Организация Объединенных Наций A/HRC/23/NI/4

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Совет по правам человека
Двадцать третья сессия
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Поощрение и защита всех прав человека, гражданских, политических, экономических, социальных и культурных прав, включая право на развитие

Информация, представленная Национальной комиссией по правам человека Индии*

Записка секретариата

Секретариат Совета по правам человека настоящим препровождает сообщение, представленное Национальной комиссией по правам человека Индии**, воспроизводимое ниже в соответствии с правилом 7 b) правил процедуры, изложенных в приложении к резолюции 5/1 Совета, согласно которому участие национальных правозащитных учреждений основывается на процедурах и практике, согласованных Комиссией по правам человека, включая резолюцию 2005/74 от 20 апреля 2005 года.

* Национальное правозащитное учреждение со статусом "А" аккредитации при Международном координационном комитете национальных учреждений, занимающихся поощрением и защитой прав человека.

** Воспроизводится в приложении в полученном виде только на языке представления.

Annex

[English only]

Comments of the National Human Rights Commission of India on the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his visit to India

1. The National Human Rights Commission of India (NHRC) welcomes the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his visit to India, in which he adhered scrupulously to the Code of Conduct for Special Procedures mandate-holders, consulted widely and listened carefully to his interlocutors, including the NHRC. While the NHRC agrees broadly with his conclusions and recommendations, it is natural that in a short visit to a country of the size and complexity of India, one or two assessments are not entirely in consonance with the facts. The NHRC thinks it might be helpful to the Special Rapporteur and to the Council when it considers the important points made in his report, if it were to clarify a few issues which relate specifically to its work.

Impact of the NHRC's work

2. In paragraph 5, the SR notes that though the incidence of unlawful killings has dropped, "extrajudicial killings remain a concern". The NHRC concurs with both assessments, but believes that its greater activism over the last few years has helped to bring down sharply the number of extrajudicial killings. From 2009, it has focused attention on extrajudicial killings through two Division Benches; over the last five years, it has held on 220 cases that grievous violations of human rights had been committed, for which reparations were essential, and recommended relief, which the Central Government and the State Governments concerned have almost invariably accepted. Feedback from civil servants, and from NGOs which monitor these killings, indicates that the NHRC's activism has been a significant factor in this drop in numbers.

3. The steepest drop has been in Uttar Pradesh, from which the largest numbers of complaints used to be received, and there is a clear correlation between the NHRC's activism and improvements on the ground, as the following table shows:

Year	*Complaints received from Uttar Pradesh*
2008-9	70
2009-10	47
2010-11	42
2011-12	19
2012-13	8

The NHRC and the judicial process

4. In paragraph 88, however, the SR writes that he "had the impression that currently the NHRC could be taking a too legalistic and deferential approach, and that the NHRC should take a more proactive view, and where appropriate, should be willing to take a critical stance towards the decisions of courts." This is a false impression and since its work has been of crucial importance on the issues covered by the SR's mandate, it might be helpful if the NHRC were to set out the ways in which it interacts with the judiciary after a death suspected to be an extrajudicial execution.

5. Under NHRC guidelines, a magisterial enquiry must be held on all deaths in police action. The SR writes in paragraph 18 that "the NHRC Guidelines appear not to be complied with", but this is not correct. They are, and when they are not, it has used the full extent of its quasi-judicial powers against those who were negligent, including the power to summon and to issue warrants of arrest. It has received magisterial enquiries on almost all of the cases before it; sometimes, more than one enquiry has been conducted on its orders. Most of these enquiries, however, accept accounts given by the police, without examining them in detail. Though State Governments then invoke this magisterial absolution to argue that no rights were violated, the NHRC refuses to be shackled by the conclusions of enquiries that were not sufficiently rigorous. It emphasizes in the recommendations it issues that a magisterial enquiry is an aid, not a fetter.

6. Invariably, since the police claim that they were attacked and the victim was killed in the right of self-defence, the police register a case against him, but this is abated in a court, since the accused is dead. The SR has referred to this in paragraph 14. When the NHRC holds that the police have not proven to its satisfaction that an encounter was genuine, State Governments draw attention to this process to argue that a court had already accepted their final report. The NHRC, however, rejects this argument as well, pointing out that these were charges against a dead man or men, who were unable to defend themselves.

7. In the majority of the cases, therefore, on which it has made recommendations for relief, ultimately accepted by the Governments concerned, the NHRC has done so despite the conclusions of a magisterial enquiry, absolving the police, and the acceptance by a court of a final report filed by them.

8. There are a few cases where, the families of the victims having filed cases in the courts, the State Governments urge the NHRC to defer recommendations until the judicial verdict is received. The NHRC, however, has held that while the question of culpability in these cases will be determined by the courts, it has the power to recommend interim relief and, since its enquiry had confirmed that rights had been violated, the State must pay the relief it recommends. On these cases as well, State Governments have almost always reluctantly complied.

9. On four or five cases so far, State Governments have filed writs in High Courts against the NHRC's recommendations. It is implicit in this that State Governments look on the NHRC's recommendations as binding and consider it necessary to get judicial permission to decline to act on them. The NHRC does not contest these cases, but asks that a full set of its proceedings be placed before the court, since these speak for themselves. Under the law, however, when a High Court issues a stay, pending hearings on the case, the NHRC cannot get its recommendation implemented.

Investigations

10. In paragraph 14, the SR writes that "few, if any, encounter cases have been brought to the point of conducting investigations…". This too is not correct. A police investigation is invariably carried out on every case, under the guidelines of the NHRC, which often directs a further enquiry by the State's Criminal Investigation Department or, in cases where this is required in its view, by the Central Bureau of Investigation. Where necessary, it has supplemented these with enquiries by its own Investigation Division. In a few cases, these investigations have led to the prosecution of policemen, but the NHRC agrees with the SR that these are rare, for the reasons that he has highlighted, including the absence of witnesses.

11. When there is a suspicion that public servants are responsible for an extrajudicial killing, the NHRC holds that two duties are incumbent upon the State – to punish the guilty and to make reparations to the next of kin. Though detailed investigations are indeed carried out on its orders, it is precisely because of the difficulty in identifying the guilty and establishing their guilt that, in most cases, the NHRC can only ensure that the State does at least provide the relief it recommends for the families of the victims.

Limitations

12. In paragraph 89, the SR writes that the "effective functioning of the NHRC is partially hampered … by its competence to only investigate matters within one year from the date of the incident, which may be a serious impediment in efforts to shed light on past violations." The NHRC does not agree. It issued its first guidelines on the steps that must be taken after deaths in police action in 1997, four years after it was established, revising them from time to time in the light of its experience. In every revision, it has brought down the time within which the police must report to it a death in an encounter. Currently, the first report must be sent within 48 hours. At no stage were the police given the leeway to report after a year. This has therefore never been an impediment.

13. There have, of course, been instances when the police have not reported deaths within the timeline set by the NHRC's guidelines. In cases where it has therefore been able to take cognizance more than a year later, the NHRC has held that the State having failed in its duty to comply with the guidelines, applying the limitation would mean that a provision of the Act was being used to subvert it. In such cases, including several now under its consideration, the NHRC has taken up deaths of which it came to know well after a year later.

14. In addition, one of the most extensive investigations the NHRC has ever carried out, on a remit from the Supreme Court in 1996, was on the allegations of mass cremations conducted by the police in the Punjab during violent uprisings in that State in the 1980s and early 1990s. This was indeed to shed light on past violations and the statute of limitations was not a bar. Through a process that only ended in 2013, the NHRC recommended relief for the families of over 1500 victims.

15. Nevertheless, to guard against the possibility that the statute of limitations might stop it from taking up cases that deserve attention, the NHRC has in fact recommended to the Government that the Act be amended to permit it to take up cases, even after the expiry of the period of limitations, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary to do so in the interests of justice.

The armed forces

16. In the same paragraph, the SR refers to the limitations placed by Section 19 of the Act on the NHRC's powers to "examine alleged human rights violations by members of the armed forces" and he has made a recommendation in paragraph 120 that this Section should be amended. The NHRC agrees that its powers to investigate incidents involving the armed forces are severely circumscribed by this Section. Because amending a law is not easy, it has explored other interim measures.

17. On a petition filed in 2012 in the Supreme Court by families of several victims from the State of Manipur, in which it was cited as a respondent, the NHRC has filed a response, now part of the Court's records, in which it has stated:

> "The NHRC must be able to monitor violations of human rights by the Army and paramilitary as rigorously as it does allegations against all other public servants. However, Section 19 of the Protection of Human Rights, which places egregious restrictions on the NHRC vis-à-vis the armed forces, makes it impossible for it to do so. This section, which confers a unique impunity on the armed forces, needs to be read down."

18. Despite the limitations imposed by Section 19, however, the NHRC has in a number of cases, after scrutinizing reports from the armed forces, held that these were false, and has recommended relief, which the Government of India has paid. The personnel involved, however, have not been punished.

Inquests and post-mortems

19. In paragraph 32, while referring to the NHRC's guidelines, the SR writes that "representatives of human rights organizations may not be present during autopsies", "autopsies are carried out by executive rather than judicial magistrates", and he therefore recommends in paragraph 122 that "the NHRC should issue guidelines on the conduct of inquests and autopsies in all cases of unlawful killings". The SR was perhaps not properly advised here, because autopsies in India refer to post-mortems, which are carried out by doctors, and the NHRC issued guidelines in 2001, which laid down a format in which they record their findings, and directed that these procedures be filmed and the CD sent to it.

20. Inquests in India refer to the first official examination of the dead body conducted by a magistrate, usually an executive magistrate, as a precursor to the post-mortem. The law makes it mandatory for an inquest to be carried out in the presence of witnesses. Representatives of human rights organizations are not debarred from inquests, at which members of the family, if they have been located, are usually present. The NHRC has not issued any guidelines on the conduct of inquests because magistrates know what they have to do and record the basic facts, countersigned by witnesses, against which later reports can be compared.