

INDIA

I. INTRODUCTION

1. THE LEGAL FRAMEWORK

1.1. Constitution

India has a population of over a billion people and is the second most populated country in the world. There are numerous ethnic groups and religions, the majority being Hindu while Muslims constitute a considerable minority.

The Republic of India gained independence from the United Kingdom on 15 August 1947. It adopted its Constitution on 26 January 1950. According to the Constitution, India is a Federal Republic, consisting of 28 states and 7 union territories. The Constitution guarantees fundamental rights, such as the right to equality, freedom of expression, procedural rights, right to life and personal liberty, freedom of religion as well as cultural and education rights and the right to redress in courts.¹

The Indian judiciary has a single pyramidal structure with the lower or subordinate courts at the bottom, the High Courts of the States in the middle, and the Supreme Court at the top. The Court system is composed of courts with civil and criminal jurisdiction as well as administrative tribunals. Civil Courts are divided into City Civil Courts and Small Claims Courts at the Metropolitan City Level and District Courts at the District Level. Criminal Courts are divided into Session Courts and Magistrates Courts at both levels as well as Metropolitan Courts at the Metropolitan City Level.

The High Courts and the Supreme Court have mainly appellate functions and the power to receive fundamental rights petitions. The Supreme Court, which is exclusively under the regulative powers of the Union has the power to review High Court judgments and declare legislation unconstitutional.² The independence of the judiciary is not expressly guaranteed but ensured by various provisions in the Constitution.³

1.2. Incorporation and Status of International Law in Domestic Law

India has ratified the following relevant international human rights and humanitarian law treaties⁴

- Geneva Conventions (9 November 1950)
- Genocide Convention (27 August 1959)
- CERD (03 December 1968)
- ICCPR (10 April 1979)

¹ See Part III of the Constitution, Sections 12-30.

² See Part V, Chapter IV, Sections 124 et seq. of the Constitution.

³ See in particular Sections 124, 4) and 125, 2) of the Constitution.

⁴ As of 21 August 2002, <http://www.unhchr.ch/pdf/report.pdf>, (last visited 13 November 2002).

- ICESCR (10 April 1979)
- CRC (11 December 1992)
- CEDAW (09 July 1993)

India has signed (14 October 1997) but not yet ratified the Convention against Torture.

There are no explicit provisions in the Indian Constitution regulating the incorporation and status of international law in the Indian legal system. However, Article 51 (c) stipulates, as one of the directive principles of state policy, that: "The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with another."

International treaties do not automatically become part of national law. They have to be transformed into domestic law by a legislative act.⁵ The Union has the exclusive power to implement international treaties.⁶ To this end, it has passed the Geneva Conventions Act but has not yet adopted any law incorporating the provisions of the International Covenant for Civil and Political Rights.⁷ The status of customary international law in domestic law follows the common law of England.⁸ Accordingly, a rule of customary international law is binding in India provided that it is not inconsistent with Indian law.⁹

While national legislation has to be respected, even if it contravenes rules binding on India under international law, Indian Courts, in particular the Supreme Court, have consistently construed statutes so as to ensure their compatibility with international law.¹⁰ The judicial opinion in India as expressed in numerous recent judgments of

⁵ See *State of Madras v G.G. Menon* AIR 1954 SC 517 and *People's Union for Civil Liberties v Union of India* (1997) 3 SCC 433. See for the proposition that some provisions of international treaties might be self-executing Shah, J., Sep.Op., in *Maganbhai Ishwarbhai v Union of India*, AIR 1969 SC 783, at 807 and comments by Verma, S.K., International Law, in: Verma, S.K. and Kusum (eds.) , Fifty Years of the Supreme Court of India, Its Grasp and Reach, Oxford University Press, Indian Law Institute, 2000, 621-649, at 632.

⁶ Article 253 provides that: "Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Entry 14 of the Union List of the Seventh Schedule empowers Parliament to legislate in relation to "entering into treaties and agreement and implementing of treaties and agreement with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

⁷ The Geneva Conventions Act, 1960.

⁸ Article 372 of the Constitution: "Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India, immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislative or other competent authority." See in relation to English common law *Director of R & D v Corp. of Calcutta* AIR 1960 SC 1355 at 1360; *Builders Supply Corp. v Union of India* AIR 1965 SC 1061 at 1068; *State of West Bengal v Corpn. Of Calcutta* AIR 1967 SC 997 at 1007, cited in Verma, supra, at 623, Fn.4.

⁹ *Gramophone Co. of India Ltd v Birendra Bahadur Pandey* AIR 1984 SC 667, at 671: "The comity of Nations require that Rules of International Law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, Municipal Law must prevail in case of conflict."

¹⁰ *SC. Vosjala & Others v. State of Rajasthan & Others* 1997 (6) SCC 241: "(it is) now an accepted rule of judicial construction that regard must be had to international conventions and norms of construing domestic law when there is no inconsistency between them and there is a void in domestic law;" *Apparel Export Promotion vs. A.K. Chopra* 1999 (1) SCC 759: "In cases involving violation of human rights, the courts must ever remain alive to the

the Supreme Court of India demonstrates that the rules of international law and municipal law should be construed harmoniously, and only when there is an inevitable conflict between these two laws should municipal law prevail over international law.¹¹

The Supreme Court has even gone a step further by repeatedly holding, when interpreting the fundamental rights provisions of the Constitution, that those provisions of the International Covenant on Civil and Political Rights, which elucidate and effectuate the fundamental rights guaranteed by the Constitution can be relied upon by courts as facets of those fundamental rights and are, therefore, enforceable.¹²

2. PRACTICE OF TORTURE: CONTEXT, OCCURRENCE, RESPONSES

2.1. The Practice of Torture

Torture has been practiced frequently in India since Independence regardless of the government in power. While torture is committed on a regular basis by law-enforcement officials in the course of criminal investigations, it was employed systematically during the Emergency Period of 1975 to 1977. Reportedly, torture has frequently been resorted to in the course of the armed conflict in Jammu/Kashmir, the militant struggle in Punjab and in other regions undergoing a political crisis. The Prevention of Terrorism Ordinance and the Prevention of Terrorism Act, adopted in 2000 and 2002 respectively, are widely seen as facilitating the use of torture against those who are either suspected of being terrorists or are simply labelled as terrorists by the police and the army. The police have also been accused of turning a blind eye or encouraging inter-communal violence involving acts amounting to torture, such as in early 2002 in the state of Gujarat.

The main perpetrators of torture have been police officers and other law-enforcement officials, such as paramilitary forces and those authorities having the power to detain and interrogate persons.¹³ Members of the army have reportedly also committed acts of torture, especially in Jammu/Kashmir. The victims of torture have been those who come into contact with law-enforcement personnel, especially those suspected of having committed crimes, members belonging to marginalized

international instruments and conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field.”

¹¹ See also Verma, CJ, in *Vishaka v State of Rajasthan* (1997) 6 SCC 241, at 251 for cases, here gender equality and guarantees against sexual harassment, in which there is no domestic law: “(a)ny international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Art.51 (c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Art.253 with Entry 14 of List 1 of the Schedule.”

¹² *People's Union of Civil Liberties v Union of India & Anor*, supra, affirming jurisprudence of Supreme Court in earlier cases concerning Article 9 (5) ICCPR that provides for a right to compensation for victims of unlawful arrest or detention. Remarkably, the Supreme Court has found Article 9 (5) ICCPR to be enforceable in India even though India has not adopted any legislation to this effect but had even entered a specific reservation to Article 9 (5) ICCPR when ratifying the Convention in 1979, stating that the Indian legal system did not recognise a right to compensation for victims of unlawful arrest or detention. See also the case of *Prem Shaker Shukla v Delhi Administration* AIR 1980 SC 1535 and *Visakha* supra.

¹³ See on torture in India G.P. Joshi, Police Brutality in India, Commonwealth Human Rights Initiative, November 2000, and in relation to one particular state, Amnesty International, India: Time to act to stop torture and impunity in West Bengal, AI-Index: ASA 20/033/2001, 10/08/2001, pp.22 et seq.

groups and ethnic communities who are believed to engage in a terrorist struggle against the Indian government.¹⁴ Women have also been subjected to torture, particularly in the form of rape in custody, a phenomenon that appears to have increased over the last few years.¹⁵ Torture is predominantly employed to obtain confessions or information in criminal cases,¹⁶ as a means of extortion or to break political opposition. It has also apparently been used to punish members of ethnic communities for their political demands, specifically in Jammu/Kashmir and Punjab.¹⁷ While torture generally takes the form of severe beatings, there have been numerous reports of more severe forms of torture, many of which resulted in the death of the victims.¹⁸ The number of deaths in custody cases is particularly high in India.¹⁹

2.2. Domestic Responses

The Supreme Court and High Courts have adopted a pro-active stance in directing the Government and/or law-enforcement bodies to take various steps to tackle torture and have repeatedly criticised the latter for failing to do so.²⁰ Civil liberties and human rights groups in India have played a major role, through public interest litigation and other means, to seize the Supreme Court and to highlight and combat the prevalence of torture.²¹

¹⁴ Krishnadeva Rao: "A Sikh youth from Punjab, a Muslim from Kashmir, a tribal from North-east, a youth from the Telangana districts of Andhra Pradesh, a Tamil from deep South or a Muslim in Bombay, Madras, Rajasthan or Gujarat after the serial bomb blasts in the wake of destruction of Babri mosque provide the living testimonies of torture."

¹⁵ See the report by the People's Union for Democratic Rights on "Custodial Rape." 1994.

¹⁶ See conclusions of Padmanabhaiah Committee, Police Reforms which presented its report and recommendations to the government in October 2000. "A large section of people strongly believe that the police cannot deliver and cannot be effective if it does not use strong-arm methods against the criminals and anti-social elements of society. And these people include India's political class, the bureaucracy, and large sections of the upper and middle class... In their own perception, the policemen feel that they are doing a job. They resort to torture for 'professional objectives' - to extract information or confession in order to solve a case... another 'professional objective' of the police often follows, which is, to terminate the criminality of a professional criminal, who could be a burglar, a robber or a gangster, or even a terrorist... by maiming him, by making him lame, rendering him incapable of further crime".

¹⁷ In relation to the Punjab, see: Amnesty International, Breaking the cycle of impunity and torture in Punjab, AI-Index: ASA 20/002/2003, January 2003, pp.4 et seq. and 18 et seq.

¹⁸ See as to the methods of torture used in India the judgment of the Supreme Court *Munna v State of Uttar Pradesh* AIR 1982 SC 806. See also the torture techniques listed in: Letter to Chief Ministers/Administrators of all States/Union Territories with a request to adopt the Model Autopsy form and the additional procedure for inquest, Appendix A, in: National Human Rights Commission, Important Instructions/Guidelines, New Delhi, 2000, pp.27,28.

¹⁹ According to the NHRC's annual reports, deaths in police custody increased from 136 in 1996 to 188 in 1997 and 193 in 1998. In 1999, 183 deaths in police custody were reported. From April to August 2002, 79 people died in police and 580 in judicial custody. See also for the assessment of the torture practice by a Supreme Court judge, Dr. A S Anand JJ in *DK Basu v State of West Bengal* (1997) 1 SCC 416: "However, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights takes place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police, or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the creditability of the Rule of Law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder."

²⁰ See by way of example *DK Basu v State of West Bengal*, supra.

²¹ In the early years of Public Interest Litigation, the court focussed on the rights of prisoners and prison conditions. See *Hussainara Khatun v State of Bihar* (1 to 6) (1980) 1 SCC 81, *Kadra Pahadiya v State of Bihar* (1981) 3 SCC 671, *Sunil Batra v Delhi Admn.* (1980) 3 SCC 488, *Veena Sethi v State of Bihar* (1982) 2 SCC 583, *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v Union of India* (1984) 6 SCC 731, *Citizens for Democracy v State of Assam* (1995) 3 SCC 743.

The National Human Rights Commission (NHRC), which was established by the Protection of Human Rights Act, 1993 is the main body entrusted with promoting and protecting human rights.²² The Act also provides for the establishment of State Human Rights Commissions ("SHRC") and Human Rights Courts ("HRC") at the district level in each state.²³ The Human Rights Act vests the NHRC with a broad mandate but it only has the power to issue recommendations and does not have any effective enforcement mechanism at its disposal. The scope of the NHRC's work and the zeal of victims of human rights violations to seek the Commission's attention is manifested by the fact that starting with 496 complaints in the first six months after it was established, the NHRC registered 50,634 complaints during 1999-2000.²⁴

The NHRC has taken a pro-active role in advocating against torture²⁵ and urging the Government of India to ratify the Convention against Torture. In this regard, it noted in its Annual Report 1998-1999 that it is distressing to know that, even though the Permanent Representative of India to the United Nations signed the Convention on 14 October 1997, the formalities for ratification are yet to be completed. The Commission urged the earliest ratification of this key Convention and the fulfilment of the promise made at the time of signature, namely that India would "uphold the greatest values of Indian civilization and our policy to work with other members of the international community to promote and protect human rights."²⁶ It is important to note, however, that these measures by the NHRC have not been successful.²⁷

Another body, the National Police Commission (NPC), was appointed by the Government of India in 1977 with wide terms of reference covering police organisation, its role, functions, accountability, relations with the public, political interference in its work, misuse of powers, evaluation of its performance etc.²⁸ The NPC made several recommendations aimed at reducing the use of torture, which were subsequently not implemented by the Government.²⁹ In 1996 a writ petition was filed in the Supreme Court by two retired police officers requesting that the Government of India be ordered to implement the recommendations of the NPC. Following the Supreme Court's orders in this case, a Committee on Police Reforms

²² Protection of Human Rights Act, 1993 (India); National Human Rights Commission, The Protection of Human Rights Act, 1993 (1994) [hereinafter PHRA or Human Rights Act].

²³ See *ibid.* §§ 21, 30. The Human Rights Courts envisaged in the act have not been set up subsequently. See Sripathi, Vijayashri, India's National Human Rights Commission: A Shackled Commission, in: Boston University International Law Journal, 1 Spring 2000, 18. See NHRC, Annual Report 1999-2000, pp. 81, 82 concerning the setting up of State Human Rights Commissions.

²⁴ NHRC, Annual Report 1999-2000, p.83, para.16.1.

²⁵ See e.g. its "Important Instructions/Guidelines" relating to custodial deaths/rape and encounter deaths, *supra*.

²⁶ See NHRC, Annual Report, 1998-1999, III.C, 3.22.

²⁷ See NHRC, Annual Report 1999-2000, pp. 45 and 65, 66.

²⁸ This was the first Commission appointed at the national level after Indian independence.

²⁹ These recommendations included: A). Surprise visits by senior officers to police stations to detect persons held in illegal custody and subjected to ill treatment; B) the magistrate should be required by rules to question the arrested person if he has any complaint of ill treatment by the police and in case of complaint should get him medically examined; C) there should be a mandatory judicial inquiry in cases of death or grievous hurt caused while in police custody; D). Police performance should not be evaluated on the basis of crime statistics or number of cases solved; and E) training institutions should develop scientific interrogation techniques and impart effective instructions to trainees in this regard. For a comprehensive reading and understanding of most recommendations of the NPC see Commonwealth Human Rights Initiative, Some Important Recommendations of (i) National Police Commission, (ii) Ribeiro Committee on Police Reforms and (iii) Padmanabhaia Committee on Police Reforms, 2001.

was set up by the Government under the leadership of J.F. Ribeiro (a retired police officer). The report of the Ribeiro Committee was finalised in October 1998 but no subsequent action has yet been taken.³⁰

Several proposals for reform, such as inserting a section 113 B) into the Evidence Act,³¹ the passing of a State Liability in Tort Act, compensation for custodial crimes and for victims of rape and sexual assault³² have all failed to win sufficient political support to be enacted. Equally, the recommendation to incorporate a specific right against torture and to compensation, proposed by the National Commission to Review the Working of the Constitution in February 2002 still awaits implementation.³³ Moreover, while several positive measures such as human rights training programmes for the police have been implemented, various officials from State Governments have made statements which could be seen as giving law enforcement personnel a licence for human rights violations.³⁴

2.3. International Responses

India has hardly opened itself to outside international scrutiny of its human rights performance. It has neither ratified the Torture Convention nor the Optional Protocol to the ICCPR. As there are no regional human rights treaties, India has only consented to periodic reporting obligations. To date, it has not issued an invitation to the Special Rapporteur on Torture despite several requests to this effect. The Special Rapporteur on Torture has nevertheless commented on India, assessing the situation on the basis of information that he has received over the years, as follows:

“While the size and diversity of the country make it difficult to characterize the intensity of the problems all over, it certainly appears that there is a tradition of police brutality and arbitrariness in much of the country, the degree of brutality frequently being sufficiently unrestrained to amount to torture, often with fatal consequences. The brutality is sometimes linked to corruption and extortion and is often deployed in the service of local vested interests, be they economic or official. The use of excessive and indeed unprovoked and unjustified forces is common, especially in response to protests demanding rights. The persecution of those pursuing complaints against the police is a not infrequent phenomenon. In areas characterized by armed resistance, the security forces seem notably prone to resort to extreme and often lethal violence, even if individual abuses not carried out as part of organized military operations may be sanctioned. In general, while not absolute, the level of impunity

³⁰ See G.P. Joshi, Ribeiro Committee Report on Police Reforms- A Critical Analysis, CHRI, 1999.

³¹ According to this proposal, a court may, in cases concerning the prosecution of a police officer for an alleged offence of having caused bodily injury to a person, presume that the injury was caused by the police officer if there is evidence that the injury was caused during the period when the person was in the custody of the police.

³² See for details on these proposals infra Part V.

³³ It recommended the insertion of a new subsection 2 and 3 to section 21, reading respectively: “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment” and “every person who has been illegally deprived of his right to life or liberty shall have an enforceable right to compensation.” See Report of the National Commission to review the working of the Constitution, Vol. I, Universal Publishers, Delhi, 2002.

³⁴ See various quotations in Joshi, Police Brutality in India, supra.

among police and security forces seems sufficiently substantial as to conduce a general sense among such officials that their excesses, especially those committed in the line of duty, will at least be tolerated, if not encouraged."³⁵

The Human Rights Committee, in 1997, in its scrutiny of India's country report expressed its concerns at: "allegations that police and other security forces do not always respect the rule of law and that, in particular, court orders for *habeas corpus* are not always complied with, in particular in disturbed areas. It also expresses concern about the incidence of custodial deaths, rape and torture..."³⁶

Recently, concerns have been raised by the Special Rapporteur on Violence against Women on the large number of reported cases of rape in custody.³⁷

II. THE PROHIBITION OF TORTURE UNDER DOMESTIC LAW

Neither the Indian Constitution nor statutory law contains an express prohibition of torture. The Indian Supreme Court has, however, construed Article 21 of the Constitution³⁸ as including a prohibition of torture.³⁹ In *Mullin v Union Territory of Delhi*, the Supreme Court declared: "Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21."⁴⁰

The Penal Code stipulates criminal offences that could be used to punish torturers but contains no explicit criminal offence of torture. While the Indian Evidence Act and the Criminal Procedure Code contain safeguards against the extraction of confessions by means of torture, they do not explicitly prohibit the use of torture as a means of obtaining evidence.⁴¹ The acts governing the exercise of police powers include rules against excessive use of force but no express prohibitions of the use of torture. Consequently, there is no definition of torture in Indian legislation. Even though the Supreme Court has not defined torture in its decisions, it has held that certain acts constitute torture.⁴²

³⁵ Report of the Special Rapporteur on Torture, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights Resolution 2000/43, UN Doc. E/CN.4/2001/66, 26 January 2001, para.57

³⁶ UN Doc. CCCPR/C/79/Add.81, 4 August 1997, para. 23.

³⁷ UN Doc. E/CN.4/2002/83/Add.1, paras. 27-39.

³⁸ Article 21 reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

³⁹ Sunil Batra v Delhi Administration, AIR 1978 SC 1675.

⁴⁰ AIR 1981 SC 746.

⁴¹ See sections 24 et seq. of the Indian Evidence Act and Section 164 of the Criminal Procedure Code (hereinafter Cr. PC).

⁴² See Dr. A S Anand JJ in *DK Basu v State of West Bengal*, supra, para.10: "'Torture' has not been defined in the Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word *torture* today has become synonymous with the darker side of human civilisation. 'Torture' is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in you, chest, cold as

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. THE SUBSTANTIVE LAW

1.1. Criminal Offences and Punishment

The Indian Penal Code criminalizes certain acts that can amount to torture. The following criminal offences might be used to prosecute those responsible for torture: the offence of voluntarily causing hurt⁴³ to extort confession or to compel restoration of property is punishable by up to seven years imprisonment and liable to a fine.⁴⁴ If the hurt caused is grievous,⁴⁵ the maximum punishment is ten years imprisonment and liability to pay a fine.⁴⁶ Wrongful confinement to extort confession or compel restoration of property carries a maximum punishment of three years imprisonment and liability to pay a fine.⁴⁷ A public servant disobeying the law, with intent to cause injury⁴⁸ to any person, is liable to a punishment of up to one year imprisonment and/or a fine.⁴⁹ A public servant concealing the design to commit an offence that it is his/her duty to prevent commits an offence, the punishment of which depends on the imprisonment or fine provided for the concerned offence.⁵⁰

As far as general offences against physical and sexual integrity are concerned, assault or use of criminal force incur up to three months imprisonment and/or a

ice and heavy, as a stone paralyzing as steep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."- Adriana P. Bartow." Rape has been recognised by the Supreme Court as a violation of a Fundamental Right, namely the Right to Life contained in Article 21, see *Bodhisattwa Gautam v Subhra Chakraborty*, (1996) 1 SC 490, at p.500.

⁴³ Section 319 Penal Code: "Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."

⁴⁴ Section 330 Penal Code: "Whosoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detention of any offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

⁴⁵ Section 320, Grievous hurt: "The following kinds of hurt only are designated as "grievous":- First- Emasculation; secondly- Permanent privation of the sight of either eye; thirdly- Permanent privation of the hearing of either ear; fourthly- Privation of any member or joint; fifthly- Destruction or permanent impairing of the powers of any member or joint; sixthly- Permanent disfiguration of the head or face; seventhly- Fracture or dislocation of a bone or tooth; eighthly- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits."

⁴⁶ Section 331 Penal Code: Voluntarily causing grievous hurt to extort confession, or compel restoration of property.

⁴⁷ Section 348 Penal Code: "Whoever wrongfully confines any person for the purpose of extorting from the person confined, or any person interested in the person confined, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined or restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall be liable to fine."

⁴⁸ The word injury denotes according to Section 44 of the Penal Code "any harm whatever illegally caused to any person, in body, mind, reputation or property."

⁴⁹ Section 166 Penal Code: "Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

⁵⁰ Section 119 Penal Code.

fine.⁵¹ Culpable homicide carries, depending on the circumstances, a punishment ranging from various terms of imprisonment up to imprisonment for life and a fine.⁵² Murder which covers acts where the offender intended to cause death or inflicted bodily injury or committed other acts sufficient or likely to cause death is punishable with death or life imprisonment and a fine.⁵³ However, culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by committing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty.⁵⁴ If death is caused by negligence, the maximum punishment is imprisonment of two years and/or a fine.⁵⁵ Rape carries a punishment ranging from seven years to life imprisonment⁵⁶ whereby rape in custody is considered to be an aggravating circumstance carrying a heavier punishment.⁵⁷ Cruelty to a child is punishable with up to six months imprisonment and/or a fine according to the Children Act, 1960.⁵⁸

Moreover, the commission of acts of torture in the course of armed conflict is punishable under the Geneva Convention Act as a grave breach of the Geneva Conventions and carries a punishment of up to fourteen years imprisonment or life imprisonment.⁵⁹

1.2. Disciplinary Sanctions

Government Service Rules are in the domain of the concerned states, except the Central Civil Service Rules that apply to the employees of the Government of India and the All India Service Rules that apply to All India Services (IAS (Indian Administrative Service), IPS (Indian Police Service) and IFOs). Thus, all public servants, including members of the Indian Police Service, are subject to disciplinary

⁵¹ Section 352 Penal Code: "Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both."

⁵² Sections 299 and 304 Penal Code.

⁵³ Sections 300 and 302 Penal Code.

⁵⁴ Section 300, Exception 3 Penal Code.

⁵⁵ Section 304 Penal Code.

⁵⁶ Sections 375 and 376 (1) Penal Code.

⁵⁷ Ibid.: "Whoever, being a police officer commits rape within the limits of the police station to which he is appointed; or in the premises of any station house whether or not situated in the police station to, which he is appointed; or on a woman in his custody or in the custody of a police officer subordinate to him; or being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or (e) commits rape on a woman knowing her to be pregnant; or commits rape on a woman when she is under twelve years of age; or commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine : Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years."

⁵⁸ Section 41 (1) of the Children Act, 1960: "Whoever, having the actual charge of, or control over, a child, assaults, abandons, exposes or wilfully neglects the child or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such child unnecessary mental and physical suffering shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both."

⁵⁹ See Article 3 Geneva Conventions Act, 1960.

sanctions ranging from censure to dismissal.⁶⁰ Members of the Army are also subject to a range of disciplinary measures for wrongdoing, including torture.⁶¹

2. THE PROCEDURAL LAW

2.1. Immunities

Indian legislation contains various provisions providing immunity from prosecution to certain groups of public officials for any offence committed in the discharge of duties unless specifically sanctioned by the Central or State Government. This applies to judges and magistrates, public servants not removable from their office save by or with the sanction of the Government and members of the armed forces of the Union.⁶² Members of the armed forces are also expressly protected from arrest for "anything done or purported to be done in the discharge of official duties except after obtaining the consent of the Central Government."⁶³ Moreover, no prosecution may be instituted except with the sanction of the Central or State Governments for the use of armed force or civil force to disperse an assembly.⁶⁴ The Armed Forces Special Power Acts for Jammu and Kashmir as well as Punjab and Chandigarh also contain provisions providing immunity from prosecution unless sanctioned by the Central Government.⁶⁵

According to recently introduced legislation to prevent terrorism, "no prosecution or other legal proceedings shall lie against any serving member or retired member of the armed forces or other para-military forces in respect of any action taken or

⁶⁰ Section 311 of the Constitution and The All India Services (Discipline and Appeal) Rules, 1955, as well as the Central Service Rules of India and the individual States, the Police Act, 1861 and the provisions of the Police Acts of the individual Union States.

⁶¹ See Sections 71-79 and 80, 83 and 84 Army Act 46 of 1950.

⁶² Section 179 of the Cr.PC.: "(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction- (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government; (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government...(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted...(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

⁶³ Section 45 (1) Cr. PC.

⁶⁴ Section 132 (1) in conjunction with sections 129, 130 and 131 of the Cr. PC.

⁶⁵ See identical section 7 of The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 and The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983: "No prosecution, suit or other legal proceedings shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act."

purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism."⁶⁶

The jurisprudence on the need for a prior consent of the government to prosecute alleged offences of government officials has not been consistent. While the Supreme Court has suggested that such sanction is not required when the alleged act was not done in furtherance or discharge of the officer's official duties,⁶⁷ it has not followed this approach in later similar cases.⁶⁸ This also applies to the restriction that the government, in granting or denying authorisation, "shall pass an order giving reasons subject to judicial review."⁶⁹

2.2. Statutes of Limitation

The Criminal Procedure Code stipulates the following limitation: six months for offences punishable with only a fine; one year for offences punishable with imprisonment for a term not exceeding one year; and three years for offences punishable with imprisonment for a term more than one year but not exceeding three years.⁷⁰ There is no statute of limitation for criminal offences carrying heavier punishments. However, several statutes enacted by Indian states, which have the power to legislate on the operation of the police forces, bar actions based on criminal complaints against police officers unless the complaint was brought within a specified time limit. In *Patel v State of Gujarat*,⁷¹ the Supreme Court considered a statute from that State which barred prosecutions against police officers unless the complaint was brought within one year of the alleged offence.⁷² The Supreme Court upheld the validity of the limitation period as it construed the statute as applying to any act that could be committed only by virtue of the offender's official position.⁷³ The same Court came to a different decision in *Unnikrishnan v Alikutty*⁷⁴ where an individual tried to initiate criminal proceedings against police officers for alleged acts of torture. Such a prosecution would have been barred by the statute of the concerned State which prevented courts hearing cases based on complaints against police officers unless the complaint was filed within six months of the date of the alleged offence. The court in this case interpreted the statute as not applying to acts amounting to an abuse of authority.⁷⁵

⁶⁶ Section 57 Prevention of Terrorism Act, 2002. However, according to Section 58 of the Act, "any police officer who exercises powers corruptly or maliciously, knowing that there are no reasonable grounds for proceeding under this Act, shall be punishable with imprisonment which may extend to two year, or with fine, or with both."

⁶⁷ *Shamboo Nath Mishra v State of Uttar Pradesh* AIR 1997 SC 2102.

⁶⁸ *State v BL Verma and another*, (1997) 10 SCC 772.

⁶⁹ *Naga peoples movement for Human Rights v Union of India* (1998) 2 SCC 109.

⁷⁰ Section 468 (1) and (2) Cr. PC. See for commencement of the period of limitation etc., sections 469-473 Cr. P.C.

⁷¹ *Crim App 485*, 2000 SOL.

⁷² The case concerned an arrest allegedly based on a false charge.

⁷³ This case is discussed by Weisburd, Mark, *Customary International Law and Torture: The Case of India*, 2 *Chicago Journal of International Law* (Spring 2001) 81, at 84.

⁷⁴ *Crim App 747*, 2000 SOL.

⁷⁵ See Weisburd, *supra*, at 85. The wording of the concerned provision stipulating a time limit concerns complaints against police officers "on account of any act done in pursuance of any duty imposed or authority conferred on (them)."

2.3. Investigations into Torture

2.3.1. Investigations by police and magistrate

A victim of torture may lodge a complaint with the NHRC,⁷⁶ the police⁷⁷ or a magistrate.⁷⁸ An investigation may also be instituted following directions by the High Court or the Supreme Court to the Government concerned. Courts can also order investigations by an outside agency such as the Central Bureau of Investigation (CBI).

The procedure differs depending on whether a complaint is lodged with the police or the magistrate.⁷⁹

Complaints to the police may be made by any person in writing or are to be recorded when made orally.⁸⁰ The procedure to be followed by the police depends on whether the offence in question is cognisable or non-cognisable.⁸¹

Cognisable offences are investigated by the police. If the officer in charge of a police station refuses to record a complaint concerning a cognisable offence, the complainant may send the substance of the complaint, in writing, to the relevant Superintendent of Police. If the Superintendent is satisfied that such information discloses the commission of a cognisable offence, he or she shall either investigate the case him/herself or direct an investigation to be made by any police officer subordinate to him.⁸² As a general rule, the officer-in-charge of the police station is required to examine information received to establish whether there is reason to suspect that a cognisable offence has been committed. Thus, upon receiving information about the commission of a criminal offence, the officer-in-charge is to draw up a First Information Report, which is to be sent to the competent Magistrate, and to commence investigations.⁸³ However, a police officer has a certain discretion since he or she shall not investigate if "it appears to (him) that there is no sufficient ground for entering on an investigation."⁸⁴ In such cases, the police officer must inform the complainant about the reasons for not proceeding with the investigation.⁸⁵

Complaints against public officials may be investigated by the police or the CBI, the latter often following recommendations by the NHRC, the Supreme Court or High

⁷⁶ See infra 2.3.2.

⁷⁷ Section 154 Cr. PC.

⁷⁸ Section 200 Cr. PC.

⁷⁹ The seized Magistrate may hold its own inquiries and direct police investigations, section 202 Cr. PC., and has the power to issue summons and arrest warrants, section 204 Cr. PC.

⁸⁰ Section 154 (1) and (2) Cr. PC.

⁸¹ See First Schedule of the Cr. PC. Criminal offences carrying a minimum punishment of more than three years are cognisable whereas all other offences, such as those in sections 330, 331 and 348 of the Penal Code, are non-cognisable.

⁸² Section 154 (3) Cr. PC.

⁸³ Section 156 and 157, 1) Cr. PC. The NHRC has, in relation to killings of alleged members of the "Peoples War Group" in West-Bengal by security forces, issued instructions that the police must carry out a proper investigation in cases where a person is killed by the police and the latter invoke the right of self-defence. See NHRC, Important Instructions/Guidelines, supra, pp.36 et seq.

⁸⁴ Section 157 1 (b) Cr. PC.

⁸⁵ Section 157 (2) Cr. PC.

Court. In its investigation, the police have the power to arrest a person suspected of having committed a cognisable offence without a warrant.⁸⁶ Members of the armed forces, however, may only be arrested with the consent of the Central Government.⁸⁷ In respect of medical evidence, a detainee has the right to have a medical examination in case of complaints relating to torture by police.⁸⁸ The Supreme Court has also directed the State to carry out medical examinations of detainees at regular intervals of 48 hours.⁸⁹ In cases of custodial deaths, an inquest, which is usually conducted by an executive magistrate, is mandatory.⁹⁰

Generally, an investigation has to be completed expeditiously. Upon completion of the investigation, the competent police officer or the CBI sends a report to the area magistrate. This is either sent in the form of a charge sheet in cases where there is sufficient evidence against the suspect or as a final report in cases where the investigation is discontinued or closed, usually on the basis of insufficient evidence.⁹¹ The Magistrate may either disagree with the conclusions of the report, in which case he or she calls for further investigations,⁹² or accept it and, as the case may be, take cognisance of the offence.⁹³ The Magistrate should not accept a final report of closure without giving notice to the complainant and giving him or her an opportunity of being heard.⁹⁴

There is no specific legislation granting victims of crimes, including torture, specific procedural rights or rights of protection. Victims have few procedural rights under the Criminal Procedure Code apart from the right to submit evidence and to make submissions to the Magistrate as outlined above.⁹⁵ While there is no express right to private prosecution, a petitioner may file a petition for an order of mandamus to compel a judicial inquiry into cases of custodial deaths and to prosecute the police

⁸⁶ Section 41 Cr. PC.

⁸⁷ Section 45 Cr. PC.

⁸⁸ Section 54 Cr. PC. See also the NHRC Guidelines regarding Arrest, in: NHRC, Important Guidelines/Instructions, supra, p.55: "When the person arrested is brought to the police station, he should, if he makes a request in this regard, be given prompt medical assistance. He must be informed of his right. Where the police officer finds that the arrested person is in a condition where he is unable to make such a request but is in need of medical help, he should promptly arrange for the same. This must also be recorded contemporaneously in a register. The female requesting for medical help should be examined only by a female registered medical practitioner. (S.53 Cr.PC.); p.56: "As soon as the person is arrested, police officer effecting the arrest shall make a mention of the existence or non-existence of any injury(s) on the person of the arrestee in the register of arrest. If any injuries are found on the person of the arrestee, full description and other particulars as to the manner in which the injuries were caused should be mentioned in the register, which entry shall also be signed by the police officer and the arrestee. At the time of release of the arrestee, a certificate to the above effect under the signature of the police officer shall be issued to the arrestee."

⁸⁹ *D.K. Basu v State of West Bengal*, supra. See also the NHRC Guidelines, supra, p.56: "If the arrestee has been remanded to police custody under the orders of the court, the arrestee should be subjected to medical examination by a trained Medical Officer every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. At the time of his release from the police custody, the arrestee shall be got medically examined and a certificate shall be issued to him stating therein the factual position of the existence or non-existence of any injuries on his person."

⁹⁰ Section 176 Cr. PC.

⁹¹ Section 173 Cr. PC.

⁹² Section 173 (8) Cr. PC.

⁹³ Section 190 Cr. PC.

⁹⁴ *Bhagwant Singh v. Commr. Of Police*, (1985) 2 SCC 537, at pp.542-543.

⁹⁵ Justice A.S. Anand, Judge, Supreme Court of India, *Victims of Crime-the unseen side*, in: (1998) 1 SCC (Jour) 3.

officials concerned.⁹⁶ Moreover, Courts can issue interim orders for the protection of victims or witnesses where there are intimidations and threats.

2.3.2. National human rights commission

The NHRC may inquire, *suo moto* or on petition presented by a victim or any person on his behalf, into complaints of i) violation of human rights or abetment thereof; or ii) negligence in the prevention of such violation, by a public servant.⁹⁷ It can only investigate allegations of human rights violations that have occurred within a year of filing the complaint.⁹⁸ The NHRC has wide-ranging powers in carrying out its inquiry into the complaints of human rights violations. It can either call for a report from the police, monitor the police investigations in other ways or conduct an inquiry itself. It may, where the inquiry discloses the commission of violation of human rights or negligence in the prevention of a violation, recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the NHRC may deem fit (s).⁹⁹ The Government or authority has to report within one month on the action it took on the NHRC's recommendation. The NHRC publishes the results of its investigations and decisions taken together with the action taken by the concerned government or authority in this regard.

The procedure differs however with respect to the armed forces. Here, the NHRC may only seek a report from the Government, and, after the receipt of the report, if the NHRC decides to take any action, it must make its recommendations to the Government. The Government has three months to respond after which the NHRC can publish its recommendations made to the Central Government and the action taken by the Government following such recommendations.¹⁰⁰

Moreover, the NHRC, relying on Section 12 (h) of the Human Rights Act, can and has issued a considerable number of instructions and guidelines concerning such issues as custodial deaths/rapes, "encounter deaths", visits to police lock-ups/guidelines on polygraph tests and arrests as well as human rights in prison.¹⁰¹

2.4. Trials

The trial, which is conducted by the Public Prosecutor on behalf of the State,¹⁰² takes place in the criminal court of first instance. This is, depending on the crime in

⁹⁶ People's Union of Civil Liberties v Union of India & Anor, *supra*.

⁹⁷ Section 12 (a), The Protection of Human Rights Act 1993.

⁹⁸ Section 36 (2) *ibid*.

⁹⁹ Sections 13 et seq., in particular Section 18, 1) *ibid*.

¹⁰⁰ Article 19, *ibid*.

¹⁰¹ See NHRC, Important Instructions/Guidelines, *supra*.

¹⁰² Section 225 Cr. PC. See Section 24 for the organisation of the Public Prosecution.

question, the Magistrate or the Court of Session.¹⁰³ Members of the armed forces that have committed military and civil offences on duty are subject to the provisions of the Army Act,¹⁰⁴ and are tried by court-martial,¹⁰⁵ unless the criminal offence in question is one of murder, culpable homicide or rape committed in India while not on active service.¹⁰⁶ These proceedings are governed by the Criminal Procedure Code and the Indian Evidence Act, and provide for an adversarial system in which the guilt of the accused has to be proved beyond reasonable doubt by the prosecution. and the victim of a crime has the right to submit evidence.¹⁰⁷

The court may award a fine, forfeiture of property, simple or rigorous imprisonment, imprisonment for life or the death sentence as punishment. The Government has the power to suspend and commute sentences.¹⁰⁸

3. THE PRACTICE

3.1. Complaints

There have been a large number of complaints against the police throughout the years. During 1999, a total of 74,322 complaints were lodged against the police of which 10,485 were dealt with departmentally, 285 by Magistrates and 513 by judicial officers. A total of 4,036 First Information Reports were registered of which 70 cases resulted in a conviction. Departmental proceedings were initiated against 19,138 policemen, of which 888 were dismissed, 11,002 awarded major punishments and 24,644 awarded minor ones.¹⁰⁹ While this figure does not give a breakdown of the kind of conduct to which the complaints relate, it is believed that a considerable number of these complaints concern torture and other forms of ill-treatment.

The NHRC also regularly receives large numbers of complaints.¹¹⁰ In 1999-2000, it registered 50,634 complaints, the majority of which were from the State of Uttar Pradesh. While no breakdown is available, most of these complaints related to ill-treatment, including torture. According to the NHRC: "Of the total number of cases admitted for disposal during 1999-2000, 54 cases pertained to "disappearances", 1,157 cases were about illegal detention/ illegal arrest, 1,647 cases were of false implications and 5,783 complaints against the police pertained to other issues. During this period, the Commission received 59 cases pertaining to indignity to women, 511 complaints about jail conditions and 341 cases of atrocities against Scheduled Castes/Scheduled Tribes. 5,433 complaints pertained to failure in taking action."¹¹¹

¹⁰³ Section 26 Cr. PC.

¹⁰⁴ Section 2 Army Act, 1950.

¹⁰⁵ See Chapter X and XI of the Army Act for the applicable procedure.

¹⁰⁶ Sections 69 and 70 *ibid*.

¹⁰⁷ The court has discretion to order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court. Section 312 Cr. PC.

¹⁰⁸ Section 432 and 433 Cr. PC.

¹⁰⁹ See the National Crime Statistics by the Government of India, National Crime Research Bureau for the year 2000.

¹¹⁰ 120,000 complaints in the first six years. See Sripathi, *supra*, 3.

¹¹¹ NHRC, Annual Report 1999-2000, p.84, para.16.6.

While there appears to be a large number of complaints, it is known that many torture survivors and relatives of torture victims have refrained from coming forward, especially members of marginalised classes, who are often unaware of their rights. Victims have also been reluctant to complain because of the stigma attached, especially in rape cases,¹¹² and the reportedly indifferent or hostile attitude of many members of the police forces towards complainants. In a number of cases, the perpetrators have openly threatened victims of torture with adverse repercussions if they dare to complain.¹¹³

3.2. Investigations

Complaints about torture and death in custody resulting from torture are in most cases not given due attention because of the closed and protective police culture. Upon receiving complaints, the police often fail to prepare a first information report. Permission to prosecute has been regularly refused. For investigations or prosecutions, evidence is generally difficult to obtain because the perpetrators and members of the police close to them refrain from co-operating, victims find it hard to identify the perpetrators and co-prisoners tend to be too afraid to become a prosecution witness. Independent medical examinations of detainees and victims are often not, carried out immediately or adequately, if at all, in disregard to existing Supreme Court directions and NHRC guidelines. Medical doctors have in the face of pressure by police officers failed to carry out their duties as established by several judicial inquiries.¹¹⁴ Bodies of those who have died as a result of torture have been disposed of or the police have framed cases in such a way that the deaths appear to have occurred after release from custody or as a result of a so-called encounter.¹¹⁵ Law-enforcement personnel have reportedly also manipulated evidence. Moreover, victims and human rights defenders have been harassed for pursuing complaints.

While the intervention and monitoring of the NHRC has at times led to more thorough investigations, it has apparently not resulted in a fundamental change of attitude of investigating authorities when examining complaints against public officials.¹¹⁶ The Investigation Division of the NHRC has throughout the years investigated numerous cases of torture. It examined 1,747 cases of human rights

¹¹² According to a report by the People's Union for Democratic Rights (PUDR) on custodial rape, *supra*, police officers were charged in 10 cases of rape in New Delhi between 1989-1993. They reported that the courts tended to ignore the victim's vulnerability, and often subject the victim to so much emotional strain that the case is dropped completely. Of the ten cases it is reported that six of the women wanted to withdraw the charges in order to end their ordeal; two of the women did not show up to complete proceedings; one of the remaining cases was still in progress, with all four defendants on bail. In the only remaining case, there was a failure to produce any of the accused in court.

¹¹³ See e.g. Amnesty International, West Bengal, *supra*, pp.8 and 13, citing the 1998-1999 Annual Report of the West Bengal Human Rights Commission.

¹¹⁴ In a survey conducted by the Indian Medical Association, New Delhi, 1995, 16% of doctors reported that they had witnessed cases of infliction of torture and 18% indicated that they new of participation of Health Professionals in Torture, while 5% of the respondents even confessed their participation in torture by administering drugs to facilitate interrogation. See also assessment of the West Bengal Human Rights Commission cited in AI, West Bengal, *supra*, p.20 and AI, Punjab, pp.35 et seq.

¹¹⁵ Some doctors did not appear to withstand pressure from the police to provide post-mortem reports that concealed the truth, see Krishnadeva Rao, Let us speak for the dead and protect the living, Torture, Volume 5, No.3, 1995, IRCT.

¹¹⁶ As evidenced by repeated calls of the NHRC in each of its recent annual human rights reports and other statements to investigate cases of torture and death in custody more thoroughly.

violations, including torture, during the period 1999-2000.¹¹⁷ Criminal prosecutions were launched against 55 officials and departmental action against 70 police officials on the basis of reports given by the Investigation Division.¹¹⁸ While the NHRC has played an important role in the investigation stage, it has been criticised for its ineffectiveness in ensuring prosecution of the perpetrators. This is evidenced by the fact that hardly any of these cases resulted in a conviction.¹¹⁹

While some courts, in particular the Supreme Court and the High Courts, have ordered the commencement of investigations into alleged acts of torture in cases before them, lower courts have tended not to institute investigations in cases where criminal suspects have complained that their confessions¹²⁰ have been extracted by means of torture.¹²¹ While the record of the courts is therefore a mixed one, the directions of the Supreme Court and the High Courts have often not been followed by the investigating and prosecuting authorities despite repeated exhortations by judges of these courts. Moreover, High Court justices have in several instances dismissed cases brought by torture victims instead of ordering the CBI to charge the police officers on the following grounds: delay in filing petitions, disputed facts, lack of evidence or because the Court had already given directions to approach the authorities or to file a civil or criminal suit.¹²²

3.3. Prosecution: Indictments, Convictions, Sentencing

There are no overall statistics available but the general picture, as evidenced by the NHRC annual reports and other surveys, is one where only a minority of cases of torture result in prosecution, few of which in turn result in a conviction carrying a sentence proportionate to the gravity of the crime. While there have been several prosecutions, often due to the persistence of victims, many have resulted in acquittals on the grounds of insufficient evidence. For example, in 1999, 171 cases of custodial deaths were reported for which 108 policemen were arrested and 71 charge sheeted. None of them were subsequently convicted.¹²³

Courts are often seen as taking the need to establish proof beyond all reasonable doubt to its extreme, ignoring the realities on the ground and the circumstances of

¹¹⁷ According to NHRC, Annual Report 1999-2000, p.85, para.16.10, 1586 of these cases were related to collection of facts and monitoring. Field investigations were conducted in 161 cases.

¹¹⁸ NHRC, Annual Report 1999-2000, p.85, para.16.10; 16.11.

¹¹⁹ Ravi Nair, Impunity and Torture in India, paper submitted at the occasion of seminar on the right to reparation for torture survivors in India, Nepal and Sri Lanka, New Delhi, 14 September 2002. See also AI, Punjab, supra, p.44, according to which the National Human Rights Commission in Punjab has confined itself to recommending compensation but has, in the period 1997-2001, not recommended a single prosecution of police officers even though there had been 26 cases of death in custody.

¹²⁰ Such confessions are excluded from evidence at trial according to Section 25 of the Indian Evidence Act: "No confession made to a Police Officer shall be proved as against a person accused of any offence may it be before or after investigation."

¹²¹ AI, West Bengal, supra, pp.18,19 and AI, Punjab, supra, pp.30 et seq.

¹²² Jaskaran Kaur, A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India, in: Harvard Human Rights Journal, Volume 15, Spring 2002, p.289, who also notes that victims often turn to the High Court judges because their approaches to the police and authorities had failed.

¹²³ P.M. Nair, The Role of the Police in Ensuring Accountability in Case of Torture, especially vis-à-vis Torture Survivors, paper submitted at the occasion of seminar on the right to reparation for torture survivors in India, Nepal and Sri Lanka, New Delhi, 14 September 2002.

the case in question.¹²⁴ In several cases, courts have apparently accepted the police's version of events that wounds were inflicted when using lawful force, or, in death in custody and disappearance cases, that either the victim never was in detention, died when trying to escape or in an encounter with the police etc.¹²⁵ The inordinate delays in all criminal cases diminish the chances of a successful outcome.¹²⁶

Sentences in torture cases that resulted in conviction tend to be light, though those responsible for death in custody have on occasion received heavy punishment. By way of example, in the year 2000, four Delhi police constables were sentenced to life imprisonment for the death in custody of Darshan Singh.¹²⁷ In early 2002, following a CBI investigation ordered by the Supreme Court, two police men and three others were sentenced by the Additional Session Court in Patiala, to seven years rigorous imprisonment for torturing to death Amrik Singh since he could not pay a bribe demanded by one of the perpetrators.¹²⁸ The official statistics of the Government of India (National Crime Research Bureau) show that in the year 2000, a total of 888 police personnel were dismissed from service on charges including acts of violence and torture. Many were given departmental punishments. Disciplinary action was also taken against many others under the Army Act, though the exact numbers are not available. However, while disciplinary action has been taken against perpetrators of torture in some cases, the record is far from consistent, and in some instances torturers appear to have been promoted for their record in solving criminal cases.¹²⁹

IV. CLAIMING THE RIGHT TO REPARATION

1. AVAILABLE REMEDIES

1.1. Constitutional Law

1.1.1. Substantive rights

The Indian Constitution does not contain an express right to an effective remedy or reparation for torture. However, according to the settled jurisprudence of the Supreme Court, an award of compensation by the Supreme Court pursuant to writ proceedings under Article 32¹³⁰ or by the High Court under Article 226¹³¹ is a remedy

¹²⁴ Anand, J., in *State of M.P. v Shyamsunder Trivedi* (1995) 4 SCC 262, at 273, para.17 quoted in *Basu v State of WB*, supra, at para.25.

¹²⁵ Kaur, supra, pp.268 et seq.

¹²⁶ See for further information on this point <http://law.indiainfo.com/legal/remedy.html>.

¹²⁷ Joshi, Police Brutality in India, supra.

¹²⁸ The Times of India, Tuesday, 10 January 2002, 2 Punjab cops among 5 sentenced for murder.

¹²⁹ AI, West Bengal, supra, p. 27.

¹³⁰ Article 32. Remedies for enforcement of rights conferred by this Part: "1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed; 2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part..."

¹³¹ Article 226. Power of High Courts to issue certain writs: "1) Notwithstanding anything in article 32, every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including [writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose]..."

available in law based on strict vicarious liability¹³² for a contravention of fundamental rights to which the principle of sovereign immunity does not apply. Such an award is distinct from and in addition to the remedy in private law for damages.

Compensation for a breach of a fundamental right, namely Article 21 of the Constitution, was first raised in 1981 in the Supreme Court in the case of *Khatri v State of Bihar*,¹³³ also known as the *Bhagalpur Blinding* case.¹³⁴ The Court failed to order compensation because the responsibility of the police officers concerned was still under investigation but the Court ordered the medical treatment for the seven blinded prisoners to be paid by the State. The Supreme Court awarded compensation (35,000 Rupees) for the first time for a violation of Article 21 in the *Rudul Shah v State of Bihar* case, which concerned unlawful detention for a period of fourteen years. The Court explained the rationale of its decision by stating "one of the telling ways in which the mandate of Article 21 is secured, is to mulct its violators in the payment of monetary compensation." It also provided that "the State must repair the damage done by its officers to the petitioners' rights. It may have recourse against those officers."¹³⁵ In the case of *Sebastian M. Hongray v Union of India*,¹³⁶ a disappearance case, the Supreme Court issued a writ of Habeas Corpus for the production of the two missing persons, and, when the Army failed to do so, it directed the State to pay exemplary costs of One Lakh (100,000 Rs) each to the dependants of the disappeared persons for contempt of court.¹³⁷

In 1989, the Apex Court held in *Rajasthan Kisan Sangthan v. State* that a person who was mistreated by the police in custody was entitled to monetary compensation regardless of the legality or illegality of detention.¹³⁸

In *Saheli, A Women's Resource Centre v. Commr. Of Police, Delhi*,¹³⁹ a case in which a nine year old child died as a result of a police assault, the Supreme Court rejected the argument of state immunity from liability for wrongs of its servants and awarded 75,000 Rs. compensation. It also directed the state to recover the money from the responsible police officials. The ability of the State to have recourse to its officials was called into question in *State of Maharashtra v. Ravikant S. Patil*,¹⁴⁰ where the Court held that the concerned police officer who had paraded a handcuffed prisoner on the streets was not personally liable. The Court awarded Rs. 10,000 but left it open whether the State could take any legal action against the official following an inquiry into his action.

¹³² The State is vicariously liable for wrongful acts committed by its public officials/employees. See *Uttarakhand Sangharsh Samiti, Mussoorie v State of Uttar Pradesh* (1996) 1 UPLBEC 461.

¹³³ AIR 1981 SC 928.

¹³⁴ The acts in question, which consisted in piercing the eyeballs of the prisoners who filed the application and pouring acid into it, undoubtedly amounted to torture.

¹³⁵ (1983) 4 SCC, 141, pp. 147-148.

¹³⁶ AIR 1984 SC 571.

¹³⁷ See also the case of *Bhim Singh v. State of J & K*, (1985) 4 SCC 677, which concerned compensation under articles 21 and 22 (1) for unlawful arrest mala fide.

¹³⁸ AIR 1989 Raj 10, at p.16.

¹³⁹ 1990, 1 SCC 422.

¹⁴⁰ 1991, 2 SCC 373.

Nilabati Behera v State of Orissa,¹⁴¹ a case of custodial death resulting from torture, is considered to be the leading case in which the Supreme Court laid down the constitutional basis and nature of compensation for the infringement of fundamental rights. The Court referred to its duty to enforce fundamental rights under articles 14, 21 and 32 of the Constitution, the need to make the guaranteed remedies effective and to provide complete justice.¹⁴²

Since 1993, the Supreme Court and the High Courts have awarded compensation under Article 21 in cases of rape,¹⁴³ of other forms of torture,¹⁴⁴ of death in custody,¹⁴⁵ of "disappearances",¹⁴⁶ of a case of death resulting from army action¹⁴⁷ as well as other cases concerning infringements of fundamental rights.¹⁴⁸ Perhaps the most important of these cases is *D.K. Basu v. State of West Bengal*,¹⁴⁹ a case of death in custody resulting from torture, where the Supreme Court strongly denounced torture and, in addition to awarding compensation, directed the respondent State to take a wide range of specific measures aimed at preventing torture.

The Supreme and High Court have discretionary power as to which (interim and final) relief to award. In their respective jurisprudence, both courts have awarded compensation for the infringement of fundamental rights in the form of exemplary damages.¹⁵⁰ Compensation may be final or may be awarded as interim relief.¹⁵¹ In assessing compensation, the Court appears to have taken compensatory factors as well as considerations of deterrence into account. It declared in one judgement: "In

¹⁴¹ *Dicta* of JS Verma and Dr A S Anand JJ in *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 (Ind SC) and of Kuldip Singh and Dr A S Anand JJ in *DK Basu v State of WB*, supra, 443, referred to in case of *People's Union for Civil Liberties v Union of India & Anor*, supra.

¹⁴² *Dicta* of JS Verma and Dr A S Anand JJ in *Nilabati Behera v State of Orissa*, supra.

¹⁴³ *Uttarakhand Sangharsh Samiti, Mussoorie v State of Uttar Pradesh*, delivered by the Allahabad High Court on 9 February 1996. See for a critical review of the jurisprudence of the Indian Supreme and High Court on rape cases: K.I. Vibhute, Victims of Rape and Their Right to Live with Human Dignity and to be Compensated: Legislative and Judicial Responses in India, in: *Journal of the Indian Law Institute*, Vol.41 (1999), 222-236.

¹⁴⁴ *Arvinder Singh Bagga v. State of U.P.*, (1994) 6 SCC 565.

¹⁴⁵ *Ajab Singh v. State of U.P.*, (2000) 3 SCC 521; *Amitadyuti Kumar v. State of West Bengal*, (2000) 9 SCC 404.

¹⁴⁶ *Union of India v. Luithukla*, (1999) 9 SCC 273; *State of Punjab v. Vinod Kumar*, (2000) 9 SCC 742.

¹⁴⁷ (1994) 2 SCC 1. See also *R.S. Sodhi v. State of U.P.*, 1994 Supp (1) SCC 142 and 143.

¹⁴⁸ See overview in Jaswal, Dr. Paramjit S., *Public Accountability for Violation of Human Rights and Judicial Activism in India: Some Observations*, (2002) 3 SCC (Jour) 6, Fn.48 and Sammaiah Mundrathi, *Law on Compensation to Victims of Crime and Abuse of Power*, New Delhi, 2002.

¹⁴⁹ (1997) 1 SCC 416.

¹⁵⁰ Justice Anand in *Nilabati Behera v State of Orissa*, supra, para.33 "... when the court moulds the relief by granting "compensation" in proceedings under Article 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. The payment of compensation in such cases is not to be understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

¹⁵¹ In *State of Punjab v. Vinod Kumar*, (2000) 9 SCC 404, the Punjab and Haryana High Court directed the State Government to pay Rs. 2 Lakhs (200,000) each to the wife and children of the persons disappeared allegedly at the hands of the police by way of interim payment. In *Re Death of Sawinder Singh Grover* [1995 Supp (4) SCC, 450], the Union of India/Directorate of Enforcement was also directed to pay a sum of Rs. 2 Lakhs (200,000) to the widow of the deceased by way of *ex gratia* payment at the interim stage.

the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do,¹⁵² and in another judgement: "Money award cannot, however, renew a physical frame that has been battered and shattered due to the callous attitude of others. All that the courts can do in such cases is to award such sums of money, which may appear to be giving some reasonable compensation, assessed with moderation, to express the court's condemnation of the tortious act committed by the State."¹⁵³ The Supreme Court decides on the quantum of compensation on the basis of the particular facts of each case, taking into account the severity of the violation. While the Court had laid down a working principle on the amounts of compensation to be paid in case of death in 1987, it has since not adhered to it and awarded compensation in the cases reviewed ranging from 5,000 - 200,000 (\$104- \$4,193) Rupees.¹⁵⁴ It is now generally recognised that the State can have recourse to the officers responsible for the violation of fundamental rights.¹⁵⁵

Courts have directed the State to: suspend public officials or impose other disciplinary measures, institute criminal investigations against them and to authorise their prosecution.¹⁵⁶ Moreover, the Supreme Court has declared that there is a genuine need to amend the law to protect the interest of detainees in death in custody cases. It has also issued orders directing the State or the police to introduce safeguards, undertake training and education, provide medical care and other measures designed to assist victims of official violation of fundamental rights.¹⁵⁷

1.1.2. The applicable procedure

According to the text of the Constitution, the victim of an infringement of fundamental rights, including the relatives in those cases where the right-holder has died, is free to choose whether to apply for relief to the High or Supreme Court. While this freedom was recognised in earlier decisions of the Supreme Court, some recent decisions have noted that the party should first approach the High Court where relief is available under Article 226. The safer route for a victim would be to

¹⁵² Basu v State of W.B., supra, para.54.

¹⁵³ R.D. Upadhyay v. State of A.P., (2001) 1 SCC 437, at p.439.

¹⁵⁴ See overview in Jaswal, *Public Accountability*, supra.

¹⁵⁵ See e.g. *Rudul Sah v State of Bihar*, (1984) 4 SCC, at pp.147-148, para.10; *Arvinder Singh Bagga v State of U.P.*, (1994) 6 SCC 565, at p.568 and *Inder Singh v State of Punjab*, (1995) 3 SCC, at 706. However, the Supreme Court has not held the Government to be obliged to recover such damages from the responsible public official.

¹⁵⁶ In *Punjab & Haryana High Court Bar Association v State of Punjab and Ors*(1996) 4 SCC 742, a case concerning the abduction and murder of an advocate, his wife and their two year of child for which the police appeared to be responsible on the basis of the available evidence, the Supreme Court held that: "The police officers in question must be suspended by the State and the trial is transferred to the Designated Court at Chandigarh. The Court is to direct the trial expeditiously within six months of its commencement. In accordance with the requirements of the Criminal Procedure Code the State of Punjab is to sanction the prosecution of the police officers immediately, within one month of receiving this order." In *Sebastian M. Hongray v. Union of India*, supra, the Supreme Court issued a mandamus to the Superintendent of Police directing him to take its judgement "as information of cognisable offence and to commence investigation as prescribed by the relevant provisions of the Code of Criminal Procedure." In *State of Punjab v. Vinod Kumar*, (2000) 9 SCC 742, the High Court directed the State Government to sanction the prosecution of the officials in question, as required by Section 197 of the Code of Criminal Procedure, without delay when asked by the investigating Central Bureau of Investigation.

¹⁵⁷ See for example *Basu v State of WB*, supra.

take legal action before the High Court if the sought after relief is available. There is no time limit for approaching the Supreme or High Court for relief. The power and jurisdiction of the Supreme Court cannot be curtailed by any statutory limitation.¹⁵⁸ The Supreme Court can also take up a case *suo moto* and has done so in death in custody cases.¹⁵⁹

The State Government cannot invoke the principle of sovereign immunity in cases of torture or custodial deaths.¹⁶⁰ The Supreme Court held that where a citizen has been deprived of his or her life or liberty, otherwise than in accordance with the procedure prescribed by law, it is no defence to claim that the said deprivation was brought about while state officials were acting in discharge of their sovereign functions.¹⁶¹ The Court noted that the defence of sovereign immunity does not apply in such a case as regards public law remedies even though it may be available as a defence in private law in an action based on tort.¹⁶² The process is governed by the respective rules of procedure of the Supreme Court and High Court.¹⁶³

1.2. CLAIMING REMEDIES IN CIVIL COURTS

1.2.1. Substantive rights

A victim of torture can claim reparation on the basis of tort law¹⁶⁴ in civil courts.¹⁶⁵ Such claims are based on the tort of public misfeasance¹⁶⁶ or trespass to the person, namely assault and battery.¹⁶⁷ The State is vicariously liable for damages caused by public officials save for those that fall under the doctrine of sovereign immunity.¹⁶⁸ The Government (Liability in Tort) Bill, 1967, which called for liability of the State for unlawful acts done by its public servants in the exercise of their duty, was introduced in the Indian Parliament as far back as 1967 following the recommendations contained in the first report of the Law Commission of India on the Liability of State in Tort, but has not been adopted subsequently.

¹⁵⁸ Parmajit Kaur v. State of Punjab (1999) 2 SCC 131.

¹⁵⁹ Re Death of Sawinder Singh Grover, 1995 Supp. (4) SCC, 450.

¹⁶⁰ People's Union for Civil Liberties v Union of India, *supra*.

¹⁶¹ *Dicta* of B P Jeevan Reddyn J in Challa Ramkonda Reddy & Ors v State of AP AIR 1989 AP 235 (Ind AP HC) and Maharaj v Attorney General of Trinidad and Tobago [1979] AC 385 (T&T PC) applied.

¹⁶² *Dicta* of J S Verma and Dr A S Anand JJ in *Nilabati Behera v State of Orissa*, *supra*, and of Kuldip Singh and Dr A S Anand JJ in *D K Basu v State of WB*, *supra*, followed.

¹⁶³ In most cases the courts do order the state or the 'other party' to pay the costs of the petitioner. If the costs and compensation ordered by the courts are not paid up in time by the concerned party, it is a matter of contempt of court and the party can be punished in accordance with the Contempt of Court Act, No.70 of 1971. See especially sections 12 and 14. See also Rules to regulate proceedings for contempt of Supreme Court, 1975.

¹⁶⁴ The law of torts is based on English common law via the operation of section 372 of the Constitution, *supra*.

¹⁶⁵ See Common Cause v Union of India, 1999 SCC 667.

¹⁶⁶ *Ibid.*, para.21. Such a tort remedy would be available in cases where the public officer caused damage to the interest of the claimant in acting maliciously or with knowledge that the impugned action was likely to injure the interest of that person.

¹⁶⁷ See Bakshi, P.M., Law of Torts, in Verma/Kusum, Supreme Court, *supra*, pp.590-620, at 608. See also *Saheli v Commissioner of Police*, *supra*, para.13.

¹⁶⁸ See overview of Supreme Court jurisprudence in Bakshi, Law of Torts, *supra*, at 601 et seq.

Damages are a matter of right and are awarded, if caused by the defendant's wrongful act, as *restitutio in integrum* to the extent that a monetary award can put the victim in a position he or she would have been had the tort not been committed.¹⁶⁹ Indian courts have recognised actual pecuniary loss, i.e. any expenses reasonably incurred by the plaintiff and future loss of income, as well as non-pecuniary damages for personal pain and suffering and loss of enjoyment of life. The amount of compensation depends on the facts and circumstances of each case. Exemplary damages are also recognised in cases where the damage has been caused by oppressive, arbitrary, unconstitutional action by the servants of the government.¹⁷⁰

1.2.2. Procedure

A victim of torture may file a suit for tort damages at the court of first instance in the place where the tort occurred or where the defendant resides.¹⁷¹ A suit has to be filed within one year.¹⁷² A victim of torture may file a suit against the individual perpetrator but in all likelihood he or she will fail to proceed against the State because it is shielded from legal actions for tort committed by its officials on the grounds of sovereign immunity. While sovereign powers are those that can be lawfully exercised only by a sovereign or by a person to whom such powers have been delegated, the scope of these powers has not been defined by law.¹⁷³ The liability of the State is still defined by reference to the Government of India Act, 1858 which makes the liability of the Government the same as that of the East Indian Company.¹⁷⁴ The courts have so far upheld sovereign immunity in civil law cases relating to "excesses" committed by police personnel while discharging their duties.¹⁷⁵ Moreover, the Central and State Government have been explicitly granted immunity from suit by Section 57 of the Prevention of Terrorism Act, No.15 of 2002.¹⁷⁶

¹⁶⁹ For an overview of Supreme Court jurisprudence, see *ibid.*, at 605. See also *Common Cause v Union of India*, *supra*, paras.28-30.

¹⁷⁰ See R.K. Bangia, *The Law of Torts (including compensation under the Motor Vehicles Act)*, 10th. Edn.) Allhabad, 1991,410 et seq. See also *Common Cause v Union of India*, *supra*, 30: "(Exemplary damages) are awarded whenever the defendant's conduct is found to be sufficiently outrageous to merit punishment for example, where the conduct discloses malice, cruelty, insolence or the like. In awarding punitive or exemplary damages, the emphasis is not on the plaintiff and the injury caused to him, but on the defendant and his conduct; para.31:"In an action of tort where the plaintiff is found entitled to damages, the matter should not be stretched too far to punish the defendants by awarding exemplary damages except when their conduct, specially those of the Govt. and its officers, is found to be oppressive, obnoxious and arbitrary and is, sometimes, coupled with malice."

¹⁷¹ Sections 19 and 20 Civil Procedure Code. See for the institution of suits section 26 in conjunction with the First Schedule, Order IV.

¹⁷² Limitation Act No.36 of 1963, Schedule Part VII. See for notice, sections 79 and 80 Civil Procedure Code.

¹⁷³ Bangia, *supra*, 133.

¹⁷⁴ Section 65 of that Act reads: "The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate and all persons and bodies politic shall, and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the East India Company."

¹⁷⁵ The leading case is *Kasturi Lal Ralia Ram v. Union of India*, AIR 1965 SC 1039 which has been followed by the Courts in upholding immunity of the State for acts considered to be of a sovereign nature. See an overview of these cases and critique of sovereign immunity Aman Hingorani, *State Liability in Tort- Need for a Fresh Look*, (1994) 2 SCC (Jour) 7.

¹⁷⁶ "No suit, prosecution or other legal proceeding shall lie against the Central Government or a State Government or any officer or authority of the Central Government or State Government or any other authority on whom powers have been conferred under this Act, for anything which is in good faith done or purported to be done in pursuance of this Act; Provided that no suit, prosecution or other legal proceedings shall lie against any serving member or retired

A public officer may in principle be sued in a private capacity for any wrongful conduct constituting a tort¹⁷⁷ unless he or she has been granted immunity by statutory law, such as under Section 157 Criminal Procedure Code or Section 57 of the Prevention of Terrorism Act.

Upon initiating a suit, the plaintiff is required to pay an *ad valorem* fee that may be waived in some circumstances.¹⁷⁸ The average rates for this non-recoverable fee range from 6 – 11 % of the damages claimed.¹⁷⁹ Legal aid for civil suits may be obtained by those deemed to be indigent persons.¹⁸⁰ The Civil Procedure Code and the Evidence Act govern the procedure. The victims may give evidence in their capacity as parties to the suit¹⁸¹ whereby the burden of proof lies on the person who has to prove the existence of any fact and would fail in his/her claim if no evidence at all were given on either side.¹⁸² The Court has discretion in awarding costs which usually follow the event.¹⁸³ Judgments are enforced by way of decrees issued by courts and executed by competent officers.¹⁸⁴

1.3. Criminal Law

A victim of a crime cannot claim reparation by way of an adhesion procedure as part of criminal proceedings. However, a court has the discretion, when imposing a sentence of fine to "order the whole or any part of the fine recovered to be applied in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court or when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for

member of the armed forces or other para-military forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism."

¹⁷⁷ See a case decided by the Allahabad High Court concerning false imprisonment *State of U.P. v. Tulsi Ram*, A.I.R. 1971 All.162.

¹⁷⁸ See for details Court Fees Act, 1870, s.7 (1) & Schedule I.

¹⁷⁹ Anderson, Michael R., Individual Rights to Environmental Protection in India, in: Boyle and Anderson (eds.), Human Rights Approaches to Environmental Protection, Oxford, 1996, p.208, Fn.38 referring to Galanter, 'Affidavit', in Baxi (ed), Mass Disasters and Multinational Liability: The Bhopal Case, 179.

¹⁸⁰ See Order XXXIII [Suits by Indigent Person], Appendix to the Civil Procedure Code. "A person is an indigent person,- (a) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or (b) where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit." See also Article 39 A of the Constitution according to which "the State shall ensure that the operation of legal system promotes justice, on a basis of equal opportunity, and shall, in particular provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities" and the Legal Service Authority Act 1987.

¹⁸¹ Sections 118, 120 *ibid*.

¹⁸² Sections 101, 102 Indian Evidence Act.

¹⁸³ Section 35 Civil Procedure Code. See however clause 2) of the said paragraph, which indicates that the costs are usually to be borne by the losing side: "Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing."

¹⁸⁴ Sections 38 et seq. Civil Procedure Code and Order XXI.

the loss resulting to them from such death.”¹⁸⁵ When a Court imposes a sentence that does not include a fine, it may, when passing judgment, order the accused person to pay compensation.¹⁸⁶ At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court will take into account any sum already paid or recovered by way of compensation.¹⁸⁷

The criminal courts have very rarely used their discretionary powers to compensate victims of crime.¹⁸⁸ The Supreme Court has ruled on Section 357 (3) Cr.PC. in several cases, especially in the *Harikishan* case¹⁸⁹ and the *Chandraprakash* case,¹⁹⁰ holding *inter alia* that the requirement of social justice demanded that a heavy fine should be imposed in lieu of a reduction of sentence to compensate the victims of crime.¹⁹¹ In the case of *Jacob George*, the Supreme Court reduced a sentence but imposed an extra fine of 1 lakh to be paid by the convicted person.¹⁹² In *Ajab Singh*, the Court directed the accused to pay compensation of 500,000 to the families of the two deceased persons who had been shot dead even though the Court recorded an acquittal on the grounds of a private defence.¹⁹³

1.4. Alternative Avenues: The National Human Rights Commission

The NHRC may, after completing an inquiry, recommend that the responsible Government or authority grant immediate relief to the victim or the members of his family.¹⁹⁴ The Commission has held that “the ‘immediate interim relief’ envisaged under Section 18 (3) of the Act has to relate specifically to the injury/loss suffered as a result of the human rights violation, and that this will not absolve the State of its

¹⁸⁵ Section 357 (1)(b) and (c) Cr. PC.

¹⁸⁶ Section 357 (3) Cr. PC. Many Indian States, such as Andhra Pradesh, Bihar, Karnataka, Madhya Pradesh, Rajasthan, Uttar Pradesh, West Bengal have passed amendments to this provision, according to which “the Court may” shall read “the Court shall” in those cases where the person against whom an offence is committed belongs to Schedules Castes or Schedules Tribes as defined in Clauses (24) and (25) of Article 366 of the Constitution of India except when both the accused person and the person against whom an offence is committed belong to either such castes or tribes.

¹⁸⁷ Section 357 (5) Cr. PC.

¹⁸⁸ See Vibhute, *supra*, 226, Fn.15 for further references on studies concerning compensation for the victims of crime in India.

¹⁸⁹ In *HariKrishan v State of Haryana*, AIR 1988 SC 2127, the Supreme Court awarded Rs 50,000 to the victims and directed the subordinate criminal courts to exercise the power of awarding compensation to victims of offences in such a liberal way that the victims may not have to rush to the civil courts for compensation.

¹⁹⁰ In *State of Maharastra v Chandraprakahsh Kewal Chand Jain*, AIR 1990 SCC 486, the Supreme Court confirmed the sentence of 5 years imprisonment on the sub-inspector of police for raping a young girl and imposed a fine of Rs.1000.

¹⁹¹ See for an overview of the Supreme Court jurisprudence, Vibhute, *supra*, p.227. Vibhute also cites the following observation of the Supreme Court on section 357 (3) in the case of *Hari Krishan & State of Haryana*, *supra*, at 2131: “It is an important provision but Courts have seldom invoked it perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgement of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of the accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to crime.”

¹⁹² *Jacob George v State* (1994) 3 SCC 430.

¹⁹³ *State of Punjab v Ajab Singh* (1995) 2 SCC 486. In *Bodhisatwa Goutam v Subha Chakraborty* (1996) 1 SCC 490 the Court held that it can enforce compensation against private bodies or individuals who violate the fundamental rights of the citizen.

¹⁹⁴ Section 18 (3), The Protection of Human Rights Act, 1993.

liability for compensation.¹⁹⁵ The NHRC noted that: "...for the purpose of award of compensation, substantiation on mere preponderance of probability, on the standard of civil evidence is sufficient. Even where a criminal charge may fail for want of evidence sufficient by standards requisite in criminal cases, yet a case of compensation can be sustained on a mere preponderance of probability."¹⁹⁶ In another case, the NHRC held that "This provision (18 (3) of the Protection of Human Rights Act, 1993) has been generously operated and the power conferred under it is widely exercised by the Commission in deserving cases. The Commission has in this connection kept itself alive to the spirit of various United Nations instruments."¹⁹⁷ While the State Government in question is obliged to pay compensation, the Commission has in several cases recommended the concerned Governments to recover the amount paid from the responsible public official.¹⁹⁸

The NHRC also has the power to approach the High Court or Supreme Court for an order directing the responsible public body or person to pay the specified compensation.¹⁹⁹

2. THE PRACTICE

2.1. Use and Effectiveness of Available Remedies

Torture survivors and relatives of torture victims only received reparation after the Supreme Court recognised a right to compensation for a breach of fundamental rights against the background of the difficulty, if not impossibility, of obtaining any kind of reparation under tort law. From the early 1990s on, there have been many applications for compensatory relief under Articles 32 and 226 of the Constitution to the Supreme Court and the High Courts respectively. Even so, many torture survivors have refrained from using the available remedies. In addition to the reasons outlined above,²⁰⁰ victims of torture have at times been pressurised by the perpetrators into withdrawing their cases, either by means of threats or bribes. Also, many victims do not have the resources to apply for relief in order to see a case through. Even though numerous victims have received assistance from human rights organisations and lawyers acting on their behalf, a considerable number have not been able or willing to avail themselves of this assistance.

¹⁹⁵ NHRC, Annual Report 1998-1999, Rationale for Grant of Immediate Interim Relief/Compensatory Jurisprudence, Case No.144/93-94/NHRC.

¹⁹⁶ Ibid. Case No.294/13/98-99/CD.

¹⁹⁷ Ibid. Case No.3177/96-97/NHRC, Comment: "Article 9 of the International Covenant on Civil and Political Rights makes it explicit that everyone has the right to liberty and security of person and nobody shall be subjected to arbitrary arrest or detention. It further mandates that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1985 makes it an obligation of the State to ensure that in its legal system, the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. Principle 35 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), also prescribes for remedy of compensation, in case of any damage incurred because of acts of omission by public officials contrary to the rights contained in the Body of Principles."

¹⁹⁸ See overview of cases of custodial deaths and torture in Annual Report 1999-2000, pp.85 et seq.

¹⁹⁹ Such as for example in the Case concerning harassment of Chakmar refugees in Arunachal Pradesh, Writ Petition (Cri) No.13/98, see NHRC, Annual Report, 1998-1999, II., 2.19.

²⁰⁰ Supra, Part IV, 3), which are also of relevance with regard to compensation claims, in particular difficulties of satisfying the burden of proof.

Torture survivors have apparently not filed cases before the Civil Courts which may be attributed to a combination of factors, in particular the resources required to pursue a case, evidentiary hurdles and the small amounts of compensation awarded, if any.

2.2. Reparation Cases

In numerous torture cases, the Supreme Court and the High Courts, as noted above, have awarded interim and final compensation and other forms of relief for a breach of Article 21 of the Constitution.²⁰¹

From its inception up to 31 March 2000, the NHRC has ordered compensation for human rights violations, of which a considerable number related to ill-treatment and torture. In 598 cases, the total amount of compensation ordered was Rs 76,783,634. During 1999, it awarded monetary compensation in 14 cases where compensation ranged between 10,000 to 10,000,000 Rupees.²⁰²

In some cases of torture, rape and death resulting from torture the authorities have offered *ex-gratia* payments to the families or alternative forms of reparation, such as offers of employment to the victims.²⁰³

There are no known cases in which torture survivors received compensation pursuant to Section 357 (3) of the Cr.P.C.

V. GOVERNMENT REPARATION MEASURES

There is no government reparation scheme or board for victims of human rights violations or crimes. However, there are special statutory compensation schemes for members of the "scheduled castes and tribes," such as the one set up under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, prescribing procedures for monetary relief and economic support programmes for victims of atrocities.²⁰⁴ The Andhra Pradesh Government has also passed an order according to which a relative of a Dalit or member of the tribal class who died as a result of a police "encounter"²⁰⁵ may receive 1 lakh in damages.

²⁰¹ See supra.

²⁰² NHRC, Annual Report 1999-2000, p. 85.

²⁰³ Information provided by Professor Krishnadeva Rao during proceedings of the seminar on the right to reparation for torture in India, Nepal and Sri Lanka, Delhi, 14 September 2002.

²⁰⁴ See section 3 of the Act, which contains an enumeration of atrocities committed by persons who are not a member of a Scheduled Caste or a Scheduled Tribe. The list does not specify any act constituting torture but some acts or omissions that, if committed by a public official, would be considered to constitute ill-treatment.

²⁰⁵ While this term is generally used for armed confrontations during which an exchange of fire takes place, victims of torture have in several cases apparently been shot and dumped at the site of the alleged encounter. Involved members of the police are known to have circulated stories or "armed encounters" between suspected insurgents and the police during which they claimed to have fired in self-defence. See NHRC, Important Instructions/Guidelines, supra, On Cases of Encounter Deaths, pp.31 et seq.

Several proposals have been put forward to establish a compensation scheme for victims of torture and ill-treatment. In 1992, when discussing the modalities for the setting up of the NHRC at the Chief Minister's conference, a scheme for compensation was suggested for custodial crimes on the basis of the Report of the Committee of Officers (1989/1, circulated in March 1990). This envisaged financial relief through a central registration system for cases of crime, including torture and rape, committed by agencies of state in custodial institutions. Under the scheme, the Sessions Court or Magistrate had jurisdiction to try a case following complaint by the victim or his/her representative. On receipt of the application, the court would direct a medical examination of the victim and a medical report to be submitted to the court within 7 days.²⁰⁶ If a *prima facie* case was established, the court could order interim relief within 30 days,²⁰⁷ and final compensation at the conclusion of the trial, with the maximum amount of relief of 50,000 for injury and of 5 lakhs in cases of death.

Following directions by the Supreme Court in its 1995 judgment,²⁰⁸ a National Commission for Women drafted the "Compensation to the Rehabilitation of Victims of Rape and Sexual Assault" Bill in 1995. The Commission suggested minimum statutory compensation be awarded to all victims of sexual crimes as Rs.10,000 for sexual harassment and Rs.30,000 for rape if the victim was an unmarried girl and Rs.40,000 if the woman was married.²⁰⁹ The bill further envisaged, for cases involving public authorities, that the authority in whose premises an incident is reported would be liable to pay compensation. In cases of custodial rape, the Government would pay compensation. The amount awarded was set at not less than one lakh if the offence resulted in the death of the victim. The Commission also proposed a new section 357A (Compensation in case of custodial rape) to be inserted in the Code of Criminal Procedure.²¹⁰

In 2001, a private member's bill "The Custodial Crimes (Prevention, Protection and Compensation Bill, 2001)" was put forward in Lok Sabha, the Indian Parliament, by G.M. Banatwalla. According to the Bill, no previous sanction of the government would be necessary for the prosecution of a police officer or a public servant accused of a custodial offence. If the offence is proven, the bill sets the amount of compensation to be awarded as no less than Rs. 25,000 in case of bodily injury and 200,000 in

²⁰⁶ In cases of custodial death, a post-mortem shall be conducted within 24 hours unless specific reasons for delay.

²⁰⁷ 10,000 for injury and 1,00,000- 25,000 in case of death.

²⁰⁸ Delhi Domestic Working Women's Forum v Union of India &Ors, (1995) 1 SCC 14.

²⁰⁹ The heads of compensation will be a) deprivation of bodily integrity and invasion of sexual freedom; b) type and severity of the bodily injury; c) mental anguish; d) expenditure incurred or likely to be incurred for rehabilitation including medical treatment and psychological counselling; e) loss of gainful activity/employment; f) expenses consequential on pregnancy including abortion; g) general damages.

²¹⁰ It reads: "Where the court convicts a public servant of the offence of rape or attempt to commit rape, being an offence constituted by an act of such public servant against a person in his custody, the provisions of this section shall apply. 1) The court, when passing judgment in any case to which this section applies, shall order that the Government, in connection with the affairs of which such public servant was employed at the time when such act was committed, shall be liable jointly and severally with such public servant to pay, by way of compensation, such amount as may be specified in the order:- (a) in defraying the expenses properly incurred in the prosecution; (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a civil court; c) when the offence mentioned in sub-section (1) had caused the death of another person, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855, entitled to recover damages from the convicted, for the loss resulting to them from such death."

case of death. In determining the amount of compensation, the Court would have to take into account all relevant circumstances, including the type and severity of the injury suffered by the victim, the mental anguish suffered by the victim, the expenditure already or likely to be incurred on the treatment and rehabilitation of the victim, the actual and projected earning capacity of the victim and the impact of its loss on the persons entitled to compensation and other members of the family, the extent, if any, to which the victim himself contributed to the injury and the expense incurred in the prosecution of the case. The Bill suggests that a Central Vigilance Commissioner and a District Vigilance Commissioner be appointed to oversee implementation of the Bill.

None of the three proposed schemes or bills has been adopted.

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. PROSECUTION OF ACTS OF TORTURE COMMITTED IN THIRD COUNTRIES

1.1. The Law

1.1.1. Criminal law

The Indian Penal Code neither recognises the principle of universal jurisdiction nor the passive personality principle. Offences committed outside Indian territory only fall within the ambit of the Penal Code if the perpetrator is a citizen of India and the act, if committed in India, is punishable under the Penal Code.²¹¹ The Code therefore recognises the active personality principle only.²¹²

However, universal jurisdiction can be exercised over perpetrators of grave breaches of the Geneva Conventions. Section 3 (1) of the Geneva Conventions Act, 1960, which provides that: "(1) If any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions he shall be punished, a) where the offence involves the wilful killing of a person protected by any of the Conventions, with death or with imprisonment for life; and (b) in any other case, with imprisonment for a term which may extend to fourteen years." This section applies to persons regardless of their citizenship.²¹³

²¹¹ Section 4. EXTENSION OF CODE TO EXTRA-TERRITORIAL OFFENCES: "The provisions of this Code apply also to any offence committed by -(1) any citizen of India in any place without and beyond India; (2) any person on any ship or aircraft registered in India wherever it may be. Explanation: In this section the word "offence" includes every act committed outside India which, if committed in India, would be punishable under this Code"; Section 188. Offence committed outside India: "When an offence is committed outside India- (a) by a citizen of India, whether on the high seas or elsewhere; or (b) by a person, not being such citizen, on any ship or aircraft registered in India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found: Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.

²¹² See *Central Bank of India Ltd v Ram Narain*, AIR 1955 SC 36 at 38. The Indian Supreme Court has also recognised the applicability of the objective territorial principle for those cases where one of the constituent elements of the crime has been committed within its territory and the protective principle for acts affecting its security, integrity and independence. See overview in Verma, supra, 642 et seq. who cites *Mubarak Ali Ahmad v The State of Bombay* AIR 1957 SC 857, 860 and *G.B. Singh v Government of India* AIR 1973 SC 2667 respectively.

²¹³ Section 3 (2) Geneva Conventions Act.

Such offences are only tried by court equal or superior to that of a Chief Presidency Magistrate or a Court of Session.²¹⁴ The competent courts shall not take cognizance of any offence under the Act except on complaint by the Government or of such officer of the Government as the Central Government may specify by notification in the official Gazette.²¹⁵ The Act does not give a specific right to anyone to approach the Court, nor does it create a right in favour of victims who might otherwise be left without a remedy.²¹⁶ Finally, if a complaint is made by the Government or an authorised officer, questions relating to the application of the Convention to a conflict are to be determined by a Government Official, not the court.²¹⁷

Universal jurisdiction over international crimes may also be exercised on the basis of recognised principles of customary international law.²¹⁸

Persons covered by the Vienna Convention on Diplomatic Relations enjoy immunity from criminal proceedings as provided for in that Convention.²¹⁹

1.1.2. Extradition laws

The extradition of alleged perpetrators of torture is governed by the Extradition Act, 1962. Extradition is conditional upon the existence of an extradition treaty that has been implemented in domestic law. The Extradition Act allows for the extradition of the crimes of culpable homicide, rape and "unnatural offences" but not for the crimes relating to the extortion of confessions by means of force laid down in sections 330, 331 and 348 of the Penal Code.²²⁰ Acts of torture thus do not constitute extraditable crimes unless they result in the death of the tortured person or involve rape or other sexual acts of torture prohibited in the Indian Penal Code. A fugitive criminal shall, *inter alia*, not be surrendered or returned to a foreign State or Commonwealth country if the offence in respect of which his surrender is sought is of a political character.²²¹ The Government has discretionary power with regard to the decision whether to extradite the person sought. It might refuse extradition even if there is a treaty and a good cause for extradition.²²²

²¹⁴ Section 5 Geneva Conventions Act.

²¹⁵ Section 17 Geneva Conventions Act.

²¹⁶ See the case of *Rev. Mons. Sebastio Francisco Xavier dos Remedios Monteiro v. The State of Goa* AIR 1970 SC 329: ii) "The Geneva Conventions Act also gives no specific right to anyone to approach the Court. By itself it gives no special remedy. It does give indirect protection by providing for penalties for breach of the Convention. The Conventions are not enforceable by the Government against itself, nor does the Act give a cause of action to any party for the enforcement of the Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of the civilian population but there is no right created in favour of protected persons which the court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and has to leave the matter to the "indignation of mankind". (97 B-C)."

²¹⁷ Section 6 Geneva Conventions Act.

²¹⁸ See supra I, 1.2.

²¹⁹ See for details and exceptions, The Diplomatic Relations (Vienna Convention) Act 1972, Act No.43 of 1972.

²²⁰ See the Second Schedule to the Act.

²²¹ See for this and other restrictions on the surrender of fugitives Section 31 Extradition Act.

²²² See sections 3, 1) and 29 of the Extradition Act. See also *Hans Muller of Nuremberg v Superintendent Presidency Jail, Cal & Others*, AIR 1955 SC 367.

1.2. Practice

There are no known cases in which India has either prosecuted or extradited a person alleged to have committed acts of torture in a third country.

2. CLAIMING REPARATION FOR ACTS OF TORTURE COMMITTED IN A THIRD COUNTRY

2.1. Legal Action against Individual Perpetrators

The jurisdiction of Indian Courts is established either at the place where the defendant resides or at the place where the cause of action arises, either wholly or in part.²²³ The latter includes not only the place where a tort was committed but also where the damages that make a tort actionable occurred.²²⁴ Jurisdiction may also be established on the ground that the defendant carries out business or is personally working for gain in India.²²⁵ To commence an action, summons has to be served on the defendant.²²⁶ Foreign nationals may bring suits unless they are considered enemy aliens residing in India without permission of the Government.²²⁷ A victim of torture that has been committed abroad can on these grounds take legal action against the perpetrator of torture in India if the latter either resides in India or any damages relating to the tort arose in India. There is no jurisprudence as to whether post traumatic stress disorder or other long-term damages resulting from torture would constitute such a ground.

High-ranking government officials of foreign States and diplomats in principle enjoy immunity from suit. According to the Civil Procedure Code, any ruler, ambassador or envoy of a foreign State or any High Commissioner of a Commonwealth Country or any such member of the staff of these as the Central Government may specify may not be sued in any Indian Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government.²²⁸ Except with the consent of the Central Government, certified in

²²³ Section 20 *ibid.*, Other suits to be instituted where defendants reside or cause of action arises: "Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or (c) the cause of action, wholly or in part, arises."

²²⁴ D.V. Chitale and K.N. Annaji Rao, *The Civil Procedure Code (V of 1908)*, Vol.1, Sections 1-101, A.I.R. Commentaries, 8th ed., 1971, at 465: "In a suit in respect of a tort the plaintiff has to prove both a tortious act and a consequent injury or damage. The damage or injury is, therefore, a material fact which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit."

²²⁵ See on the grounds of jurisdiction, Diwan, Paras, *Indian and English Private International Law, A Comparative Study*, Bombay, 1977, pp.157 et seq.

²²⁶ See details in Order V of First Schedule of Civil Procedure Code. See also Diwan, *supra*, pp.162 et seq.

²²⁷ Section 83 Civil Procedure Code.

²²⁸ Section 86 (4) in conjunction with 86 (1) of the Civil Procedure Code. Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the persons classified may be sued, but it shall not be given, unless it appears to the Central Government that any of the above specified persons has instituted a suit in the Court against the person desiring to sue him/her, or the privilege accorded to him/her by this section has been expressly or impliedly waived. Section 86 (4) in conjunction with 86 (2) (a); (d) *ibid.* The Central Government is thus

writing by a Secretary to that Government, no decree shall be executed against the property of any of the persons specified above.²²⁹

The applicable substantive law is that of the place where the tort was committed.²³⁰

There are no known cases in which victims of torture or ill-treatment committed in a third country have sued the perpetrators of such torture in India.

2.2. Legal Action against Foreign States

A foreign State may not be sued in any Indian Court except with the consent of the Central Government certified in writing by a Secretary to that Government.²³¹ Such consent may be given with respect to specified suit(s), and may specify the Court in which the foreign State may be sued. However, consent shall not be given, unless it appears to the Central Government that the foreign State has instituted a suit in the Court against the person desiring to sue it, or has expressly or impliedly waived the privilege accorded to it by this section.²³² Except with the consent of the Central Government, certified in writing by a Secretary to that Government, no decree shall be executed against the property of any foreign State.²³³

There are no known cases in which victims of torture or ill-treatment committed in a third country have sued a foreign State responsible for torture under international law.

competent to determine questions of State immunity whereby such decisions can be judicially reviewed by courts in respect of their reasonableness. See *Harbhajan Singh Dhalla v Union of India*, AIR (1987) SC 992.

²²⁹ Section 86 (4) in conjunction with 86 (3) *ibid*.

²³⁰ See Diwan, *supra*, pp.556, 557.

²³¹ Section 86 (1) Civil Procedure Code and on the particulars section 86 (2) (a); (d).

²³² Section 86, 2, a); d) *ibid*.

²³³ Section 86, 3) *ibid*.