

LAW update

UPDATED

Amazing legal opportunities

# Despots are no more beyond the reach of justice

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ALTHOUGH, universal justice and an across-the-board accountability is still long off, it is nevertheless hard to identify a general bias and/or a state-specific prejudice in the ongoing pursuit of the felons who transgressed the norms of civilised behaviour while in power. Leading western leaders standing trials justifying their "war crimes" is not likely in near future either but the ramifications of the recent legal developments in the international arena will definitely be far reaching.

The arm of the law is growing longer and the world smaller for national leaders and others accused of atrocities. A strong message sent out to would-be vendors of evil is that justice has crossed national frontiers. To escape the legal course of your conduct is no longer easy if outright impossible. The era of impunity is being replaced by a new phase of international law and justice.

## Remarkable events

There seems to be a consensus that the following events [not in chronological order] are important milestones in bringing perpetrators of crimes against humanity at the highest levels, to justice. The very fact that serious efforts have been [and are being] made to bring these merciless individuals to justice may [hopefully] help to discourage dictators the world over from feeling that they can rule with impunity and fear no consequences. That would be a mighty achievement.

On June 28, 2001, the man responsible for so much suffering in the Balkans, Slobodan Milosevic, the former Yugoslav President was handed over to an international tribunal. He was finally in a court of justice to face the consequences of his horrifying sins. His brief appearance before the Tribunal was extraordinary by any account. This was the first time that a former head of state was produced before an international court. In a world where national leaders have routinely escaped punishment for crimes ranging from corruption to genocide, Milosevic's indictment in The Hague was a no doubt historic event.

On February 12, 2003, the Supreme Court of Belgium declared that Ariel Sharon, the sitting Prime Minister of Israel can be tried for genocide in Belgium once he has left the office. The historical judgement opens the way for survivors of the 1982 massacre of Palestinian refugees in Beirut to press their case against the Likud leader the moment he loses his immunity from prosecution. The ruling, while blocking the case against Mr. Sharon, did allow a Belgian court to hear the case against Mr. Sharon's co-defendant, Amos Yaron, the former Israeli Army chief of staff. In its summary, the high court said investigations and a trial could proceed even if a suspect was not physically present in Belgium. Jean Kambanda, a former Rwandan Prime Minister, went to jail for life for his role in the 1994 genocide, mostly of ethnic Tutsi.

The example of Augusto Pinochet, the former Chilean strongman, who spent a year and a half in British custody on a Spanish warrant before being allowed to return home, where his legal problems continue, must be a matter of some solace for his victims. Hisene Habre, the former leader of Chad, was under arrest in Senegal until a new government turned him loose in 2000, but his fate remains uncertain.

Several dozens senior political leaders and high-ranking military officials, across the ethnic/religious spectrum (including Muslims,) are behind bars in the Netherlands facing a range of war crime charges at The Hague for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Intensive efforts are underway to apprehend Radovan Karadzic and Ratko Mladic, the two topping the list of most-wanted war criminals.

Peru is demanding that the Japanese extradite its former president, Alberto Fujimori. There have been attempts to bring similar cases against other world leaders as well, including the Cuban president, Fidel Castro, the Palestinian leader, Yasser Arafat, Saddam Hussein of Iraq, and the

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former Iranian president Hashemi Rafsanjani. Preparations are underway for the setting up of an international tribunal under the auspices of the United Nations to try leaders of the now defunct Khmer Rouge for their role in the deaths of over one million Cambodian citizens between 1975 and 1979. A similar international tribunal has been recommended by the UN to try Indonesian military and militia leaders for their role in the violence in East Timor during the formerly occupied country's referendum on independence in 1999. A human rights panel established in Jakarta has found sufficient evidence to charge key Indonesian military officials with a host of crimes including allegations of torture, forced evacuation, kidnapping, rape, and mass killings.

## Immediate benefit of third world countries

Academic discussion of the phenomenon aside, a question arises what immediate benefits we in the Third World countries like Pakistan and India, with a long record of not-so-benign leaders, can draw of these developments to put our own house in order and to lay hands on those who have been unapproachable so far?

## Communal riots in India

The first four days of November 1984 were the bloodiest in Delhi's history since 1947, says a highly acclaimed report "The Quest for Justice" compiled jointly by Vrinda Grover, a scholar and activist, and her associate, Kajal Bharadwaj. According to official figures, 2,733 Sikhs were brutally killed, burnt and slaughtered in the Indian Capital within 72 hours. Countless others were injured, women raped and hundreds of homes and shops looted and destroyed.

Based on substantial documented testimony of both victims and other citizens of Delhi, the writers conclude, it was not a riot, but a massacre, a mass murder. "There was no large scale rioting between Hindu and Sikh communities. Actually, recorded testimony points to the fact that mobs were assigned the task of "systematically eliminating and looting Sikh families". Thus, once again confirming the findings of, "Who are the guilty? Report of a joint inquiry into the causes and impact of the anti-Sikh violence in Delhi from 31 October to 10 November 1984: PUCL-PUDR", deemed the most authentic account of the gory events. Most impartial observers would agree that by substituting the word Muslim for Sikh, "The



Quest for Justice" becomes equally valid for the recent pogrom in Gujarat. The indiscriminate killings in Gujarat were meticulously planned with computer printouts pointing out addresses of Muslims, and executed with surgical precision, openly facilitated by the police and the Government machinery.

Calculated butchery of a hapless minority by a majority community cannot be termed as "communal riots", in particular when almost all the victims belong to the former group. In a civilized society, a community cannot be held responsible for the action of individuals, or even organizations coming from that community. Gujarati Muslims were not responsible for what happened in Godhra, if someone insinuates that.

As the renowned columnist Kuldip Nayar puts it, "the instigation of communal frenzy and the commission of mass murder cannot be ignored or excused. The persons who killed, burned or looted as well as the minds

that engineered or conspired to arrange these events must be punished".

## Genocide in Bangladesh

Similarly, the traumatic secession of Bangladesh (former East Pakistan) is a dark and very tragic chapter of Pakistan history. To date, there has been no serious attempt to nab and punish those who were responsible for the flagrant human rights violation in Bangladesh. Gross atrocities committed against the Bengali are war crimes by any definition of the term. Many of the main accused are still alive and can be put on trial for their alleged role. This is long over due.

## Trial of Indio-Pakistani leaders

In addition to that, there are scores of Pakistanis who were kidnapped, tortured, extra-judicially executed, jailed and abused on direct/indirect orders of the top leadership of Pakistan. Pakistani judicial machinery has hitherto failed to offer any substantial relief to the victims. It is bitterly painful to accede that there are slim chances that our courts would ever be able to impart justice to the sufferers of the [past and present] despots, especially when Zia ul Haque and Altaf Hussain respectively stands for worst type of state-sponsored and mafia type terror in our region.

Pakistani generals standing trial in Pakistan is almost out of question for foreseeable future. To get Benazir, Nawaz Sharif or Altaf Hussain extradited from their safe havens and held them liable for their misdeeds in Pakistan is a difficult task. Likewise, tragically, Narendra Modi, the incumbent Bharatiya Janata Party (BJP) chief minister of Gujarat, the top leadership of Vishwa Hindu Parishad (VHP) and the Rashtriya Swayamsewak Sangh (RSS), and those who masterminded the massacre of Sikhs in 1984, are more or less beyond the reach of Indian legal system.

At the same time finding proofs for the enormities of these obnoxious leaders and/or litigants willing to pursue their cases abroad cannot be a problem. Why shouldn't we take some of the most gruesome cases to Belgium (or to any other EU-member country) and let the justice take its course? The doctrine of "command responsibility", if not the exact chain of command, ought to be enough to implicate the aforementioned "leaders" for the heinous crimes committed against citizens of our countries.

## Concluding remarks

The wheels of justice must catch up with them by now. Human rights attorneys should therefore thoroughly probe the feasibility/possibility for filing at the least civil suits, which are normally easier to initiate and sustain than the criminal ones, somewhere in the western world on the behalf of all those who unlawfully and maliciously suffered because of our self-styled leaders. A good lead is O J Simpson trial where he was acquitted for homicide by the criminal court whereas the jury in the following civil suite fined him heavily on the same charges.

Regardless of the outcomes of this exercise, the process will certainly make the life of respondents bit less pleasant, expose their true faces and limit their mobility. It would also deprive them of their [false] halo and the "pioussness" they are so adept at feigning, spoil their political careers for a long time to come, consequently incapacitating them for further crimes.

If the sentencing of two Rwandan nuns to long jail terms for their part in the killing of Tutsis in their country in 1994 was an experiment in the exercise of international law against genocide and mayhem, the arrest and extradition of Milosevic to The Hague, and lately the ruling by the Belgian Supreme Court, are ample proofs that now no individual committing acts of manifest murder and other means of persecution is safe from the long arms of justice. South Asians are patiently waiting for the day when the region's tyrants too will be made to pay for their savagery and would love to see them punished to the legal maximum. No one is above the law; it should be damn clear to all and sundry by now.

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## HUMAN RIGHTS analysis

# India: Extrajudicial killings under the spotlight

HUMAN RIGHTS FEATURE

THE practice of extrajudicial killings has once again reared its ugly head in India due to two highly publicised cases that have focussed public attention on the issue. Both cases involved so-called 'encounter' killings by police. The euphemism 'encounter killings' has been used since the 1960s to describe extrajudicial killings because of the frequency with which officials claim that the deceased had been killed in an 'encounter' with police. While media reports of 'encounter' deaths often receive little public attention, the recent cases have attracted an unusual degree of public scrutiny. The high level of public interest creates an opportunity to refocus attention on the alarming frequency with which extrajudicial killings have occurred and continue to occur throughout the country.

## Case studies

In the first case, police shot and killed two men at New Delhi's Ansal Plaza shopping complex on 3 November 2002. The police claimed the two men were Pakistani terrorists and were killed in an 'encounter'. However, media reports questioned the police version of events. A local doctor, Dr. Hare Krishna, claimed to have witnessed the event, and alleged that the encounter was faked. Dr. Krishna filed a petition in the Delhi High Court seeking an independent inquiry into the Ansal Plaza shoot-out. He also claimed to have been pressured to change his statement.

More recently, Patna, the capital city of the state of Bihar, was the scene of mass protests against the killings of three youths in an allegedly fake encounter on 28 December 2002. The deceased's families accused police of concocting the 'encounter' story and falsely claiming looted vehicles were recovered from the scene. A dawn-to-dusk general strike, or bandh, as it is known in India, was called in Patna in protest against the killings. In response to the protests, the State Government ordered a probe by the Criminal Investigation Department (CID) into the killings. Six policemen were reportedly suspended in connection with the case.

A fresh incident of 'encounter killing' was reported as recently as 13 January 2003 in the western state of Gujarat. Police in the city of Ahmedabad shot dead 25-year-old Sadiq Jamal Mehtar, who, they alleged, was on a mission to kill Gujarat Chief Minister Narendra Modi. Police claimed they fired at him "in self defence". This was the second such incident following the events of early 2002. In October 2002, another 'militant', Samirkhan Pathan, who had allegedly planned to "kill Modi" had been killed in an 'encounter.'

## Human rights regime

International human rights law prohibits the arbitrary deprivation of life under any circumstances. Article 3 of the Universal Declaration of Human Rights states that "everyone has the right to life, liberty and security of person." Article 6 of the International Covenant on Civil and Political Rights ("ICCPR") provides that "[e]very human being has the inherent right



to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 4 of the ICCPR states that this right cannot be waived "even in times of public emergency threatening the life of the nation." Moreover, under Article 2(3)(a) and (b) of the ICCPR, State parties are obliged to ensure that remedies are available to the victims of human rights violations and that those remedies are effective. Extrajudicial killings clearly contravene the right to life.

## The obligations

The Indian Government ratified the ICCPR in 1979. By ratifying an international treaty which enshrines the right to life, India is obliged not only to respect that right in principle, but also to take effective measures to ensure that extrajudicial killings do not occur in practice. Although the right to life is enshrined in Article 21 of the Indian Constitution, the increasing incidence of extrajudicial killings in India demonstrates that the Government has failed to take effective measures to ensure that the right is respected in practice.

## A "deliberate and conscious state administrative practice"?

Extrajudicial killings are not isolated occurrences in India; as former civil servant and social activist S.R. Sankaran puts it, they are part of a "deliberate and conscious state administrative practice" for which successive Indian governments must bear responsibility. Indeed, successive Indian governments have adopted a de facto policy sanctioning extrajudicial killings by members of the police forces, army and security personnel. A number of factors compel this conclusion.

First, the Indian Government has failed to ensure the adequate investigation of all complaints and reports of extrajudicial killings. Proper investigation is, of course, a critical factor in the prevention of extrajudicial killings. Without adequate investigation of complaints of extrajudicial killings, there can be little hope of prosecuting and convicting the perpetrators. However, the Indian Government has not demonstrated a commitment to ensuring that all such complaints are adequately investigated. Importantly, there is no independent body in India that is empowered to investigate such complaints. Moreover, India's national human rights body, the National Human Rights Commission (NHRC), has not proved to be an effective body in combating extrajudicial killings. The NHRC's ineffectiveness is exacerbated by the Indian Government's failure to give adequate consideration and attention to the NHRC's recommendations in relation to human rights violations generally, including recommendations in relation to extrajudicial killings. For example, although the NHRC has issued guidelines to be followed by police in all cases of 'encounter' killings, it is clear that these are generally not followed in practice.

Second, the Indian Government has failed to ensure the prosecution of those who commit extrajudicial executions. Indeed, the government's failure in this regard extends beyond the mere failure to prosecute, as Indian law, through the doctrines of sovereign and official immunity, actually protects officials who commit human rights violations. Moreover, under the Code of Criminal Procedure, 1973 the sanction of the Central or State Government is required to arrest or institute criminal prosecutions against public servants, including police officers and members of the civil or armed forces. The Indian Government has ignored repeated calls to amend the law to ensure that public officers who violate human rights are no longer protected from prosecution.

Third, entrenched problems within India's judicial system contribute to the climate of impunity that allows extrajudicial killings to occur. As observed by the US State Department, "court action in cases of extrajudicial killings is slow and uncertain." The reality of the Indian judicial system is that long delays are the rule rather than the exception, and such delays are measured in years rather than months. Such delays impede the process of bringing to justice those who commit extrajudicial killings, in many cases making conviction impossible due to the length of time that has passed. The failure to ensure that cases of extrajudicial killings are concluded within a reasonable period of time contributes to the climate of impunity that allows extrajudicial killings to continue to occur throughout India.

Fourth, successive governments have failed to establish an adequate compensation system in India. There is no statutory right to compensation for families of victims of extrajudicial killings. An effective compensation system would operate to deter government officials from committing or authorising extrajudicial killings, and encourage the families of those murdered to bring their cases to court. In failing to provide adequate compensation, the Indian Government is failing to meet its obligations under international law.

Fifth, it is well documented that the armed and security forces are rarely held accountable for the commission of extrajudicial killings. Moreover, a perpetrator is more likely to be held to account by way of an internal disciplinary hearing than under the general law. Although it is very difficult to obtain accurate information about such hearings, it seems clear that the punishments awarded for serious human rights violations are grossly inadequate if punishments are awarded at all. In circumstances where a member of the army or security forces commits a serious human rights violation that also constitutes a serious criminal offence, that person should be charged under the general law and tried in a public court.

Finally, the Indian Government has failed to satisfactorily demonstrate its opposition to extrajudicial killings. Indeed, there is evidence that both the Central and State Governments actively encourage the practice. For example, there is evidence that Central and State Governments have funded auxiliaries who commit extrajudicial killings and have rewarded police officers who commit extrajudicial killings. Such actions strengthen the conclusion that the Indian Government has adopted an official policy sanctioning the commission of extrajudicial killings.

## Right to life the first casualty

It is clear that the Indian Government has failed to establish effective mechanisms to ensure the accountability of the police, security forces and the army. Moreover, the Government steadfastly refuses to change laws that have been rightly condemned as operating to protect those who commit extrajudicial killings. Certainly, there is some awareness that extrajudicial killings occur in India. For example, in successive Country Reports on Human Rights Practices, the US Department of State has documented numerous cases of extrajudicial killings in India. However, there is inadequate recognition in the international arena of the gravity of the problem and its systemic nature. The Indian Government must be reminded of its obligations under international law. The right to life is the most fundamental right, and its continued abuse in India through the commission of extrajudicial killings must not be tolerated.

Human Rights Features, an initiative of SAHRDC, Delhi, is an independent, objective and analytical attempt to look comprehensively at issues behind the headlines from a human rights perspective.

