

# Lessons Learned from the ACHR's National Campaign for Prevention of Torture in India

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## Abstract

This paper seeks to examine the 'lessons learned' from the work of Asian Centre for Human Rights (ACHR) for combating torture in India. Torture in India is widespread, endemic and institutionalised. Newspapers and magazines regularly report deaths in custody as a result of torture. There is a high degree of social, political, institutional and legal tolerance of torture: torture is underwritten by archaic punitive laws and institutions. The National Human Rights Commission (NHRC) of India has taken a number of measures to combat torture, especially custodial deaths. However, these measures have however proven to be insufficient. The NHRC's repeated recommendations to the Government of India to ratify the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT) have fallen on deaf ears, though, during the Universal Periodic Review of the Human Rights Council in 2008, India promised to ratify the UNCAT. In this regard, a Prevention of Torture Bill has been drafted; however, the Bill is highly flawed and the Government has yet to engage in public consultation on it. The judiciary has been working to create jurisprudence on prosecution of persons who have tortured and on awarding compensation to victims. However, judicial interventions remain hamstrung by the lack of a specific law against torture and also the impunity that has traditionally been afforded to law enforcement personnel in India. In such a milieu, organisations such as ACHR have been using existing, albeit, flawed mechanisms to combat torture. India must not only focus on creating a powerful economy but on establishing a rule of law under which torture and torturers will not be tolerated.

## 1. Introduction

The National Human Rights Commission (NHRC) of India has recorded 16,836 custodial deaths, or an average of 1,203 per year during the period 1994 to 2008; these included 2,207 deaths in police custody and 14,629 deaths in judicial custody.<sup>1</sup> The majority of the deaths in police custody took place within 48 hours of detention. Given well-established practices and consistent documentation of cases of persons being tortured to death in police custody, it is not

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<sup>1</sup> See Suhas Chakma (ed.), *Prevention and Punishment of Torture Bill 2009 – Report of the National Conference on the Prevention of Torture Bill, 2008 as drafted by the Government of India* (New Delhi: ACHR, July 2009), p.1. Available at <http://www.achrweb.org/reports/india/India-Anti-Torture-Bill-2009.pdf>.

unreasonable to conclude that a number of the victims who died were subjected to torture. The figures on the use of torture not resulting in death are likely to be a multiple of these statistics. However, as cases of torture not resulting in death are seldom recorded even by the NHRC, no reliable statistics on the incidence of torture in India exist. Torture remains an acceptable – albeit tacit – means to tackle crime and insurgency in the criminal justice system in India. This acceptance has been buttressed by insecurity following the Mumbai terror attacks, the rise of the Maoist movement and the increasing instability in countries that share a border with India.

In addition, there are high levels of impunity for torture in India, particularly in regions affected by armed conflict. To even begin ‘any persecution, suit or other legal proceeding’ against the armed forces deployed in conflict situations, prior permission from central government is mandatory (under Section 197 of the Criminal Procedure Code and Section 6 of the Armed Forces Special Powers Act of 1958). Prior permission is, at best, patchy. Even when the Government’s Central Bureau of Investigation has found compelling evidence of torture, permission has regularly been denied.<sup>2</sup> This has encouraged existing perceptions among the security forces that they are beyond the law. Punishment is possible but is currently limited – with notable exceptions – to compensation and departmental disciplinary action. This does not appear to offer a sufficient disincentive, not least when it is understood that the State, rather than the accused individual, pays the compensation in successful cases. The result is the well-documented practice of routine use of torture, as well as other grave violations of human rights, during cordon and search operations.<sup>3</sup>

There are many other obstacles to addressing impunity. Post-mortem and police reports are often tampered with and may also be deemed national secrets and, thus, not available to victims or their families.<sup>4</sup> Summary executions take place without witnesses and the practice of ‘fake encounter’, which pre-supposes an armed encounter in order to justify a murder/execution, is so common that it has entered into the Indian-English lexicon.<sup>5</sup> In some cases, witnesses and lawyers are intimidated or killed; for instance, human rights activist Jaswant Singh Kalra disappeared and was later killed for trying to uncover the extent of disappearances in Punjab.<sup>6</sup> People released from detention were threatened by the authorities to prevent them from exposing human rights violations.<sup>7</sup>

The international community is unable and, increasingly, unwilling to exert influence over India. India’s status as a democratic country has protected it from much criticism. What is true of the Government is also true of international NGOs. The body of work of international human rights

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<sup>2</sup> ‘The State versus Kataria: The Impunity of the Indian Army and Lessons from Nepal’, *ACHR Weekly Review* 214/08, 16 April 2008. Available at <http://www.achrweb.org/Review/2008/214-08.html>.

<sup>3</sup> For a detailed discussion of cases of torture by the armed forces during security operations see ACHR, *Torture in India 2008: A State of Denial* (New Delhi: ACHR, 2008), pp.31-39 and ACHR, *Torture in India 2009* (New Delhi: ACHR, 2009), pp.45-46. Available at <http://www.achrweb.org/reports/india/torture2008.pdf> and <http://www.achrweb.org/reports/india/torture2009.pdf>.

<sup>4</sup> ACHR, *Torture in India 2008: A State of Denial*, p.25 and ACHR, *Torture in India 2009*, pp.39-42 provide details of specific cases of medical acquiescence for tempering with post-mortems. See fn.3.

<sup>5</sup> Please refer to the India Human Rights Report Series (published annually, since 2005), which provides details of specific cases of extrajudicial executions and fake encounters in each State in India. The India Human Rights reports are available at <http://www.achrweb.org/reports.htm>.

<sup>6</sup> Ram Narayan Kumar and Amrik Singh, *Reduced to Ashes: The Insurgency and Human Rights in Punjab* (Kathmandu: South Asia Forum for Human Rights, 2003).

<sup>7</sup> One of the victims of torture who has been facing intimidation delivered the opening speech at the National Conference on Prevention of Torture Bill 2009, organised by the ACHR, on 24-25 June 2009.

NGOs on India is spartan at best. For example, Amnesty International's last specific report on the issue of torture, *India: torture, rape & deaths in custody*<sup>8</sup> was published in 1992 while Human Rights Watch's first report, *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police*<sup>9</sup> was published in August 2009. This reluctance to scrutinise India will only increase as India's economic power grows. National civic organisations are unevenly spread, highly restricted in funding, and lack advocacy, monitoring, and legal skills: therefore, few take up individual human rights cases.

While impunity is prevalent in India, it does not appear insurmountable. The establishment of the NHRC by parliamentary act has improved social acceptance of human rights activism and human rights.<sup>10</sup> This has also led to a significant increase in legal challenges in response to human rights violations. India's emergence as an economic power has reduced the formal influence on the country of the international community, but is also exposing the country to new ideas and approaches to human rights issues. The needs for a meaningful legal framework and reform of security forces and law enforcement are pressing for both the development of India's economy and the country's approach to human rights. There is no doubt that, despite the political and institutional reticence, there are opportunities to take action against torture. India has sufficient jurisprudence on establishing accountability and awarding compensation to victims.<sup>11</sup> Moreover, it has a functional rule of law and a strong judiciary.

In 2007, the ACHR launched a National Campaign for the Prevention of Torture in India with financial support from the European Commission under the European Initiative for Human Rights Democracy.<sup>12</sup> This campaign aims to advocate for the creation of a national law that will lead to ratification of the United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT) by India. A second, smaller element has focused on legal work to address specific cases of torture. The project – based around annual reports on torture in India – has garnered a high level of interest from national and international media and has even been discussed in the Indian Parliament. A number of lessons about monitoring capacity in India, both in terms of state and non-state actors, have been learnt. It provides political space for debates about human rights and has contributed to the momentum towards India's ratification of the UNCAT via the emergence of a new (albeit highly flawed) draft national law against torture.

Similarly, the ACHR's legal challenges, over the period since the campaign began, have resulted in substantial compensation awards (6.25 million Indian Rupees in total to date) for victims and their families, and dramatic increases in the levels of individual compensation awards. This has culminated in an award of 500,000 Indian rupees (the highest compensation award in the history

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<sup>8</sup> *India: Torture, Rape and Deaths in Custody*, 26 March 1992. Available at <http://www.amnesty.org/en/library/info/ASA20/006/1992/en>. Last accessed 15 January 2010.

<sup>9</sup> Available at Human Rights Watch, *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police*, 4 August 2009. Available at <http://www.hrw.org/en/reports/2009/08/04/broken-system-0>. Last accessed 15 January 2010,

<sup>10</sup> The NHRC was established by the Protection of Human Rights Act, 1993, as amended by the Protection of Human Rights (Amendment) Act, 2006, No 43 of 2006. Article 3(1) reads: 'The Central Government shall constitute a body to be known as the National Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to it, under this Act.' Available at <http://www.nhrc.nic.in/>.

<sup>11</sup> ACHR, *Torture in India 2008*, pp. 61-87, and ACHR, *Torture in India 2009*, pp. 58-68, provide specific cases of judicial interventions against torture. See fn.3.

<sup>12</sup> See <http://www.achrweb.org/ncpt.htm>.

of the NHRC) in September 2009.<sup>13</sup> The increase in the number of prosecutions has been less marked, but these take longer to bring to fruition; however, to date, the ACHR has obtained 34 departmental and disciplinary actions in 14 cases of torture. Moreover, the ACHR has used legal instruments to oblige the sometimes reluctant NHRC to deploy its full range of powers in defence of human rights. The aim is now to move increasingly toward prosecution in as many cases as possible, particularly as the courts have now ruled in favour of the ACHR against the NHRC 29 times. These rulings offer the potential for substantially strengthening of the procedures and governance of the institution, its state equivalents, and, because of its regional standing, explore the lessons that might be learnt by other national human rights institutions (NHRIs).

## 2. Promoting Human Rights in India

The ACHR's experience and its main methodology may be useful in other countries and regions that lack an effective regional or sub-regional mechanism and which do not accept the competence of the United Nations Treaty Bodies in relation to examining individual cases, but which do have a functioning rule of law.

The ACHR uses its annual report (as discussed below) as its primary tool to raise public awareness and create debate to achieve two intermediate aims: the ratification of the UNCAT and the adoption of an effective prevention of torture act in India. The advocacy strategy itself is not new per se, but the ACHR's application of it differs in a number of aspects. Perhaps the most significant difference is that the ACHR explicitly and consistently links statements about human rights to the pressing security issues facing India. The statements stress the counterproductive nature of human rights violations, including torture, as part of the operations by the security forces; simultaneously, the ACHR continues to advocate for security sector reform. This is done out of necessity. Generally speaking, the ACHR would argue that human rights in India are not accepted as desirable in themselves or in terms of their intrinsic value. Rather, for human rights to resonate with policy, they must be applied to practical current concerns.

Measuring public awareness, public debate, and making definitive statements about the impact of its work is beyond the capacity of the ACHR, but the reactions of the national and international press to the annual reports have exceeded expectations.<sup>14</sup> This is at least suggestive of the impact of the ACHR's work. For the purposes of national advocacy, international coverage, while welcome, is of less interest than national debate. The ACHR's report, *Torture in India 2008: A State of Denial*,<sup>15</sup> was debated in both the Lok Sabha (lower house) and Rajya Sabha (Upper House) of the Indian parliament.<sup>16</sup> The first and most immediate lesson learned from the project is that there is significant political space for a debate on torture in India.

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<sup>13</sup> Ananya Sengupta, 'Rs 5 lakh for son's death in custody', *The Telegraph*, Kolkata, 23 August 2009. Available at [http://www.telegraphindia.com/1090823/jsp/nation/story\\_11397825.jsp#](http://www.telegraphindia.com/1090823/jsp/nation/story_11397825.jsp#).

<sup>14</sup> See the ACHR's website at <http://www.achr.org>.

<sup>15</sup> ACHR, *Torture in India 2008*. See fn.3.

<sup>16</sup> See question no 3542, answered in the Lok Sabha, 23 December 2008, and question no 565 and question no 568, answered in the Rajya Sabha, 22 October 2008 by India's Minister of Home Affairs. Available respectively at <http://www.achrweb.org/ncpt/ACHR-LokSabha.pdf>, <http://www.achrweb.org/ncpt/ACHR-Rajya-Sabha-Darda.pdf> and <http://www.achrweb.org/ncpt/ACHR-Rajya%20Sabha-Sule.pdf>.

The other key goal of the campaign is to create public debate to encourage ratification of the UNCAT. The Government signed the UNCAT in 1997 but has, thus far, failed to move towards ratification, despite the fact that the NHRC has repeatedly recommended ratification. During 2004 and 2005, the Government established an Inter-Ministerial Group consisting of the Ministry of External Affairs, the Ministry of Home Affairs, and the Ministry of Law and Justice, on the question of early ratification of the UNCAT.

More recently, during the examination of India under the Universal Periodic Review in April 2008 (discussed below), India stated rather obliquely that 'the ratification of the Convention against Torture is being actively processed by Government'<sup>17</sup> However, the process of ratification does appear to be moving ahead, as demonstrated by the decision, in 2008 by the Ministry of External Affairs, to draft the Prevention of Torture Bill 2008 in order to 'ratify the said Convention [UNCAT] and to provide for more effective implementation'.<sup>18</sup> However, the proposed law is highly flawed.

### 3. Critique of the Prevention of Torture Bill, 2008

The Bill falls short of expectations on several counts. The Bill contains only three operative paragraphs relating to (i) the definition of torture, (ii) punishment for those who torture, and (iii) limitations for cognisance of offences. It excludes many of the key provisions of the UNCAT. The Bill also falls short of the obligations that States Parties to the UNCAT must undertake; they also fall short of existing national standards on administration of the criminal justice system.

The ACHR organised the 'National Conference on the Prevention of Torture Bill, 2008' on 24 and 25 June 2009 to highlight and debate these and the following shortcomings.

#### 3.1 *Restrictive definition of torture*

Section 3 of the Prevention of Torture Bill 2008 states that

Whoever, being a public servant abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act which causes – (i) grievous hurt to any person; or (ii) danger to life, limb or health (whether mental or physical) of any person is said to inflict torture. Provided that nothing contained in this section shall apply to any pain, hurt or danger as aforementioned caused by any act, which is justified by law.

Explanation:- For the purpose of this section 'public servant' shall without prejudice to section 21 of the Indian Penal Code, also include any person acting in his official capacity under the Central Government or the State Government.<sup>19</sup>

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<sup>17</sup> Report of the Working Group on the Universal Periodic Review: India, UN Doc. A/HRC/8/26, 23 May 2008, para. 46.

<sup>18</sup> See Prevention of Torture Bill 2008, discussed and quoted in *Prevention and Punishment of Torture Bill 2009*, p.26. See fn.1 above.

<sup>19</sup> See Prevention of Torture Bill 2008, discussed and quoted in *Prevention and Punishment of Torture Bill 2009*, pp.26-27. See fn.1.

The above definition is narrow and restrictive and does not capture the spirit and essence of the UNCAT. Despite the prevalence of custodial deaths as a result of torture, it makes no reference to death as a result of torture. This means acts of torture that result in death are likely to be prosecuted as a murder and, thus, sentences may not incorporate the gravity of the crime of torture as the cause of death. Similarly, there is no reference to ‘other cruel, inhuman or degrading treatment or punishment’<sup>20</sup> anywhere in the Bill. Thus, the Bill does not conform to the requirement in Article 16 of the UNCAT that India undertake to prevent acts of cruel, inhuman or degrading treatment or punishment. Failing to legislate against cruel and inhuman treatment sends the wrong message, as seen in relation to the United States in recent years. The US permitted some forms of torture and discovered that these limits were being routinely exploited in practice. Similarly, intimidation and coercion are not discussed in the Bill. This means that acts of serious violence that do not constitute torture will not be covered and may go unpunished. It equally means that death threats, including to a victim’s family, may not be covered.

### 3.2 *Lenient punishment for torture*

Section 4 of the Prevention of Torture Bill 2008 states that

Where the public servant referred to in section 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures any person –

(a) for the purpose of extorting from him or from any other person interested in him, any confession or any information which may lead to the detection of an offence or misconduct.

(b) on the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to a fine.<sup>21</sup>

The Bill foresees a maximum of 10 years imprisonment for those who are convicted of torturing. The Bill does not address deaths in custody as a result of torture in this section either. The Bill equates crimes by law enforcement personnel, including torture, with normal crimes. This is a serious omission considering that law enforcement personnel exercise the sovereign power of the state. Through being entrusted with carrying out duties by the state, they are afforded special powers and, thus, have a higher level of responsibility. Hence, the crimes committed by law enforcement personnel should receive harsher punishment than is provided under the Indian Penal Code. For India to comply with the UNCAT, punishments for torturers should reflect the gravity of the crimes committed, as stated in UNCAT Article 4(2): ‘Each state party shall make these offences punishable by appropriate penalties which take into account their grave nature’.<sup>22</sup>

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<sup>20</sup> See UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment, adopted by the UN General Assembly, UN Doc. A/Res/39/46, 10 December 1984, entered into force 26 June 1987. Available at <http://www2.ohchr.org/english/law/cat.htm>.

<sup>21</sup> See Prevention of Torture Bill 2008, discussed and quoted in *Prevention and Punishment of Torture Bill 2009*, p.27. See fn.1.

<sup>22</sup> UNCAT. See fn.20.

### 3.3 *Limitation for cognisance of offences*

Section 5 of the draft Prevention of Torture Bill provides that

Notwithstanding anything contained in the Code of Criminal Procedure 1973 no court shall take cognisance of an offence under this Act unless the complaint is made within six months from the date on which the offence is alleged to have been committed[.]<sup>23</sup>

The Bill asserts excessive statutory limitations that go beyond existing Indian law. The limitation of six months for taking cognisance is less than that for other comparable crimes under the Criminal Procedure Code. For example, in its definition, the Prevention of Torture Bill includes ‘grievous hurt’ as part of infliction of torture. However, for normal crimes of grievous hurt (i.e. those not committed by an agent of the State) there are no limitations under the Criminal Procedure Code. Instead, the Bill relies on Section 199(5) of the Indian Penal Code relating to defamation to justify the limitation, despite the fact that this provision has no bearing on crimes such as grievous hurt.

The Prevention of Torture Bill fails to address the requirement of Article 2 of the UNCAT that ‘no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture’.<sup>24</sup> At present, Section 197 of the Criminal Procedure Code, and other special laws, makes sanction from the government mandatory for prosecution of public servants accused of being responsible for torture and other human rights violations. Permission is rarely given. In practice, the Government of India allows for ‘exceptional circumstances’ to be invoked to prevent prosecution of torturers through the need for prior permission. International law, including the UNCAT, is very clear about the need to avoid exceptional circumstances as this encourages abuse.

### 3.4 *Issues excluded in the Bill*

The Bill also does not include any text pertaining to the following provisions of the UNCAT: the need to

- (1) ensure that an order from a superior officer or a public authority may not be invoked as a justification of torture (Article 2).
- (2) establish jurisdiction over acts of torture committed by or against a party’s citizens (Article 4).
- (3) ensure that torture is an extraditable offence (Article 8).
- (4) establish universal jurisdiction to try cases of torture where an alleged torturer cannot be extradited (Article 5).
- (5) provide a mechanism to promptly investigate any allegation of torture (Articles 12 and 13).
- (6) provide an enforceable right to compensation to the victims of torture (Article 14).
- (7) ban the use of evidence obtained via torture in the courts (Article 15).

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<sup>23</sup> Prevention of Torture Bill 2008, discussed and quoted in Prevention and Punishment of Torture Bill 2009, p.27. See fn.1.

<sup>24</sup> UNCAT, Article 2(2). See fn.20.

- (8) bar deportation, extradition or *refoulement* of any person when there are substantial grounds for believing he/she will be subjected to torture (Article 3).

The National Conference drafted the alternate *Prevention and Punishment of Torture Bill, 2009*.<sup>25</sup> The ACHR is currently lobbying for incorporation of the alternative Bill in the government one.

#### 4. Paucity and Quality of Human Rights Monitoring and Reporting in India

The extent of the influence of UN mechanisms on India has been subject to limited investigation. The international community has resisted criticism of India's human rights record, in part because of poor monitoring, but equally because of its democratic status and, increasingly, because of its growing economic power. For these reasons, expressions of international concern are often limited to the space that can be created by national initiatives.

When India came up for examination before the Universal Periodic Review (UPR) in April 2008, the ACHR prepared a shadow report entitled INDIA: Stakeholders' Report under the UPR<sup>26</sup> on behalf of the Peoples Forum for UPR (a group of 200 national non-governmental organisations). The report was referred to extensively by Office of the Higher Commissioner for Human Rights (OHCHR) in the stakeholders' summary. The UN High Commissioner for Human Rights, Ms Navanetham Pillay, in her address at the NHRC in New Delhi on 23 March 2009 referred to the report, stating that 'Remarkably, a group of 200 Indian nongovernmental organizations forwarded a joint submission for the UPR, underscoring the significance of the review and its potential to mobilize public opinion towards spurring positive change'.<sup>27</sup>

From the ACHR's perspective, it is important that international action is seen, first, as a process, not an end goal, and, second, as an adjunct to a well-developed national strategy. Based on the ACHR's experience in a country where human rights has, at best, limited social acceptance, there is a need to examine the context of rights violations in terms of the needs of policy makers in addition to finding ways to encourage them to recognise the intrinsic value and growing international recognition of the human rights.

The ACHR's report seeks to account for the use of torture in a country that represents about a sixth of the population of the world. Existing human rights monitoring and reporting in India – particularly given its size, status and well-documented human rights issues – is scant. Indeed, the ACHR's first annual report on torture, written in 2007, was actually the first nationwide assessment by a national or international NGO. Given the resources available, the aim of the report was to create an overview that would give direction to future reports and a focus for advocacy. The first major lesson of the report relates to the paucity and poor quality of human rights monitoring in India. India is very large and demographically diverse and is also highly populated. Some of its states are comparable with large countries in themselves, but there are

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<sup>25</sup> *Prevention and Punishment of Torture Bill 2009*. See fn.1.

<sup>26</sup> Available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/IN/ACHR\\_IND\\_UPR\\_S1\\_2008\\_AsianCentreforHumanRights\\_etal\\_uprsubmission.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/IN/ACHR_IND_UPR_S1_2008_AsianCentreforHumanRights_etal_uprsubmission.pdf).

<sup>27</sup> Available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/0A3A151662B82F2AC1257582005B0EC4?opendocument>.

large areas of India with almost no human rights monitoring at all. There is also an increasingly large area of the country where a relatively stable operating environment, sufficient levels of governance to implement human rights recommendations, and sufficient levels of operational freedom for NGOs cannot be said to exist. However, increased political attention has been directed towards human rights NGOs and the creation of the NHRC has changed perceptions about the importance of human rights greatly at the level of central government. However, the extent of the 'trickle down' to Indian hinterland is, as yet, limited.

One clear obstacle is access to funding. Strict governmental control limits access to international funds. Funds have been further limited by political control. Since 2002, apart from permission under the Foreign Contribution Regulation Act, 1976, bilateral donors are required to obtain permission from the Department of Economic Affairs (DEA) for grants to non-governmental organisations (NGOs). The European Commission, which provides funds through its global calls for proposals, is the only donor out of reach of the DEA. Other major donors including the UK Department for International Development (DfID) and United States Agency for International Development (USAID) have no funds available for civil and political rights and focus on sectoral, rather than NGO, support. Private donors have more flexibility, but are increasingly being closely monitored by the Home Ministry and funds are increasingly being directed towards economic, social and cultural issues rather than civil and political human rights issues. Private giving remains nascent and focuses on populist causes.

Widespread tolerance of torture, including amongst the media, means that unless torture involves a public complaint about permanent disability or death, or involves custodial rape, it seldom make the news; even then, it is often poorly reported. When it comes to lower castes, or indigenous peoples or minorities, even deaths may not be reported in the media. However, as the ACHR's annual reports have demonstrated, there is a substantial domestic media appetite for human rights issues and domestic research in the field.

The inadequacy of public statistics is another key challenge. Since 1999, the National Crime Records Bureau (NCRB) under the Ministry of Home Affairs has been collecting data on human rights violations, particularly in relation to torture, fake encounter killings, enforced disappearances, illegal detention and arrest, extortion, false implication, 'indignity' to women, and 'atrocities'<sup>28</sup> against Scheduled Castes and Scheduled Tribes. In its 2007 Annual Report, the NCRB recorded only five incidents of torture: three in Assam and one each in Jammu and Kashmir and Uttar Pradesh respectively.<sup>29</sup> This sits uneasily with the 139 custodial deaths recorded by the NCRB during the same period.<sup>30</sup> The need for serious reform is made clear by the volume of reports of torture made in the media and recorded by the ACHR in its annual reports of 2008 and 2009, and in the August 2009 report from Human Rights Watch.<sup>31</sup>

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<sup>28</sup> As defined in the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 11 September 1989.

<sup>29</sup> National Crime Records Bureau (NCRB), *Crime In India 2007*. Available at <http://ncrb.nic.in/cii2007/home.htm>. See Chapter 16, Table 16(E).

<sup>30</sup> The NCRB stated that, out of 139 deaths, 23 occurred during production in court, process in court or journeys connected with investigation, 38 during hospitalisation and/or treatment, 9 in mob attacks and riots, 2 as a result of attacks by other criminals in custody, 31 by suicide, 7 while trying to escape from custody, and 29 due to illness/natural causes. See NCRB, *Crime in India 2007*, Chapter 13. See fn.29.

<sup>31</sup> See Human Rights Watch, *To Protect & Serve: Police Brutality in India*, 3 August 2009. Available at <http://www.hrw.org/en/video/2009/08/03/protect-serve-police-brutality-india>.

The National Human Rights Commission (NHRC) statistics similarly fail to present an accurate picture, not least because it does not collate reports of torture in its annual report. It has, however, taken steps to improve its reporting of custodial deaths. In view of the rising number of custodial deaths and custodial rapes, and also attempts to suppress (or present a different picture of) these incidents, the NHRC issued instructions on 14 December 1993 to the District Magistrates and Superintendents of Police of every district to report such incidents to the Secretary General of the NHRC within 24 hours of occurrence, or within 24 hours of these officers coming to know about incidents. The NHRC warned that ‘Failure to report promptly would give rise to presumption that there was an attempt to suppress the incident’.<sup>32</sup> Since the directive was issued, the NHRC records on custodial deaths statistics have improved. The NHRC recorded 16,836 custodial deaths, or an average of 1,203 persons per year, during the period 1994 to 2008. This included 2,207 deaths in police custody and 14,629 deaths in judicial custody. In fact, the number of custodial deaths in India had been rising consistently with 1,037 custodial deaths in 2000-2001, 1,305 in 2001-2002, 1,340 in 2002-2003, 1,462 in 2003-2004, 1,493 in 2004-2005, 1,730 in 2005-2006, 1,596 in 2006-2007, and 1,977 in 2007-2008.<sup>33</sup> Although the accuracy and completeness of the NHRC’s statistics have improved, they continue to represent only a fraction of the actual number of deaths in custody and do not indicate the prevalence of cases of torture. A large number of the cases taken up by the ACHR demonstrate that the police do not report all custodial deaths.<sup>34</sup> The NHRC expresses perennial anguish over these reporting failures but its guidelines continue to be flouted.<sup>35</sup>

Furthermore, custodial deaths in army and paramilitary forces’ custody are not reported to the NHRC or the NCRB. Under Section 19 of the 1993 Human Rights Protection Act, the NHRC cannot investigate violations by the central paramilitary forces or the army. It may, either on its own motion or on receipt of a petition, seek a report from the central Government and ‘after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government’.<sup>36</sup> At present, 21 out of 28 States are afflicted by internal armed conflicts in which central paramilitary forces are deployed. There are regular and consistent reports of torture and other human rights violations by paramilitary forces in these areas afflicted by these armed conflicts.

## 5. Prosecution of Perpetrators

A key factor in preventing torture is the issue of accountability and punishment of perpetrators. However, in India, impunity is fostered through Section 197 of the Criminal Procedure Code. Section 197(1) of the Code provides that when a public servant is accused of any offence alleged to have been committed while acting, or purporting to act, in the discharge of official duties, no

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<sup>32</sup> Letter to all Chief Secretaries on the reporting of custodial deaths within 24 hours (No 66/SG/NHRC/93) by the National Human Rights Commission, 14 December 1993. Available at <http://nhrc.nic.in/Documents/sec-1.pdf>

<sup>33</sup> *Prevention and Punishment of Torture Bill, 2009*. See fn1.

<sup>34</sup> These include the custodial deaths of Tsering Tondup of Leh in Jammu and Kashmir (NHRC File No 29/9/9/07-08-AD), Boya Venkatanna of Andhra Pradesh (NHRC File No 6/1/2003-2004-AD), Harilal Yadav of Uttar Pradesh (NHRC File No 704/24/2003-2004-CD), Jarupula Srinu of Andhra Pradesh (NHRC File No 60/1/2005-2006-AD-SCN), and Dwipen Bayan of Assam (NHRC File No 133/3/2004-2005-AD).

<sup>35</sup> *Torture in India 2009*. See fn.3.

<sup>36</sup> Protection of Human Rights Act, 1993, Section 19(1)(b). See fn.10.

court shall take cognisance of such an offence without the previous sanction of the appropriate government.

The State Government of Jammu and Kashmir sent at least 458 cases (during the period 1990 to 2007) to the Central Government of India, seeking permission for prosecution of army personnel indicted by the State police in different cases of human rights violations. As of October 2008, the Government had reportedly provided sanction in only 290 cases.<sup>37</sup>

### 5.1 Cases of prosecution and punishments

In 14 cases of torture, the ACHR’s actions led to the punishment/prosecution of 35 perpetrators, including the dismissal of three law enforcement personnel from service and the arrest of three others pending trial.

Details of Case	Outcome of Case
Death of 10 prisoners in Cherlapally Jail (Case No 938/1/7/07-08-ad) Date of order: 8 May 2008	Arrest of one jailor Departmental action against four jail officials: a jailor, a head jailor and two warders (M. Anjaneyulu and D. Srinivasa Reddy)
Custodial death of Boya Venkatanna (Case No 6/1/2003-2004-ad) Date of order: 9 February 2007	Arrest of one sub-inspector Suspension of four police officials
Custodial death of Salapakshi Gopi (Case No 821/1/2004-2005-cd) Date of order: 5 August 2008	Departmental action against three constables
Custodial death of Dwipen Bayan (Case No 133/3/2004-2005-AD) Date of order: 19 February 2007	Arrest of one sub-inspector
Custodial death of Tsering Tondup (Case No 27/9/9/07-08-AD) – HC Date of order: 13 April 2009	Departmental action against two police officials, including ‘censure’ entries in their personal records
Extrajudicial killing of Pinto Singh (Case No 287/34/2005-2006) Date of order: 23 November 2007	Departmental action against one constable
Custodial torture of Lalduhsiana (Case No 1/16/2005-2006)	Departmental action against one sub-inspector: a black mark was put on his

<sup>37</sup> Rashid Paul, ‘458 HR cases against troops under judicial scrutiny’, *The Rising Kashmir*, 19 January 2009.

Date of order: 2 December 2008	service record
Killing of Gubalya Chakma by the BSF (Case No 3/16/2006-2007-PF) Date of order: 17 April 2009	Departmental action against an assistant commandant and an inspector: they were punished, respectively, by forfeiture of 10 years and three years past service for the purpose of pension
Torture of 9-year-old Puli Shiva by police (Case No 32/18/2003-2004) Date of order: 30 October 2004	Departmental action against two constables
Torture of Kamal Acharjee (Case No 24/23/3/07-08) Date of order: 8 December 2008	Departmental action against the then Sub-Divisional Police Officer (SDPO), Sabroom, Tripura
Rape of a Reang tribal girl by police (Case No 5/23/2003-2004-wc) Date of order: 10 January 2005	Dismissal of three state police personnel
Custodial death of Dollchand (Case No 9802/24/2003-2004-AD) – Date of order: 21 September 2007	Departmental action against three police personnel: ‘censure’ entries were put in their personal service records
Torture of Nazmul Sheikh by the Border Security Force (BSF)(Case No 198/25/2006-2007-pf) Date of order: 12 December 2008	Departmental action against Commander of Mahakholaby Border Out Post, West Bengal
Killing of Masud Rana Sarkar by BSF (Case No 180/25/1807-08-PF) Date of order: 11 May 2009	Suspension of six personnel of 72nd BSF: a charge sheet against them has also been submitted in court Disciplinary action was taken against a deputy commandant

Dismissal from service and departmental disciplinary action for perpetrators, and increasing compensation awards for victims, while an advance, cannot be said to conform with the requirement for adequate punishment given the grave nature of the offences. Moreover, in a number of cases, the ACHR’s interventions were critical: these cases reveal the systematic failings of the current systems.

### 5.1.1 Custodial death of D Bhaskar

On 30 October 2007, the ACHR filed a complaint with the NHRC<sup>38</sup> with regard to the death of at least 10 prisoners at the Cherlapally Jail in Hyderabad of Andhra Pradesh in January to October 2007. D. Bhaskar (age 32) died as a result of torture by jail officials. The others died of

<sup>38</sup> NHRC Case No 938/1/7/07-08-ad.

preventable diseases as a result of the denial of basic medical care. The victims belonged to poor and underprivileged sections of society. Action taken by the ACHR led to the arrest of Jailor R.K. Harinath, while the other three persons accused (the Head Warder and two warders) obtained anticipatory bail from the High Court of Andhra Pradesh. All four prison officials were suspended and disciplinary action was initiated against them. The report of from the Director General, and the Inspector General, of Prisons and Correctional Services of Andhra Pradesh to the NHRC confirmed that D. Bhaskar was tortured by the four jail officials. The post-mortem report found 23 external ante-mortem injuries. However, the NHRC found that the Director General and the Inspector General sent an ‘incomplete’ post-mortem report and also failed to submit reports regarding the deaths of other prisoners. In its proceedings, dated 8 May 2008, the NHRC further directed the Director General and Inspector General, and also the District Magistrate of Hyderabad, to send a ‘report into each death along with explanation as to why intimation into each alleged custodial death was not sent to the Commission’ within four weeks. The ACHR continues to monitor the case.

### 5.1.2 *Custodial death of Boya Venkatanna*

The NHRC registered a complaint<sup>39</sup> filed by the ACHR on the custodial death of Boya Venkatanna (age 26) as a result of torture at Maldakal Police Station (under Muhabunagar in Andhra Pradesh) on 29 February 2003. The deceased was detained by the police, along with two others, on charges of theft. The police claimed that Mr Venkatanna committed suicide by hanging himself from the iron rods of a window with his *lungi* (a length of cloth wrapped around the lower half of the body). An investigation by the Sub-Divisional Police Officer of Mahabubnagar found Sub-Inspector C. J. R Chary of Maldakal Police Station guilty of illegally detaining Boya Venkatanna in the police station. A case under Section 342 of the Indian Penal Code was registered against C. J. R. Chary and he was remanded to judicial custody on 28 February 2003. Four police personnel were suspended and the victim’s parents were awarded 100,000 rupees as compensation.

### 5.1.3 *Rape of a tribal girl in Tripura*

The ACHR’s complaint (Case No 5/23/2003-2004-wc) against the rape and torture of a Reang tribal girl (name withheld) by three Special Police Officers (SPOs) of the State Government of Tripura on 26 May 2003 near Manoranjan Daspara camp (in the remote Gandacherra subdivision of the Dhalai district in Tripura) led to the dismissal of three SPOs from service. However, the police officials at Gandacherra Police Station refused to register the complaint filed by the victim’s parents. The case began to move only after the ACHR filed a case with the NHRC. As a result of the NHRC’s intervention, the three accused SPO personnel were dismissed from service and compensation of 50,000 rupees was paid to the victim.

## 6. Compensation

India continues to maintain its reservation to Article 9 of the International Covenant on Civil and Political Rights on the grounds that ‘under the Indian Legal System, there is no enforceable right

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<sup>39</sup> NHRC Case No 6/1/2003-2004-ad.

to compensation for persons claiming to be victims of unlawful arrest or detention against the State'.<sup>40</sup> However, the principal of awarding compensation to the victims of torture and other human rights violations is well-established and the NHRC has expanded its application.

Under its National Campaign for Prevention of Torture in India, the ACHR's interventions with the NHRC have led to the award of 86,05,000 rupees in compensation for victims (and/or their families) in 35 cases. The cases taken up by the ACHR included not only torture and extrajudicial execution by the security forces, but also by armed opposition groups.<sup>41</sup>

<b>Name of Victim, State, NHRC Case No</b>	<b>Compensation paid (in Indian Rupees)</b>
Nine Chakma women: Gunchitra Chakma, Jamuna Devi Chakma, Roma Pati Chakma, Kulpana Chakma, Deborani Chakma, Sebika Chakma, Mayon Devi Chakma and 2 others, Tripura (10/23/2004-2005-WC/UC)	Rs 60,000 vide order dated 9 March 2007
Boya Venkatanna, Anadhra Pradesh (6/1/2003-2004-AD)	Rs 100,000 vide order dated 29 March 2007
Kunju Mushahary, Assam (114/3/2004-2005-AF/UC)	Rs 300,000 vide order dated 11 September 2007
Dwipen Bayan, Assam (133/3/2004-2005-AD)	Rs 100,000 vide order dated 19 September 2007
Pintu Singh, Jharkhand (287/34/2005-2006)	Rs 500,000 vide order dated 3 December 2007
Dalit woman (Sapna), Jharkhand (712/34/2005-2006-WC)	Rs 25,000 vide order dated 13 March 2008
Zahoor Ahmed Mir, Jammu & Kashmir (178/9/2/07-08)	Rs 100,000 vide order dated 25 March 2008
Nitai Sarkar, Assam (111/3/2003-2004-CD)	Rs 100,000 vide order dated 25 March 2008
Banna Bairwa, Rajasthan (889/20/6/07-08)	Rs 150,000 vide order dated 12 April 2008

<sup>40</sup> See [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec).

<sup>41</sup> For example, compensation and government jobs have been awarded as a result of the massacre of five Chakma tribals by armed opposition groups (AOGs) (Case No 3/23/2005-2006) and the gang rape of six Chakma women by AOGs in Tripura state (Case No 10/23/2004-2005-wc), following intervention in the case by the ACHR.

Sinam Devan and 2 others, Manipur (36/14/2004-2005)	Rs 110,000 vide order dated 16 May 2008
Harilal Yadav, Uttar Pradesh (704/24/2003-2004-CD)	Rs 300,000 vide order dated 21 May 2008
Madhukar Ghatge, Maharashtra (171/13/23/07-08)	Rs 150,000 vide order dated 18 June 2008
Kailash, Madhya Pradesh (2089/12/15/07-08)	Rs 140,000 vide order dated 10 July 2008
Kamal Acharjee, Tripura (24/23/3/07-08)	Rs 200,000 vide order dated 12 August 2008
Rangappa, Karnataka (95/10/2004-2005-cd)	Rs 100,000 vide order dated 8 September 2008
Nishu Sharma and 2 others, Jammu & Kashmir (97/9/2005-2006)	Rs 250,000 vide order dated 9 September 2008
Minor Girl, Uttar Pradesh (46674/24/59/07-08-PCR)	Rs 200,000 vide order dated 22 October 2008
Sahebrao Jondhale, Maharashtra (639/13/35/08-09)	Rs 200,000 vide order dated 21 November 2008
Gangavalli Pushpakumari, Aandhra Pradesh (284/1/2004-2005-WC/UC)	Rs 500,000 vide order dated 21 November 2008
Lianzangmin Samte, Pumzahao and Khailian (all killed) and 33 others (all injured), Manipur (22/14/2005-2006-PF)	Rs 630,000 vide order dated 12 December 2008
Muktikanta Muduli, Orissa (494/18/1/07-08-JCD)	Rs 100,000 vide order dated 12 January 2009
Five Chakmas: Ashok Kumar Chakma (40), Swapanjay Chakma (28), Bakrabahu Chakma (25), Sushanta Chakma (18), and Arogya Chakma), Tripura (3/23/2005-2006)	Rs 365,000 One government job awarded, two others still being processed vide order dated 10 February 2009
Farooq Ahmad Wani and Ghulam Hassan Mughloo, Jammu & Kashmir (143/9/2004-2005-AF/UC)	Rs 200,000 vide order dated 10 February 2009

Khilan Singh Ahirwar, Madhya Pradesh (1469/12/49/07-08)	Rs 150,000 vide order dated 12 February 2009
Saikhom Samungou and S Ngongo Meitei, Manipur (37/14/2004-2005-AF)	Rs 200,000 vide order dated 23 February 2009
Lalduhsiana, Mizoram (1/16/2005-2006/UC)	Rs 25,000 vide order dated 28 April 2009
17 year old girl, Jammu & Kashmir (50/9/5/08-09)	Rs 200,000 vide order dated 8 July 2009
Abdul Latif Malik, Jammu & Kashmir (48/9/4/08-09-AD)	Rs 100,000 vide order dated 16 July 2009
A woman from Keshpura village, Uttar Pradesh (47791/24/28/08-09)	Rs 25,000 vide order dated 26 August 2009
Mohan Lal, Jammu & Kashmir (55/9/2003-2004-AD/UC)	Rs 500,000 vide order dated 4 September 2009
Ram Singh Chauhan and Jawaharlal Gour, Assam (89/3/8/08-09)	Rs 1,000,000 vide order dated 17 October 2009
Gubalya Chakma and 7 others, Mizoram (3/16/2006-2007-PF/M-4)	Rs 650,000 vide order dated 12 November 2009
Nipul Saikia, Assam (91/3/2006-2007-AF)	Rs 200,000 vide order dated 18 November 2009
Latifur Rahman Sarkar, Masud Rana Sarkar and 2 others, West Bengal (180/25/18/07-08-PF)	Rs 650,000 vide order dated 2 December 2009
Jeetendra Trivedi, Uttar Pradesh (18676/24/2005-2006)	Rs 25,000 vide order dated 19 January 2010
<b>Total Cases: 35</b> <b>Total Victims: 99</b>	<b>Rs 86,05,000</b>

### 6.1 *Custodial death of Mailapalli Satya Srinivasa*

On 24 April 2003, the ACHR filed a complaint with the NHRC after Mailapalli Satya Srinivasa Rao (age 33) was tortured to death in Kotabommali Police Station in Srikakulam (District of Andhra Pradesh) on 1 March 2003. The police informed the NHRC of the custodial death. They claimed that the victim had hanged himself inside the police station lock up. The ACHR filed a complaint with the NHRC<sup>42</sup> and notice was issued to the authorities concerned. The District Collector of Srikakulam vide communication (dated 13 April 2005) informed the NHRC that the subsequent magisterial enquiry revealed contradictions in the police version of events. It found the police guilty of negligence. Departmental disciplinary action was taken against three policemen. Compensation of 250,000 rupees was awarded to the deceased's family.

### 6.2 *Custodial death of Nitai Sarkar*

On 14 November 2003, the ACHR filed a complaint with the NHRC concerning Mr Nitai Sarkar (age 35), who was tortured to death by four police personnel of the 13<sup>th</sup> Assam Police Battalion at Rakshmari (under the Dhekiajuli Police Station of the Sonitpur district of Assam) on the evening of 7 November 2003. Acting on the ACHR's complaint,<sup>43</sup> the NHRC issued notice to the Senior Superintendent of Police of Sonitpur on 2 December 2003. In response, Inspector General of Police in Charge of Human Rights Cell admitted that the deceased was assaulted by a police constable 'with the butt of his rifle' and the post-mortem revealed that he died 'due to head injury'. The inquest report also revealed that blood was seen coming from the victim's mouth and that there were marks on his body consistent with a beating. The ACHR's action led to the registration of a First Information Report<sup>44</sup> at Dhekiajuli Police Station. Five police officials were named in the report, including an assistant sub-inspector and three constables of the 13th Battalion, 20th Platoon. At the recommendation of the NHRC, 100,000 rupees were paid to the next of kin.

### 6.3 *Custodial death of Tadipatri Eswaraiah*

The ACHR's actions in relation to the custodial death of Tadipatri Eswaraiah<sup>45</sup> (age 42), at the Itikelapalli Police Station (in Anantapur, District of Andhra Pradesh) on 28 January 2005, resulted in a direction from the NHRC for the Crime Branch □ Criminal Investigation Department to investigate the death. Dr Prabhakar Rao, who conducted the post-mortem, had stated that the injuries found on the body were caused post-mortem and resulted from transporting the body. The Sub-Divisional Magistrate found no evidence against the police. However, since the ACHR alleged torture in its complaint, the NHRC vide proceedings dated 21 September 2006 directed the Chief Secretary of the Government of Andhra Pradesh to order a probe into the incident by the Crime Branch □ Criminal Investigation Department. The post-mortem report, inquest report and other documents were examined by a medical board. The

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<sup>42</sup> NHRC, Case No 693/1/2002-2003-CD.

<sup>43</sup> NHRC, Case No 111/3/2003-2004-CD.

<sup>44</sup> First Information Report (FIR) No 1/4, issued under Section 304/34 of the Indian Penal Code, Dhekiajuli Police Station, 7 January 2004. An FIR is a written document/ complaint prepared by the police based on information about the commission of an offence.

<sup>45</sup> NHRC Case No 819/1/2004-2005-CD.

medical board found that the injuries were ante-mortem in nature and were caused by a blunt object. In view of the findings of the medical board, the Additional Director General of Police directed the Superintendent of Police of Anantapur to re-open and re-investigate the case. The new investigation by the Superintendent of Police found that the deceased had been beaten by unidentified persons after release by the police. However, the new investigation also found that the accused, a sub-inspector of Itikalapalli Police Station, had made no entry in the police records that the deceased was summoned and interrogated in the police station. The NHRC found the local police and the surgeon who had performed the post-mortem guilty of several lapses. The NHRC issued a show cause notice to the Government of Andhra Pradesh requiring them to explain why monetary relief was not given to the next of kin of the deceased.

#### 6.4 *Implications*

There are considerable problems with the compensation awards of the NHRC. International law stipulates that a victim of torture shall have the right to interim compensation and rehabilitation for pecuniary and non-pecuniary damages suffered due to torture and other cruel, inhuman or degrading treatment or punishment. The quantum of reparation, including immediate medical treatment, shall be determined by taking into consideration many factors, such as (i) the grievous nature of the physical or mental torture (or other cruel, inhuman or degrading treatment or punishment) alleged to have been suffered by the victim, (ii) lost opportunities, including those relating to employment, education and social benefits, (iii) material damages and loss of earnings, including loss of earning potential, (iv) the age and familial responsibilities of the victim, and the condition of the victim's dependents, (v) expenses incurred, or likely to be incurred, during treatment of the alleged torture-related injuries and in relation to obtaining help from psychological and social services, and (vi) costs required for legal or expert assistance, medicine and medical services, and psychological and social services. Furthermore, a victim of torture shall have the right to final restitution, compensation, rehabilitation, guarantees of non-repetition of torture (and other cruel, inhuman or degrading treatment or punishment) such as are necessary to secure the victim's health, property and security.

However, the NHRC has not established guidelines for awarding compensation. Compensation appears arbitrary: in similar cases the amount of compensation awarded varies greatly. On 21 August 2009, the NHRC made its highest ever compensation award (500,000 rupees) in relation to a complaint filed by the ACHR concerning the death of Mr Mohan Lal, a rickshaw-puller who died in Jammu and Kashmir police custody in July 2003.<sup>46</sup> In another complaint of custodial death filed by the ACHR, the NHRC ordered the Orissa State Government to pay only 100,000 rupees to the family members of Takala alias Mukhtikanta Muduli, a prisoner on remand who died in Balasore District Jail on 29 August 2007.<sup>47</sup> As the NHRC has increased compensation awards, the State authorities have reacted by increasingly pre-empting NHRC orders.

On 9 May 2009, Sngewlem Kharsati was picked up for alleged extortion and was beaten to death inside Mawryngkneng Police Outpost lock-up in the East Khasi Hills district. On 11 May 2009, the ACHR made a complaint to the NHRC after being informed of the death by the family of the deceased. The State Government of Meghalaya ordered a magisterial inquiry, headed by

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<sup>46</sup> Ananya Sengupta, 'Rs 5 lakh for son's death in custody'. See fn.13.

<sup>47</sup> Information provided by the NHRC to the ACHR's Director in a communication dated 9 September 2009. Available at <http://www.achrweb.org/ncpt/Mukhtikanta.pdf>.

Additional District Magistrate Tableland Lyngwa. The magisterial inquiry (completed on 31 July 2009) found a number of police personnel guilty of the death of Shri Sngewlem Kharsati. The inquiry commission report was submitted to the Government, and the NHRC, on 5 August 2009.<sup>48</sup> In its appeal on 29 August 2009, the ACHR asked the NHRC to direct the State Government of Meghalaya to pay an interim compensation of one million Indian Rupees for the custodial death of 17-year-old Sngewlem Kharsati, and to start the necessary criminal proceedings against the accused police personnel, including arrest and prosecution. As of 30 November 2009, the order of the NHRC is still awaited. However, on 21 August 2009, the State Government of Meghalaya announced that 200,000 rupees would be given in compensation to the next of kin of Mr Sngewlem Kharsati and departmental actions were also instigated against the accused police personnel in an attempt to pre-empt the order of the NHRC. It remains to be seen whether this attempt at pre-emptive action will be considered sufficient or whether the NHRC will order further compensation be paid out and criminal (rather than merely disciplinary) proceedings be taken.

## 7. The ACHR and the NHRC

Many lessons have been learned in relation to the ACHR's work with India's national human rights mechanisms, primarily the NHRC and its state-level equivalents. Before examining this area of work, it is important to recall that the emergence of the NHRC in India has resulted in a major change of perspective with regard to human rights defenders and human rights in general. Prior to the NHRC, the political space for human rights work was highly constricted, not simply by the Government but, equally, by a pervasive public view that human rights work was 'un-Indian': in some quarters, it was even regarded as part of a foreign conspiracy. These sentiments remain and, indeed, appear to be again on the rise as a result of the increasing national panic over the spread of polarized political views.

All NHRCs are assumed to work in favour of human rights. However, the procedures of the NHRC, unlike the court system, are neither public nor transparent. The NHRC (and its state-level equivalents) are currently constrained by internal policy, rather than the lack of legal powers. Despite their legal obligations, the NHRC has established a practice of dismissing complaints of torture without hearing the complaint or allowing the victim access to the State's response to the complaint. As India has a strong judiciary, using the new Right to Information Act (2005), the ACHR has repeatedly challenged NHRC rulings when they violate due process.

The ACHR uses the Right to Information Act (RTI) extensively to pursue cases filed with the NHRC. In cases where the NHRC has failed to respond to the authorities concerned in a particular case, the ACHR uses the RTI to seek access to documentation of the case. After obtaining the required information from the NHRC, the ACHR submits further comments or recommendations to the NHRC to ensure justice for victims. The RTI is also used to obtain the necessary information to file petitions in the High Court against the decisions of the NHRC. Finally, the RTI allows the ACHR to preserve key records. This is important because the NHRC has developed an extraordinary practice of what it calls 'weeding out': destroying the records of cases immediately following its final ruling. The ACHR works to obtain all the necessary documents prior to the NHRC reaching a conclusion in order to keep the records should there be a need to challenge the orders of the NHRC before the courts. The ACHR has had to repeatedly

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<sup>48</sup> NHRC Case No 10/15/2/09-10-AD.

approach the High Courts to address these procedural failings. The judiciary has ruled consistently in the ACHR's favour in the twenty nine cases adjudicated so far.

### 7.1 *Separation of powers*

The 1993 directive issued by the NHRC to all District Magistrates and Superintendents of Police, requiring them to report custodial deaths and custodial rapes, has had a real impact in terms of increasing reporting and as a deterrent, but there are fundamental areas of process weakness.<sup>49</sup> These weaknesses have serious repercussions on administration of justice and provide opportunities to undermine the landmark 1993 NHRC directive.

The NHRC registers custodial death reports (based on the 1993 directive) from police and prison officials as complaints and treats the reporting party, in this case the police, as the complainant. However, in many cases the NHRC refuses subsequent requests from the victims or their representatives (such as in relation to the custodial death of Grohon D. Shira,<sup>50</sup> as discussed below) to be made party to the complaint; hence the victims' family members and/or their representatives are denied complainant status and rights. Since the victims in such cases are killed in custody in police stations and prisons, the police or prison authorities are aware of the deaths before the members of the victims' families. Thus, in most cases, the police make the complaint and, as a result, become both the complainant and respondent.

This is perhaps best explained with a generic, hypothetical example. The police make a report to the NHRC that Mr X hanged himself. The report of the police fulfils the reporting obligations under the 1993 directive. However, equally and fundamentally, the police also become the complainant that the NHRC is charged with investigating. Meanwhile, Mr X's family is denied the opportunity to gain complainant status as the police are already occupying this role. This means that they cannot make a complaint in relation to any counter-allegation: that Mr X was, in fact, beaten to death and was then strung up by the police. This is not regarded by the NHRC as relevant, no matter how strong the evidence is, since the family does not have complainant status. It is hardly surprising then that when the NHRC receives such complaints it finds that no human rights violations have taken place. The NHRC often concludes that the police report and the complaint (the same thing) are about a suicide. There is no counter-claim and, hence, the case is closed. The ACHR can cite numerous real examples of this practice.

On 2 January 2008, the ACHR filed a complaint with the NHRC concerning the custodial death of Grohon D. Shira (age 37), a resident of Darang A'Kep (Nongalbibra village in the district of Meghalaya), in the custody of the Baghmara police station. On 12 October 2007, the victim was remanded to seven days police custody in connection with a crime at the Baghmara police station. On 18 October 2007, he was reportedly found hanging from the iron rod of the ventilator inside the police station toilet. The police claimed that he had hanged himself with his T-shirt. The ACHR filed a case after the deceased's family members approached the organisation for assistance. The ACHR received no response from the NHRC with regard to its complaint (dated 2 January 2008). Subsequently, ACHR staff discovered, on the NHRC's web page, that the

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<sup>49</sup> Letter to all Chief Secretaries on the reporting of custodial deaths within 24 hours, No 66/SG/NHRC/93, National Human Rights Commission, New Delhi, 14 December 1993. Available at <http://nhrc.nic.in/Documents/sec-1.pdf>. Last accessed 15 January 2010.

<sup>50</sup> NHRC Case No 18/15/0/07-08-PCD.

NHRC had registered a case<sup>51</sup> on the custodial death of Grohon D. Shira on the basis of the report received from the District Police. The family of the deceased expressed concerns over the investigation because Sub-Inspector J Rabha of Baghmara Police Station, who made the original report to the NHRC, was then appointed to head the subsequent investigation. The family of the deceased wrote to the NHRC Chairperson, requesting that the NHRC make the ACHR a party to the complaint.<sup>52</sup> The deceased’s father expressed ‘fear that the police will try to cover up the torture to death [*sic*] of my son late Grohon D. Shira and make it appear as a case of suicide’; he urged the NHRC to make the ACHR a party on the family’s behalf while considering the case. The NHRC refused. The ACHR has taken up the matter in court. The case is pending adjudication.

This process is particularly perverse given that the NHRC 1993 directive was explicitly established to act against the regular cover-up of torture (including death by torture) of detainees by the police. However, the NHRC process circumvents this by making the police version of the events – often a cover up – the ‘complaint’ and refusing to accept the alternative version of events put forward by the victim/the victim’s family. In effect, this process allows the police officials even greater powers than prior to the 1993 directive, providing them with the opportunity to formally ignore human rights allegations made against them and yet be seen to be conforming with national processes.

## 7.2 *Concerns over due process*

Even when the victims’ representatives are provided with complainant status, the NHRC proceedings are of concern in terms of due process. Under Section 13(5) of the Human Rights Protection Act (1993)

Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code, and the Commission shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.<sup>53</sup>

This implies that both the complainant and the respondent must be given equal time, equal opportunity and equal access to documents before the NHRC adjudicates on the complaints. However, the NHRC regularly adjudicates without giving complainants the opportunity of a hearing; sometimes it completely ignores the evidence submitted. In a number of cases, the ACHR had to approach the Delhi High Court in order to ask that action be taken against the NHRC.

Between 6 and 9 February 2005 at least six civilians, including a teenager, were allegedly illegally detained and tortured by the 14<sup>th</sup> Assam Rifles personnel stationed at Kangpokpi (in the Senapati district of Manipur). The victims were accused of having links with underground armed organisations. On 10 February 2005, the ACHR filed a complaint about the case with the

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<sup>51</sup> NHRC Case No 18/15/0/07-08-PCD.

<sup>52</sup> NHRC Case No 18/15/0/07-08-PCD.

<sup>53</sup> The Protection of Human Rights Act 1993. See fn.10.

NHRC.<sup>54</sup> Pursuant to the NHRC's notice, the Additional Director General of Police (DGP) of Manipur, in his report dated 4 August 2005, stated that

All the persons mentioned above stated that they were brutally tortured by hitting with hard punches on their chest. On arrival at the camp of AR [Assam Rifles] they were asked to undress and electric shocks were applied on their fingers, toes and to their private parts. One of them i.e. Ningkhohao Chongloi stated that he is a married man and due to the electric shocks his private part is paralyzed[.]<sup>55</sup>

On 26 June 2006, the Under Secretary to the Government of the Ministry of Defense submitted a report to the NHRC. The NHRC failed to send a copy of the report to the ACHR. On 3 July 2006, despite the statement of the Director General of Police of Manipur, the NHRC closed the case, finding no evidence of torture; the NHRC did not provide an opportunity of a hearing to the ACHR. The ACHR has challenged the decision of the NHRC before the Delhi High Court.<sup>56</sup> The case is still being heard.

In a similar case, on 28 August 2003, Aminul Islam (of Puran Diara village under the Dhubri district of Assam) was detained by local police on suspicion of *dacoitry* (banditry). The victim was allegedly tortured in Mancachar Police Station custody. He later died at Kukurmara Public Health Centre. On 23 September 2003, the ACHR filed a complaint with the NHRC.<sup>57</sup> Pursuant to the direction of the NHRC, the Inspector General of Police (Human Rights) of Guwahati submitted a response (dated 22 January 2004). The NHRC failed to supply these documents to the ACHR. Without affording the ACHR any opportunity to be heard, in a communication (dated 16 March 2007) the NHRC informed the ACHR that the case had been closed. The ACHR challenged the NHRC's decision before the Delhi High Court.<sup>58</sup> On 12 December 2008, the High Court directed the NHRC to check the case records and hand over a copy of the same to the ACHR. The court gave liberty to the ACHR to move the court in case it was not satisfied with the actions of the NHRC. The NHRC, in its latest communication to the ACHR (on 23 July 2009), claimed that it had 'weeded out' the records.

The following case exemplifies the complexities of this issue. On 2 August 2003, police forcibly entered the house of Farman Ali (age 55) in Bahirkap village (under the Malda district of West Bengal) and, allegedly, beat him. Farman Ali succumbed to the injuries sustained during the alleged attack on 3 August 2003. According to his son, Yousuf Ali, the officer in charge of Ratua police station tortured Farman Ali. On 18 August 2003, the ACHR filed a complaint with the NHRC.<sup>59</sup> Pursuant to the notice of the NHRC, an investigation report was submitted by the Director General of Police and the Inspector General of West Bengal to the NHRC. The NHRC failed to provide the ACHR with copies. On 21 August 2006, the NHRC closed the case without allowing the complainant to submit a response. The ACHR challenged the Commission's

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<sup>54</sup> NHRC Case No 41/14/2004-2005-AF.

<sup>55</sup> Bearing No 15/603/2005/HR/PHQ/497; NHRC Case No 41/14/2004-2005-AF. See also the submission of the Additional Director General of Police of Manipur: on file with the ACHR.

<sup>56</sup> *ACHR vs NHRC*, WP(C) No 8102/2007, Delhi High Court.

<sup>57</sup> NHRC, Case No 80/3/ 2003-2004-AD.

<sup>58</sup> *ACHR vs NHRC*, WP(C) No 9335/2007, Delhi High Court. The case before the Delhi High Court examined the ACHR's petition with regard to a number of different NHRC cases, including those of Aminul Islam and Farman Ali.

<sup>59</sup> NHRC, Case No 329/25/2003-2004.

decision before the Delhi High Court.<sup>60</sup> On 12 December 2008, the Delhi High Court directed the NHRC to check the case records and provide a copy of the same to the ACHR. The court gave liberty to the ACHR to move the court in case it was not satisfied with the actions of the NHRC. The NHRC has so far failed to provide copies of documents (including replies received from the authorities concerned) relating to the case. The NHRC, in its latest communication to the ACHR (on 23 July 2009), again claimed that it had 'weeded out' the records.

These are just a few examples of the many cases in which the NHRC failed to provide copies of reports, submitted by the authorities, to the complainant. The NHRC effectively adjudicated and denied the complainant an opportunity to challenge the submissions of the Government.

### 7.3 *Failure to deploy powers in individual cases of torture*

The NHRC has the power to 'intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such Court'.<sup>61</sup> The NHRC has intervened in two specific instances by invoking Section 14 of the Human Rights Protection Act of 1993.

In 1995, the NHRC intervened with the Supreme Court by filing a Public Interest Litigation with regard to the Chakma and Hajong tribal persons of Arunachal Pradesh who had been denied citizenship rights and asked to leave the State. The NHRC petition, *inter alia*, demanded the intervention of the Supreme Court of India to uphold the rights of about 65,000 Chakmas and Hajongs in Arunachal Pradesh under Article 21 of the Constitution. The NHRC moved the apex court after the State Government repeatedly refused to comply with the directions of the NHRC for the protection of the Chakmas and Hajongs. The Supreme Court, in its 9 January 1996 order, *inter alia*, directed the state of Arunachal Pradesh to 'ensure that the life and personal liberty of each and every Chakma residing within the State shall be protected', to process the citizenship applications of the Chakmas, and not to evict the Chakmas from their homes; the Supreme Court also ordered that the quit notices and ultimatums issued by the All Arunachal Pradesh Students' Union and any other group should be dealt with by the Government of Arunachal Pradesh in accordance with law.

However, the NHRC has so far failed to make judicial interventions in any individual case of torture. If impunity is to be challenged, and the NHRC's actions are to act as a deterrent to the perpetration of future acts of torture, it is unclear why the NHRC is restricting its actions only to the award of compensation. It has the power to petition courts in individual cases of torture, and arbitrary and unlawful deprivation of the right to life, when there is sufficient evidence to stand judicial scrutiny.

In September 2009, the ACHR urged the NHRC to intervene with regard to the torture and custodial death of Mr Mohan Lal of Mahal village (in Amritsar, Punjab), who died at the District Police Lines hospital at Jammu on 23 June 2003. The ACHR filed a complaint with regard to the death. As observed in the NHRC's proceedings, the victim was tortured and efforts were made to destroy the evidence. During the first post-mortem, conducted in Jammu, 16 external injuries were observed and the cause of death of Mohan Lal was stated to be septicemia. A magisterial

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<sup>60</sup> *ACHR vs NHRC*, WP(C) No 9335/2007, Delhi High Court.

<sup>61</sup> Protection of Human Rights Act, 1993, Section 12(b). See fn.10.

enquiry conducted by the Tehsildar Settlement concluded that Mohan Lal had died due to blood infection and found no evidence of abuse in his death. However, a fresh post-mortem, conducted by a medical board at the Medical College of Amritsar, revealed 41 injuries, including incised wounds, blisters and also 6 marks of electric burns. The blisters and electric shock burns observed in the second post-mortem were not noted in the first. The NHRC concluded that, 'prima facie it would appear that the first post mortem was fudged'. The NHRC of India awarded 500,000 rupees as interim compensation.<sup>62</sup> However, it remains to be seen whether the NHRC intervenes in any criminal case(s) brought in relation to this death. Unless the NHRC intervenes in such emblematic cases, there is no deterrent effect, especially as the State pays any compensation awarded.

#### 7.4 *Visits to places of detention*

Visits to all places where persons are deprived of life and liberty, including police stations, prisons, administrative detention facilities, military detention centres, juvenile detention centres and social care institutions (such as psychiatric hospitals), are a key method for reducing the incidence torture. This is the central feature of the mandate of the UN Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT), which monitors the implementation of the Optional Protocol to the UNCAT (OPCAT).<sup>63</sup> The NHRC does not have access to military detention centres, though it does have the power to visit 'any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection', under Section 12 (c) of the Protection of Human Rights Act.<sup>64</sup> However, there are a number of problems with the NHRC's visiting programme.

First, the NHRC makes visits to oversee prison conditions. It does not investigate individual cases of human rights violations in prisons. It seldom carries out surprise visits, although it has the mandate to do so. Second, the number of prison visits by the NHRC has substantially decreased in recent years. The NHRC has visited only two prisons in one State (Meghalaya) during the period 2006 to 2007.<sup>65</sup> It visited only nine prisons in four States (three in Chhattisgarh, four in Karnataka and one each in Orissa and Jharkhand) during the period 2005 to 2006,<sup>66</sup> and 22 prisons in five States/Union Territories (three in Tripura, three in Andhra Pradesh, five in Kerala, five in Goa and one in Chandigarh) during the period 2004 to 2005.<sup>67</sup> There are some 1,296 prisons in India;<sup>68</sup> therefore, the number of visits undertaken by the NHRC each year is entirely inadequate and the decline in the use of these powers is a matter of concern. Similar concern must be voiced over the lack of information about the modalities, results and

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<sup>62</sup> NHRC awards Rs 5 lakhs compensation: ACHR urges prosecution of the culprits, Press Release of the ACHR, 22 August 2009. Available at <http://www.achrweb.org/press/2009/IND0609.html>.

<sup>63</sup> Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, entered into force on 22 June 2006. Available at <http://www2.ohchr.org/english/law/cat-one.htm>.

<sup>64</sup> Protection of Human Rights Act, 1993. See fn.10.

<sup>65</sup> NHRC Annual Report 2006-2007.

<sup>66</sup> NHRC Annual Report 2005-2006.

<sup>67</sup> NHRC Annual Report 2004-2005. Similarly, in 2003-2004, it visited 18 prisons in seven States and, in 2002-2003, it visited 14 prisons in 7 States.

<sup>68</sup> Prison Statistics India 2007, National Crime Records Bureau. Available at <http://ncrb.nic.in/PSI2007/prison2007.htm>.

recommendations of NHRC visiting systems, as this makes it difficult to assess their value. Third, NHRC has not reported any surprise visits to police stations, even in Delhi.

Although India has not ratified the UNCAT, let alone the OPCAT, progress towards ratification is being made. Article 1 of the OPCAT states that

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment’.

The NHRC already has the mandate to undertake such visits but has, to date, failed to fulfil this aspect of its mandate. This presents a significant problem for ratification, as it is likely that the NHRC would be designated as India’s national preventative mechanism (NPM): as it is unable to fulfil its present mandate, there are understandable concerns about its ability to fulfil the more demanding NPM mandate.

### 7.5 Concerns over *suo motu* powers

Under Section 12 of the Human Rights Protection Act, the NHRC can inquire, *suo motu*, into complaints of violation of human rights (and complaints about persons abetting those committing violations) and into negligence in the prevention of such violations by a public servant. It can also intervene in any proceeding involving any allegation of violation of human rights pending before a court, with the approval of such court (as discussed above).

The NHRC had made a number of *suo motu* interventions, but their effectiveness could be enhanced. Presently, since the NHRC takes actions on its own behalf, there are no other complainants. In such cases, the NHRC instructs the police to submit a report but the submitted by the police is often the only source of information. For example, on 21 July 2009, the NHRC took *suo motu* cognisance of a news report under the caption ‘Govt. holds virginity test for MP brides’, published in *The Hindustan Times*.<sup>69</sup> However, instead of starting its own investigation, the NHRC directed the Chief Secretary of Madhya Pradesh to provide a factual report within four weeks. The NHRC is yet to make the outcome of its intervention public. Moreover, the NHRC does not always register the compliant submitted by NGOs in *suo motu* interventions. For instance, on 3 May 2006, the ACHR urged the NHRC to intervene in the case of four-year-old Master Budhia Singh, who was induced to run a 65 kilometres marathon from Puri to Bhubaneswar in Orissa on 2 May 2006.<sup>70</sup> The NHRC instead turned the complaint into a *suo motu* action and nothing has been made public since then.

The ACHR advocates that *suo motu* interventions should be improved in the following ways. First, in all cases of *suo motu* interventions, the NHRC’s investigative section must perform its own investigation of allegations. Second, victims and/or their representatives should be given a hearing and allowed to submit evidence. This will help to address the problems and failures that occurred in the cases described above.

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<sup>69</sup> Debobrat Ghose, ‘Govt holds virginity test for MP brides’, *The Hindustan Times*, 13 July 2009. Available at <http://www.hindustantimes.com/News-Feed/bhopal/Govt-holds-virginity-test-for-MP-brides/Article1-431622.aspx>.

<sup>70</sup> ACHR, 3 May 2006. Available at <http://www.achrweb.org/press/2006/IND1306.htm>.

## 7.6 Powers to summon and power of contempt of court

The NHRC has vast powers. Section 13(4) of the Protection of Human Rights Act provides that the NHRC

shall be deemed to be a civil court and when any offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code is committed in the view or presence of the Commission, the Commission may after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1973, forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under section 346 of the Code of Criminal Procedure, 1973[.]<sup>71</sup>

Further, Section 13(5) provides that

every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code, and the Commission shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973[.]<sup>72</sup>

Disobeying the orders of the NHRC can amount to contempt of court. The NHRC has summoned senior government officials in person in rare cases to address continuous defiance of its directions. This has delivered results and should be used more systematically.

However, the NHRC itself has, on several occasions, defied court orders. On 7 October 2004, the ACHR filed a complaint before the NHRC about the torture of Arjun Paswan by Railway Protection Force personnel at Patna railway station in Bihar on 14 September 2004.<sup>73</sup> Pursuant to the NHRC's notice, the Inspector General of the Railways submitted a reply (written in Hindi) that the NHRC forwarded to the ACHR on 8 August 2006 for comments. In its reply of 4 September 2006, the ACHR stated that Mr Sinha's report revealed that the Superintendent of Railway Security had found Railway Protection Force guilty of torturing Arjun Paswan.<sup>74</sup> The NHRC closed the case, citing non-receipt of response/comments from the complainant, although the ACHR had submitted its comments eight days ahead of the NHRC's deadline. On 8 December 2008, the Delhi High Court ruled in favour of the ACHR<sup>75</sup> and directed the NHRC to re-open and re-hear the case of torture of Arjun Paswan in Bihar. As of 20 October 2009, the NHRC is still to organise the re-hearing of the case.

Similarly, on 8 December 2008, the Delhi High Court directed the NHRC to re-hear the Writ Petition pertaining to the rape of pregnant tribal woman by army personnel in Assam.<sup>76</sup> On 5

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<sup>71</sup> Protection of Human Rights Act, 1993. See fn.10.

<sup>72</sup> Protection of Human Rights Act, 1993. See fn.10.

<sup>73</sup> NHRC Case No 2422/4/2004-2005.

<sup>74</sup> The ACHR also pointed out that, due to mistakes in translation, the NHRC misinterpreted the response of Mr Sinha and blamed the victim for his failure to turn up during the identification parade of the accused: the report actually stated the opposite.

<sup>75</sup> *ACHR Vs NHRC*, WP(C) No 9326/2007, Delhi High Court.

<sup>76</sup> *ACHR Vs NHRC*, WP(C) No 9338/2007, Delhi High Court.

July 2004, the ACHR filed a complaint before the NHRC regarding the rape of a pregnant tribal woman from Padmapukri Village (Kokrajhar District in Assam) by three Kashmir Light Infantry Regiment personnel on 29 June 2004.<sup>77</sup> On 16 September 2004, the NHRC sent only the gist of the reports (dated 3 July 2004 and 2 August 2004) received from the authorities concerned and asked the ACHR to submit comments. On 15 November 2004, the ACHR requested that the NHRC send the full reports. However, on 15 March 2005, the NHRC closed the case. This forced the ACHR to move the Delhi High Court. The NHRC is yet to comply with the directions of the Delhi High Court to re-hear the case.

Thus, the NHRC must adapt if it is to be considered a suitable candidate as India's NPM when the country eventually ratifies the OPCAT. Not only must practices that encourage violations (particularly the practice of 'weeding out' and the practice of treating the police as complainant and respondent and, thus, failing to consider alternative versions of events, even when human rights violations are alleged) be changed, but the NHRC must be encouraged to use the full range of powers available to it under its mandate. Similarly, it must engage in a more active pursuit of human rights goals by stepping up its visiting programme and by conducting its own investigation into allegations of torture and other human rights violations.

## 8. Conclusion

There are real opportunities at the national level in India to address the menace of torture. International advocacy is limited and its impact likely to decrease as India's economic power is increasingly reflected in political power. The ACHR's work on preventing torture has demonstrated that there is an appetite amongst the media and parliamentarians to discuss both prevention and protection issues. However, there is a pressing need for far more civil society action than the ACHR is able to provide. The endemic lack of capacity and the current restrictions on funding are key limiting factors.

However, there is reason for cautious optimism. NHRC compensation awards are becoming more frequent and also larger. Similarly, disciplinary, and occasionally criminal, proceedings against perpetrators of torture (and other ill-treatment) are becoming more frequent, though they are still relatively rare. Another promising development is the courts' willingness to act in favour of human rights (as shown in their support of the ACHR's challenges against the NHRC's actions in individual cases). As a result of these various developments, national human rights institutions are being forced to review their working methods, including in relation to denial of due process, but a great deal of work remains to be done. There is a need to establish clear and transparent institutional practice that conforms to the NHRC's status as a quasi-judicial institution. There is also a need to ensure that all the powers available to the NHRC are deployed, particularly in relation to the prosecution of individual cases. If the gains made so far cannot be translated into further progress on prosecution and punishment of those who torture in order to deter future violations, then the institutional and operational practice of torture is likely to continue.

Success in reducing impunity, and strengthening the commitment of all key institutions and bodies to human rights, will ultimately depend on the political climate. The reasons for cautious optimism may be only temporary and, thus, should be exploited while the opportunity remains.

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<sup>77</sup> NHRC Case No 44/3/2004-2005-WC.

In relation to preventing torture, the key actors must move quickly to capitalise on the opportunities available for passing the alternative Prevention of Torture Bill, 2009, with its clearer, broader definition of torture and ill-treatment, and provisions to increase the likelihood that those who torture will be prosecuted.