

## **Country Mission to India**

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At the invitation of the Government of India, I conducted an official visit to this country from 19 to 30 March 2012. I travelled to New Delhi, as well as to five States, namely: Gujarat; Kerala; Jammu and Kashmir, where I had meetings in the cities of Jammu and Srinagar; Assam; and West Bengal.

I am grateful to the Government of India for extending an invitation to my mandate. I am further particularly thankful to the United Nations Resident Coordinator, Mr. Patrice Coeur-Bizot, and his team, for having facilitated the preparation and conduct of my mission.

During this country visit, I had the opportunity to meet with Secretaries from the Ministry of External Affairs, the Ministry of Home Affairs, and the Ministry of Law and Justice, officials from the Ministry of Defence and other Ministries at Union level. At State level, I met the Lieutenant Governor of Delhi, State Chief Secretaries and other Secretaries; Commissioners, Directors General and other relevant officers of the Police; and other senior officials. I also visited the Supreme Court, the National Human Rights Commission and the Assam Human Rights Commission. In addition, I held meetings with the United Nations agencies, as well as a wide range of domestic and international non-governmental organisations, lawyers, witnesses, and victims and their families.

My mission focussed in particular on the right to life in the context of the use of force by the police and the armed forces, and on the possible impact on the right to life of cultural practices.

My provisional conclusions are as follows:

### **A) General comments**

India, often described as the world's largest democracy, has a Constitution that guarantees a wide range of human rights, and is a living document, supported by broad public endorsement and enforced by a strong Supreme Court, whose human rights jurisprudence is respected worldwide. The right to life (article 21 of the Constitution) in particular has been given an extensive interpretation by the courts. There is a robust press, and a vibrant and engaged human rights civil society. India has ratified a number of international human rights instruments, including the International Covenant on Civil and Political Rights.

At the same time India faces many challenges to the realisation of human rights, including movements aimed at separation or greater local autonomy, Maoist or Naxalite, insurgency, organised crime, and communal organisations opposed to secularism, plurality and equality. India accommodates a huge diversity in terms of religion, languages and culture, largely in a remarkably peaceful way. The state structure is federal in nature.

The challenge to protect, promote and respect the right to life is undeniably a real one. It is of concern however that despite constitutional guarantees and a robust human rights jurisprudence,

extrajudicial killings is a matter of serious concern in India. However, it is important to emphasise the solution to these issues largely lies within the system itself.

While data available on extrajudicial executions in India is not easy to obtain, in some parts, particularly in conflict areas where political dialogue has been initiated by the government, or where there has been a concerted shift to move away from such occurrences, the last couple of years appear to have seen a drop in respect of unlawful killings. This momentum – and the general commitment to human rights in the country – should now be captured to obliterate the unacceptable levels of deadly violence that remain, and assume higher moral ground.

While I will make some concrete proposals about changes to be affected, I will also propose a process to be followed to address this issue.

India has not hosted many Human Rights Council special procedures. In 2011 it extended an open invitation to special procedures, and to its credit it admitted, for the first visit under this open invitation, the mandate on extrajudicial, summary and arbitrary executions, a mandate covering an area in which it faces well-documented challenges. This reflects a commendable willingness to engage with the issue of unlawful killings in a constructive manner – giving further credence to the view that there may at the moment be a window of opportunity to take significant and decisive steps forward on this issue.

## **B) Concerns**

I have the following concerns about unlawful killings, both in terms of prevention and accountability:

### **1) Use of force by State actors**

#### **a) Police**

There are complaints of use of excessive force by the police against unarmed demonstrators and protestors, with scant adherence to the principles of proportionality and necessity.

Disproportionate use of force during demonstrations has resulted in over 100 deaths, in 2010 in Jammu and Kashmir, while elsewhere, such as in New Delhi, many demonstrations occur without bloodshed. I have been told by the police of a few states that they have recently started using less lethal weapons and other more modern methods of crowd control.

Salutary guidelines laid down by the Supreme Court in the *D.K.Basu* judgment on arrest, detention and interrogation, many of which have been incorporated through amendments in the Code of Criminal Procedure, are not sufficiently complied with.

Significantly, problems concerning excessive and arbitrary use of force by the police are further aggravated by statutory immunities that restrict accountability. Section 197 of the Criminal Procedure Code requires prior sanction from the concerned government before cognizance can be taken of any offence by a public servant for criminal prosecution.

A practice of what is called 'fake encounters' has developed in parts of the country. Where this occurs, suspected criminals or those labelled as terrorists or insurgents, and in some cases people on

whose head there is a prize, are shot dead by the police, and a scene of a shootout is staged. Those killed are then portrayed as the aggressors who had first opened fire and the police escape legal sanction. According to the National Human Rights Commission (NHRC) 2 965 cases of 'encounters' have been reported between 1993 and 2010, though there is possibly under-reporting.

While the use of 'encounters' to eliminate criminals has decreased since the 1990s, it is nevertheless being deployed to target others.

A seminal case from Andhra Pradesh is currently pending before the Supreme Court wherein the High court had held that in situations where deaths occur at the hands of police in cases of alleged returning fire, a first information report (FIR) must be registered, the case investigated and the claim of self-defence by the police proven in a trial before the court.

In a positive development, the Supreme Court and the NHRC have issued guidelines on the Armed Forces (Special Powers) Act and on encounters.

### ***b) Custodial deaths***

There have been a large number of cases recorded on deaths that have occurred in police as well as judicial custody, often in the context of torture. I have been assured by Government representatives that the process of passing the legislation on torture as proposed by the Select Committee of the Upper House is well under way, which will allow the ratification of the Convention Against Torture. Needless to say this proposed legislation must be compliant with CAT and must include the mandatory provisions of training of police, prison cadre and other forces as well as orientation of the judiciary.

### ***c) Armed Forces***

The Armed Forces are deployed in so-called 'disturbed areas' in the North East and in Jammu and Kashmir.

The Armed Forces (Special Powers) Act (AFSPA) in effect allows the state to override rights in the 'disturbed areas' in a much more intrusive way than would be the case under a state of emergency, since the right to life is in effect suspended, and this is done without the safeguards applicable to states of emergency.

AFSPA – continuously in force since 1958 (different states have their own versions as well) in the North East and since 1990 in Jammu and Kashmir – has become a symbol of excessive state power. I have heard extensive evidence of action taken under this law that resulted in innocent lives being lost, in Jammu and Kashmir and in Assam, where witnesses from neighbouring states also assembled. This law was described to me as 'hated' and a member of a state human rights commission called it 'draconian'.

A law such as AFSPA has no role to play in a democracy and should be scrapped. The repeal of this law will not only bring domestic law more in line with international standards, but also send out a powerful message that instead of a military approach the government is committed to respect for the right to life of all people of the country.

The government-appointed Jeevan Reddy Committee and the Administrative Reform Commission have both called for its repeal; as have political leaders of states where the Act applies. The NHRC told me during our meeting that they are in favour of its repeal and that they have commented in their submission to the 2012 UPR that AFSPA often leads to the violation of human rights. It is therefore difficult to understand how the Supreme Court, which has been so progressive in other areas, also concerning the right to life, could have ruled in 1997 that AFSPA did not violate the Constitution – although they tried, seemingly with little success, to mitigate its impact by issuing guidelines on how it is to be implemented.

AFSPA clearly violates International Law. A number of UN treaty bodies have pronounced it to be in violation of International Law, namely HRC (1997), CEDAW (2007), CERD (2007) and CESCR (2008). My predecessor has also called for its repeal.

The widespread deployment of the military creates an environment in which the exception becomes the rule, and the use of lethal force is seen as the primary response to conflict with a concomitant permissive approach in respect of the use of lethal force. This is also difficult to reconcile in the long run with India's insistence that it is not engaged in armed conflict.

Accountability is circumvented by invoking AFSPA's requirement of obtaining prior sanction from the Central government before any civil prosecutions can be initiated against armed forces personnel. The information received through Right to Information applications, shows that this immunity provision effectively blocks any prosecution of members of the armed forces. The Centre has for example never granted sanction for civil prosecution of a member of the armed forces in Jammu and Kashmir.

#### ***d) Death penalty***

Indian law continues to provide for the death penalty, and in around 100 cases per year this sentence is imposed. However, once imposed, there seems to be little appetite to execute. The last execution was in 2004, although another execution has just been stayed at the last minute during the writing of this report.

It is a matter of concern that the death penalty may be imposed for a (seemingly growing) number of crimes that cannot be regarded as 'the most serious crimes' referred to in article 6 of the ICCPR as internationally understood, namely crimes involving intentional killing. For example, the death penalty may be imposed for kidnapping for ransom under Sec. 364A IPC and has also been proposed in the Prevention of Torture Bill and for drug-related offences. I intend to follow up on the concerns expressed that the categories of capital crimes are being expanded.

The phrase 'rarest of the rare cases' (taken from *Bachan Singh v State of Punjab*) is often used to describe the Indian approach to the death penalty. However, this may create the wrong impression, since the list of crimes for which this sentence may be imposed is still much wider than the one provided for under international law. Even if the death penalty is not implemented, those who had been sentenced to death remain on death row for extraordinarily long periods, while, as one interlocutor put it, 'they remain hanging there'.

My attention was drawn to the case of *Ravji alias Ram Chandra v. State of Rajasthan (1996) 2 SCC 175*, where the Supreme Court upheld the death sentence and held that circumstances pertaining to the criminal need not be considered, in spite of earlier authority to the contrary. Subsequently, in seven cases, the Supreme Court invoked the precedent of *Ravji Rao's* case to foreclose inquiry into the circumstances pertaining to the prisoner. A total of 14 prisoners were sentenced to death by the Supreme Court on the basis of flawed legal reasoning. Out of these 14 prisoners, two – including Ravji – have been executed.

## **2) Use of force by non-state actors**

### ***a) Terrorists, criminals and others***

Deadly violence has been used by Maoists, insurgents, and terrorists. The callous nature in which lives, often of innocent civilians, are taken by these non-state actors needs to be condemned strongly. The state has a right to defend itself against such aggression, provided it abides by the international standards in this regard. The state however cannot adopt unlawful or unconstitutional means or create a vigilante force to counter such violence.

### ***b) Communal violence***

I have heard evidence regarding a number of instances where inter-community violence has occurred, resulting in large-scale loss of life. In particular I have met with a large number of people who lost relatives during the Gujarat killings of Muslims in 2002 and the Kandhamal killings of Christians in 2007/8, during which between 1200 – 2500 people and between 50 and 100 people, respectively, were reportedly killed. It is a matter of regret that the Gujarat authorities at the last minute cancelled the meetings we had scheduled during the mission.

In these cases grave allegations of direct state involvement in the killings has been made; moreover in all cases the state has the responsibility to protect citizens against such violence.

The phenomenon of mass and targeted communal violence clearly poses a significant threat to the right to life, also because it sets into motion a cycle of violence that stretches over the years. One of the problems here is that the role of the police and other agencies of the state in these situations could involve bias against minorities. I will further examine this issue.

A number of people have proposed the introduction of the doctrine of some form of 'command responsibility' and 'superior responsibility', in domestic law, to hold culpable persons in positions of political, civil and administrative power and authority, complicit in the communal violence. I will also examine this matter further.

### ***c) Traditional practices affecting women***

'Honour' killings occur where a woman is killed by her family or community because she has exercised her right to choose a partner, particularly when the partner belongs to a different community, caste or religion. This crime is reportedly on the ascendance. It is currently dealt with as murder under the Indian Penal Code. There have been suggestions that this be dealt with under a separate piece of legislation so as to highlight the unique nature of such killings.

Dowry deaths occur where a husband or his relatives are dissatisfied by the amount of dowry brought by the wife, and cause her death. Special legal provisions have been enacted to punish this crime in the Indian Evidence Act. The unnatural death of a wife within seven years of marriage, under suspicious circumstances, including burning or other bodily injuries, and where she is known to have been harassed and treated cruelly by her husband or his relatives on account of dowry, creates a presumption that a dowry death has been committed by the husband or his relatives.

The branding of elderly and single women as witches, while largely associated with tribal areas is no longer confined to these regions. Property reasons often underlie these killings.

This is a difficult area for any state to address. While accountability and punishment is important in the context of the above gender-based killings, it is not clear that increasing the punishment, however severe, will lead to prevention. Ensuring certainty of conviction and some form of consequence to establish the norm seems to be more important. This is often difficult for a host of reasons, including the fact that there is general social sanction for the crime, and the police often do not address these killings as crimes. The values at stake are often viewed as more important than life itself. A change in the values themselves is therefore required, a task for which an institution such as the NHRC should be eminently suited.

### **3) Systemic challenges**

#### ***a) Justice delayed is justice denied***

The complaint is widely raised that the wheels of justice, when they turn, often do so too slowly. Legal proceedings drift for years, while the alleged perpetrators are out on bail and back in the community. The Nanavati Commission of Inquiry in Gujarat has now taken 10 years without any concrete results. This is exacerbated by the symbolic importance of the events that are being investigated, and inevitably the conclusion will be drawn that this is not a matter of priority. Similarly, the Supreme Court in 2006 issued a directive for the establishment of Police Complaints Authorities, but in many cases this has not been done.

#### ***b) Perpetrators receive awards***

Many of the people I interviewed whose family members had been killed, pointed out that the alleged perpetrators, belonging to the police or the armed forces, have been awarded out of turn promotions, or have in other ways been rewarded.

#### ***c) Compensation instead of prosecution***

While in some cases of custodial death and death due to excessive use of force compensation is paid by the state, criminal investigation and prosecution against the perpetrators is rarely initiated. Consequently few if any are punished for violating the right to life. This is also a manifestation of a military as opposed to a rights based approach. It blunts the deterrent effect of the law and encourages impunity.

#### ***d) Burden on the victim***

The burden of initiating civil, criminal or writ proceedings in cases of custodial deaths or 'encounter' killings, for compensation or securing accountability and punishment, is placed on the victim's family. Their marginalised and vulnerable status cripples their ability to secure accountability for the violation of the right to life.

***e) Form over substance***

Standards such as the Supreme Court and NHRC guidelines mentioned above are often not followed in practice. On most occasions, where the alleged accused are men in uniform, belonging to the police or the armed forces, registration of First Information Reports (FIR) is refused, further deterring access to justice. In case of 'encounter' killings, the police lodge the FIR under Sec. 301 IPC, for attempt to murder, naming the deceased as the accused and close the case. Families are also unable to access and secure autopsy reports. Laws and policies are mostly in place, but they are not implemented.

***f) Statutory immunities and good faith clause***

The statutory provisions of requirement of prior sanction, for a Court to take cognizance of offences committed by public servants, including the police and armed forces, while discharging official duty, coupled with the presumption of good faith for acts done, effectively renders them immune from criminal prosecution.

***g) Marginalised groups***

Groups such as the *dalits* and the *adivasis* are particularly vulnerable, also in respect of the right to life. The increased targeting of 'right to information' activists and human rights defenders by land, forest and mining interest groups has also been reported to me.

***h) Witness and victim protection***

The lack of a systematic witness and victim protection system places them at risk, and leads to impunity.

**4) The role of the human rights institutions**

The National Human Rights Commission has a proud record and has a critical role to play in the protection of the right to life, especially with reference to ensuring strict compliance with its Guidelines on Encounter Killings.

The NHRC presently seems, from my interaction with them, to be taking a largely legalistic and deferential approach. During our discussions the approach on a number of points was that there are laws in place to deal with matters, and nothing more is required.

The state human rights institutions inspire little confidence. The Manipur Human Rights Commission was for all practical purposes closed after it challenged abuse of power by the police. A member of another state commission told me the commission was 'subordinate' to the government – there was not even pretence of independence. In West-Bengal, NGOs showed me how the number of cases they refer to the Commission has dropped to zero for 2012, because it serves no purpose.

The fact that lodging a complaint with a state commission blocks access to the NHRC raises the question whether their presence helps or hinders complainants.

### **C) Conclusions**

There is reason for serious concern about extrajudicial executions. The National Human Rights Commission has on occasion said 'extrajudicial executions have become virtually a part of state policy'. The position may have improved in some respects, but has not been resolved, and the legacy of the past is bound to continue into the future.

To a large extent the required structures to decrease extrajudicial executions are already in place. The steps to be taken have also by and large been identified within the system. What is required is a concerted and systematic effort by the state, civil society and all others concerned to eradicate its occurrence. In this process some of the best practices that are already followed in the country should be used as models for reform elsewhere. I have been impressed, for example, by the measures taken in Kerala State to make the police force more responsive to the needs of the public.

Impunity for extrajudicial executions is the central problem. This gives perpetrators a free reign, and leaves victims in a situation where they either are left helpless, or have to retaliate. The obstacles to accountability that are in place – in particular the need for prior sanction of prosecutions – should be removed.

Women and minorities – religious minorities, as well as *dalits* and *adivasis* – as well as human rights defenders, including right to information activists, are especially at risk, and their protection deserves special measures.

Almost everyone interviewed said that the courts, and the Supreme Court in particular, play a central role in the fight against unlawful killings. The same applies to the role of the media. I was also struck by the level of expertise and responsibility in civil society.

It is evident that the killings of people take place in the context of other abuses, such as torture and enforced disappearances. Preventing these other abuses can under some circumstances prevent the taking of life.

It is clear that in general the underlying causes of some of the violence need to be addressed, including the levels of development of those who are currently using force to oppose state policies. Andhra Pradesh was mentioned to me as an example in this regard.

There is a strong need for victims to speak about their experiences. A large number of the almost 200 victims who made presentations to me emphasised the need to know the truth, and to 'clear the names' of their loved ones who had been killed in 'fake encounters'. However, a credible



national process will have far greater legitimacy in this regard than an international one. Some form of – internal – transformative justice is called for. In Jammu and Kashmir the Chief Minister called for a truth and reconciliation commission. It must be underscored that justice for the victims, accountability and punishment of the perpetrators, that is a real end to impunity for extrajudicial executions, enforced disappearances and torture, are essential elements of any such process.

A public commitment to the eradication of the phenomenon of unlawful killings is needed. In this context it could be valuable to highlight to the public and to those in the structures of the State the historical and global role the country has played in promoting non-violence worldwide, including non-violent demonstrations, and the fact that extrajudicial executions is its opposite. A Commission of Inquiry, drawing on some of the outstanding jurists and other figures that the country has produced, can play this role.

There should be a special focus on the areas of the country where specific forms of unlawful killings take place. In some instances some form of transitional justice may be required, to ensure justice to the victims, break the cycle of violence, and to symbolize a new beginning. Specific and targeted attention should be given to the following issues: challenging the general culture of impunity; addressing the practice of ‘fake encounters’, to ensure that it is rooted out; and ensuring that swift and decisive action, with concrete outcomes, is taken when there are mass targeted killings. The Commission has to be required to complete its work within a reasonably short period of time, also to demonstrate that a new approach is being followed. In this respect it will be useful to look at possible lessons to be learned from the recent appointment of a judge to investigate extrajudicial executions in Gujarat, which at this stage appears to be a positive development.

#### **D) Provisional recommendations**

- 1) A credible Commission of Inquiry that inspires the confidence of the people, into extrajudicial executions in India should be appointed by the Government which also serves a transitional justice role. The Commission should investigate allegations concerning past violations, propose where relevant measures to deal with those, and work out a plan of action for the future to eradicate practices of extrajudicial executions. The Commission must submit recommendations on legal reform, and the reform of state structures, security apparatus and processes that encourage impunity.

Without waiting for the Commission, the following steps should be taken as a matter of priority:

- 2) Ratification of the following international instruments should take place without further delay: Convention Against Torture; OP-CAT; and the Convention on Enforced Disappearances. Ratification of the following instruments should be considered: The two Optional Protocols to the ICCPR; Optional Protocol to CEDAW; Rome Statute of the International Criminal Court; and the two Optional Protocols to the Geneva Conventions.
- 3) Repeal the Armed Forces (Special Powers) Act, 1958 and the Jammu and Kashmir Armed Forces Special Powers Act, 1990. To tie this to the announcement of the Commission

mentioned above will send a powerful signal about the State's commitment to a new dispensation.

- 4) Repeal the following laws or bring them otherwise into conformity with the applicable international standards, including the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and the Basic Principles on Extrajudicial Executions: Jammu and Kashmir Public Safety Act; Jammu and Kashmir Disturbed Areas Act, 2005; Section 197 of the Code of Criminal Procedure Act; provisions of Unlawful Activities Prevention Act, 1967; and the Chhattisgarh Special Public Security Act 2005;
- 5) Enact the Prevention of Torture Bill, along the lines of the amendments proposed by the Select Committee of the Upper House of Parliament (*Rajya Sabha*) ensuring its compliance with CAT.
- 6) There should be regular review and monitoring of the status of implementation of the directives of the Supreme Court and the NHRC guidelines on arrest, custodial violence, encounter killings and custodial death. In particular, the establishment of the independent Police Complaints Authorities by the States should now be made a priority.
- 7) To counter impunity for extrajudicial executions, where the police cause the death of a person in an 'encounter', there must be mandatory registration of FIR under Sec.302 IPC against the police and there must be an independent investigation of the same. Whether the police acted in self-defence or committed culpable homicide is to be decided by the competent court.
- 8) Families of victims should have full and easy access to autopsy reports, death certificates and other relevant documentation to allow them to proceed with their lives.
- 9) The practice of inviting UN special procedures should be continued, especially in areas where international concern has been expressed, such as torture, counter-terrorism measures, and minority rights.
- 10) Increased sensitizations and orientation programmes in respect of gender-based killings, 'honour' killings, dowry deaths and witch killings should be undertaken, both for the police, judiciary and public especially in the areas of the country that most affected.
- 11) An effective witness and victim protection programme should be established.
- 12) The National Human Rights Commission should be given the mandate to investigate the actions of the Armed Forces, and there should not be a year cut-off date on the cases they can consider. The Commission should develop a strategy to enhance its contribution towards protecting the right to life which goes beyond mere references to laws and procedures, and focuses on actual impact. The NHRC should undertake a review of compliance with its guidelines on 'encounter' killings, and whether their guidelines work in practice. They should also issue guidelines on inquests and autopsies. The independence and working of state human rights commissions should be reviewed.

13) Place a moratorium on the death penalty in accordance with General Assembly resolution 65/206.