiterate the need for a specific legislation to prevent torture in India.

Background

India shares a border of approximately 4,096 kilometers with Bangladesh. The border was conceived in 1947, decades before Bangladesh was to become an independent nation state. After the Second World War, the British decided to grant autonomy to the subcontinent. Autonomy came at a significant cost however—the subcontinent was to be divided along religious lines into two separate nations. Subsequently, two independent nation states were born—Hindu majority India and Muslim majority Pakistan. The task of drawing a border through an incredibly diverse region with a population of over 400 million was given to British lawyer Sir Cyril Radcliffe. Radcliffe was visiting the subcontinent for the first time and had no knowledge of its geography, diversity and communal tensions. The boundary that divided India and Pakistan was drawn merely in five weeks and cut through rivers, fields, police stations on some occasions, even through people's homes. In August 1947, while festivities were observed for the long awaited freedom, over 12 million people were forced to migrate across the border, in the face of extraordinary communal violence.¹

Due to the haphazard manner in which the border was drawn between India and Pakistan, many territorial disputes and irregularities emerged on both the western, and eastern ends of the border. When Bangladesh (formerly East Pakistan) became an independent nation state in 1971, these disputes were inherited by it. However, given India's instrumental role in its independence, Bangladesh did not hold on to the rivalry between India and Pakistan, paving a new path for diplomacy in South Asia. Several attempts were made to resolve the border disputes by the governments of India and Bangladesh. The Land Boundary Agreement (LBA)² which was signed between former Indian Prime Minister Indira Gandhi and former Bangladeshi Prime Minister

¹ Dr Andrew Whitehead, 'Partition 70 years on: The turmoil, trauma - and legacy' BBC News (27 July 2017)

² Land Boundary Agreement 2015,

Retrieved online: https://www.mea.gov.in/Uploads/PublicationDocs/24529_LBA_MEA_Booklet_final.pdf

Sheikh Mujibur Rahman in 1974 was implemented on 31st July 2015, after decades of negotiations. The LBA resolved three main disputes along the border—an undemarcated boundary of approximately 6.1 kilometers, exchange of enclaves, and adverse possessions.³

In spite of this, the Indo-Bangladesh border continues to face various challenges such as cross border smuggling, immigration, human trafficking and other trans-border crimes.⁴ The border is heavily militarized and guarded by the Border Security Force (BSF), a paramilitary force under the administrative control of India's Ministry of Home Affairs. In order to keep smuggling and illegal immigration in check, the BSF have constructed the border fence several kilometers inside the zero point of the border. This means that a stretch of Indian territory, along with the lands and houses of Indian citizens, has been drawn out of the border fence. Since the BSF are placed inside villages, they interfere in the quotidian affairs of citizens and monitor essential freedoms of movement and securing livelihood. This leads to tensions between the BSF and the residents of border areas, in turn disturbing the peace and tranquility of the region.

Banglar Manabadhikar Suraksha Mancha (MASUM), a non-governmental organization based in the state of West Bengal, has been documenting incidents of torture, extrajudicial executions, custodial deaths, illegal detention and arbitrary restrictions at the Indo-Bangladesh border since 1997. The Indian state of West Bengal shares a border of 2,217 kilometers with Bangladesh. Eight out of twenty-three districts in the state share a border with Bangladesh.⁵ According to the national census conducted in 2011, these districts account for 55.98% of Muslims, 43.7% of Scheduled Castes (SCs) and 37.19% of Scheduled Tribes (STs) of West Bengal.⁶ This data is significant because Muslims, SCs and STs are among the most marginalized communities in India and face various forms of discrimination based on their religious and caste identities.⁷ A lack of opportunities, poor economic conditions and socio-political discrimination make these communities especially vulnerable to violence. Between January 2010 and April 2021, MASUM has documented 851 incidents of torture and deaths in custody, involving 567 Muslim victims and 257 victims from the Scheduled Caste community.

India's Stance on Torture and International Human Rights Law

The Universal Declaration of Human Rights (UDHR), which was adopted in the aftermath of the Second World War, recognized the right of an individual to be free from torture.⁸ Subsequently, international human rights law has evolved to recognize the acute suffering caused by torture, especially in times of war and conflict. It has also been noted that torture is often used against vulnerable populations who face discrimination on the basis of their race, religion, ethnicity,

³ *ibid*, 2

⁴ Zahoor A Rather, 'India–Bangladesh Border Issues: Challenges and Opportunities.' *International Studies*, vol. 50, no. 1–2, Jan. 2013, pp. 130–144

⁵ Eight districts of West Bengal–Cooch Behar, North 24 Parganas, North Dinajpur, South Dinajpur, Nadia, Murshidabad, Malda and Jalpaiguri share their borders with Bangladesh.

⁶ Census of India 2011. Retrieved online: <https://censusindia.gov.in/2011Census/pes/Pesreport.pdf>

⁷ See for example, Prime Minister's High level Committee, *Social, Economic and Educational Status of the Muslim Community of India: A Report* (2006) for the status of Muslims in India; and Government of India, Planning Commission, *Report of the Task Group on Development of Scheduled Castes and Scheduled Tribes* (2005) for the status of SCs and STs in India.

⁸ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Art. 5

nationality, sex, class and/or caste. The absolute prohibition of torture is a peremptory norm or *jus cogens* under customary international law. This means that torture in any form and under any circumstances cannot be justified and it is the duty of every state to prevent, prohibit and punish torture and other forms of cruel, inhuman and degrading treatment, while also ensuring adequate protection and remedies for victims and survivors.

This does not imply however that torture is an obsolete practice that does not require immediate humanitarian intervention. In spite of the fact that torture is explicitly forbidden under various international and regional legal instruments, it remains rampant across the world.

At India's third cycle of the Universal Periodic Review (UPR) in 2017, ex-Attorney General Mukul Rohatgi had claimed that "torture is alien to the culture of India".⁹ At the same cycle, 34 states had made recommendations to India to ratify the United Nations Convention Against Torture (CAT).¹⁰ Various submissions from India's civil society, including the National Human Rights Commission (NHRC) countered the statement made by the ex-Attorney General.¹¹

Article 51 of the Constitution of India states that the state shall endeavour to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another".¹² This article is a component of the Directive Principles of State Policy which are not enforceable in Indian courts but are "nevertheless fundamental in the governance of the country and [it is] the duty of the State to apply these principles in making laws".¹³ Even so, India has shown reluctance in adhering to international laws in the past, especially with regard to civil and political liberties.

India's stance is apparent during the debates in the Third Committee of the United Nations General Assembly on a draft of the International Covenant on Civil and Political Rights (ICCPR) produced by the Commission on Human Rights. Under that draft, it would have been mandatory for a state party to accept the intervention of the Human Rights Committee if another state party filed a complaint against it for the violation of the provisions of the covenant. The draft that was later adopted made this procedure voluntary meaning that states could accede to the ICCPR without recognizing the authority of the Human Rights Committee to intervene in complaints brought against one state party by another. India greatly welcomed this amendment in 1966.¹⁴ India's representative explained that the state felt that "the time had not yet come to set up an international legal system for the enforcement of human rights throughout the world."¹⁵

While this statement was made by India several decades ago, it would not be wrong to assume that the Indian state continues to maintain this position because it is yet to ratify the First Optional Protocol to the ICCPR which "recognizes the competence of the Committee to receive and

⁹ Gaurav Vivek Bhatnagar, "Testimonies of Torture Victims Lay Bare India's Claim of It 'Being Alien to Our Culture'", *The Wire* (29 October 2018)

¹⁰ UPR info, India: Third Review, *India's responses to recommendations* (15 December 2017)

¹¹ UN General Assembly, Working Group on the Universal Periodic Review, *Summary of Stakeholders' submissions on India*, (27 February 2017) A/HRC/WG.6/27/IND/3

¹² Constitution of India, Part IV, *Directive Principles of State Policy*, Art. 51(c)

¹³ *ibid*, Art. 37

¹⁴ A. Mark Weisburd, 'Customary International Law and Torture: the Case of India' [2001]

¹⁵ *ibid*

consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.”¹⁶ In fact, India has not recognized the competence of a single treaty body for intervening in complaints brought against India by individuals or other state parties. India has also expressed reservations against Articles 20, 21 and 22 of CAT, all of which deal with inquiries into allegations of torture by the Committee against Torture.¹⁷

On 14 June 2018, the Office of the High Commissioner for Human Rights (OHCHR) published a report titled, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan*.¹⁸ The report called for a probe into serious allegations of human rights abuses in the Kashmir valley and made recommendations to the governments of India and Pakistan to adequately address this issue. India however, dismissed the report and claimed that the report violates India’s sovereignty and territorial integrity.¹⁹ On 23 April 2019, India shut down any further engagement with the UN or any other mandate holders on the issue of torture in Kashmir. India stated:

India rejects any reference whether implicit or explicit or any quote by any human rights mechanisms or bodies from the remote report published by the OHCHR on the situation of human rights in Kashmir in June 2018. India rejects the remote report and doubts on its credibility and objectivity. The report begets the questions whether individual prejudices should be allowed to undermine the dignity and standing of the high office.²⁰

India does not have a specific legislation to prevent torture in the country. However, the Constitution of India recognizes the right of every individual to be equal before law and to be treated with dignity. On a number of occasions, the Supreme Court of India has acknowledged the prevalence of torture in the country and has strongly condemned the practice. For instance, the Court in *DK Basu v State of West Bengal*²¹ said:

If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal court of human rights jurisprudence. The answer, indeed, has to be an emphatic ‘No’.

¹⁶ UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966

¹⁷ Law Commission of India, Report No. 273, *Implementation of ‘United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment’ through Legislation* (October 2017) ch 1, para 1.11

¹⁸ Office of the High Commissioner for Human Rights, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan* (14 June 2018)

¹⁹ Meenakshi Ganguly, ‘India should not reject UN Report on Kashmir’ (14 June 2018)

²⁰ Permanent Mission of India to the United Nations Offices at Geneva, NV. GEN/PMI/353/05/2019. Retrieved Online: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34631>

²¹ *DK Basu v State of West Bengal* [1997] SC 610

The Supreme Court of India has also cited international human rights standards on several occasions to support its arguments. While ordering a probe into allegations of extrajudicial executions by armed forces in the state of Manipur,²² the Supreme Court of India stated:

The Human Rights Committee has urged a State party to the International Covenant on Civil and Political Rights to guarantee that the victims of human rights violations know the truth with respect to the acts committed and know who the perpetrators of such acts were. It is necessary to know the truth so that the law is tempered with justice. The exercise for knowing the truth mandates ascertaining whether fake encounters or extrajudicial executions have taken place and if so, who are the perpetrators of the human rights violations and how can the next of kin be commiserated with and what further steps ought to be taken, if any.

While India has not ratified CAT, it has an obligation to adequately prohibit torture as a state party to the UDHR, ICCPR and Convention on the Rights of the Child (CRC). Since torture is a norm of *jus cogens*, even a state that is not party to any international human rights treaties would have an obligation to prohibit torture. A study of torture at the Indo-Bangladesh border indicates that India has consistently violated its international obligations to protect its citizens from torture. The residents of border areas face various challenges due to dense militarization. Legal safeguards against torture in India are either completely absent or are not properly implemented at the border because of the immunity granted to members of armed forces through various legislations. It is imperative that human rights abuses at the border receive adequate attention so that necessary legal and administrative reforms can be undertaken and justice can finally be ensured for the victims of torture and other human rights violations.

Indo-Bangladesh Border: Arbitrary Restrictions

MASUM's findings indicate that the people who have been left outside the border fence face grave challenges in their day-to-day activities.²³ There is a complete absence of public health infrastructure, educational institutions, clean drinking water, sanitation, electricity and proper roads in these areas. The government's social security schemes related to livelihood opportunities, pensions, childcare and so on, often do not reach the people who live outside the border fence. The BSF personnel monitor the movement of people through gates constructed on the border fence. In most villages, these gates are opened only three times in a day for an hour each. In rural India, the main source of livelihood is agriculture. The people who own land outside the border fence are required to submit their identity documents with the BSF while passing through the gate. Identity documents such as Aadhaar and Voter ID cards²⁴ are not accepted as valid proofs of identity for the border areas, instead the people are required to produce a particular identity card issued by the

²² *EEVFAM v Union of India* [2016]

²³ Sukanya Roy, 'No man's land is no woman's land either: The fraught relationship between residents and the Border Security Force at the Indo-Bangladesh Border' (*The Polis Project*, 11 February 2021) <<https://www.thepolisproject.com/no-mans-land-is-no-womans-land-either/#.YJjokLUzY2z>> accessed 10 May 2021

²⁴ Aadhaar Cards contain a verifiable 12-digit identification number issued by the Unique Identification Authority of India to the residents of India and are recognized as valid proof of identity pan India. Voter identity cards are issued by the Election Commission of India and provide Indian citizens the right to cast their votes during elections.

BSF for this purpose. This differential treatment creates a feeling of being an outsider in one's own country and violates the Constitution of India, which guarantees equality before law to all of its citizens.

Moreover, the BSF do not allow people to take household essentials and agricultural equipment across the border fence on the suspicion that they would be smuggled to Bangladesh. Fertilizers, cattle, pesticides, tractors and such, cannot be used by farmers to cultivate crops. Under the Government of India's Integrated Child Development Services (ICDS) Scheme, the people are provided cooked meals for their children.²⁵ When people attempt to take these meals back to their families, the BSF stir the food with a dirty stick to check if anything that can be smuggled is hidden inside, making the food inedible.

Satish Burman²⁶, a 47-year old Dalit²⁷ man and resident of Satgram Manabari village in Cooch Behar district, owns a piece of farming land ahead of the border fence. Every morning, he crosses the gate with his wife after seeking permission from the BSF to cultivate crops on his land. On 15 March 2015 when he arrived at the gate, a BSF officer asked him to catch a calf that had run off into the fields. Worried that the gate would be closed before he managed to return, he declined to do so. The BSF officials, however, closed the gate and verbally abused Satish and his wife. They assaulted him brutally till he was bleeding from several places, and also molested his wife. Satish had to be hospitalized for three days in order to receive treatment for his injuries. The BSF also filed a complaint against Satish under Section 353 of the Indian Penal Code 1860 (IPC) which prescribes punishment for using "criminal force to deter a public servant from discharge of his duty". The National Human Rights Commission (NHRC) did not intervene in the case since the matter was sub-judice. Satish's case is pending before a sessions court in Cooch Behar district.

MASUM had filed applications under the Right to Information (RTI) Act 2005 to the eight districts of West Bengal that share a border with Bangladesh²⁸, seeking information regarding the imposition of Section 144 of the Criminal Procedure Code 1973 (CrPC)²⁹ in the border areas. While they did not receive a response from Murshidabad, Nadia and North Dinajpur, the responses from the others were quite telling. In South Dinajpur, Section 144 CrPC has been imposed consistently from 2015-2017, and again from 2019-2020. The order, signed by the District Magistrate, prohibits the movement of certain commodities³⁰ within a radius of 8 kilometers of the

²⁵ Ministry of Women and Child Development, Integrated Child Development Services (ICDS) Scheme (1975)

²⁶ Names of the victims of torture have been changed to protect their identities

²⁷ 'Dalit' is essentially the name of a caste in India, included under the category of Scheduled Castes in the Constitution of India. It has also become a symbol of struggle against upper-caste oppression in India.

²⁸ Eight districts of West Bengal-Cooch Behar, North 24 Parganas, North Dinajpur, South Dinajpur, Nadia, Murshidabad, Malda and Jalpaiguri share their borders with Bangladesh.

²⁹ Apurva Vishwanath, Shruti Dhapola, 'Explained: How Section 144 CrPC works' *The Indian Express* (New Delhi, 20 December 2019)

³⁰ The movement of the following commodities near the border has been restricted through Section 144 CrPC. These commodities have been listed under Schedule 'A' of the order. Rice, Wheat products, kerosene, mustard oil, sugar, coconut, textile goods including yarn, cement, iron & steel materials, bidi leaves, tyre, tubes, wax, bleaching powder, baby food, machine parts, stationery articles, grocery, cattle, milk powder, gunny bags, goat-skin, soaps, betelnut, chili, cloves, fruits, electric goods, cycle and parts, cinnamon, glass, tile making materials, motor tyre, rickshaw tyre, cigarettes, flour grinding stone, photo materials, copper, salt, chira, charcoal, cycle-rickshaw, coal tar, glass panel, cardamom, torchlight, iron rail, soybean, tea, medicine, fertilizer, cosmetics, black paper, plastic,

Indo-Bangladesh border from 6 pm to 6 am every day. The reasons for imposing Section 144 CrPC have been provided as: “On prayer of BSF to prevent movement of all commodities mentioned in Schedule ‘A’³¹ of the issued orders, 144 CrPC is being promulgated.” Similar answers have been received from the districts of Jalpaiguri, Cooch Behar, Malda and North 24 Parganas.

In *Anuradha Bhasin v Union of India*, the Supreme Court of India stated³²:

The power under Section 144 CrPC cannot be used to suppress legitimate expression of opinion or grievance or exercise of any democratic rights. [...] Repetitive orders under Section 144 CrPC would be an abuse of power.

The continuous imposition of Section 144 CrPC in border areas limits essential freedoms of citizens. The authorities have restricted the movement of essential items such as rice, kerosene oil, mustard oil, sugar, salt, baby food, medicine and gas light, which can be required in times of emergency. Even in cases of medical emergencies, people are often unable to convince BSF officials to allow them to take medicines across the border. Moreover, the BSF personnel rarely allow the passage of commodities through the border fence even during day hours, when the restrictions under Section 144 CrPC are relaxed.

Indo-Bangladesh Border: The link between Cross border smuggling and Torture

Sarita Halder³³, a widow and mother of two girls lives in a village named Mahakhola in Nadia District of West Bengal. She belongs to the Scheduled Caste community and makes a meagre living by selling groceries and fertilizers. On 12 March 2021, while returning home after a medical checkup, she was stopped by two male personnel of the BSF. They conducted a search on her person and found two mobile chargers in her bag. Even when she showed them a receipt of her purchase and said that they were for her personal use, they accused her of trying to smuggle the chargers to Bangladesh. They detained her in a public washroom for two hours after which she was taken to the BSF camp for interrogation. At the camp, she was brutally beaten by the BSF personnel till she was unconscious. When she finally came to her senses, she found that she had been disrobed. In the middle of the night, the BSF personnel took her to the Bhimpur police station but the police refused to take a seriously injured woman in their custody and advised them to escort her home. Instead, the BSF personnel took her back to their camp, beat her again and forced her to sign a document stating that she had not been tortured by the BSF during interrogation. Sarita’s case is pending with the Bhimpur police and the NHRC.

A number of incidents of torture and extrajudicial executions at the Indo-Bangladesh border occur under the pretext of controlling smuggling of goods, mainly cattle, across the border. According to a report by Human Rights Watch titled, “*Trigger Happy*”: *Excessive Use of Force by Indian Troops at the Bangladesh Border*, the BSF had received orders to shoot suspected smugglers by

utensils, fish, brass, mats, timber, camphor, razor blades, goat, pulses, wrist watch, aluminium, silver, potatoes, gas light, eggs, molasses, gold

³¹ ibid

³² *Anuradha Bhasin v Union of India* [2020]

³³ Names of the victims of torture have been changed to protect their identities

higher authorities.³⁴ The report also says that the BSF justify the killings by their personnel on the grounds that the accused were evading arrest or that firing was done in self-defense. These claims cannot be substantiated because in every case documented by MASUM, the victims of extrajudicial executions were found to be unarmed or armed with non-lethal weapons. In one of MASUM's interviews with a BSF Company Commander, the deaths of civilians at the border while controlling smuggling were referred to as "collateral damage"³⁵. Therefore, violence inflicted even over the mere suspicion of smuggling is often overlooked by Indian authorities.

Amir Pramanik³⁶ died in the custody of the police on 21 January 2020. He was a daily wage labourer, Muslim and a resident of Cooch Behar district. On the day of the incident, he was arrested by the BSF personnel on the suspicion of being involved in smuggling. He was detained and brutally tortured by them for several hours before he was brought to the Sitai Police station in the middle of the night. Eye witness accounts have alleged that he found it difficult to even stand on his feet and had to be supported by the BSF when he was brought in. In spite of this, he was put into jail custody without being provided any medical assistance³⁷. It was only when Amir started bleeding out of his genitalia that he was taken to the hospital. He died within a few hours of reaching the hospital. Later, the police personnel of Sitai Police station tried to bribe his family in order to coerce them into not filing a complaint against the police and BSF. The Inspector-in-charge also threatened the human rights activists of MASUM and refused to lodge the First Information Report³⁸. The inquest was performed by the executive magistrate in violation of Section 176 (1A) of the Criminal Procedure Code 1973 which mandates inquest by a judicial magistrate in cases of deaths in custody. The NHRC had sent notices to the District Magistrate and Superintendent of Police of Cooch Behar asking for their reports on the incident as far back as 30 January 2020 but no updates have been received so far. Amir's mother, who was suffering from cancer, passed away during this time, awaiting justice for her son.

The presence of cross border smuggling at the border has become a tool in the hands of the BSF to threaten, intimidate and arbitrarily torture citizens. There have also been incidents where the BSF have implicated people under false charges of smuggling narcotics across the border, in order to threaten them against or punish them for filing complaints against the atrocities committed by the BSF. The case of Tahira Begum³⁹ is one such incident. In 2013, Tahira and her family were brutally tortured by BSF personnel. While the police had refused to lodge a complaint against the BSF, the NHRC recommended interim monetary compensation of 25,000 INR which Tahira received in 2017. However, Tahira and her daughter were repeatedly harassed by BSF personnel because she spoke up against the atrocities committed by them. On 5 September 2019, the Company Commander of the BSF ordered his troops to detain the women in order to interrogate them regarding an incident of smuggling in the area. In the camp, the BSF planted fifty bottles of

³⁴ Human Rights Watch, "Trigger Happy": Excessive Use of Force by Indian Troops at the Bangladesh Border' 9 December 2010

³⁵ Interview conducted by MASUM in December 2019, details withheld.

³⁶ Names of the victims of torture have been changed to protect their identities

³⁷ Section 54 of CrPC mandates medical checkup of an arrested person if such a request is made by him at any time during custody.

³⁸ Section 154 of CrPC mandates the registration of the First Information Report wherein a cognizable offence is reported by any individual.

³⁹ Names of the victims of torture have been changed to protect their identities

Phensedyl⁴⁰ on the women and accused them of being engaged in cross border smuggling. A complaint was lodged against them under the Narcotics Drugs and Psychotropic Substances Act, 1985. While Tahira's daughter received bail from the court, Tahira continues to languish in jail to this day, her only crime being speaking up against injustice!

These incidents would suggest that cross border smuggling has a direct link to the violence inflicted at the border and that the government of India would use any means necessary to keep it under check. But this is not quite the complete picture. On 17 November 2020, Satish Kumar, ex-BSF Commandant of 36 Battalion in Malda District of West Bengal, was arrested by the Central Bureau of Investigation for being involved in illegal trade and smuggling of cattle. Kumar has been charged under Section 120 B of IPC and Sections 7, 11, and 12 of the Prevention of Corruption Act, 1988.

The Parliamentary Standing Committee on Home Affairs published a report titled, *Border Security: Capacity Building and Institutions* in April 2017 that addressed the problem of cattle smuggling at the Indo-Bangladesh border. The Committee published data received from the Ministry of Home Affairs wherein more than 100,000 cows were seized by the BSF annually from 2012-2016.⁴¹ The Committee stated:

[...] Police forces of various States have failed to stop this mass movement of cattle to border States and West Bengal Police has failed to intercept or stop the movement of the cattle. The Committee feels that there is a wide and deeply entrenched nexus due to which this menace has proliferated and the Government needs to strike at the roots of this nexus if it has to completely curb this problem.

The Committee, responding to the information provided by the Ministry of Home Affairs, noted that the problem of cattle smuggling has been allowed to proliferate due to the complicity and negligence of public officials and the inaction of the government. In addition, the Committee stated that the West Bengal government has consistently violated its own order dated 1 September 2003 which outlaws the existence of any cattle haats⁴² within eight kilometers of the border. At present, there are fifteen cattle haats within eight kilometers of the border and the West Bengal state administration has taken no measures to shut them down.

Four Aspects of Remedy: India's Obligation to the Victims of Torture

In a report titled, *The Due Diligence Standard as a tool for the Elimination of Violence against Women*⁴³, former Special Rapporteur on Violence Against Women Yakin Ertürk, identified four essential aspects for adequately addressing violence against, and ensuring redressal for victims. These were: prevention, protection, punishment and reparation. These aspects also resonate with the spirit of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for*

⁴⁰ Phensedyl is a cough syrup which is banned in India. Since alcohol is banned in Bangladesh, phensedyl has become an alternative source of addiction.

⁴¹ Parliamentary Standing Committee on Home Affairs, *Border Security: Capacity Building and Institutions* (April 2017)

⁴² Cattle haats are weekly markets where cattle are sold

⁴³ UN Economic and Social Council, *The Due Diligence Standard as a tool for the Elimination of Violence against Women*, 20 January 2006, E/CN.4/2006/61

Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly on 16 December 2005.⁴⁴ Therefore, it would be helpful to explore the possibilities of justice for the victims of torture in India in relation to these aspects.

Prevention

In its National Report to the UPR 2017⁴⁵ India said:

India remains committed to ratifying the Convention. The Law Commission of India is examining the changes required to domestic law prior to ratification. The Government has requested the Law Commission to examine and give a comprehensive report covering all aspects of criminal law so that comprehensive amendments can be made in Indian Penal Code (IPC), Code of Criminal Procedures (CrPC) and Indian Evidence Act, etc. In the meantime, acts of torture remain punishable under various provisions of the Indian Penal Code. The higher judiciary also serves as a bulwark against such violations.

The Law Commission of India published its report titled, *Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation*, in October 2017⁴⁶. The report reiterated India's need to enact a domestic legislation preventing torture and also provided a proposed draft of an anti-torture legislation in India.⁴⁷ However, the Bill has still not been passed by the Parliament of India. Former Union Law minister Ashwani Kumar had filed an application to the Supreme Court of India seeking directions to the government for enacting a domestic legislation against torture without delay. In response, the government of India said that due deliberation was required to act upon the legislation. Ultimately, the Court refused to issue directions to the government and the application was dismissed.⁴⁸

The mid-term report for the UPR 2022 submitted by the NHRC⁴⁹ gives the following update on the issue of torture legislation:

As the GoI has accepted the recommendations to ratify the Convention against Torture, in the present as well as previous UPR cycles, it remains committed to ratifying the said Convention. Towards this end, the GoI has requested the Law Commission of India to

⁴⁴ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005 60/147

⁴⁵ UN General Assembly, Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India*, (23 February 2017) A/HRC/WG.6/27/IND/1

⁴⁶ Law Commission of India, Report No. 273, *Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation* (October 2017)

⁴⁷ *ibid*, Annexure

⁴⁸ The Wire Staff, 'SC Refuses to Direct Parliament To Enact Stand-Alone Law Against Custodial Torture', *The Wire* (5 September 2019)

⁴⁹ National Human Rights Commission, *Mid-Term Report of India* (May 2020). Retrieved Online: https://www.upr-info.org/sites/default/files/document/india/session_36_-_may_2020/nhrc_india_mid-term_report_on_upr-iii.pdf

examine and give a comprehensive report covering all aspects of criminal law so that necessary amendments can be made to the India Penal Code, Code of Criminal Procedures and Indian Evidence Act.

The submission makes no mention of the unwarranted delay in the implementation of the bill, or of the fact that the Law commission of India has made its submission to the government of India in 2017.

The Human Rights Committee's (HRC) General Comment no. 20 on Article 7 of the ICCPR says⁵⁰:

The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

The committee warns against the mendacious stance that India has consistently taken on the issue of torture in the country, implying that merely the pronouncement that torture is forbidden is not nearly enough to fulfill the obligations to eradicate torture from the society. India has failed till date, to take legislative, administrative or any other measures to prevent and punish acts of torture.

Protection

The HRC General Comment no. 20 states:

It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

The Indian state has no legislation for providing adequate protection to victims of torture. As mentioned previously in the paper, many victims of torture, their families and human rights defenders face repeated threats from the perpetrators for withdrawing complaints against them. MASUM documented the case of Sayed Ali Gazi⁵¹, a Muslim resident of North 24 Parganas District who has faced continuous torture and harassment at the hands of the BSF. Sayed was tortured by the BSF in 2013 due to the mere suspicion of being involved in smuggling. Since Sayed reported this incident of torture, the BSF personnel repeatedly obstructed his movements and threatened him with false charges under the NDPS Act. On one occasion, the BSF trespassed into Sayed's house, beat up his family members, sexually harassed his wife and warned him against associating with the human rights defenders of MASUM. Fearing contestations with the BSF,

⁵⁰ HRC, General Comment No. 20, *Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, 10 March 1992

⁵¹ Names of the victims of torture have been changed to protect their identities

Sayed stopped stepping out of the house. But now, his son Sabuddin Gazi, faces the brunt of the BSF's brutality. In 2020, Sabuddin was accused of smuggling Phensedyl by a BSF constable and beaten mercilessly. In spite of lodging several complaints with the police and NHRC, the perpetrators have faced no consequences for their actions.

This incident showcases the imperative need for adequate protection for survivors of torture. The government introduced a Witness Protection Scheme in 2018⁵² which was approved by the Supreme Court of India in *Mahendra Chawla v Union of India*⁵³. However, there is little to no information on the proper implementation of the scheme as of now. The scheme also does not address the urgency of witness protection especially in cases of torture. It can only be hoped that a domestic legislation on torture shall provide adequate protection to victims and their families.

Punishment

The HRC General Comment no. 20 states:

States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment.

Section 197 of the CrPC protects all public officials from prosecution under criminal charges unless it is authorised by the government. An RTI application was filed to know the number of instances where the government has granted sanction for prosecution of security forces operating in Jammu and Kashmir between 1989 to 2011. The response to the RTI revealed that out of the 44 applications made during this period, sanction was granted to none of them.⁵⁴ A statement recently issued by Human Rights Watch on the human rights violations committed by the BSF on the Indo-Bangladesh border also mentioned that the organization was not aware of any cases in which Indian authorities have held BSF soldiers accountable for abuses committed along the Indo-Bangladesh border.⁵⁵

Under Section 125 of the Army Act 1950, if any member of the armed forces is accused of committing a criminal offense, their commanding officer has the authority to decide whether the official would be tried through a criminal court or through court martial proceedings. Court martial proceedings are generally never open to the public and there are few ways to ensure that the trial is conducted in a fair and impartial manner.

The NHRC does not have the authority to investigate allegations of violation of human rights by members of armed forces under the Protection of Human Rights Act 1993. It can merely request

⁵² Ministry of Home Affairs, *Witness Protection Scheme* (2018)

⁵³ *Mahendra Chawla v Union of India* [2018]

⁵⁴ Working Group on Human Rights, 'Factsheet - UPR 2017 - India 3rd Cycle Universal Periodic Review' (2017) 9

⁵⁵ Human Rights Watch, 'India: Investigate Alleged Border Force Killings' 9 February 2021

for reports on the incident from the central government and give its recommendations on the basis of the report. This is in violation of the Principles relating to the Status of the National Institutions which states that a national institution should be given as broad a mandate as possible.⁵⁶ Even in cases involving police and other public officials, the NHRC has been found to not initiate proceedings for prosecution. In the 851 incidents of torture that MASUM has reported to the NHRC, it has not recommended prosecution of officials in any incident and has only recommended departmental action against erring officers and monetary compensation for victims in a select few cases.

The protection granted to armed forces in India under the Army Act 1950, Protection of Human Rights Act 1993 and the Criminal Procedure Code 1973, sets a dangerous precedent. In Kashmir and the Northeast, the Armed Forces Special Powers Act 1958 (AFSPA) is in force, which goes a step further in granting immunity to members of armed forces. International and domestic civil society organizations have repeatedly urged the government to repeal AFSPA and to initiate a probe into the countless allegations of abuses by the army in these regions. However, India has maintained that special powers for the armed forces is necessary to control cross border terrorism and insurgency.

Reparation

The case of Felani Khatun, a 15-year old girl whose body was found hanging from the barbed wire fences between India and Bangladesh after being allegedly shot by the BSF personnel in 2011, was met with widespread criticism. Two trials were conducted in special BSF courts in 2013 and 2015 that acquitted the BSF constable accused of shooting the girl. A plea for a new investigation is still pending before the Supreme Court of India.⁵⁷ The NHRC recommended a monetary compensation of 500,000 INR for Felani's family but the government of India refused to grant the amount.

The NHRC has recommended monetary compensation in only 24 of the 851 cases of torture and custodial deaths documented by MASUM in the last decade. Other measures for the proper rehabilitation for the survivors of torture including medical and psychological assistance, support groups, counseling and opportunities for livelihood are also not in place.

Section 357 A of the CrPC provides for a Victim Compensation Scheme. Under this scheme, the victims who have suffered loss or injury due to a crime committed against them can file an application with the State or District Legal Services Authority for award of compensation. The State or District Legal Services Authority are required to complete inquiries within two months of an application being filed. However, it is often difficult to conduct inquiries into incidents where human rights abuses are alleged to have been committed by public officials due to the lack of evidence and witnesses against them. Even when compensation is awarded under this scheme, it amounts to interim relief without any assurance of punishment for the perpetrators.

Conclusion

⁵⁶ UN General Assembly, *Principles relating to the Status of the National Institutions (The Paris Principles)* 20 December 1993

⁵⁷ *ibid*

India's reluctance to acknowledge the magnitude of torture inflicted on its citizens by its public officials has led to a grave humanitarian crisis in the country. The poorest and most vulnerable populations of India face harsh struggles in accessing the right to remedy and justice. The lack of a specific legislation against torture in the country and the existence of legal immunity for public officials make it extremely difficult to adequately address torture. While the Supreme Court of India has set a good precedent of condemning torture in any form, it has failed to direct the government to undertake legal, administrative and other reforms to prevent torture. India's commitment to international human rights law has however, given citizens the tools to explore possibilities of justice in relation to torture. Therefore, it is the responsibility of both the Indian state, and the international community to ensure the absolute prohibition of torture in the country.

References

Legal Instruments

International

[1] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948

[2] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966

[3] UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984

[4] UN General Assembly, Working Group on the Universal Periodic Review, *Summary of Stakeholders' submissions on India*, (27 February 2017)

[5] UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966

[6] UN Economic and Social Council, *The Due Diligence Standard as a tool for the Elimination of Violence against Women*, (20 January 2006)

[7] UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005

[8] UN General Assembly, Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India*, (23 February 2017)

[9] HRC, General Comment No. 20, *Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, 10 March 1992

[10] UN General Assembly, *Principles relating to the Status of the National Institutions (The Paris Principles)* 20 December 1993

India

[11] Land Boundary Agreement 2015

[12] Constitution of India, Part IV, *Directive Principles of State Policy*

[13] Ministry of Women and Child Development, *Integrated Child Development Services (ICDS) Scheme* (1975)

[14] Ministry of Home Affairs, *Witness Protection Scheme* (2018)

[15] Criminal Procedure Code 1973

[16] Indian Penal Code 1860

[17] Protection of Human Rights Act 1993

[18] Right to Information Act 2005

[19] Narcotics Drugs and Psychotropic Substances Act 1985

[20] Prevention of Corruption Act 1988

[21] Army Act 1950

[22] Armed Forces Special Powers Act 1958

Literature

[23] Dr Andrew Whitehead, 'Partition 70 years on: The turmoil, trauma - and legacy' BBC News (27 July 2017)

[24] Zahoor A Rather, 'India–Bangladesh Border Issues: Challenges and Opportunities.' *International Studies*, vol. 50, no. 1–2, Jan. 2013

[25] Prime Minister's High level Committee, *Social, Economic and Educational Status of the Muslim Community of India: A Report* (2006)

[26] Government of India, Planning Commission, *Report of the Task Group on Development of Scheduled Castes and Scheduled Tribes* (2005)

[27] Gaurav Vivek Bhatnagar, 'Testimonies of Torture Victims Lay Bare India's Claim of It 'Being Alien to Our Culture'', *The Wire* (29 October 2018)

[28] UPR info, India: Third Review, *India's responses to recommendations* (15 December 2017)

[29] A. Mark Weisburd, 'Customary International Law and Torture: the Case of India' [2001]

[30] Law Commission of India, Report No. 273, *Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation* (October 2017)

[31] Office of the High Commissioner for Human Rights, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan* (14 June 2018)

[32] Meenakshi Ganguly, 'India should not reject UN Report on Kashmir' (14 June 2018)

[33] Permanent Mission of India to the United Nations Offices at Geneva, NV. GEN/PMI/353/05/2019

[34] Sukanya Roy, 'No man's land is no woman's land either: The fraught relationship between residents and the Border Security Force at the Indo-Bangladesh Border' (*The Polis Project*, 11 February 2021)

[35] Apurva Vishwanath, Shruti Dhapola, 'Explained: How Section 144 CrPC works' *The Indian Express* (New Delhi, 20 December 2019)

[36] Human Rights Watch, "'Trigger Happy": Excessive Use of Force by Indian Troops at the Bangladesh Border' 9 December 2010

[37] Parliamentary Standing Committee on Home Affairs, *Border Security: Capacity Building and Institutions* (April 2017)

[38] The Wire Staff, 'SC Refuses to Direct Parliament To Enact Stand-Alone Law Against Custodial Torture', *The Wire* (5 September 2019)

[39] National Human Rights Commission, *Mid-Term Report of India* (May 2020)

[40] Working Group on Human Rights, 'Factsheet - UPR 2017 - India 3rd Cycle Universal Periodic Review' (2017)

[41] Human Rights Watch, 'India: Investigate Alleged Border Force Killings' 9 February 2021

Cases

India

[42] DK Basu v State of West Bengal [1997]

[43] Anuradha Bhasin v Union of India [2020]

[44] *EEVFAM v Union of India* [2016]

[45] Mahendra Chawla v Union of India [2018]