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# INDIAN ARMY'S

# Approach to Counter

# Insurgency Operations

## A Perspective on Human Rights

**Vivek Chadha**



INSTITUTE FOR DEFENCE  
STUDIES & ANALYSES

रक्षा अध्ययन एवं विश्लेषण संस्थान

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## **Indian Army's Approach to Counter Insurgency Operations: A Perspective on Human Rights**

The Indian Army has been involved in counter insurgency (CI) operations since the mid-1950s, when, for the first time, it was called upon to establish peace in Nagaland. This commenced a series of involvements into the sub-conventional domain, different from the conventional role of the army that focused towards guarding the country against external threats. Subsequent induction into states of Mizoram, Manipur, Tripura and Assam in Northeast India was followed in quick succession by involvement in Punjab and Jammu and Kashmir (J&K). In between, the army was also involved in peacekeeping operations in Sri Lanka, at the request of its Government. During the course of almost six decades of operational exposure in CI operations, the army emerged as one of the most experienced fighting forces in sub-conventional warfare anywhere in the world. The term 'sub-conventional' best describes the vast experience of the army, given the large variety of conflicts undertaken and their subtle differences in classification. From classical insurgencies, terrorism and proxy war, to a no-war-no-peace environment on the Line of Control (LoC), the Indian Army has faced a number of different, and at times unique, challenges. This has provided it an opportunity to evolve its operational understanding of these threats over the years and develop effective means to tackle them.

The Indian Army has learnt lessons based on best practices of other armies, as well as on the basis of its own experiences. Over a period of time, the overall framework and its operational implementation has come to represent the national approach to such internal security challenges. This distilled essence of years of experience can be described as the Indian approach to sub-conventional warfare. While there are variations in the operational imperatives that drive the operations of the army, the larger doctrinal underpinnings remain the same. It is difficult to document the entire scope of the sub-conventional operations that the Indian Army has undertaken over the period of six decades, as part of a single paper. Some of these

aspects, like specific periods of various armed movements, historical assessments, overall approach and issues related to hearts and minds, have been documented in the past.<sup>1</sup> However, the issue of human rights has not been analysed in adequate detail, especially from the perspective of the Indian Army. Organisations like Amnesty International and Jammu Kashmir Coalition of Civil Society (JKCCS), which have focused on human rights, tend to provide a perspective, which is constrained by their limited understanding of country-specific systems and procedures, as also on the basis of one-sided inputs, often leading to factual inaccuracies and perceptual voids.<sup>2</sup> This paper aims to fill this gap in existing literature by delving into the army's approach to CI operations, from a human rights perspective. This has been addressed at three levels: first, the doctrinal evolution of the army's understanding and application of human rights to the conduct of operations; second, organisational and procedural structuring as part of the learning process; and third, incorporation of human rights as an essential element of operations.

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<sup>1</sup> For an assessment of lessons learned from India's CI experiences, see Sumit Ganguly and David Fidler (eds), *India and Counterinsurgency: Lessons Learned*, New York: Routledge, 2009. B.G. Verghese provides an excellent historical overview of insurgencies in the Northeast in India's *Northeast Resurgent: Ethnicity, Insurgency, Governance, Development*, Delhi: Konark Publishers Pvt. Ltd, 2002. Navnita Chadha Behera analyses the Kashmir issue in *Demystifying Kashmir*, Washington, DC: Brookings Institution Press, 2006. Brigadier (Brig) Rahul Bhonsle in his paper, "Human Rights in Counter Terrorism Strategy", *CLAWS Journal*, Winter 2007, available at [http://www.claws.in/images/journals\\_doc/2093066063\\_RahulKBhonsle.pdf](http://www.claws.in/images/journals_doc/2093066063_RahulKBhonsle.pdf), accessed on November 03, 2015, suggests the need to employ human rights as part of the overall strategy of the state.

<sup>2</sup> As a sample, see Amnesty International's report, "Denied": Failures in Accountability for Human Rights Violations by Security Forces Personnel in Jammu and Kashmir, Amnesty International, London, 2015, available at <https://www.amnesty.org/en/documents/asa20/1874/2015/en/>, accessed on October 28, 2015; JKCCS Structures of Violence: The Indian State in Jammu and Kashmir, The International Peoples' Tribunal on Human Rights and Justice in Indian-Administered Kashmir [IPTK] and the Association of Parents of Disappeared Persons [APDP], Srinagar, September 2015, available at <http://www.jkccs.net/structures-of-violence-the-indian-state-in-jammu-and-kashmir-2/>, accessed on October 28, 2015.

These factors are universally applicable to the army's operations in the context of each region that it operates in. However, the paper limits its scope to J&K for two reasons. One, the state is the most sensitive and active region from the perspective of human rights organisations and the environment at large, which is illustrated by the regular publication of reports assessing the human rights conditions in the region. The army's conduct can therefore best be judged based on data from the state and its analysis to understand the human rights policy and its implementation. Two, it allows a degree of complementarity between the region and its associated operational environment, which is different from other areas.

### **Doctrinal Evolution and Human Rights**

The Indian Army, as part of the erstwhile British Indian Army, displayed a high degree of professionalism during the Second World War.<sup>3</sup> This raised the tactical acumen of the army and remained its hallmark in the succeeding years as well. However, the excellence achieved by the army was in the sphere of its conventional war-fighting role, against armies in state-on-state battles. As a result, the initial foray of the army into CI operations against Naga insurgents was a novel experience, which began a fresh process of learning.<sup>4</sup>

The leaders at both the national level and within the army possibly understood this limitation. It was for this reason that doctrinal directives were issued from the highest level, to ensure that the conduct of security forces was guided by clearly defined operational parameters. Prime Minister Nehru insisted that soldiers and officials

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<sup>3</sup> "Field-Marshal Sir Claude Auchinleck, Commander-in-Chief of the Indian Army from 1942 asserted that the British 'couldn't have come through both wars if they hadn't had the Indian Army.' Churchill paid tribute to 'The unsurpassed bravery of Indian soldiers and officers.'" See Commonwealth War Graves Commission, "The Indian Army in the Second World War", available at <http://www.cwgc.org/foreverindia/context/indian-army-in-2nd-world-war.php>, accessed on November 17, 2015.

<sup>4</sup> Rajesh Rajagopalan, *Fighting Like a Guerrilla: The Indian Army and Counterinsurgency*, New Delhi: Routledge, 2008, p. 140.

should always remember that the Nagas were fellow countrymen, who were not merely to be suppressed but, at some stage, had to be won over.<sup>5</sup> This was reinforced by the Chief of Army Staff (COAS), who in a Special Order of the Day wrote: “You are not there to fight the people in the area, but to protect them. You are fighting only those who threaten the people and who are a danger to the lives and properties of the people.”<sup>6</sup>

The army gained from the experience of the British forces in Malaya, which continues to be considered as an example of one of the early successes of state forces against insurgents. Some of these lessons were adopted for CI operations both in Nagaland and Mizoram, of which the concept of “protected villages” was a prominent example.<sup>7</sup> As part of this initiative, villagers were shifted from their traditional living areas to new settlements along the major arteries in the state and placed under the protection of security forces. This isolated them from the insurgents, thereby cutting off the logistic support that they exploited for survival. While this experiment was successful in Malaya, its efficacy remained limited in India and the antipathy that it generated, both as a result of the inconvenience caused to the people as also poor implementation, ultimately led to its failure.<sup>8</sup> This experiment also highlighted the negative impact of curtailing human rights of the people, given their forceful migration from traditional living areas, which possibly contributed little to the long-term efforts of the government to bring peace.

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<sup>5</sup> Sarvepalli Gopal, *Jawaharlal Nehru: A Biography*, Vol. 2, 1947–1956, New Delhi: Oxford University Press, 2010, p. 212.

<sup>6</sup> Quoted from Rajagopalan, *Fighting Like a Guerrilla*, n. 4, p. 147.

<sup>7</sup> Lieutenant Colonel (Lt Col) S.P. Anand, “Counter Insurgency Theory and Practice in Mizo Hills”, *USI Journal*, Vol. CI, No. 423, 1971, p. 153.

<sup>8</sup> Vijendra Singh Jafa, “Insurgencies in North-East India: Dimensions of Discord and Containment”, in S.D. Muni (ed.), *Responding to Terrorism in South Asia*, New Delhi: Manohar, 2006, p. 98.

The army's reliance on "conventional" tactics also became a limiting factor for conduct of operations. The movement of forces in large groups, employment of weapons like 2-inch mortars, poor drills for opening fire and reliance on prophylactic, rather than clinical, operations during the initial years in CI operations brought home important lessons over the years. This led to tactical adaptation, which, over a period of time, led to a shift in the doctrine of the army's employment in CI operations. Amongst the aspects that witnessed debate was the importance of ensuring human rights of the local people. Lieutenant General (Lt Gen) S.K. Sinha wrote in the *USI Journal* in 1970 that "The conduct of Security Forces towards the locals must be exemplary at all times. Any attempt to harass, torture or otherwise maltreat the people must be ruthlessly stopped."<sup>9</sup>

The significance of human rights issues is best illustrated by the sub-conventional doctrine, which was released in 2006.

Since the centre of gravity for such operations is the populace, operations have to be undertaken with full respect to Human Rights and in accordance with the laws of the land... This underscores the importance of people friendly operations that are conducted with a civil face.<sup>10</sup>

The doctrine also reinforced the need for operations based on specific intelligence, which caused least inconvenience to the population. It said: "To obviate inconvenience to the populace, operations should be based on hard intelligence rather than being conducted on prophylactic basis."<sup>11</sup> While this was not the first time that these principles were articulated, however, it did provide an overarching understanding of the concepts followed by the army.

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<sup>9</sup> Brig S.K. Sinha, "Counter Insurgency Operations", *USI Journal*, Vol. C, No. 420, July 1970, p. 268.

<sup>10</sup> See Doctrine for Sub-Conventional Operations, Integrated Headquarters of Ministry of Defence (Army), Headquarters Army Training Command, Shimla, December 2006, p. 21.

<sup>11</sup> *Ibid.*, p. 32.

It outlined the army's overall approach to human rights on the basis of four principles which guide its operations. These are:

- Deep respect for human rights and scrupulous upholding of laws of the land.
- Ensuring awareness amongst all ranks on human rights.
- Expeditious investigation and disposal of alleged human rights violations.
- Promulgation of punishment meted out to defaulting personnel for deterrent effect.<sup>12</sup>

The army's emphasis on zero tolerance for human rights violations is the fundamental theme that is enshrined in these guidelines. In order to implement this, besides the strict code of conduct put in place, the army also attempted to link human rights with the very ethos of soldiering, both as an ideal and in practice. The doctrine employed an oft-reinforced moral plane considered sacred to Indian soldiers by linking it with the ideals of "honour, integrity and loyalty". These were further associated with the army's values, morality and allegiance to the Constitution, army, regiment, battalion and colleagues.<sup>13</sup>

Over the years, certain doctrinal guidelines have become the building blocks for conduct of CI operations. While operational details and their implications will be assessed later in the paper, the essence of the same remains relevant.

First, the emphasis on minimum force needs elaboration. This is not merely a concept that has been one of the elements of the army's approach to CI operations, it also characterises its overall response. This was highlighted during an international exercise by a contingent of the army, exercising with its United States (US) counterparts as part of Yudh Abhyas, at the Joint Base, Lewis

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<sup>12</sup> Ibid., p. 55.

<sup>13</sup> Ibid.

McChord, Washington State. Lt Col Teddy Kleisner of the US Army stated, “One of the great mantras that we got (from the Indians) is the concept of maximum restrain minimum force.”<sup>14</sup> General V.P. Malik, former COAS, reinforced the issue, elaborating upon the approach of the army. He wrote that “They (army) employ the principle of ‘use of minimum force’ during such operations—not the overkill required in a war.”<sup>15</sup>

Lt Gen S.K. Sinha, the former Governor of J&K, while accepting occasions where the army has been guilty of human rights violations, reiterates the principle of minimum force, highlighting the considered decision of the army to not employ “offensive air power or large scale artillery” against terrorists, which is indiscriminate and leads to large-scale casualties. He draws a contrast with Pakistan’s use of offensive air power and artillery in Baluchistan, Waziristan and Swat Valley and the US employment of air power both in Iraq and Afghanistan.<sup>16</sup>

Gen J.J. Singh, another former COAS, in his foreword to the 2006 sub-conventional doctrine, also reinforces the principle of “minimum force”, further linking it with his “Iron Fist with Velvet Glove” concept, which “implies a humane approach towards the populace at large in the conflict zone”.<sup>17</sup>

The second principle is of “discrimination”, which has been elaborated and emphasised repeatedly by the army. This relates to

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<sup>14</sup> “Indian Soldiers Teaches Concept of ‘Maximum Restrain Minimum Force’ to US”, Deccan Herald, September 23, 2015, available at <http://www.deccanherald.com/content/501439/indian-soldiers-teaches-concept-maximum.html>, accessed on September 23, 2015.

<sup>15</sup> Gen V.P. Malik, “Human Rights in the Armed Forces”, Journal of the National Human Rights Commission, Vol. 4, 2005, , available at <http://nhrc.nic.in/Documents/Publications/PART-1.pdf>, accessed on September 24, 2015.

<sup>16</sup> Lt Gen S.K. Sinha, “Terrorism—An Assam and J&K Experience”, Journal of the National Human Rights Commission, Vol. 9, 2009, p. 190, available at [http://nhrc.nic.in/Documents/Publications/nhrc\\_journal\\_2009.pdf](http://nhrc.nic.in/Documents/Publications/nhrc_journal_2009.pdf), accessed on September 23, 2015.

<sup>17</sup> Gen J.J. Singh, “Foreword”, in *Doctrine for Sub-Conventional Operations*, n. 10, p. i.

the need to differentiate between the terrorists and innocent population at large in a conflict zone. While the army conducts deliberate operations with proportional and justifiable force against terrorists, there is a concerted attempt to safeguard the people, who remain in danger as a result of collateral damage. Gen Malik clarifies this position of the army:

The rules of engagement are based on two forms of self-restraint: ‘discrimination and proportionality’. Civilians and civilian places are to be kept distinct from military targets and protected from deliberate attack. Any action against military targets must be carried out in a manner so as to avoid unreasonable harm to civilians.<sup>18</sup>

This guideline has been repeated at length by commanders, especially those who have held the highest positions and were the source of policy formulation. The underlying theme of the 2006 sub-conventional doctrine is based on the concept of “Iron Fist with Velvet Glove”, which puts this principle at the heart of operations conducted in a sub-conventional environment. It further differentiates between foreign and domestic terrorists, retaining the option of taking local misguided youth back into the fold of national mainstream.<sup>19</sup>

## **Organisational Structure and Procedures**

The army, in pursuance of the Human Rights Act, 1993, established the Human Rights Cell, as part of the Adjutant General’s Branch in Army Headquarters, in March 1993. The cell “processes allegations and reports, collects relevant data and analyses them from the legal point of view”.<sup>20</sup> This was established prior to the

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<sup>18</sup> Malik, “Human Rights in the Armed Forces”, n. 15, p. 46.

<sup>19</sup> Singh, “Foreword”, n. 17, p. i.

<sup>20</sup> Quoted from the inaugural address by Gen Deepak Kapoor, at a seminar on “Internal Security: Duties and Obligations in Upholding Human Rights”, organised by Centre for Land Warfare Studies (CLAWS), December 18, 2009. See more at <http://www.claws.in/event-detail.php?eID=256#sthash.183ROJCV.dpuf>, accessed on September 24, 2015.

National Human Rights Commission that came up in October 1993. The establishment of the cell at Army Headquarters was followed by similar cells at subordinate headquarters, that is, the command, corps and divisional headquarters. At the command level, the cell:

promulgates policy guidelines on Human Rights issues to troops of all units and formations in the Command and processes complaints of Human Rights violations against the Army received from Ministry of Defence (MoD), Ministry of Home Affairs (MHA) and National Human Rights Commission (NHRC). The Army also takes suo-moto cognizance and investigates cases based on media reports/intimation by NGPs about alleged excesses by the Army.<sup>21</sup>

### *Training Establishments*

In addition to the human rights cells established by the army at various levels, training establishments have made a concerted attempt to educate officers and men on issues related to the subject. As part of this initiative, human rights has been included in the training syllabi of establishments which train officers and men at all levels of command. The importance of human rights is also indicated in the *Army Training Note*, which aims “to educate all ranks in maintaining and upholding Human Dignity and protecting Human Rights in accordance with the law of the land and National and International conventions, during peace and war”.<sup>22</sup> This is reinforced by the military law school, which highlights:

The members of the armed forces are adequately trained in humanitarian law and human rights law at the time of recruitment

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<sup>21</sup> Indian Army, “Human Rights and Northern Command”, available at <http://indianarmy.nic.in/Site/FormTemplate/frmTempSimple.aspx?MnId=DzSf+eLEtycXxYtN31cLyQ==&ParentID=g9W2T+ASogAQ1EXoccNbZw==>, accessed on October 27, 2015.

<sup>22</sup> Army Training Note, Chief of Staff, Army Training Command, Ministry of Defence, Government of India, 1995, pp. 1–2, available at [https://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_in\\_rule142](https://www.icrc.org/customary-ihl/eng/docs/v2_cou_in_rule142), accessed on November 05, 2015.

as well as while in service. The Geneva Conventions form part of training manuals. In addition, they are trained in human rights norms especially in view of the fact that they may be required to deal with civilians in times of internal conflicts...<sup>23</sup>

This commences at the lowest level for section commanders, who are non-commissioned officers (NCOs) and represent the grassroots level of decentralised command in both CI operations and conventional conflicts. Similarly, the subject is also taught at the Junior Leaders Academy and Platoon Commanders Wing, which train both non-commissioned and junior commissioned officers (JCOs).

Training on human rights for officers commences early as part of the basic young officers courses for all arms. This is further reinforced during the Junior Command, Senior Command and Higher Command courses. Gen Malik indicates that the army has formulated a number of case studies, based on past experiences, which are circulated in the army to highlight the lessons learnt. “The illustrations are meant to assist the troops in undertaking anti-terrorist missions in a legally sustainable manner.”<sup>24</sup> The Centre for Land Warfare Studies (CLAWS), a think tank supported by the army, also hosts seminars and events on similar subjects, with speakers having expertise on legal, operational and international humanitarian law, for officers from the army.<sup>25</sup>

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<sup>23</sup> “Report on Practice of India”, 1997, chapter 6.6, International Committee of the Red Cross, Customary International Humanitarian Law (IHL), India, available at [https://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_in\\_rule142](https://www.icrc.org/customary-ihl/eng/docs/v2_cou_in_rule142), accessed on November 05, 2015.

<sup>24</sup> Malik, “Human Rights in the Armed Forces”, n. 15, p. 48.

<sup>25</sup> For reference to such seminars, see the seminar on “Internal Security: Duties and Obligations in Upholding Human Rights”, n. 20. See more at <http://www.claws.in/event-detail.php?eID=256#sthash.183ROJCV.dpuf>, accessed on September 24, 2015; and “White Knight Conduct Human Rights Seminar”, early TIMES, December 22, 2009, available at <http://www.earlytimes.in/newsdet.aspx?q=86066>, accessed September 24, 2015.

## *Procedures*

Over a period of time, a number of procedures have been put in place by the army to ensure that human rights cases and issues are handled expeditiously. These procedures are based on the premise that adherence to human rights is not only the duty of the organisation and the officers who lead it, but also is in the long-term interest of the people in the affected area, the government and the army.

The fundamental question that is often raised relates to the army's decision to try cases of alleged human rights violations after taking them over from civil courts. The critique suggests that if the code for criminal procedure (CrPC) is suitable for a vast majority of the country's population, it should be appropriate for the armed forces as well. As a matter of principle, this argument cannot be disputed. And this is the reason that a number of guidelines of the CrPC have been incorporated as part of procedures followed by the army.<sup>26</sup> Besides harmonising internal legal procedures in accordance with CrPC, trying cases in military courts by the Indian Army is not an exception amongst major armies of the world; rather, it is the rule that all the others follow as well. These laws have been framed based on the reality of operating conditions and the need to ensure that the ends of justice are expeditious. As an illustration, the US forces are governed by the Uniform Code of Military Justice and the *Manual for Courts-Martial*.<sup>27</sup> Similarly, the United Kingdom (UK) also has the Armed Forces Act, 2006, which governs the conduct of members of the armed forces.<sup>28</sup> While it is not within the scope

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<sup>26</sup> Amongst the procedural aspects included are some of the Do's and Don'ts, which form a part of the Armed Forces Special Forces Act, 1958, as discussed later in the paper.

<sup>27</sup> Uniform Code of Military Justice, Legal Information Institute, available at <https://www.law.cornell.edu/uscode/text/10/subtitle-A/part-II/chapter-47#>, accessed on December 10, 2015; and Manual for Courts-Martial United States, 2012, available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>, accessed on December 10, 2015.

<sup>28</sup> Armed Forces Act 2006, *legislation.gov.uk*, available at <http://www.legislation.gov.uk/ukpga/2006/52/contents>, accessed on December 10, 2015.

of the paper to analyse procedures laid down for armies of other countries, however, it needs to be emphasised that armies operate under the most difficult conditions, when all else fails. This includes the routine administrative structures and procedures. In addition, armies tend to judge their soldiers on moral and legal standards which, more often than not, remain more stringent and strict when compared with their civilian counterparts. This is not only a part of the ethos of most armies, it is also critical to maintain the moral compass of an organisation which is considered, in most countries, the last and final upholder of territorial integrity and sovereignty. The circumstances that shape the existing procedures in this regard in context of the Indian Army need further elaboration.

Before this aspect can be analysed in requisite detail, it is important to understand the reality of conditions that have been and continue to be prevalent in J&K. The ongoing violence in J&K has a limited indigenous component and is largely fuelled by Pakistan.<sup>29</sup> After the initial years, which saw the emergence of the Jammu and Kashmir Liberation Front (JKLF), the movement lost its indigenous component as leaders of groups like JKLF were fighting for freedom, which was unacceptable to Pakistan. This led to the propping up of Hizbul Mujahideen (HM), which fought for the merger of J&K with Pakistan. When even such groups failed to carry forward the violent movement, Pakistan created terrorist groups like the Lashkar-e-Taiba (LeT) and Harqat-ul-Ansar, which recruited Pakistani nationals and foreign mercenaries to fight Indian state forces.<sup>30</sup> The character of the movement was not only transformed over the years, it was also subsumed by Pakistan's desire to further

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<sup>29</sup> See "Parvez Musharraf Owns Up to Pakistan's Role in Terrorism: Calls Osama Bin Laden a 'Hero'", DNA, October 28, 2015, available at <http://www.dnaindia.com/world/report-parvez-musharraf-owns-up-to-pakistan-s-role-in-terrorism-calls-osama-bin-laden-a-hero-2139337>, accessed on October 28, 2015.

<sup>30</sup> Mugdha Variyar, "Osama Bin Laden, Hafiz Saeed were Pakistan's Heroes; We Trained Taliban, LeT: Parvez Musharraf", International Business Times, October 28, 2015, available at <http://www.ibtimes.co.in/osama-bin-laden-hafiz-saeed-were-pakistans-heroes-we-trained-taliban-let-parvez-musharraf-652207>, accessed on October 28, 2015.

its strategic interests through a proxy war in J&K. Under these circumstances, it is important to underline the nature of conflict being waged in the name of jihad.

Pakistan considers J&K and its people a tool to achieve its objectives. Therefore, it employs every conceivable instrument available to fight the Indian government and its forces. When its efforts to achieve its aims through armed insurrection began to fail, given dwindling local support and effective military operations, the Inter-services Intelligence (ISI) resorted to psychological warfare against the Indian Army to affect its resolve. A concerted attempt was made to exploit every possible and conceivable opportunity to turn the local population against the army.

Amongst the incidents that were carefully orchestrated were ambushes on security forces in populated areas, which could result in civilian casualties as a result of cross-firing. Gen J.J. Singh, the former COAS, describes an incident of this very nature, wherein his convoy was ambushed at Baramulla in 1992, when he was a brigade commander. He recalls that the incident “was a deliberate strategy of the terrorists to execute this action in the marketplace so that the blame for the civilian casualties and other collateral damage could be attributed to the army”.<sup>31</sup> The General goes on to describe the counter action thus: “Our response to this provocation was measured and cool. We fired accurately and purposefully and for effect. During the fierce encounter in the bustling market, it was amazing that only a few civilians had got injured in the crossfire.”<sup>32</sup> Similarly, there was also a phase during which terrorists took shelter in mosques (masjids), which if fired at would lead to local outcry.<sup>33</sup> There was further an attempt to file false cases against

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<sup>31</sup> Gen J.J. Singh, *A Soldier's General: An Autobiography*, New Delhi: HarperCollins, 2012, pp. 125–26.

<sup>32</sup> *Ibid.*

<sup>33</sup> Mukhtar Ahmad, “J&K: All Hostages Released; Three Militants Killed”, *rediff.com*, December 25, 2007, available at <http://www.rediff.com/news/2007/dec/25hostage.htm>, accessed on October 28, 2015.

battalions and individuals in an attempt to unleash a propaganda war against the army.<sup>34</sup>

This process was supported by certain segments of people, who were at times lured to participate in the protests. The 2010 street protests are a case in point, wherein young children were paid to throw stones. Former Chief Minister of J&K has gone on record to confirm the same:

Unfortunately there are those forces which do not want normalcy in the state. They are time and again trying to precipitate law and order situation. Money is being paid to youngsters to go into the street and throw stones. Stones are dumped at particular points, particularly at Old Baramula, Sopore, and Old Srinagar with a view to disrupt the law and order situation.<sup>35</sup>

Given the backdrop of these conditions, four major factors led the army to prefer trying cases against its own personnel. First, any case filed against a soldier in a criminal court led to long-drawn legal proceedings, which effectively ensured that the individual was not available for duty thereafter. There are instances of cases that have languished in criminal courts for well over a decade.<sup>36</sup> The targeting as a result of false cases was aimed more at officers. This had a particularly adverse impact on the rank and file of the army, as it served as a deterrent for others to carry out operations, given the possibility of being implicated in such cases. This became all the more challenging given the shortage of officers, especially in the junior ranks, which remains the cutting edge for any CI conflict.

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<sup>34</sup> As per the army, a large number of complaints are registered years after the purported incident, even when there is no First Information Report (FIR) to support such claims. These, according to them, are aimed at maligning the army and embroiling it in legal tangles. See Indian Army, "Human Rights and Northern Command", n. 21.

<sup>35</sup> "Srinagar's Stone Throwers being Paid by Pakistan?", NDTV, February 03, 2010, available at <http://www.ndtv.com/india-news/srinagars-stone-throwers-being-paid-by-pakistan-410290>, accessed on October 28, 2015.

<sup>36</sup> The case against then Major (Maj) Kishore Malhotra is one such example, which is premised on the basis on a false allegation of January 2002.

The army's argument is reinforced by the average duration for disposal of cases filed under the Indian Penal Code (IPC), which can extend to well over 10 years in certain cases. The detailed breakdown of cases and the average time for their disposal is given at Table 1.<sup>37</sup> Further, the rate of conviction in serious offences in one of the most sensitive cities in India, Mumbai, was 7 per cent for the year 2012 and 8 per cent for 2013.<sup>38</sup> On the other hand, court martial proceedings are completed within one month to about one year at the most, clearly highlighting the expeditious nature of the process.<sup>39</sup>

**Table 1 - Duration for Disposal of Cases**

Duration of Trail	Number of Cases
Over 10 years	41,670
5–10 years	1,70,601
3–5 years	2,84,663
1–3 years	4,01,524
6 months–1 year	2,28,510
Less than 6 months	1,63,180

**Source:** National Crime Records Bureau.

<sup>37</sup> National Crime Records Bureau, *Crime in India—2013*, p. 77, available at <http://ncrb.gov.in/CD-CII2013/Chapters/4-Disposal%20of%20cases%20by%20Police%20and%20Courts.pdf>, accessed on October 01, 2015.

<sup>38</sup> White paper on “State of Policing and Law & Order in Mumbai”, *praja.org*, November 2014, p. 5, available at [http://www.praja.org/praja\\_downloads/STATE%20OF%20POLICING%20AND%20LAW%20&%20ORDER%20IN%20MUMBAI.pdf](http://www.praja.org/praja_downloads/STATE%20OF%20POLICING%20AND%20LAW%20&%20ORDER%20IN%20MUMBAI.pdf), accessed on September 18, 2015.

<sup>39</sup> See Indian Army, “Human Rights and Northern Command”, n. 21.

Second, the army came up with a clear policy for taking stringent action against the guilty in cases of human rights violations. This was based on a policy of differentiating between acts of omission and commission. The former included cases like mistaken identity and casualties in crossfire, for which punishments were less severe. However, in case of acts of commission, the severest punishment was given. This also acted as a deterrent for the rank and file of the army, thereby improving its human rights record. The only way this could be achieved was by ensuring fast trials and speedy promulgation of sentences, which was facilitated by trial of soldiers in military courts, especially since the army itself remains most concerned about maintaining the moral health of the organisation. It also simultaneously ensured that soldiers were kept away from their duties for the least possible time, thereby maximising their operational employment.

Third, based on specific cases, the army noted that soldiers were able to get favourable judgements in criminal courts for human rights violations, thereby seeking reinstatement in service.<sup>40</sup> This had a detrimental impact on the organisation as, at times, it allowed the guilty to go scot-free for technical reasons. This reinforced its resolve to try the accused and give exemplary punishment in cases of human rights violation.

Fourth, very often, conditions of near normalcy are seen as the reality of an area like J&K. However, the present state of relative peace does not reflect the challenging conditions of complete breakdown of law and order of the early 1990s. Those years were characterised by local civilian authority being rendered redundant. “The insurgency reached its peak in 1990. The militants were able to subvert a portion of the Kashmir State Police.”<sup>41</sup> This stage saw

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<sup>40</sup> A case in point is that of Maj Rehman Hussain of the army who was reinstated after he was acquitted in a civil court, despite being found guilty by the army.

<sup>41</sup> Professor Scott Gates and Dr Kaushik Roy, *Unconventional Warfare in South Asia: Shadow Warriors and Counterinsurgency*, Burlington: Ashgate Publishing Company, 2014, pp. 103–04.

police personnel subjugated under the weight of terrorism and fear. Judges had vacated their courts and premises out of threats and fear. Jagmohan, the former Governor of the state, notes:

The entire government apparatus was systematically subverted... it was the writ of the subversionists that ran in all important departments of the government. This subversion was facilitated—rather abetted—by the sympathetic and permissive elements in the political and administrative structure. Some of these elements were openly pro-Pakistan; some were clandestinely so; some were indifferent and some were playing the role similar to that of double agents—they would go over to the side which would appear to be winning.<sup>42</sup>

These are not ideal conditions for either independent investigations or fair trial to be conducted. This is all the more relevant in relation to soldiers, who are the target of propaganda and contrived prosecution. Speaking on “Human Rights Violation: Truth and Myth”, Justice Syed Bashirud-Din, former J&K State Human Rights Commission (SHRC) Chairman, said that his experience as the SHRC chairman had shown him that while there are genuine human rights violations in conflict situations, there are also unsubstantiated charges.<sup>43</sup> Under these circumstances, military trials offered a more viable and fair alternative, which best protected the interests of the victims and the accused.

It was, therefore, a considered opinion of the senior army leadership to try cases involving the soldiers to ensure that innocent soldiers were not harassed and the guilty did not go scot-free.<sup>44</sup> In order to

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<sup>42</sup> Jagmohan, *My Frozen Turbulences in Kashmir*, Allied New Delhi: Publishers Pvt. Ltd, 1996, p. 409.

<sup>43</sup> “Army Last Bastion of the Country: Troops Have a Huge Responsibility of Fighting Inimical Elements: Parnaik”, *Daily Excelsior*, December 21, 2011, available at <http://www.dailyexcelsior.com/web1/11dec22/news.htm>, accessed on September 24, 2015.

<sup>44</sup> Section 475 of the CrPC has a provision under which the commanding officer of the accused can try him through a “court martial” and it is the responsibility of the magistrate to deliver him to the court.

make this process free of individual prejudices, a number of stages of legal action have been put in place. As an example, the process commences with a court of inquiry in order to investigate the circumstances under which the act is said to have been committed. Thereafter, the accused is produced in the presence of his commanding officer, who on application of Army Rule 22, can order for the evidence to be reduced in writing.<sup>45</sup> This is followed by the recording of a summary of evidence (SoE), which can be used in the court of law as evidence. This document helps establish a prima facie case against the accused and sets the stage for either court martial proceedings to be ordered or closure, if the absence of evidence does not justify further legal action. A court martial, if ordered and convened, comprises of a legally qualified officer of the Judge and Advocate General (JAG) Branch, a presiding officer and members, who comprise the court. In case an accused is charged under Section 302 of the IPC, the procedure followed presumes that the accused has pleaded “not guilty”, in order to re-examine the witnesses and evidence produced during the SoE, thereby revising the same and limiting the possibility of oversight.<sup>46</sup> After a deliberate and considered process, the court passes its judgement. This, depending upon the nature of court martial, is vetted by a senior functionary in the army, who confirms the sentence.

The process offers a two-stage appeal, which can be pre- and post-confirmation of the sentence, in accordance with Army Act, Section 164.<sup>47</sup> This ensures that an accused cannot be harmed at any stage of the trial. Even after the final verdict and confirmation, the

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<sup>45</sup> “Army Rule 22 Hearing of Charge”, in Manual of Military Law, *lawzonline.com*, available at <http://www.lawzonline.com/bareacts/army-rules/rule22-army-rules.htm>, accessed on September 29, 2015.

<sup>46</sup> Section 302 of the IPC deals with punishment for murder.

<sup>47</sup> Army Act, 1950, Section 164, available at <http://indiankanoon.org/doc/165229/>, accessed on November 13, 2015. The officer’s arrest was stayed by the Supreme Court on the basis of a special leave petition (SLP) filed, even as it directed that the officer should support the investigative process. See <http://kashmirwatch.com/news/print.php/2015/09/01/supreme-court-of-india-asks-jk-police-not-to-arrest-indian-army-officer-in-custodial-disappearance-case.phtml>, accessed on November 13, 2015.

accused or the petitioner is further afforded the opportunity to challenge the verdict in the Armed Forces Tribunal (AFT). The AFT, given its composition of a retired Lt Gen equivalent from the armed forces and a High Court judge, is ideally constituted to hear these appeals, since it provides both a professional and legal perspective. It also enjoys the status of a High Court. Finally, the verdict of the AFT can be challenged in the Supreme Court.

It is evident from this that the procedure is neither arbitrary nor likely to be influenced adversely, since there are multiple levels of investigative and legal processes undertaken by different individuals and authorities. Besides this multiple-stage legal system within the army, oversight is ensured through the national legal system, governed by Indian legal statutes and processes. It also needs to be emphasised that the procedure in the AFT has been established to facilitate a low-cost, fast and just trial, which ensures speedy justice in such cases. Recourse to justice at the AFT can be sought at a minimal cost of Rs 250 and a simple procedure.<sup>48</sup> This enhances fairness of the system by affording a combination of military and civil legal recourse to an individual.

The aforementioned is the procedure followed wherein the army takes cognisance of a case and commences proceedings *sou moto*, or does so on the basis of a complaint received from an individual, local police, SHRC, NHRC or the government. However, if a case is filed in a civil court for seeking sanction to prosecute a soldier, it is forwarded by the local police along with a detailed report of the investigating officer from the police. This is accompanied by comments of superior police officers on the case. On the basis of such a report, the army carries out its examination and makes detailed comments on the same.<sup>49</sup> These comments ascertain the charge, analyse the evidence that accompanies the same and provide

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<sup>48</sup> See Armed Forces Tribunal (Procedure) Rules, 2008, Para 7, Ministry of Defence, New Delhi, Notification September 17, 2008, available at <http://www.mod.nic.in/writereaddata/AFTPROC2.pdf>, accessed on September 29, 2015.

<sup>49</sup> See Indian Army, "Human Rights and Northern Command", n. 21.

further details and observations. The same is thereafter commented and deliberated upon by the Discipline and Vigilance Directorate in Army Headquarters. They forward the case to the MoD, with their recommendations for directions. On the basis of these elaborate findings and comments, the MoD issues its acceptance or rejection of the request for sanction for prosecution of a soldier in a civil court.

It is, therefore, both a factual and perceptual misinterpretation by an organisation like Amnesty International to suggest that the MoD, by virtue of a denial, controverts “criminal prosecution in civil courts”.<sup>50</sup> The decision of the MoD can be challenged in the AFT and Supreme Court in case it is not found to meet the ends of justice. Given this recourse available to the petitioner, the description of the decision as an “outright” rejection is misleading. It is also factually inaccurate to suggest that the army conducts “its own court of inquiry”, which becomes the basis of such a rejection.<sup>51</sup> The army does not hold a court of inquiry to negate or accept the recommendation for handing over cases.<sup>52</sup>

Despite these procedures having been put in place, there are certain instances where the army has not taken over the cases, contrary to the existing perception in certain quarters. Amnesty International says that:

To date, not a single member of the security forces deployed in Jammu and Kashmir over the past 25 years has been tried for alleged human rights violations in a civilian court. An absence of accountability has ensured that security forces personnel continue to operate in a manner that facilitates serious human rights violations.<sup>53</sup>

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<sup>50</sup> Amnesty International, “Denied”: Failures in Accountability for Human Rights Violations by Security Personnel in Jammu and Kashmir, , n. 2, p. 30.

<sup>51</sup> Ibid.

<sup>52</sup> Based on inputs provided by Headquarters Northern Command.

<sup>53</sup> Amnesty International, “Denied”: Failures in Accountability for Human Rights Violations by Security Personnel in Jammu and Kashmir, n. 2, p. 9.

This assertion is factually inaccurate on at least two counts: one, related to cases being tried in civil courts; and two, lack of accountability. First, there have been five cases against army personnel that continue to be dealt by civilian courts in J&K. These were not taken over by the army based on the nature and circumstances of crimes involved. This includes the case of Maj Kishore Malhotra. The officer was a company commander in the Srinagar area in 2002. On January 19, 2002, Manzoor Ahmad Dar was allegedly picked up by unidentified people for questioning. This led to agitation in the area, which the officer attempted to pacify. Though not involved in the case, a complaint was filed against the officer. Despite deposing in front of the police a number of times, the case continues to linger on even after 13 years. Second, this is not only an example of the army not taking over the case, it also indicates the cooperation extended to the judicial and administrative authorities by virtue of the fact that the officer has deposed before police and judicial authorities a number of times to facilitate speedy resolution of the case.<sup>54</sup> The status report filed by the Additional Advocate General, J&K High Court, Srinagar, in respect of contempt petition No. 53/32005 in *Original Writ Petition (OWP) No. 288/2002* titled *Mst Jana vs State of J&K and others*, clearly indicates that the investigating officers repeatedly failed to find any substantive evidence against the accused. As a result, it closed the case vide CD No. 23, dated October 22, 2003. However, the case was reopened on order of the High Court of J&K vide OWP No. 288 of 2002, dated July 24, 2004. A Special Investigation Team (SIT) reinvestigated the case and found the following:

That in light of the above mentioned disclosure made by the said Col the statements recorded during the investigation of the instant case were examined minutely to ascertain whether any of the witness had named Shri Col. Kishore Malhotra being part of the party which picked up the said Manzoor Ahmad Dar during the intervening night of 18/19 Jan 2002. The examination thereof

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<sup>54</sup> Based on inputs provided by Headquarters Northern Command.

revealed that none of the witness had said anything directly regarding the role of the said Col. in the abduction of the said Manzoor Ahmad Dar.<sup>55</sup>

The report further added:

Statements of Mst Jana and her daughter do not expressly prove the culpability of Col. Kishore Malhotra...The complaint lodged by Mst Jana and a subsequent application lodged by the complainant and her statement, if read collectively, become unreliable as she has improved her version at every occasion.<sup>56</sup>

The report indicated that even documentary evidence did not reveal anything incriminating against the officer. As a result, the investigation was closed on December 31, 2012. However, the case was opened yet again with directions to carry out an identification parade in 2013. Despite no further evidence coming to light, in the third instance, the investigation finally found that the “case has been concluded as proved against accused Major/Colonel Kishore Malhotra U/S/ 364 RPC” and requested permission for prosecution against the accused from the Government of India.<sup>57</sup>

The case has been highlighted and elaborated upon primarily to illustrate the challenges faced by soldiers when their cases are not taken over by the army. They are further expected to undertake their operational responsibility even as repeated and protracted calls for investigation run concurrently, as this instance suggests.

The nature of action undertaken by the army is also illustrated by a case wherein the Amnesty International report contends that Ashiq Hussein Ganai was “allegedly tortured to death in custody in 1993” by the army and “no further action is known to have been taken”.<sup>58</sup>

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<sup>55</sup> Status report filed by Additional Advocate General, J&K High Court, vide OWP No. 288 of 2002, dated July 24, 2004.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Amnesty International, “Denied”: Failures in Accountability for Human Rights Violations by Security Personnel in Jammu and Kashmir, n. 2, p. 35.

Contrary to this assertion, the case involved the apprehension of Ashiq Ganai on March 03, 1993, at Dangiwacha, along with an AK-47 rifle and 24 rounds of ammunition. While being transferred to Watargam, the convoy came under fire and in the melee, the accused escaped. He could not be traced thereafter. On April 12, 1993, his body was recovered from Jhelum River. According to the post-mortem report, as endorsed in the police case diary file, the death of the accused was likely to have taken place 48–72 hours prior to the recovery of his body. This clearly illustrated that the army was not involved in the incident. Further, the army, as part of a staff court of inquiry, found the officer in charge of the convoy blameworthy for failure to ensure custody of the accused. This led to action being initiated against him. The progress of the case was also intimated to the family of the accused. On the basis of a writ petition by the family in 1999, in relation to the case, the government filed a reply in 2001. Further, as on February 25, 2015, the case was listed for dismissal as the petitioner was no longer alive.<sup>59</sup>

Second, the trial of personnel by the military justice system, as has clearly been explained earlier, suggests that these are, in fact, based on well-established and accepted codes of criminal procedure. The same has been validated and accepted on a number of occasions by the highest courts of law, whenever they have been challenged. In cases where limitations of existing procedures have been noted, these have been corrected to meet the ends of justice.<sup>60</sup> Further, the fact that a number of military personnel have been punished by this very system suggests that it is suitably structured to ensure speedy and considered delivery of justice. Finally, this justice system

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<sup>59</sup> Based on inputs provided by Headquarters Northern Command.

<sup>60</sup> The formal incorporation of Do's and Don'ts in the Armed Forces Special Powers Act, 1958, was carried out on the basis of a Supreme Court judgement in 1997. See "Naga People's Movement of Human Rights, etc.—Petitioner vs. Union of India—Respondent before J.S. Verma, CJI and Other Four Judges 27 November, 1997", available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/IN/COHR\\_IND\\_UPR\\_S1\\_2008anx\\_Annex%20XXIII\\_Supreme%20Court%20%20ruling%20on%20AFSPA.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/IN/COHR_IND_UPR_S1_2008anx_Annex%20XXIII_Supreme%20Court%20%20ruling%20on%20AFSPA.pdf), accessed on October 26, 2015.

is accountable to two levels of scrutiny, the AFI and Supreme Court, which can overturn its verdicts. Therefore, to suggest that the existing military legal system suffers from the “absence of accountability” is an abject misunderstanding of the legal system as prevalent in India, based on its constitutional validity and legal scrutiny. This in the absence of verifiable data or legal indictment is, at best, a one-sided assertion, which does not stand the test of objectivity.

Amongst the procedures being followed by the army that ensure delivery of justice to the local people is the practice of taking *son moto* cognisance of human rights violation by any member of the armed forces. As and when such a case comes up, the army takes strict disciplinary action against the accused. Cognisance in these cases is neither a result of complaints from the aggrieved nor official channels. Instead, these are a part of the army’s internal checks and procedures, which are designed to ensure that such cases do not go unpunished. The hierarchy of the army is of the view that it is in the interest of the country and the army that punishment is awarded expeditiously to set an example in the area of operations and within the organisation at large. A recent incident, which resulted in the accidental death of two people at Chattargam in 2014, is a case in point.<sup>61</sup> This is not the only case where *son moto* cognisance has been taken by the army and disciplinary proceedings initiated. Until early 2015, the army has punished 52 officers and soldiers as a result of *son moto* action, clearly indicating its intent to stem violations at its level.<sup>62</sup>

The procedures adopted by the army for sharing details of proceedings and judgements in the interest of transparency and justice follow existing legal norms.<sup>63</sup> The procedure for ensuring

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<sup>61</sup> Indian Army, “Human Rights and Northern Command”, n. 21.

<sup>62</sup> Ibid.

<sup>63</sup> Amnesty International, “Denied”: Failures in Accountability for Human Rights Violations by Security Personnel in Jammu and Kashmir, n. 2, p. 33.

the same on completion of proceedings is similar, as prescribed by the CrPC, in all other cases. Section 363 of CrPC lays down the mandatory requirement of handing over a copy of the judgement to the accused. It says, “When the accused is sentenced to imprisonment, a copy of the judgement shall, immediately on the pronouncement of the judgement, be given to him free of cost.”<sup>64</sup> This suggests that existing rules require copies of the judgement to be provided to the accused. However, it is at the discretion of a court to provide additional copies to others affected by the judgement.<sup>65</sup> The CrPC also lays down the requirement of a lower court to send a copy of the finding and judgement to a district court.<sup>66</sup> The army, on taking over a case and completing the trial, forwards the findings to the court according to this procedure.

Despite these guidelines, the army has given publicity to disciplinary proceedings in the past. The case of Maj Rehman Hussain, which led to his dismissal from the army by a court martial, was disseminated by an official spokesperson, as was a more recent Machhil case.<sup>67</sup>

Further, the role and responsibility of the senior leadership of the army has been reinforced as part of the legal statutes in place within the army to ensure that cognisance of human rights violations are taken, failing which, the leadership can be held responsible. Army

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<sup>64</sup> Section 363(1), Code of Criminal Procedure, available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814340.pdf>, accessed on September 30, 2015.

<sup>65</sup> Section 363(5), Code of Criminal Procedure, available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814340.pdf>, accessed on September 30, 2015.

<sup>66</sup> Section 365, Code of Criminal Procedure, available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814340.pdf>, accessed on September 30, 2015.

<sup>67</sup> “Major Dismissed for Molesting J&K Girl, Mother”, The Times of India, February 01, 2005, available at <http://timesofindia.indiatimes.com/india/Major-dismissed-for-molesting-JK-girl-mother/articleshow/1006777.cms>, accessed on September 30, 2015; and Mir Ehsan and Pranav Kulkarni, “Machhil Fake Encounter Case: Army Confirms Life Sentences for its Six Army Personnel”, The Indian Express, September 8, 2015, <http://indianexpress.com/article/india/india-others/machhil-fake-encounter-case-life-sentences-of-six-army-personnel-confirmed/>, accessed on January 08, 2015.

Act, 1950 has a provision that a commander would commit an offence if after “receiving a complaint that anyone under his command has beaten or otherwise maltreated or pressed any person...[to] fail to have due reparation made to the injured person or to report the case to the proper authority”.<sup>68</sup>

Data have often been used selectively to highlight the limitations in the military judicial system. Amnesty International writes that the “military justice system in India has been a key instrument in shielding alleged perpetrators of human rights violations, particularly those accused of custodial torture and extrajudicial executions, from prosecution and accountability”.<sup>69</sup> It further goes on to quote figures of 995 cases of human rights violations in J&K from 1993 to 2011 and the dismissal of 96 per cent of these, thereby attempting to reinforce its suggestion of systemic protection of the accused.<sup>70</sup> A closer look at the data available will highlight how reality becomes a casualty as a result of misinterpretation of facts. According to Headquarters Northern Command, in 25 years of conflict in J&K, approximately 1,121 allegations have been received by the army from various sources, including media and petitions from complainants and human rights organisations.<sup>71</sup> Of these, the police found it fit to file First Information Reports (FIRs) only in 350 cases. This implies that preliminary police investigation suggested that the other cases were not supported by adequate evidence or were false and contrived, which is 68 per cent of cases that came to light. Of the 350 cases, the army found prima facie evidence in 72 cases and initiated disciplinary proceedings accordingly. Since

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<sup>68</sup> Army Act, Section 64(a), relates to command failure to prevent, punish or report war crimes. See ICRC, Customary IHL, India, available at [https://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_in\\_rule153](https://www.icrc.org/customary-ihl/eng/docs/v2_cou_in_rule153), accessed on November 05, 2015.

<sup>69</sup> Amnesty International, “Denied”: Failures in Accountability for Human Rights Violations by Security Personnel in Jammu and Kashmir, n. 2, p. 44.

<sup>70</sup> *Ibid.*, p. 45.

<sup>71</sup> Based on inputs received from Headquarters Northern Command on November 13, 2015.

1990, the army has punished 150 of its personnel, to include 51 officers, 18 JCOs and 81 other ranks, as a result of these cases. This punishment ranges from dismissal from service to imprisonment in civil jail. It also needs to be highlighted that the army has taken *sou moto* cognisance in approximately 100 cases—at times, despite an FIR not having been filed or even in the absence of a complaint. This has led to 52 army personnel receiving varying forms of punishment.

Therefore, to say that “In general, victims of human rights abuses in the state have been unable to secure justice, regardless of whether the perpetrator is a state or non-state actor” is a contention which is inherently flawed.<sup>72</sup> This statement should be seen in light of the fact that in over 150 police stations of the state, a mere 0.01 per cent cases filed relate to allegations of human rights violations against the army and, of these, only 50 cases have come up for prosecution sanction in the last 25 years!<sup>73</sup>

### **Operational Approach**

An assessment of the army’s approach to human rights, with specific reference to its operational role, is possibly the most visible and debated factor as part of its overall responsibility in J&K. This is primarily because of the impact it has on the population at large and its association with specific incidents that are related to the local population. This is often elaborated upon through statistics to both defend and implicate the army on the issue of human rights. However, the maze of numbers often tends to hide the reality of circumstances, which is important for any objective analysis.

It is a well-established fact that the initial phase of any armed struggle is associated with high intensity of operations. This is often

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<sup>72</sup> Amnesty International, “Denied”: Failures in Accountability for Human Rights Violations by Security Personnel in Jammu and Kashmir, n. 2, p. 8.

<sup>73</sup> Based on inputs received from Headquarters Northern Command on November 13, 2015.

referred to as the kinetic stage, which over a period of time gives way to a preponderance of non-kinetic measures, once security of the people has been ensured.<sup>74</sup> This leads to a transition from restoring public order to law and order. The kinetic phase of operations needs further elaboration to better illustrate the reality of conditions prevalent during these circumstances. Some of these conditions have best been described by the former Governor of J&K, Jagmohan. He suggests that:

the extent to which the rot had set in the vital components of the State's power structure and intrusion had taken place in them, was truly depressing. The police, the general services, the hospital administration, the press, the Bar and the Bench—all had been infected.<sup>75</sup>

Jagmohan refers to the absence of police records of terrorists, their complicity in getting Intelligence Bureau officials killed and the unwillingness to pursue investigations, even as sensitive as that of Rubaiya Sayeed (case).<sup>76</sup>

These conditions were further aggravated as a result of a carefully calibrated propaganda campaign on part of the terrorist groups, which aimed at turning the tide of public opinion against the security forces in general, and the army in particular. Amongst these was the well-publicised case of Kunan rape accusation. According to Jagmohan,

there were written instructions contained in the booklet written by Raja Mohammad Muzaffar Khan of J & K. Liberation Front,

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<sup>74</sup> Doctrine for Sub-Conventional Operations, n. 10, p. 23. Also, see Bhonsle, "Human Rights in Counter Terrorism Strategy", n. 1. He not only refers to the high intensity of operations during the initial phases but also to the increasing aspirations with return to near-normalcy conditions. In the context of human rights as well, this is relevant, as curbs on movement and acceptance of searches are no longer acceptable with reduction in violence levels.

<sup>75</sup> Jagmohan, *My Frozen Turbulences in Kashmir*, n. 42, p. 375.

<sup>76</sup> *Ibid.*

which directed the cadres to “Continue your propaganda both inside and outside your houses and localities. Keep also in full swing the propaganda campaign against the security forces, and false and reckless allegations should be made.”<sup>77</sup>

The implication of these conditions suggests that the army had to operate in an environment where intelligence was not forthcoming from the police; the state structure was not only ineffective but also compromised; and there was a concerted attempt at targeting the army through false accusations as part of a well-orchestrated propaganda.

These circumstances led to mass contact with the population, with reliance on operations like cordon and search and establishment of mobile check posts, in the absence of specific intelligence on terrorist movement and location. This was also accompanied by a large number of cases of locals feeding false information, in an attempt to settle personal disputes. The inability of the army to substantiate the information fed, given the ineffectiveness of state machinery, further led to the potential of mistaken action on these inputs.

Over a period of time, these circumstances led the army to make its operational procedures increasingly stringent to ensure avoidance of human rights violations. Some of the initiatives in this regard included the issue of COAS's Ten Commandments and supplementary commandments in 1993 and 2004 (see Annexures 1 and 2). While this provided the overall moral compass for soldiers, along with the mandatory requirement of carrying a copy of the same at all times in the pocket of battle fatigues, a more detailed note was formulated in the form of Do's and Don'ts. These were initially formulated as a guideline for the army while operating in CI operations, however, the Supreme Court sanctified the same as part of the Armed Forces Special Powers Act, 1958. This resulted

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<sup>77</sup> Ibid., p. 517 and the footnote on the same page.

through a ruling on the constitutional validity of the Act and its provisions. As part of the ruling, the Supreme Court said:

While exercising the power conferred under clauses (a) to (d) of Section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of “Do’s and Don’ts” issued by the army authorities which are binding and any disregard to the said instructions would entail suitable action under the Army Act, 1950.<sup>78</sup>

A number of provisions were made mandatory as part of this inclusion and became the basis for formulation of rules of engagement thereafter.<sup>79</sup> Some of the important provisions included the principle of “minimum force” and opening of fire “only after due warning”. In order to ensure that transparency in operations and behavioural norms were maintained, respectable citizens of the locality were required to accompany the search of any premises, as also certify a list of seizures, if any, as witnesses. The occupant of the house was also allowed to accompany the search and was handed over a copy of the seizure list signed by the witnesses. Arrest or search of women could only be done by women police personnel in accordance with provisions on the subject laid down in the CrPC. It became mandatory for the army to hand over a suspect within 24 hours of arrest, excluding journey period, and maintain a record of personnel who were a part of the operation, including commanders who were a part of the team. There was also an explicit rejection of use of third degree methods on suspects. A medical examination report was required to be submitted while handing over the suspect to civil police.

Headquarters Northern Command has incorporated the following guidelines/self-imposed restrictions, which have since become the

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<sup>78</sup> “Naga People’s Movement of Human Rights, etc.”, n. 60.

<sup>79</sup> Doctrine for Sub-Conventional Operations, n. 10, pp. 68–74.

basis for detailed rules of engagement that have been issued by different formations operating in J&K:<sup>80</sup>

- No unilateral search.
- Avoid large-scale operations/enforcing population control measures causing discomfort to locals.
- Operations on concrete intelligence indicating likelihood of terrorist action only.
- Joint operations with police to ensure higher transparency and accountability where ever possible.
- All apprehended persons are to be handed over to civil police with least deal and within 24 hours.
- No search of ladies without lady (*mahila*) police.
- Recoveries (weapons and bodies) handed over to police.
- Transparency in operations—media and public scrutiny.
- Regular training and advisories on human rights issue.
- All civilian casualties as a result of action of the army should be provided first aid.
- Use of maximum night sights for operations at night.
- Minimum collateral damage, only as operationally justifiable.
- Principle of minimum force, good faith, impartiality and necessity should be ensured.

An assessment of these guidelines and their impact needs to be reinforced, especially with reference to other areas of combat

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<sup>80</sup> Based on inputs received from Headquarters Northern Command on November 13, 2015.

experience. In about two decades of operations in J&K, the army has lost over 4,000 of its officers and men.<sup>81</sup> Some of the losses are a result of stringent operating procedures of the army, which reinforce the need to minimise collateral damage and employ minimum force. There are numerous cases wherein terrorists seek refuge in houses of locals, and in places of worship, during a fire fight with the army. From a perspective of ensuring minimal loss of life to its own personnel, the army can use heavy weapons against a building or the house, which will bring it down, thereby killing the terrorists. This would also ensure that there are no casualties to army personnel. In contrast, the action would cause large-scale collateral damage and could also result in civilian casualties. However, the army chooses the opposite. It makes an announcement for the terrorists to surrender and evacuates civilians to safety, if trapped in the building. It also relies on small-calibre weapons fired in a carefully calibrated fashion. There is no reliance on helicopter gunships, attack helicopters, mortar or artillery to neutralise the target. In a number of instances, the desire to close in with the objective, position soldiers in suitable firing positions and minimise damage to life and property leads to casualties to army personnel. Stringent measures are put in place, despite the challenges it creates for officers who operate in the thick of combat situations.<sup>82</sup>

The effectiveness of increasingly stringent rules of engagement becomes evident from an assessment of human rights allegations cases over the last five years (Table 2).<sup>83</sup>

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<sup>81</sup> Indian Army, “Human Rights and Northern Command”, n. 21.

<sup>82</sup> “Army Officers Feel Restrained: Young Army Officers Blame Commanders for Uri Debacle on Social Media”, Broadsword, December 07, 2014, available at <http://ajaiishukla.blogspot.in/2014/12/young-army-officers-blame-commanders.html>, accessed on September 30, 2015.

<sup>83</sup> Indian Army, “Human Rights and Northern Command”, n. 21.

**Table 2. Human Rights Allegations (2010–14)**

S. No.	Year	Cases Filed	Action Taken
1	2010	Eight allegations received, including harassment of serving soldier in army custody for anti-national activities and non-payment of rent.	Seven cases found to be false and six personnel found guilty in Machhil case.
2	2011	Four allegations received, including rape of woman and harassment of soldier in his unit by his ex-serviceman father.	All allegations found to be false.
3	2012	Two allegations received.	Both found to be false.
4	2013	Four allegations received. Three investigated by army and fourth was a civil case of marital discord leading to killing of two women in civil court.	Three cases found to be false.
5	2014	Four allegations received. Two raised by activists based on unsubstantiated media reports of army operations. There was a report of a disappearance of a soldier while training in JAK LI Regimental Centre in Kashmir. The army took suo moto cognisance of a case involving killing of two civilians.	Three cases have been found to be false. Disciplinary proceedings have been initiated in the fourth case.

**Source:** Indian Army Website.

This needs to be contrasted with the data of total complaints filed by the SHRC and NHRC in J&K and Delhi (see Table 3). In light of details mentioned at Table 3, Table 2 indicates the small share of complaints related to the army, the balance being in context of other agencies. Surprisingly, the table also indicates a rising trend in the number of complaints filed by the SHRC, in relation to the NHRC, especially given the steady decline in violent incidents in the state over the last five years.

**Table 3. Human Rights Violations—Complaints**

Agency	2010	2011	2012	2013	2014
SHRC	228	263	326	246	120
NHRC	28	22	48	23	17
MHA	4	0	0	0	0

*Source:* Headquarters Northern Command.

The data of cases highlighted indicate that a large number of cases tend to get filed as a result of civil and criminal offences that do not have any relation to the professional life of soldiers or linkage with the discharge of official responsibilities. It is also evident that cases tend to get exaggerated as a result of unsubstantiated complaints filed on the basis of media reports or hearsay, which are not substantiated by evidence. The Chattargam case of 2014 indicates that even mistakes which were a violation of laid-down rules of engagement lead to expeditious inquiry and initiation of disciplinary proceedings against the accused in the pursuit of justice. In fact, in the 2010 Machhil case, the court had initially sentenced five of the six accused, letting off a soldier from the Territorial Army. However, the intervention of the Army Commander, Lt Gen D.S. Hooda, led to a retrial and conviction of the sixth accused as well.<sup>84</sup> This is a clear indicator of the intent

<sup>84</sup> Pranav Kulkarni, “Before Army Commander Intervened, Only Five were Convicted”, The Indian Express, September 08, 2015, available at <http://indianexpress.com/article/india/india-others/before-army-commander-intervened-only-5-were-convicted/>, accessed on October 27, 2015.

and strong desire of the army to ensure compliance of human rights.

Table 2 indicates that in the last five years, there have been 22 cases of human rights violations reported, a majority of which do not even qualify as such. In contrast, a recent leak from a 250-page dossier, detailing allegations of beatings, electrocution, mock executions and sexual assault related to British forces in Iraq, has been presented in the International Criminal Court. The dossier is titled, “The Responsibility of UK Officials for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003–2008”. According to the report, the dossier documents cases of inhuman treatment meted out to 400 Iraqis that include “‘hooding’ prisoners to burning, electric shocks, threats to kill and ‘cultural and religious humiliation’” Other forms of alleged abuse include sexual assault, mock executions, threats of rape, death and torture.”<sup>85</sup> The newspaper goes on to suggest that despite these accusations, only a handful of court martial proceedings relating to the cases have been held and there has been just one conviction till date. Other than this, no one has been found guilty.<sup>86</sup> This, when read in conjunction with Amnesty International’s assertion that the reformed UK model for military justice is the way to go for the Indian Army, seems misplaced.<sup>87</sup>

## Conclusion

It cannot be denied that there have been human rights violations in J&K over the last 25 years. It is also not suggested that the army’s

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<sup>85</sup> Jonathan Owen, “Exclusive: Devastating Dossier on ‘Abuse’ by UK Forces in Iraq goes to International Criminal Court”, *The Independent*, January 12, 2014, available at <http://www.independent.co.uk/news/uk/politics/exclusive-devastating-dossier-on-abuse-by-uk-forces-in-iraq-goes-to-international-criminal-court-9053735.html>, accessed on October 27, 2015.

<sup>86</sup> *Ibid.*

<sup>87</sup> Amnesty International, “Denied”: Failures in Accountability for Human Rights Violations by Security Personnel in Jammu and Kashmir, n. 2, p. 49.

existing system of dealing with such issues cannot be improved. The paper clearly suggests that there has clearly been a concerted effort on part of the government and the army to reinforce the need for respecting human rights. This is indicated by the army's sustained effort to improve compliance of laid-down rules and procedures, as also cooperate with law enforcement agencies. The record of the Indian Army in upholding human rights of the citizens is second to none. Having participated in CI operations in J&K, the author can say with authority that utmost care is taken in ensuring that the people are provided security without violation of their human rights. The orders to every soldier from higher commanders are that 10 insurgents may escape if it is not feasible to engage them, but not even one citizen should come to harm.

There is understanding that human rights are universal principles which should be respected. These, along with its related laws, also serve the ends of defeating terrorism in an environment where the people are the centre of gravity. The army's record of upholding human rights should act as a catalyst for undertaking further reforms and streamline procedures to ensure that upholding of human rights and operational procedures become strategic assets, in contrast with violence perpetuated by terrorists and countries like Pakistan, which support them.

## Annexure 1

### COAS Ten Commandments

1. No rape.
2. No molestation.
3. No torture resulting in death or maiming.
4. No military disgrace.
5. No meddling in civil administration.
6. Competence in platoon and company level tactics in counter insurgency operations.
7. Willingly carry out civic action with innovations.
8. Develop media interaction.
9. Respect Human Rights.
10. Only fear God, uphold Dharma and enjoy serving the country.

## Annexure 2

### Supplementary Commandments

1. Remember that people you are dealing with are your own countrymen. All your conduct must be dictated by this one significant consideration.
2. Operations must be people friendly, using minimum force and avoiding collateral damage—restraint must be the key.
3. Good intelligence is the key to success—the thrust of your operations must be intelligence based and must include the militant leadership.
4. Be compassionate, help the people and win their hearts and minds. Employ all resources under your command to improve their living conditions.
5. No operations without police representative. No operations against women cadres under any circumstances without Mahila Police. Operations against women insurgents be preferably carried out by police.
6. Be truthful, honest and maintain highest standards of integrity, honour, discipline, courage and sacrifice.
7. Sustain physical and moral strength, mental robustness and motivation.
8. Train hard, be vigilant and maintain highest standards of military professionalism.
9. Synergise your actions with civil administration and other security forces.
10. Uphold Dharma and take pride in your Country and the Army.

**T**he Indian Army has undertaken sub-conventional operations, especially counterinsurgency and counter-terrorism for over 60 years. During this period, there has been an evolutionary shift in its approach to such operations. However, there are certain guidelines that have come to define them. Amongst these, the relevance of human rights remains possibly the most important. Despite its criticality, the subject has been researched inadequately, especially from the army's perspective. This paper attempts to fill this void by analysing three factors that remain the most important constituents of the army's approach to human rights. These include its incorporation as part of the doctrinal evolution, organisational structuring and procedural aspects and finally operational issues. The paper restricts its focus to Jammu and Kashmir in order to link its peculiar circumstances to the conduct of the army.

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