Ignoring the Disappeared of Kashmir with Impunity

The blanket refusal by security forces in Jammu and Kashmir to investigate or release the identities of bodies buried in unmarked and mass graves is a gross violation of international law that India has so far been able to commit with impunity. National and international pressure has been found wanting in this regard. Fatigue and helplessness over the persistence of India’s egregious human rights abuses has made such relative silence the norm domestically.

Domestic apathy and selective enforcement of international law must be overcome to end such impunity to the violation of human rights. National and international outrage over the mass graves found in Kashmir has been muted at best. When the Jammu and Kashmir State Human Rights Commission (SHRC) disclosed that roughly 2,700 bodies were found in unmarked and mass graves in Kashmir – some of which were identified as those of local residents, not foreign militants as claimed by the government – national and international criticism was hard to find. Fatigue and helplessness over the persistence of India’s egregious human rights abuses has made such relative silence the norm domestically.

The government will only open an investigation into the identity of a body if a family member meets nearly insurmountable conditions such as (1) India lacks resources to conduct large-scale identifications; (2) it fears triggering “serious law and order” violations; (3) the work is unnecessary as the police have records identifying most of those bodies; and (4) any remaining unidentified bodies were of militants (Ahmad 2012).

According to newspaper reports, the J&K government recently announced in its Action Taken Report to SHRC that it will not conduct DNA testing to identify the bodies (Hussain 2012). It reportedly justified its position on the basis that, (1) India lacks resources to conduct large-scale identifications; (2) it fears triggering “serious law and order” violations; (3) the work is unnecessary as the police have records identifying most of those bodies; and (4) any remaining unidentified bodies were of militants (Ahmad 2012; Ashiq 2012; Kashmir Times 2012a). When asked to release the information it does have on all bodies in unmarked and mass graves, which extend beyond those researched by SHRC (Peer 2011), the government refused, claiming that releasing the information would prejudice public peace and the “sovereignty, integrity and security of the state” as “anti-national elements may use the same [information] for incitement of commission of offence in the state” (Mukherjee 2012).

The government will only open an investigation into the identity of a body within a grave if a family member meets nearly insurmountable conditions such as (1) India lacks resources to conduct large-scale identifications; (2) it fears triggering “serious law and order” violations; (3) the work is unnecessary as the police have records identifying most of those bodies; and (4) any remaining unidentified bodies were of militants (Ahmad 2012). When asked to release the information it does have on all bodies in unmarked and mass graves, which extend beyond those researched by SHRC (Peer 2011), the government refused, claiming that releasing the information would prejudice public peace and the “sovereignty, integrity and security of the state” as “anti-national elements may use the same [information] for incitement of commission of offence in the state” (Mukherjee 2012).

The government will only open an investigation into the identity of a body within a grave if a family member meets nearly insurmountable conditions such as (1) India lacks resources to conduct large-scale identifications; (2) it fears triggering “serious law and order” violations; (3) the work is unnecessary as the police have records identifying most of those bodies; and (4) any remaining unidentified bodies were of militants (Ahmad 2012). When asked to release the information it does have on all bodies in unmarked and mass graves, which extend beyond those researched by SHRC (Peer 2011), the government refused, claiming that releasing the information would prejudice public peace and the “sovereignty, integrity and security of the state” as “anti-national elements may use the same [information] for incitement of commission of offence in the state” (Mukherjee 2012).
as providing the date and circumstances of the death or disappearance, along with the location with some degree of certainty of the grave believed to contain their loved one (Ahmad 2012; Ashiq 2012; Kashmir Times 2012a; Hussain 2012). These conditions essentially place the entire burden of investigation on family members who generally do not have the resources, ability or access to information to make such findings.

**Prohibition on Enforced Disappearances**

The refusal of the J&K government to investigate the identities of or release information regarding the bodies found in unmarked and mass graves is a gross violation of international law. The International Convention for the Protection of All Persons from Enforced Disappearance (UNGA 2006), hereafter the Convention, which India signed in 2007, expressly prohibits enforced disappearance, including through the failure to disclose information about disappeared persons. Specifically, the Convention defines enforced disappearances as:

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.²

The Convention grants all persons directly harmed by an enforced disappearance, such as family members of the disappeared, a “right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”³ Even without this express right, human rights law places a duty on all states to investigate allegations of human rights violations, which means they have a duty to investigate charges of enforced disappearances (HRC 2008: para 7.9; CHR 2006: para 26).

Enforced disappearances, including the refusal to identify persons killed by security forces or others working for the government and/or to disclose information regarding a missing person, violate numerous rights protected by the International Covenant on Civil and Political Rights, which India has ratified, including the right to recognition as a person before the law (HRC 2008: para 7.7), “the right to life, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, the right to liberty and security, the right to fair trial, and the right to respect for private and family life” (ACMP 2011: para 19). As many of these rights are customary international law, the International Committee of the Red Cross (icrc) regards the prohibition on enforced disappearance as customary international humanitarian law binding on all parties to conflicts (icrc 2012a). ⁴

The Rome Statute of the International Criminal Court (icc 2011) further treats enforced disappearances as a crime against humanity if they are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.⁵

Every aspect of the government’s justification for refusing to identify the bodies violates a different principle related to this prohibition. First, the Convention expressly prohibits states from claiming a lack of resources to justify refusing to investigate a possible enforced disappearance by placing a duty on states to guarantee those resources (Article 12(3)). Second, the Convention does not permit security fears to justify refusing to identify and release information related to enforced disappearances, as “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance” (Article 12(2)). According to the United Nations (Un) Working Group on Enforced or Involuntary Disappearances, the only justification for limiting the right to the truth is if disclosure would “jeopardise an ongoing criminal investigation”; any “blanket refusal” to identify or disclose the identity of bodies is an outright violation of the right (OHCHR 2010a: para 3).

The third justification for closing the investigation into the bodies expects the families of missing Kashmiris (and everyone else) to take the government’s word on faith that the police records correctly identify the bodies in the unmarked and mass graves and describe the circumstances of the deaths. IPTHR accuses the government of making up much of this information. The shrc finding that nearly 20% of the bodies in graves it investigated in fact belonged to local residents, not to foreign militants as claimed by the government, supports the IPTHR accusation and undermines, in light of this evidence, the government’s assertions that it has correctly identified the bodies.

The last justification for refusing to identify the bodies is that militants do not deserve to be identified, seemingly a punishment for their conduct. Taking aside the fact that there is no independent evidence that the bodies are those of militants, under the Convention’s definition of a “disappeared” person, the reason for the disappearance is irrelevant to the finding of enforced disappearance and to the application of the right to the truth. A person is “disappeared” as long as: (1) state agents caused the disappearance, and (2) the government is refusing to identify or disclose the identity of the persons buried in unmarked and mass graves. Additionally, international humanitarian and human rights law requires India to identify all bodies within its territories, even those of militants (icrc 2005: Articles 31-32; UNGA 2006: Article 24(3)),⁶ as “the dead should be searched for, recovered and identified without distinction” (ACMP 2011: para 81). India’s blanket refusal to investigate and/or disclose the identities of the bodies in the graves effectively conceals the “whereabouts of the disappeared person” in violation of international law.

As a final point, placing the burden on families to supply the circumstances surrounding the disappearances and the specific location of the bodies – information likely to be solely in the hands of the government – before undertaking identification of those in the graves defies international law. International humanitarian and human rights law places the burden of implementing the right to the truth on the state, not the
The Adivasi Question

Edited By

INDRA MUNSHI

Depletion and destruction of forests have eroded the already fragile survival base of adivasis across the country, displacing an alarmingly large number of adivasis to make way for development projects. Many have been forced to migrate to other rural areas or cities in search of work, leading to systematic alienation.

This volume situates the issues concerning the adivasis in a historical context while discussing the challenges they face today.

The introduction examines how the loss of land and livelihood began under the British administration, making the adivasis dependent on the landlord-moneylender-trader nexus for their survival.

The articles, drawn from writings of almost four decades in EPW, discuss questions of community rights and ownership, management of forests, the state's rehabilitation policies, and the Forest Rights Act and its implications. It presents diverse perspectives in the form of case studies specific to different regions and provides valuable analytical insights.

Authors:

Ramachandra Guha • Sanjeeva Kumar • Ashok K Upadhyaya • E Selvarajan • Nitya Rao • B B Mohanty • Brian Lobo • K Balagopal • Sohel Firdos • Pankaj Sekhsaria • DN • Judy Whitehead • Sagari R Ramdas • Neela Mukhejee • Mathew Areepparampill • Asmita Kabra • Renu Modi • M Gopinath Reddy, K Anil Kumar, P Trinadha Rao, Oliver Springate-Baginski • Indra Munshi • Jyothis Sathyapalan • Mahesh Rangarajan • Madhav Gadgil • Dev Nathan, Govind Kelkar • Emmanuel D'Silva, B Nagnath • Amita Baviskar

Orient Blackswan Pvt Ltd

www.orientblackswan.com

Mumbai • Chennai • NewDelhi • Kolkata • Bangalore • Bhubaneswar • Ernakulam • Guwahati • Jaipur • Lucknow • Patna • Chandigarh • Hyderabad

Contact: info@orientblackswan.com

Pp xi + 408


2012

Rs 695

The Way Forward

Indians and the international community need to pressure the Indian government to address the severe violations of human rights evident in the unmarked and mass graves found in Kashmir. Advocacy should focus on urging the government to take at least three initial steps. The first is to identify the bodies in the unmarked and mass graves using appropriate forensic techniques that preserve evidence in case prosecution is appropriate. Hiding behind the plea of lack of resources to avoid this duty perpetuates and exacerbates the human rights violations already committed.

One possible way to address the resource issue is to seek help from international organisations such as the ICRC or Physicians for Human Rights (PHR) who could offer expertise and other resources.

Given the accusations that many of the bodies in these graves have been misidentified by the J&K police, identification should be required for all bodies. India also must be urged to adopt the Convention's Article 19 guarantee that any DNA collected for purposes of identifying bodies will not be used for any other purpose. Since the government claims the bodies belong to militants, it could be risky for family members to come forward to provide DNA samples, thereby identifying themselves as family members of alleged militants and possibly putting themselves under government suspicion.

The second step the Indian government must take to fulfil its obligations is to investigate the circumstances of the deaths of the people in the graves with an eye towards prosecution. Under the Indian Code of Criminal Procedure, the police are required to investigate any suspicious deaths and, where there is any suspicion that the police were responsible for the death, a magistrate must conduct an inquest (Sections 174 and 176). The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (OHCHR 1989) recommends an independent inquiry that the government must take to fulfill its obligations is to investigate these deaths where there has been an apparent pattern of abuse (Principle 11). Investigatory powers must include the power to compel testimony and the production of documentary evidence from anyone with information (Principle 10). As with identification of the bodies, investigations must follow the standards required for collecting and preserving evidence under Indian and international law.

The final step towards achieving justice with respect to the unmarked and mass graves in Kashmir is to prosecute human rights abuses where appropriate; experience of the Punjab mass cremations case highlights that the first two steps are not enough to end impunity.

The Supreme Court ordered the CBI to identify the remains of, and investigate, the more than 2,000 cases of cremations of supposedly unidentified bodies during counterinsurgency operations in Punjab between 1984 and 1995. Although the National Human Rights Commission proclaimed these cremations were a "flagrant violation of human rights on a victim's family (UNGA 2006: Article 24(2); ICRC 2012b)."
Part and parcel of this third step is that India needs to remove the barrier to prosecution created by immunity provisions in the Armed Forces (Special Powers) Act (Article 6), the Disturbed Areas Act (Article 6) and the Code of Criminal Procedure (Section 197) that permit impunity for security forces. These statutes require government sanction to prosecute security forces, something the government rarely offers. Any mandate for investigation must include a blanket provision granting permission to prosecute officials who committed human rights violations connected to the deaths of the persons in these graves. Given the seriousness of the crimes alleged with respect to these graves, this blanket permission for prosecution would be appropriate and necessary to end impunity. Moreover, prosecutions must take place not only against individual security force members, but also any high-ranking officers and/or government officials who played a role in the killings or their cover-up, directly or indirectly authorised the killings or cover-ups, or were willfully blind to them (UNGA 2006: Article 6). All culpable individuals and entities must be held accountable.

The domestic and international communities should request that the UN Working Group on Enforced or Involuntary Disappearances visit Kashmir to monitor any investigation into the identity of the bodies and the circumstances surrounding the deaths. Such independent monitoring may provide the Government of India the political will it needs to adequately respond to the allegations of enforced disappearances that may be crimes against humanity.

Should the Government of India refuse to follow any of the three steps towards seeking justice and ending impunity for crimes related to the unmarked and mass graves in Kashmir, a Public Interest Litigation following the example of the Punjab mass cremations case would be appropriate.

Conclusions
Blanket refusals by security forces to investigate or release the identities of bodies buried in unmarked and mass graves is a gross violation of international law that India has so far been able to commit with impunity. Indians need to shake off the fatigue and helplessness and empower themselves through concerted efforts to press the government to investigate. Similarly, the international community should take this opportunity to repair its credibility by refusing to engage in the selective enforcement of international law and demand that Government of India meet its international obligations. To do otherwise is to allow India to disappear its disappeared with impunity.

Notes
1. The Association of Parents of Disappeared Persons estimates between 8,000-10,000 people in Kashmir may have been victims of enforced disappearances. See Association of Parents of Disappeared Persons, Home Page available at: www.disappearancesinKashmir.com.
2. Article 2: This right exists under international humanitarian law as well. Article 32 of Protocol I to the Geneva Conventions grants a “right of families to know the fate of their relatives” and, in Article 33, places a duty on states to search for missing persons as reported to the adverse party (ICRC 2006).
3. Article 24(2). The right to the truth is considered customary international humanitarian law for international and internal conflicts (ICRC 2012b).
5. Article 7(1)(i). The Indian government rejected the statement by the Working Group on Enforced or Involuntary Disappearances that proclaimed that the Rome Statute’s treatment of enforced disappearances as a crime against humanity reflected customary international law (OHCHR 2010b).
6. Although India is not a signatory to the Additional Protocols to the Geneva Convention, the Protocols’ prohibitions are instructive for understanding India’s obligations under the International Convention on the Protection of All Persons from Enforced Disappearances, to which India is a signatory.
7. This is also evident from the willingness of the Human Rights Council to place the burden of proof on the state that there was no disappearance: “In cases where allegations are corroborated by credible evidence and where further clarification depends on information exclusive in the hands of the state party, the committee may consider...[the] allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the state” (HRC 2008: para 7.3).

Bibliography


