

NHRC Comments on the observations/recommendations mentioned in the Press Release of UN Special Rapporteur Mr.Christof Henys on conclusion of his visit to India from 19-30 March, 2012

I. General Observations by UN SR:

1. *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.*

NHRC Comments

UN Special Rapporteur Mr Christof Heyns has raised doubt that though 2965 cases of encounters has been reported in NHRC between 1993-2010, there is possibly under reporting. In this context it is *stated* that since May 2010 the Commission has issued guidelines wherein every death in police action has to be reported to NHRC within 48 hours of the incident. Prior to it, there were guidelines for submission of half-yearly reports by the State authorities in this regard

2. *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.

No comments since the matter is sub-judice

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

NHRC Comments

NHRC has issued guidelines in May 2010 wherein every death in police action has to be reported to the Commission within 48 hours as reported earlier.

4. *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 (Pg 4)*

NHRC Comments:

The NHRC *has been* of the view that the AFSPA should be repealed. However, the Supreme Court of India has held that the Act is constitutional. Since the judgement of Supreme Court is after taking into account the arguments for and against the repeal, it will not be proper for NHRC to further take action in this matter. Thus, it will be for the Government to decide whether or not to repeal the Act. The NHRC has not pursued the issue as a priority, since it is not central to the work of the Commission and also since there is a range of other pressing and complex issues that the Commission is presently engaged in addressing. However, the impact of legislations on the people remains an important concern for the Commission.

NHRC has commented in its 2012 UPR that the Armed Forces Special Powers Act remains in force in Jammu & Kashmir and the North-Eastern States, conferring an impunity that often leads to the violation of human rights. This, despite the fact that India's 2011 report on the Optional Protocol to the CRC states that "India does not face either international or non-international armed conflict situations".

5. *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 Pg 6 (Honour killings)*

NHRC Comments:

Although the instances of the so-called 'honour' killings were very few, NHRC is of the view that a killing, irrespective of the intent or motivation, was a murder, and hence, a crime punishable under law. In such cases, the Commission inquires into why action was not taken by the concerned official, and subsequently, acts according to the case under consideration.

As regards the role of NHRC for a change in the social values, the Commission has been engaged in conducting training programmes, for promoting human rights awareness at the grassroots level, in collaboration with credible NGOs of various states, throughout the country, on various human rights issues.

The NHRC also conducts regular seminars and workshops on a host of human rights issues. The national conferences organized by the Commission are supplemented with regular regional seminars and workshops on issues that need both urgent and ongoing attention.

6. *The NHRC 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 discussion the approach on a number of points was that there are laws in place to deal with matters, and nothing more is required. (Pg 7The role of human rights institutions)

NHRC Comments:

This is an incorrect view of the Special Rapporteur. NHRC is of the view that there are enough laws to protect the victims of police aggression but with the existence of a vibrant legal structure and other institutions like NHRC, National Commissions for Women, Minorities, Scheduled Castes, Scheduled Tribes, Children etc. together work for the better protection of human rights in the country.

7. *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 (Pg 8)*

NHRC Comments:

The PHR Act, 1993 grants State Human Rights Commissions (SHRCs) similar functions and powers as NHRC, India with the exception of Section 12(f) which grants NHRC, India the power to “study treaties and other international instruments on human rights and make recommendations for their effective implementation”.

The SHRCs, despite obvious weaknesses, are actively engaged within their respective states to protect and promote human rights and provide relief to those whose rights and fundamental freedoms have been violated. The question is not whether the presence of SHRCs helps or hinders complainants, rather, the focus has to be on what measures to adopt so that the SHRCs may be further strengthened in the fulfillment of their mandate to protect and promote human rights?

Despite the relentless efforts on the part of the SHRCs, certain issues tend to impede their effectiveness in reaching out to people/groups/populations, especially in the remote parts of the country. Lack of education and human rights awareness at grassroots levels coupled with abject poverty often frustrates efforts to reach out to the people. Further, a lack of accessibility to and low availability of infrastructure in these remote parts of the country thwart the ability of the SHRCs to reach out to large numbers of people in these areas.

Better infrastructure, further capacity building, and greater financial strength therefore, will enable SHRCs to respond more effectively to human rights violations. The NHRC has already installed its computerized Complaints Management System (CMS) in 4 SHRCs with the remaining SHRCs proposed to be covered in phases. Installing the CMS in the remaining SHRCs will enable them to handle and dispose off the complaints they receive more efficiently, thus, strengthening the human rights system within the Country.

8. *The NHRC has on occasion said “extrajudicial executions have become virtually a part of state policy” (Pg 9)*

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NHRC Comments

The NHRC has never said that “extra judicial executions have become virtually a part of State policy.” The NHRC views any death in police action quite seriously and had issued detailed guidelines on 2nd December, 2003 regarding the procedure which has to be followed by the State Governments in all cases of death in the course of police action. These guidelines were further modified on 12th May, 2010 and the same are being mostly followed by the authorities.

II. Provisional recommendations by UN SR (Pg 9-11)

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.*

NHRC Comments:

While the Commission enquires into all such killings reported to it as per its guidelines, Commissions of Inquiry into such cases have been set up in the States of Odisha, Manipur and Gujarat

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.*

NHRC Comments:

NHRC is mandated to recommend to the Government of India to sign and/or ratify international conventions, and it does so, on issues and concerns vital to the protection of the rights of India's people, such as the Convention on Torture. However, one has to ask if the Optional Protocol to the ICCPR, for instance, which essentially creates a body to hear individual complaints, is necessary for a country like India, which already has a robust judiciary in addition to the NHRC and other Commissions to hear and address individual complaints? If the Government decides to ratify the Protocol, the Commission would definitely support it, but this particular issue is not central to the Commission's concerns. Similarly it is for the Government to decide whether or not India should sign the Rome Statute of ICC.

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.*

NHRC Comments:

NHRC has been of the view that the AFSPA should be repealed. However, the Supreme Court of India has held that the Act is constitutional. Since the judgement of Supreme Court is after taking into account the arguments for and against the repeal, it will not be proper for NHRC to further take action in this matter. Thus, it will be for the Government to decide whether or not to repeal the Act.

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;*

NHRC Comments:

It is for the Central/State Governments to decide whether or not to repeal these laws

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.*

NHRC Comments:

NHRC has already given its inputs on the torture bill to the Government of India.

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.*

NHRC Comments:

NHRC agrees. Besides the guidelines already issued by the Commission on arrest, police and judicial custodial death and fake encounters, it also calls upon the State Governments to follow the instructions strictly while disposing of individual cases, during visits to jails, detention centres or camp sittings etc.

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.*

NHRC Comments:

The issue of mandatory registration of F.I.R. under Section 302 IPC against the police personnel in a case where a death occurs in a police action is engaging the attention of Supreme Court of India. The High Court of Andhra Pradesh took the view that there must be a mandatory registration of F.I.R. under Section 302 IPC against police personnel in such a situation. An appeal has been preferred by the State of Andhra Pradesh against the said decision before the Supreme Court and the matter is sub-judice.

The NHRC has issued detailed guidelines on 12th May, 2010 regarding the procedure which is to be followed by the authorities of the State Government in all cases of deaths in the course of police action. Apart from others, they also provide that whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognizable case of culpable homicide, an F.I.R. to this effect must be registered under appropriate sections of the I.P.C. Such case shall be investigated by State CBCID or any other specialized investigation agency.

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.*

NHRC Comments:

NHRC agrees

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.*

NHRC Comments:

That the Government of India is open to the idea of inviting Special Rapporteur procedures is evident from the fact that the Special Rapporteur has visited India to carry out his mandate.

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.*

NHRC Comments :

Section 12(h) of the PHRA mandates the NHRC to “spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means.” The NHRC uses a wide range of measures to discharge this function, prominent among them being training programmes, conferences, seminars, workshops and outreach programmes. These also help in making assessments of problems and gauging the effectiveness of government programmes meant to address them.

11. An effective witness and victim protection programme should be established.

NHRC Comments;

It is for the Government to decide. However the ground situation in the country needs to be kept in view while developing such a programme

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.

NHRC Comments

(a) Section 19 of the PHR Act 1993 provides the mandate and the procedure to the Commission to investigate the actions of the Armed Forces.

(b) Regarding the suggestion that there should not be year-cut-off date for taking cognizance, Section 36(2) of the PHR Act also provides that Commission shall not enquire into any matter after expiry of one year from the date on which the act constituting violation of human rights has been committed and there is no necessity to revise it. However, the Commission entertains complaints of more than one year period also when it is satisfied that there is sufficient reasons for not filing a complaint within the said period or when it feels that immediate attention in such cases is required.

(c) In respect of the observation of the UN Special Rapporteur that NHRC should develop a strategy to enhance its contribution towards protecting right to life beyond by mere references to law and procedure and focus on actual impacts, it is stated that the Commission has already expanded its mandate in accordance with the broader interpretation of right to life by Supreme Court. It therefore covers all basic necessities for a life of dignity like right to health where issues of SILICOSIS, Endosulphan, florescence, etc. has been taken care of; besides preventing manual scavenging, child labour, bonded labour, prevention of atrocities on deprived and weaker sections of society which is important to right to have dignified life, monitoring the development of basic facilities pertaining to health, education etc. PDS system facilities in KBK districts; visits to 28 most backward districts of the country, apart from issuing procedures, guidelines, coming up with manuals to sensitize the functionaries in field who are entrusted with task of protecting right of citizens etc.

(d) It is also submitted that every case of death in police action is reviewed in the Commission to ensure compliance of its guidelines. Regarding the observations of the UN Special Rapporteur that NHRC should issue guidelines on inquest and autopsy, it is submitted that guidelines in this regard have already been issued and there are periodical review and revision as and when required.

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

NHRC Comments

It is for the Government to decide.

The Commission was of the view that there is a need to include a provision in the Narcotic Drugs and Psychotropic Substances (Amendment) Bill, 2011 which seeks to amend the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 to remove death penalty for routine drug-related offences unless they are having serious/lethal implications.

Referring to the views expressed by UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 2007, the Commission stated that death penalty must be limited to crimes where there was an intention to kill, which resulted in the loss of life. As such the international law standards make it very clear that drug offences do not fall under the category where death penalty may be imposed. Therefore, the death penalty be removed for routine drug-related offences unless they are having serious/lethal implications.

These recommendations of the Commission were communicated to the Chairperson of the Parliamentary Standing Committee on Finance on 19 March 2012.
