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**INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION TO THE
UNIVERSAL PERIODIC REVIEW OF
INDIA**

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The International Commission of Jurists (ICJ) is a non-governmental organisation founded in 1952, in consultative status with the Economic and Social Council since 1957. The ICJ is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. It takes an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law. It provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level.

ICJ submission to the Universal Periodic Review of India

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Human Rights Council's Universal Periodic Review (UPR) of India. In this submission, the ICJ brings to the attention of the Human Rights Council's Working Group on the UPR (Working Group) and to the Human Rights Council (Council) issues concerning: (1) the ratification of the Convention against Torture (CAT); (2) international human rights instruments and mechanisms.

PREVENTION OF TERRORISM BILL (PTB)

2. In its 2008 Universal Periodic Review, it was recommended that India expedite its ratification of the CAT, as well as to sign and ratify the Optional Protocol to the CAT (OPCAT). In response, the delegation from India stated that ratification of CAT was being processed by the Government.¹

3. On 6 May 2010, the lower house of Indian Parliament (*Lok Sabha*) passed the Prevention of Torture Bill 2010 without any discussion. The Bill was subsequently referred to a Select Committee by the Upper House (*Rajya Sabha*), following which the Select Committee of the Upper House drafted substantive amendments and prepared a revised Bill. While curing some deficiencies, the revised Bill still fails to comply with several key provisions in the CAT as well as India's obligation to prohibit torture and ill-treatment under the International Covenant on Civil and Political Rights (ICCPR). Six concerns are highlighted herein.

(i) *Death penalty*

4. Torture causing death is punishable by death or life imprisonment under Section 4(2). The ICJ considers the imposition of the death penalty to violate the right to life and right to be free from cruel, inhuman or degrading punishment. The UN General Assembly has repeatedly called on all retentionist States, most recently in December 2010, to "progressively restrict the use of the death penalty and to reduce the number of offences for which it may be imposed;" and to "establish a moratorium on executions with a view to abolishing the death penalty".² The establishment by India of a new offense for which the death penalty may be applied would fly in the face of these prescriptions.

(ii) *Statute of limitations*

5. Section 6 imposes a statute of limitations on complaints of torture. If a complaint is not made within two years from the date of the alleged acts, the victim is precluded from obtaining a legal remedy for torture. The accused is thereby immune from subsequent prosecution. Section 6 represents a serious impediment to the eradication, prevention, prosecution and punishment of torture. It also interferes with victims' access to justice and thus violates victims' right to remedy and reparations. Section 6 is incompatible with the object and purpose of the CAT and the ICCPR.

(iii) *Limited immunity for public officials*

6. Section 7 provides a form of statutory immunity for public officials. A public official acting or purporting to act in the discharge of an official duty is immune from prosecution unless permission for prosecution is obtained from a senior officer in the Central or State Government. A decision to deny permission to prosecute can only be taken in the first three months from the date an application is made. If no decision is taken within three months, permission is deemed to have been granted and the public servant will be subject to prosecution. Where the Government or competent authority denies permission, there must

be written reasons justifying the decision. The complainant is entitled to appeal such a decision to the High Court within 90 days.

7. Notwithstanding these counterbalances, it remains possible that a public servant will be immune from prosecution and punishment for an act of torture. It is also a serious impediment in accessing justice and reparations and is not compatible with the object and purpose of the CAT and the ICCPR.

(iv) *Definition of torture and cruel, inhuman or degrading treatment or punishment*

8. The Supreme Court of India, in its recent decision *Prithipal Singh etc. v State of Punjab and Anr, etc.*,³ affirmed the State's unequivocal obligation to prohibit torture, and specifically cruel, inhuman and degrading treatment of all persons. The definition of torture in the revised Bill nevertheless fails to do so in four respects: (1) it fails to criminalise complicity in or instigation of acts of torture; (2) it uses a stricter definition of cruel, inhuman or degrading treatment than "severe pain and suffering, whether physical or mental" (as in article 1 of the CAT); (3) it fails to criminalise cruel, inhuman or degrading treatment; and (4) it does not prohibit corporal punishment or punishment that constitutes cruel, inhuman or degrading punishment.

(v) *Non-refoulement*

9. The revised Bill does not contain any provision or reference to *non-refoulement*. The principle of *non-refoulement* is a basic component of the prohibition of torture and must be included in the implementing legislation. It is imperative that a person not be transferred forcibly to a third country where he or she faces a risk of torture or ill-treatment.

(vi) *Preventative measures*

10. A key aspect of the article 2 obligation is that States parties take "effective legislative, administrative, judicial or other measures to prevent acts of torture... under [their] jurisdiction" (emphasis added). The Committee against Torture views preventive measures as paramount, transcending the items enumerated specifically in the Convention or the demands of its General Comment.⁴ The revised Bill contains no specific preventive measures. Nor has India taken any steps towards signing or ratifying the OPCAT despite the recommendation of the UPR in 2008.

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND MECHANISMS

11. India has ratified or acceded to several core human rights treaties, but is yet to become a party to the First and Second Optional Protocols to the ICCPR,⁵ the Optional Protocol to the ICESCR,⁶ the Optional Protocol to the CEDAW,⁷ the CAT (despite being a signatory since 1997), the Optional Protocol to the CAT, the ICRMW,⁸ the ICPED,⁹ the Rome Statute on the International Criminal Court, and the Convention on the Status of Refugees.

12. India is systematically late in all of its reporting obligations to treaty bodies, with the exception of the combined third and fourth reports to the Committee on the Rights of the Child, due on 10 January 2005 and submitted on 26 August 2011. India has fail to adhere to reporting deadlines for periodic reports to the Human Rights Committee (HRCttee), the

Committee on Economical, Social and Cultural Rights (CESCR), and the Committee on the Elimination of Discrimination against Women (CEDAW):

- India is yet to submit its fourth report to the HRCttee, which was due on 31 December 2001;
- India's sixth periodic report to CESCR, due 30 June 2011, is outstanding;
- India has failed to submit its combined fourth and fifth report to CEDAW, due since 8 August 2010.

13. Although India has extended a standing invitation to the Special Procedures as of 14 September 2011, it is yet to respond to requests for visits to India by 11 Special Procedure mechanisms, despite several reminders in many instances.¹⁰

RECOMMENDATIONS

14. The ICJ calls upon the Working Group and the Council to urge the Government of India to:

Concerning the Prevention of Terrorism Bill (PTB):

- i). Insert a provision in the PTB to recognise the criminal liability of public officials and/or superior or commanding officers complicit in, or instigating acts of, torture and other cruel, inhuman or degrading treatment or punishment;
- ii). Criminalise acts of cruel, inhuman or degrading treatment or punishment as a separate offence;
- iii). Insert a provision in the PTB explicitly prohibiting corporal punishment or any other punishment constituting cruel, inhuman or degrading treatment or punishment;
- iv). Eliminate the death penalty as a penalty for the offence of torture causing death and replace it with a lengthy term of imprisonment;
- v). Remove sections 6 and 7 from the PTB ;
- vi). Insert a provision in the PTB prohibiting persons from being transferred to any State where there is a risk of torture or other cruel, inhuman or degrading treatment or punishment;
- vii). Increase the human rights training and education of staff involved in custody;
- viii). Ensure that persons convicted of torture or ill-treatment are prevented from working in places of detention, interrogation or imprisonment;
- ix). Take steps to guarantee that detained persons are brought before a judge or other independent judicial officer regularly and allowed visits from family;
- x). Establish an effective mechanism immediately to prevent, through monitoring, the use of torture and ill-treatment through the National Human Rights Institution, and eventually by becoming a party to the OPCAT and allowing for visits by the international mechanism established thereunder;

Concerning international instruments and mechanisms:

- xi). Become a party to: the First and Second Optional Protocols to the ICCPR; the Optional Protocol to the ICESCR; the Optional Protocol to CEDAW; the Convention against Torture and its Optional Protocol; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the International Convention for the Protection of All Persons from Enforced Disappearances; the Rome Statute on the International Criminal Court; and the Convention on the Status of Refugees;
- xii). Establish a moratorium on executions with a view to abolishing the death penalty, and take immediate steps toward abolition of the death penalty in law;

- xiii). Immediately sign, with a view to ratifying, the Third Optional Protocol to the CRC;
- xiv). Provide without delay its fourth periodic report to the HRCttee, its sixth periodic report to the CESCR, and its combined fourth and fifth periodic report to CEDAW;
- xv). Accept at the earliest opportunity the requests for country visits to India from the Special Rapporteur on torture; the Special Rapporteur on racism; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the sale of children; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on adequate housing; the Special Rapporteur on indigenous people; the Special Rapporteur on water; the Special Rapporteur on independence of judges and lawyers; the Working Group on Arbitrary Detention; and the Special Rapporteur on trafficking in persons, and extend to the mandate holders all reasonable cooperation and assistance to facilitate timely and effective country missions;
- xvi). Present to the Council, during the plenary session to adopt the outcome document for the UPR of India, a national plan of action for the implementation of accepted recommendations and voluntary pledges and commitments;
- xvii). Present to the Council, two years after adoption of the outcome document, a mid-term progress report on the status of implementation of recommendations and voluntary pledges and commitments.

ENDNOTES:

¹ Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: India, Addendum, Response of the Government of India to the recommendations made by delegations during the Universal Periodic Review of India, UN Document A/HRC/8/26/Add.1 (2008), p.2.

² General Assembly Resolution 65/206, UN Doc A/Res/65/206 (2010). See also: General Assembly Resolution 62/149, UN Doc A/Res/62/149 (2008); General Assembly Resolution 63/168, UN Doc A/Res/63/168 (2009); Universal Declaration of Human Rights, article 3, adopted under General Assembly Resolution 217A (III); CRC, article 37(a); and ICCPR article 6.

³ *Prithipal Singh Etc. Versus State of Punjab & Anr Etc*, Criminal Appeal No. 528 of 2009, Supreme Court of India, Criminal Appellate Jurisdiction, 4 November 2011, para 7.

⁴ CAT General Comment 2, para 25.

⁵ International Covenant on Civil and Political Rights.

⁶ International Covenant on Economical, Social and Cultural Rights.

⁷ Convention on the Elimination of All Forms of Discrimination Against Women.

⁸ International Convention on the Rights of All Migrant Workers and Members of their Families.

⁹ International Convention for the Protection of All Persons from Enforced Disappearances.

¹⁰ The following requests and reminders are yet to be responded to by India: Special Rapporteur on torture (1993, 2007, 2010); Special Rapporteur on racism (2006, 2008); Special Rapporteur on extrajudicial, summary or arbitrary executions (2000, follow-up request in 2005 and 2006, reminder in 2008); Special Rapporteur on the sale of children (2004, reminders in 2008, 2009); Working Group on Enforced or Involuntary Disappearances (2005, reminder on 18 August 2011); Special Rapporteur on adequate housing (2008); Special Rapporteur on indigenous people (2008); Special Rapporteur on water (2009); Special Rapporteur on independence of judges and lawyers (January 2011); Working

Group on Arbitrary Detention (2004, renewed in 2005, 2006, 2007 and 2009); and Special Rapporteur on trafficking in persons (October 2011).