

# Punished for Protest: Violations Against Human Rights Defenders in Times of Covid-19

November 2022

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## I. EXECUTIVE SUMMARY

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Human rights defenders (HRDs) in India are being targeted through the use of overbroad national security laws, particularly the Unlawful Activities Prevention Act (UAPA), and criminal laws covering such areas as sedition and hate speech laws. Many of the actions taken against these defenders are replete with human rights violations, including arbitrary detention and denial of the right to a fair trial. They also typically interfere with the capacity of these defenders to exercise their rights to freedom of expression and association.

As of 15 August 2022, at least 31 HRDs had been charged in connection with two well publicized cases- Bhima Koregaon and Delhi Riots Cases, including under the UAPA on allegation of membership of "terrorist organizations". Notably, 20 of the 31 human rights defenders were arrested in 2020 after the onset of the COVID-19 pandemic. At least six of the 31 defenders are above 60 years of age and suffer from serious health problems, which have been exacerbated in custody. As of 15 August 2022, seven of these 31 have been released on bail, and one, Father Stan Swamy, has died in custody. Formal charges have not been framed by the prosecution and the trial is yet to start in any of the cases.

The ICJ in this Report looks at 15 of these cases. They reveal multiple breaches of criminal and other laws entailing human rights violations, including denial of bail, ill-treatment in prison, lack of access to adequate medical facilities, and inadequate health protection amidst COVID-19 outbreaks in prison.

The human rights defenders highlighted in this Report are widely recognized, including by the United Nations, for their work on protecting the rights of persons from the poorest and most marginalized communities, including Dalits. Some are also student leaders. UN independent experts have condemned their treatment, noting that they appear to have been targeted through abusive national security laws simply for their legitimate human rights work, leading to a chilling effect on human rights work.

The COVID-19 pandemic further impeded access to justice for human rights defenders both due to its impact on court hearings and on prisons. For some time, the Courts functioned in a very limited capacity leading to reduced number of hearings, slower hearings and resulting in bail hearings getting delayed. Indian prisons are notoriously overcrowded and have unsanitary conditions which has adversely impacted the detained HRDs right to health.

### Key Findings of the Report

- A. Human rights defenders (HRDs) Surendra Gadling, Gautam Navlakha, Sudha Bhardwaj and Umar Khalid appear to have **not been promptly informed about the grounds for their arrest** in violation of both international and domestic law.
- B. Many detainees, including Stan Swamy, Khalid Saifi and Ishrat Jahan, were allegedly **unable to meet with their lawyers and family members immediately upon detention and in custody**, in violation of their right to legal counsel and access to family members. This lack of access was due

in part to overbroad restrictions on visits in response to COVID-19, and lack of effective alternate options.

- C.** Several human rights defenders **continue to be held in prolonged detention as bail has been denied by the Courts**. Legislation regulating bail improperly shifts the burden of proof to the accused, preventing the Court from granting bail if based on police information the Court believes that there is a prima facie case of guilt. This contravenes the presumption of bail under international law, that bail should be the rule and may only be denied in narrow circumstances.
- D.** Detained human rights defenders such as Khalid Saifi and Stan Swamy among others have allegedly been subject to physical and verbal abuse as well as severe lack of medical care, amounting to prohibited **torture or ill-treatment in prison**.
- E.** The authorities have failed to meet their legal obligations to provide adequate medical care to those in its care and custody, resulting in **severe illness of a number of HRDs and the custodial death of HRD Stan Swamy**. During their incarceration, Father Stan Swamy, Varavara Rao and Hany Babu were allegedly denied medical care, despite repeated entreaties to executive authorities and the courts for access to basic medical treatment.
- F.** A number of the detainees, including the elderly and immuno-compromised, Varavara Rao, Hany Babu, Sharjeel Imam, Akhil Gogoi, Stan Swamy **contracted COVID-19 in prison, facilitated by lack of effective COVID protocols** to address overcrowding, lack of social distancing within prison, and limited testing facilities. Stan Swamy, suffering from various ailments, including Parkinsons for the last decade, died shortly after testing positive for COVID-19 while in custody, one day before his bail hearing before the Bombay High Court.

## Recommendations

### To the Parliament

- Repeal or amend the UAPA to meet fundamental guarantees under the Constitution of India and India's international legal obligations. In particular, repeal or amend provisions on anticipatory bail and default.
- Amend or repeal the law on sedition.
- Ratify the Convention Against Torture (CAT) in line with the recommendations of the Law Commission of India.
- Adopt anti-torture legislation incorporating CAT provisions irrespective of ratification and India's existing obligations in respect of torture and ill-treatment, particularly under article 7 of the International Covenant on Civil and Political Rights.

### To the Prison Administration

- Upgrade the video-conferencing system to ensure continuous and effective communication between detainees and family members and lawyers.
- Adopt major upgrades to the provision of healthcare in all places of detention, in line with obligations under international human rights law; ensure that detention facilities have the capacity to protect the health of those detained, along with guaranteed access to treatment in the facility itself or at the hospital or other medical facility sanctioned by the government.

- In particular, ensure adequate prison hygiene in line with international law and standards and recommendations by the Ministry of Home Affairs, including regular sanitization, cleaning and disinfection of wards and common places.
- Ensure that all people deprived of their liberty are granted continuous and confidential access to their lawyers, in line with ICCPR articles 9 and 14, the Mandela Rules and the prescriptions of the Supreme Court in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.*
- Refer complaints of torture or other ill-treatment by police to the prosecutorial authorities for a proper, thorough, impartial and independent investigation of any police officials accused of ill-treatment, either on complaint or even *suo motu* in line with international and domestic standards.
- Address complaints of other forms of harassment by prisoners and jail officials promptly.
- End prison overcrowding and ensure social distancing at places of gatherings in prison complex.
- Construct new facilities where required to meet standards of adequate housing as required under international human rights law.

#### To Prosecutors

- Provide for early release of low-risk category of detainees in order to reduce overcrowding in jails. Low-risk category of detainees include unfit detainees, aged persons with underlying health conditions and those who are in pre-trial detention for non-violent offences.
- Conduct a general review of all cases to determine if the original basis for charges was legitimate and move to withdraw charges that were without a legitimate legal or factual foundation or otherwise inappropriately made.

## II. RESEARCH METHODOLOGY, OBJECTIVE AND SCOPE

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An ICJ consultant conducted interviews between April and August 2021 with nine human rights defenders from Delhi and Mumbai, their family members, and their lawyers. The ICJ conducted additional research from published human rights documentation, court records, legal sources and media reports which covers the time period until August 15, 2022.

Due to the sensitive nature of the Report, and the fact that most of the human rights defenders whose cases have been discussed in the Report remain in prison, and in all cases the trials are yet to start, the names of the people interviewed as well as any quotes given have been withheld.

The Report focuses on the most important cases of detained HRDs in India to emphasize the violations faced by them through the misuse of national security legislation and also to highlight the status of under-trial detainees in India more broadly. The Report does not address the full range of human rights violations faced by detained human rights defenders in India, in accessing their right to justice in the light of COVID-19 pandemic. The Report, instead, focuses on serious violations of the right to liberty and human rights immediately upon detention and in prison, with reference to both international law and standards and domestic law.



### III. LEGAL FRAMEWORK PERTAINING TO HUMAN RIGHTS DEFENDERS

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This Report addresses the failure of the Indian Government to discharge the State's obligations to respect and ensure the freedoms of expression and association, right to liberty, right to a fair trial, right to health and freedom from torture and other ill-treatment, particularly in respect of its application of national security laws and hate speech laws in relation to human rights defenders.

#### **Freedom of expression, association, and assembly**

As a party to the ICCPR, India must respect and ensure the rights to freedom of expression, association and assembly under Articles 19, 21 and 22 of the ICCPR. These are protected as fundamental rights under Article 19(1)(a)(b)(c) of the Indian Constitution. The UN Human Rights Committee, the supervisory body responsible for providing the authoritative interpretation for ICCPR, has issued General Comments detailing the scope of the obligations of freedom of expression and freedom of assembly.<sup>1</sup>

The Human Rights Committee has affirmed the importance of freedom of expression in facilitating "transparency and accountability"<sup>2</sup> of public officials and others.<sup>3</sup> While these rights are not absolute, the ICCPR provides that they may only be restricted in a narrow range of circumstances.

To be permissible, the restrictions must meet the following conditions:

- The restriction must be "provided by law", and the law must be stated with enough specificity to meet the conditions of legality and allow for those subject to it to have the capacity to understand which behaviour is governed by it;<sup>4</sup>

- The restriction may only be imposed for the legitimate purpose of protection of national security, public order, public health or morals, another person's right or reputation.<sup>5</sup>

- The restriction must be strictly necessary for that legitimate purpose and must be the least restrictive reason of achieving it (principle of necessity and proportionality). Therefore, when a State invokes a restriction, it must identify the precise nature of the threat, as well as explain why the specific action taken is a necessary and proportionate response to the specific threat.<sup>6</sup>

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<sup>1</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 34: Article 19: Freedoms of opinion and expression CCPR/C/GC/34, 12 September 2011 and UN Human Rights Committee (HRC), CCPR General Comment No. 37: Article 21: Right of Peaceful Assembly CCPR/C/GC/37, 17 September 2020.

<sup>2</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 34: Article 19: Freedoms of opinion and expression CCPR/C/GC/34, 12 September 2011, para 3.

<sup>3</sup> *Ibid*, para 7.

<sup>4</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 34: Article 19: Freedoms of opinion and expression CCPR/C/GC/34, 12 September 2011, para 22; UN Human Rights Committee (HRC), CCPR General Comment No. 37: Article 21: Right of Peaceful Assembly CCPR/C/GC/37, 17 September 2020, para 44.

<sup>5</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 34: Article 19: Freedoms of opinion and expression CCPR/C/GC/34, 12 September 2011, para 24; UN Human Rights Committee (HRC), CCPR General Comment No. 37: Article 21: Right of Peaceful Assembly CCPR/C/GC/37, 17 September 2020, para 36.

<sup>6</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 34: Article 19: Freedoms of opinion and expression CCPR/C/GC/34, 12 September 2011, para 35; UN Human Rights

- The restriction must not be made for a discriminatory purpose or effect and the law must not give “unfettered discretion” to the executive.<sup>7</sup>

The Human Rights Committee has made clear that restrictions must not be used to “stifle expression of political opposition to a government.”<sup>8</sup> In addition, “all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition”.<sup>9</sup>

The Indian Constitution in Article 19 treats as “fundamental”, the rights to freedom of speech, expression, assembly and association. Under the Constitution, “reasonable restrictions” can be imposed in the interests of the “sovereignty and integrity”, “security”, “friendly relations with foreign States”, “public order”, “decency” or “morality”.<sup>10</sup> However any such restrictions also must meet the test of proportionality.<sup>11</sup>

### **Right to liberty and freedom from arbitrary arrest or detention**

The right to liberty, including the freedom from arbitrary detention is protected under article 9 of the ICCPR. Article 9, ICCPR provides:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

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Committee (HRC), CCPR General Comment No. 37: Article 21: Right of Peaceful Assembly CCPR/C/GC/37, 17 September 2020, para 36.

<sup>7</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 34: Article 19: Freedoms of opinion and expression CCPR/C/GC/34, 12 September 2011, paras 7 and 25; UN Human Rights Committee (HRC), CCPR General Comment No. 37: Article 21: Right of Peaceful Assembly CCPR/C/GC/37, 17 September 2020, para 44.

<sup>8</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 37: Article 21: Right of Peaceful Assembly CCPR/C/GC/37, 17 September 2020, para 49.

<sup>9</sup> *Supra Note 2*, para 38.

<sup>10</sup> Constitution of India, Article 19- Protection of certain rights regarding freedom of speech etc.

<sup>11</sup> Supreme Court of India, *In Re: Ramlila Maidan Incident v. Home Secretary, Union Of India & Ors*, 2012, Suo Moto Writ Petition (Crl.) No. 122 of 2011, para 32.

The Human Rights Committee has produced a General Comment setting out in greater depth, the nature and scope of the State obligation under article 9.<sup>12</sup> It clarifies that the term “arrest refers to any apprehension of a person that commences at deprivation of liberty” and does not require a “formal arrest” as defined under domestic law.<sup>13</sup> An arrest that is authorized by domestic law may still be arbitrary if it includes elements of “inappropriateness, injustice, lack of predictability and due process of law.”<sup>14</sup> It further emphasizes that any arrest or detention meted out as punishment for exercise of the right to freedom of opinion and expression or assembly or association is arbitrary.<sup>15</sup> The Committee explains that “any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.”<sup>16</sup> Persons who are not released pending trial must be tried “as expeditiously as possible”.<sup>17</sup> It further recommends that detainees have prompt and regular access to medical personnel and lawyers.<sup>18</sup>

Article 21 of the Indian Constitution is the overriding fundamental right and protects person’s right to liberty, which may only be restricted according to procedure established by law. The Supreme Court has affirmed that such procedure established by law “must be *right and just and fair and not arbitrary, fanciful or oppressive, otherwise, there would be no procedure at all...*”<sup>19</sup> The Court has also indicated that “*there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment...*”<sup>20</sup> It has also determined a speedy trial to be a constitutional mandate of the State and that authorities must do “whatever is necessary” to ensure speedy trial.<sup>21</sup>

Article 22 of the Indian Constitution further clarifies that an accused person has a right to be informed “of the grounds for such arrest” “as soon as may be”,<sup>22</sup> “to consult, and to be defended by, a legal practitioner of his choice”<sup>23</sup>, “be produced before the nearest magistrate, within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate”.<sup>24</sup>

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<sup>12</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 35: Article 9: Liberty and security of person, CCPR/C/GC/35, 16 December 2014.

<sup>13</sup> *Ibid*, para 13.

<sup>14</sup> *Supra Note 12*, para 12.

<sup>15</sup> *Supra Note 12*, para 17.

<sup>16</sup> *Supra Note 12*, para 22.

<sup>17</sup> *Supra Note 12*, para 37.

<sup>18</sup> *Supra Note 12*, para 58.

<sup>19</sup> Supreme Court, *Maneka Gandhi v. Union Of India*, 1978 AIR 597, para 19.

<sup>20</sup> Supreme Court, *Francis Coralie Mullin V. The Administrator, Union Territory Of Delhi & Ors*, 1981 AIR 746, para 17.

<sup>21</sup> Supreme Court, *Hussainara Khatoon v. Home Secretary, State of Bihar*, 1979 AIR 1369, para 20.

<sup>22</sup> Article 22(1), Constitution of India.

<sup>23</sup> *Ibid*.

<sup>24</sup> Article 22(2), Constitution of India.

## Right to fair trial

Right to fair trial is protected under Article 14, ICCPR. The Human Rights Committee has also issued a general comment setting out scope of obligation to protect the right to a fair trial.<sup>25</sup>

The right to fair trial includes the right to be presumed innocent until proven guilty,<sup>26</sup> and the right to be tried without undue delay as reiterated in ICCPR article 14(3)(c). The Human Rights Committee has emphasized that the manner in which criminal proceedings are held may adversely impact the rights of detainees, particularly through delays in criminal proceedings for years and through a chilling effect on the rights of freedom of expression and opinion, right to leave the country, among other rights.<sup>27</sup> Even during emergencies, derogations from the right to fair trial cannot exceed those strictly required by the exigencies of the situation.<sup>28</sup>

The right to fair trial is also protected under Article 21 of the Indian Constitution and judicial interpretation holds that “speedy trial” is an “essential ingredient of reasonable, fair and just procedure guaranteed by Article 21”,<sup>29</sup> which extends to all stages including investigation, inquiry, trial, appeal, revision and re-trial as well as the presumption of innocence, as the burden to prove guilt lies upon the prosecution to prove all the facts constituting the offence beyond reasonable doubt.

## Freedom from torture and other cruel, inhuman or degrading treatment or punishment and the right to health

Freedom from torture and other cruel, inhuman or degrading treatment or punishment is protected under article 7, ICCPR, and the right to humane treatment is protected under article 10, ICCPR. Detailed provisions on treatment in detention are provided for in the revised Minimum Standards on the Treatment of Prisoners (Mandela Rules), which were adopted by consensus of States at the UN General Assembly.<sup>30</sup> The right to health is guaranteed pursuant to India’s obligations under article 12 of the International Covenant on Economic, Social and Cultural Rights. The obligation extends to those who are deprived of their liberty.<sup>31</sup>

## Laws Used Against Human Rights Defenders in India

1. **Unlawful Activities (Prevention) Act, 1967** (UAPA) is an omnibus and permanent national security law that was introduced in 1967 amended in 2004, 2008, 2012 and 2019 to provide “more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities.”<sup>32</sup> UAPA has provided for two new crimes – unlawful acts (S. 13) and terrorist acts (S.16) and establishes grounds under which the Indian Government may ban “unlawful organizations” (S. 2) and “terrorist organizations” (S. 35). The law

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<sup>25</sup> UN Human Rights Committee (HRC), General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial, CCPR/C/GC/32, 23 August 2007.

<sup>26</sup> *Ibid*, para 30.

<sup>27</sup> *Supra Note 25*, para 63.

<sup>28</sup> *Supra Note 25*, para 6.

<sup>29</sup> *Supra Note 21*, para 15.

<sup>30</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), A/RES/70/175, 8 January 2016.

<sup>31</sup> UN Committee on Economic Social and Cultural Rights (CESCR), General Comment No. 14: The right to the highest attainable standard of health, E/C.12/2000/4, 11 August 2000, para. 34.

<sup>32</sup> Preamble, Unlawful Activities (Prevention) Act, 1967.

defines unlawful acts as those that support or are intended to bring about "secession", "disruption of sovereignty or territorial integrity" or "disaffection".<sup>33</sup> It includes in "terrorist acts" those that "threaten or are likely to threaten the unity, integrity, security, economic security, or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country".<sup>34</sup> In addition to "terrorist organizations", the UAPA also incorporates the concept of "terrorist gangs".<sup>35</sup> In August 2019, UAPA was amended again to allow the central government to nominate individuals as terrorists.<sup>36</sup> UAPA provides greater powers of arrest, search and seizure to the police (S.43A, S.43B), increases the period of detention (S.43D(2)), excludes anticipatory bail (S.43D(4)), enhances the restrictions on bail (S.43D(5)), weakens the presumption of innocence (S.43 E), and allows intercepted communications to be used as evidence (S. 46). Notably, of the number of persons booked under the UAPA, 66% are for conspiracy without any act of violence.<sup>37</sup>

2. In the legislation governing **sedition, under S. 124A, IPC**, **sedition** is defined as words, spoken or written, signs, or otherwise that brings "hatred or contempt, or excites or attempts to excite disaffection" towards the government. The Supreme Court in 1962 in *Kedarnath Singh v. State of Bihar* had upheld the constitutional validity of the offence of sedition, explaining that the restrictions the provision imposed on the freedoms of speech and expression were in the interest of public order and therefore qualified as permissible legislative interference. The Court had clarified that the "section must be so construed as to limit its application to acts involving intention or tendency to create disorder, or disturbance of law and order; or incitement to violence."<sup>38</sup> However, on 11 May 2022, in recognition of the misuse of the sedition law, the Indian Government decided to "re-examine and re-consider the provision of Section 124A." The Supreme Court has ordered that application of the provision be kept in abeyance until the reconsideration of the provision. The Court indicated that the "Centre and State Governments [should] refrain from registering any FIR, continuing investigation, or taking coercive steps under Section 124A IPC when it is under reconsideration. It will be appropriate not to use this provision of law till further re-examination is over." Further, it has said, "[a]ll pending trials, appeals and proceedings with respect to the charge framed under Section 124A of IPC be kept in abeyance. Adjudication with respect to other Sections, if any, could proceed if the Courts are of the opinion that no prejudice would be caused to the accused."<sup>39</sup> The fact that S.124A cases are being kept in abeyance has not led to release of any of the HRDs discussed in this Report, as they are in prison under multiple charges, with sedition being only one of the charges.

3. **Hate speech** provisions include, among other provisions, Sections 153A, IPC and 505, IPC. Section 153A IPC punishes "promotion of enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and

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<sup>33</sup> S. 2(o), Unlawful Activities (Prevention) Act, 1967.

<sup>34</sup> S. 15, Unlawful Activities (Prevention) Act, 1967.

<sup>35</sup> S. 2(l), Unlawful Activities (Prevention) Act, 1967.

<sup>36</sup> The Unlawful Activities (Prevention) Amendment Act, 2019 No. 28 Of 2019

<sup>37</sup> Staff, "Blot on democracy: Shashi Tharoor moves Bill to repeal UAPA", *Scroll*, April 1, 2022, <https://scroll.in/latest/1020906/blot-on-democracy-shashi-tharoor-moves-bill-to-repeal-uapa>

<sup>38</sup> Supreme Court of India, *Kedarnath Singh v. State of Bihar* 1962 AIR 955.

<sup>39</sup> Supreme Court of India, *S.G. Vombatkere v. Union Of India*, WPC 682/2021, 2022LiveLaw(SC)470, para 8.

doing acts prejudicial to maintenance of harmony.” Section 505, IPC prohibits making “statements conducing to public mischief”. Section 505(1)(b) penalizes publishing or circulating any report “with intent to cause, or which is likely to cause, fear or alarm to the public.. whereby any person may be induced to commit an offence against the State or against the public tranquillity.

The three laws typically used against HRDs violate the right to freedom of expression and association as they are not precise and cannot be justified as necessary or proportionate to any legitimate end asserted by State authorities. The UAPA, in particular, provides for criminal liability of persons who engage in “terrorist activity” and “unlawful activity” but defines these terms in a manner that is overbroad and vague.<sup>40</sup>

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<sup>40</sup> Supreme Court of India, *Sajal Awasthi v. UOI*, WP(C)1076/2019 – This is an ongoing case where the petitioner has challenged the constitutionality of UAPA.



## IV. BACKGROUND

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Indian authorities have imposed increasingly repressive restrictions on the exercise of freedom of expression, association and assembly, with heightened threats to human rights defenders. There has been an increase in human rights defenders being detained for expressing their views on matters of public importance and being charged under national security laws, particularly under Unlawful Activities Prevention Act (UAPA), but also other laws such as sedition and the Public Safety Act.<sup>41</sup> This trend has been documented by civil society organizations and the media, noted by the UN, and is also corroborated by Indian Government data.<sup>42</sup>

In March 2022, the V-Dem Institute, an independent research institute noted a downward movement in India's democratic indicators, stating that based on its indices, "anti-pluralist parties drive autocratization in... India."<sup>43</sup>

In 2021, the Office of the UN High Commissioner for Human Rights (OHCHR) expressed grave concern about the death of detainee Stan Swamy, an 84 year old priest and human rights defender, in prison, after his arrest under UAPA. The OHCHR called on the Government to "ensure that no one is detained for exercising their fundamental rights to freedom of expression, peaceful assembly and association."<sup>44</sup> The High Commissioner had previously in October 2020 raised concern about Stan Swamy's detention despite his poor health and the overall situation. It had noted the "restrictions on human rights, NGOs and arrests of activists in India", and had appealed to the government "to release people charged under the Unlawful Activities Prevention Act for simply exercising basic human rights that India is obligated to protect", including their "rights to freedom of expression and peaceful assembly".<sup>45</sup> In 2018, fifteen UN independent human rights experts with various thematic mandates by the UN Human Rights Council, criticized the use of national security laws to effectively silence human rights defenders. The experts urged the Government to "refrain from engaging in the criminalization of human rights defenders in general,

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<sup>41</sup> See Kunal Purohit, "Our New Database Reveals Rise In Sedition Cases In The Modi Era", *Article 14*, 02 February 2021, available at <https://www.article-14.com/post/our-new-database-reveals-rise-in-sedition-cases-in-the-modi-era>; Mani Chander, "How India Is Favouring Public Order Over Freedom", *Article 14*, 08 December 2020, <https://article-14.com/post/how-india-is-favouring-public-order-over-freedom>.

<sup>42</sup> See Kunal Purohit, "Our New Database Reveals Rise In Sedition Cases In The Modi Era", *Article 14*, 02 February 2021, available at <https://www.article-14.com/post/our-new-database-reveals-rise-in-sedition-cases-in-the-modi-era>; OHCHR, "Bachelet dismayed at restrictions on human rights NGOs and arrests of activists in India", 20 October 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26398>.

<sup>43</sup> "Autocratization Changing Nature? DEMOCRACY REPORT 2021", V-Dem Institute, March 2022, [https://v-dem.net/media/publications/dr\\_2022.pdf](https://v-dem.net/media/publications/dr_2022.pdf), page 7; International Commission of Jurists et al, Joint Open Letter to the Indian Government calling for the release Of human rights defenders at risk, 27 May 2020, available at <https://www.icj.org/joint-open-letter-to-the-indian-government-calling-for-the-release-of-human-rights-defenders-at-risk/>

<sup>44</sup> Press briefing notes on India, Spokesperson for the UN High Commissioner for Human Rights: Liz Throssell, OHCHR, 6 July 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27270&LangID=E>

<sup>45</sup> OHCHR, Press Release - Bachelet dismayed at restrictions on human rights NGOs and arrests of activists in India, 20 October 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26398>.

including through the use of overly broad national security legislation..." and appealed to Indian authorities to "ensure that due process, including the right to a fair trial, is provided to all detained human rights defenders...".<sup>46</sup>

According to data provided by the Ministry of Home Affairs, the number of arrests made under UAPA have increased by nearly 75 percent between the years 2015 and 2019.<sup>47</sup> The data also shows that of the 5,922 people arrested under the UAPA between 2016 and 2019, only 132 were convicted.<sup>48</sup> This means that roughly 2.2 percent of arrests led to convictions, compared to the rates for ordinary crimes such as murder which in 2020 had conviction rates of just above 44 percent. Of the 2,642 cases pending under UAPA in 2020,<sup>49</sup> trials have been completed only in 128 cases (5.4 percent of the total),<sup>50</sup> and there have been only 27 convictions,<sup>51</sup> while the remaining 94.6 percent cases are still pending trial.<sup>52</sup> Pendency of cases resulting in prolonged detention of alleged accused persons and extensive delays in commencement of trial, combined with the low rate of conviction under UAPA, indicate that the process is effectively the punishment under this law.

### Impact of COVID-19 on Delays in Court Proceedings

The Indian penal system in practice is plagued by delays due to several years of backlog of cases in the courts, which leads to delays in court proceedings.<sup>53</sup> The effects of COVID-19 further restricted judicial functioning and impeded the right to fair trial of all prisoners, including of human rights defenders. Between March

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<sup>46</sup> Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on minority issues; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; members of the Working Group on the issue of discrimination against women in law and in practice; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; members of the Working group on arbitrary detention, "India: Terrorism charges are pretext to silence human rights defenders, say UN experts", 5 October 2018, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23686&LangID=E>

<sup>47</sup> Lok Sabha Unstarred Question No. 2486, Persons Arrested Under UAPA, Answer by Minister of State, Ministry of Home Affairs, G Kishen Reddy, 9 March 2021, available at <http://164.100.24.220/loksabhaquestions/annex/175/AU2486.pdf>; See The Wire Staff, "UAPA: 72% Rise in Arrests Between 2015 and 2019" *The Wire*, 10 March 2021, <https://thewire.in/government/uapa-72-rise-in-arrests-between-2015-and-2019>. Notably, a Writ Petition has been filed by former civil servants challenging the validity of UAPA in the Supreme Court. See <https://www.livelaw.in/top-stories/former-civil-servants-challenge-validity-of-uapa-supreme-court-issues-notice-harsh-mander-julio-ribeiro-wajahat-habibullah-185738>

<sup>48</sup> Syed Nassir Hussain, Rajya Sabha Unstarred Question 1013, People Detained Under UAPA, Answer by G Kishen Reddy, Minister of State in the Ministry of Home Affairs, 10 February 2021, available at <https://pqars.nic.in/annex/253/AU1013.pdf>

<sup>49</sup> National Crime Records Bureau, Crime in India 2020: Statistics Volume II, Ministry of Home Affairs, Government of India, available at <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%202.pdf>, page 863.

<sup>50</sup> *Ibid*, page 865.

<sup>51</sup> *Ibid*, page 866.

<sup>52</sup> *Ibid*, page 866.

<sup>53</sup> Arunav Kaul et al, "Deconstructing Delay: Analyses of Data from High Courts and Subordinate Courts", Daksh, September 2017, available at [https://www.dakshindia.org/Daksh\\_Justice\\_in\\_India/19\\_chapter\\_01.xhtml](https://www.dakshindia.org/Daksh_Justice_in_India/19_chapter_01.xhtml)



and June 2020, the courts were hearing only urgent matters,<sup>54</sup> through video conferencing,<sup>55</sup> with only the litigants along with their lawyers permitted in the courtroom.<sup>56</sup> After June 2020, courts resumed physical hearings and were functioning in a hybrid model of physical hearings and video conferencing hearings until the second wave of COVID-19 in April 2021. At that time, courts went back to virtual hearings. Since November 2021, the Delhi High Court and district courts commenced physical hearings and since April 2022, the Supreme Court has commenced physical hearings, although the option of choosing a virtual hearing is available in some cases.<sup>57</sup> As a result of COVID-19, hearings progressed at a slower pace.<sup>58</sup> This contributed to delayed bail hearings, including those of HRDs.

In addition to the limited functioning of courts, Indian prisons continue to be overcrowded and unsanitary, with little social distancing and capacity for consistent washing, which is essential to preventing further spread of COVID-19.<sup>59</sup> The National Campaign Against Torture (NCAT) in 2020 reported that out of the 1,350 prisons in India, COVID-19 infections were reported from at least 351 prisons between March 2020 until 31 August 2020.<sup>60</sup> At least eight of the 15 HRDs whose cases are discussed in this Report contracted COVID-19 in custody between March 2020 and October 2021 and HRD Stan Swamy, who also had Parkinsons, died after contracting COVID-19 on July 5 2021.<sup>61</sup>

The ICJ has selected two sets of cases – the Bhima Koregaon violence case of 2018 and the Delhi riots case of 2020 - to illustrate obstacles faced in access to justice for imprisoned human rights defenders as well as fair trial rights violations that detained human rights defenders face in India, exacerbated by Indian State's response to COVID-19 pandemic.

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<sup>54</sup> Notification by Supreme Court of India dated 13 March 2020 [https://scobserver-production.s3.amazonaws.com/uploads/beyond\\_court\\_resource/document\\_upload/384/Hearing\\_of\\_only\\_Urgent\\_Matters.pdf](https://scobserver-production.s3.amazonaws.com/uploads/beyond_court_resource/document_upload/384/Hearing_of_only_Urgent_Matters.pdf)

<sup>55</sup> Supreme Court of India, *In Re: Guidelines for Court Functioning through Video Conferencing during COVID- 19 Pandemic*, 2020 SCC Online SC 355, 06 April 2020.

<sup>56</sup> Supreme Court of India, Standard Operating Procedure for Ld. Advocate/Litigant-in-person for attending urgent hearing of a matter through video conferencing, 24 March 2020, [https://main.sci.gov.in/pdf/LU/23032020\\_153530.pdf](https://main.sci.gov.in/pdf/LU/23032020_153530.pdf).

<sup>57</sup> High Court of Delhi, Office Order: System of Hearing of Cases Before the Delhi High Court with effect from 08.11.2021, dated 29 October 2021 available at [https://www.livelaw.in/pdf\\_upload/publicnoticexberm7w0qf2-403184.pdf](https://www.livelaw.in/pdf_upload/publicnoticexberm7w0qf2-403184.pdf) and Supreme Court of India, Circular, dated 1 April 2022, available at [https://www.livelaw.in/pdf\\_upload/sc-sop-circular-413691.pdf](https://www.livelaw.in/pdf_upload/sc-sop-circular-413691.pdf)

<sup>58</sup> For instance, virtual hearings require five separate entities – the judge, court staff, the prosecution and defence lawyer as well as accused (in jail) to have adequate internet connection and ensuring connectivity of all five entities is often cumbersome. Further, reference to documents was made virtually over screen-share, which takes more time.

<sup>59</sup> HT Correspondent, "Tihar releases over 400 prisoners to 'reduce overcrowding' in light of Covid-19", *Hindustan Times*, 29 March 2020, <https://www.hindustantimes.com/delhi-news/over-400-inmates-released-from-tihar-jail-to-reduce-overcrowding-in-light-of-covid-19/story-SXSHk7J5wLL7IS1KYMg8cJ.html>.

<sup>60</sup> Suhas Chakma, "The Status Of COVID-19 In Indian Prisons" UNCAT, 15 September 2020, <http://www.uncat.org/by-country/india/the-status-of-covid-19-in-indian-prisons/>.

<sup>61</sup> HRDs contracting COVID-19 are Hany Babu, VV Rao, Stan Swamy, Sharjeel Imam, Mahesh Raut, Sagar Gorkhe, Ramesh Gaichor, and Stan Swamy. Discussed in Section III.

## Bhima Koregaon Case

On 31 December 2017, about 250 scheduled caste groups in India met in a conference, Elgaar Parishad, in Pune, Maharashtra for a gathering of activists, former judges and political leaders to discuss the Indian State's repressive practices, convened by former Supreme Court Judge Sawant.<sup>62</sup> The Pune police as well as the National Investigation Agency<sup>63</sup> allege that inflammatory speeches were made by the activists that day based on complaints registered by eye-witnesses.<sup>64</sup> The next day after the Elgaar Parishad event, on 1 January 2018, when the Dalit groups had collected to commemorate the bicentenary celebration of the Bhima Koregaon battle, violence broke out, when some groups, led by alleged Hindu ultra-nationalists, carrying saffron flags entered the arena, purportedly in response to the inflammatory speeches delivered at the 31 December 2017 event.<sup>65</sup> The violence on 1 January, 2018, led to the death of one Dalit person and injuries to several others.<sup>66</sup>

This led to an official written police complaint (FIR) by a Dalit woman, an eye witness, on 2 January, 2018.<sup>67</sup> Another FIR was filed on 8 January, 2018 by another eye witness and a Hindu nationalist, against six activists who had participated in the Elgar Parishad event on 31 December 2017, stating that activists at the Bhima Koregaon festival made provocative speeches leading to the violence.<sup>68</sup> This FIR alleged, among others, crimes of hate speech - promoting enmity between different groups on grounds of religion (S. 153A, IPC) and making statements likely to cause fear or alarm among the public, inducing a person to commit an offence against the State (S. 505(1)(b) IPC) as well as abetting commission of offence by the public (S. 117, IPC).<sup>69</sup> On 17 May 2018, Pune Police invoked UAPA and added to the FIR allegations under UAPA of participation in unlawful activities (S. 13, UAPA), terrorist act (S. 15, UAPA), raising funds for terrorist acts (S. 17, UAPA), conspiracy (S. 18, UAPA) recruiting of persons for terrorist act (S. 18B, UAPA), being a member of terrorist gang or organisation (S. 20, UAPA), giving support to a terrorist organisation (S. 39, UAPA) and raising funds for a terrorist organisation (S. 40, UAPA).<sup>70</sup>

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<sup>62</sup> Interview with retired Supreme Court Justice Sawant, "The Truth about the Elgaar Parishad What was it and who organised it?" Citizens for Justice and Peace, 01 September 2018, <https://cjp.org.in/the-truth-about-the-elgaar-parishad/>

<sup>63</sup> The National Investigation Agency (NIA) is India's counter-terrorist task force that came into existence with the enactment of the National Investigation Agency Act 2008 by the Parliament of India on 31 December 2008, which was passed after the 26/11 terror attack in Mumbai.

<sup>64</sup> Parth MN, "Tushar Damgude, man whose FIR spurred nationwide raids, reveres Sambhaji Bhide, attacks Left-wing ideology" Firstpost, 29 August 2018, <https://www.firstpost.com/india/tushar-damgude-man-whose-fir-spurred-nationwide-raids-reveres-sambhaji-bhide-attacks-left-wing-ideology-5066691.html>

<sup>65</sup> See Timeline of Bhima-Koregaon Cases and Status in Court, available at <https://indiacivilwatch.org/timeline-of-bhima-koregaon-cases/>

<sup>66</sup> Sharmeen Hakim, "Witness Before Probe Panel Accuses Sambhaji Bhide & Milind Ekbote Of Instigating Bhima Koregaon Riots" LiveLaw, 01 October 2021, <https://www.livelaw.in/news-updates/bhima-koregaon-witness-deposes-research-papers-incriminating-right-wing-leaders-pune-police-182839>.

<sup>67</sup> 02 January 2018 FIR no. 2/2018 Police Station Pimpri, Pune, filed by an eye-witness.

<sup>68</sup> 08 January 2018 FIR no. 4/2018 Police Station Vishrambagh, Pune was filed by Tushar Ramesh Damgude.

<sup>69</sup> *Ibid.*

<sup>70</sup> P. Agarwal, "Bhima-Koregaon FIR Didn't Mention UAPA, Do Cops Have Evidence Now?", *The Quint*, 04 September 2018, <https://www.thequint.com/news/india/bhima-koregaon-activists-arrest-uapa-act>

As of August 2022, 16 HRDs – including doctors, lawyers, academics, poets– associated with the Bhima Koregaon case remain charged under the UAPA in connection with the violence on 1 January 2018 at Bhima Koregaon.<sup>71</sup> The allegations were that they had played a role in organizing the Bhima Koregaon event, had alleged links with banned Maoist organizations, and around November 2018 an allegation of conspiring to assassinate Prime Minister Narendra Modi was added by the authorities.<sup>72</sup> Of these 16 people, 13 remain in pre-trial detention as of August 2022, while co-accused Stan Swamy, an 84 year old Jesuit priest detained on 8 October 2020, died in judicial custody in July 2021. He had been in poor health, but his condition worsened due to lack of medical care in prison.<sup>73</sup> Accused 80-year-old Varavara Rao has been released on permanent bail on medical grounds.<sup>74</sup> Accused Sudha Bharadwaj has also been released on default bail, i.e. on the basis of a bail application when her detention period of 90 days was over and as the chargesheet had also not been filed.<sup>75</sup>

Fourteen UN Special Rapporteurs (independent human rights experts appointed by the UN Human Rights Council) on 5 October 2018 in a joint statement expressed concern at laying of “terrorism charges” and continuing detention of Bhima Koregaon human rights defenders. They stressed that these charges were being “used to silence human rights defenders who promote and protect the rights of India’s Dalit, indigenous, and tribal communities”. The experts urged authorities to “ensure that due process, including the right to a fair trial, is provided to all detained human rights defenders, with a view to their prompt release.”<sup>76</sup>

#### Timeline of Arrests

Between June 2018 and October 2020, 16 arrests were made in relation to the Bhima Koregaon case, six of which were made after the COVID lockdown.

**06 June 2018** - The first arrests were made on 6 June 2018, where human rights lawyer Surendra Gadling, Dalit rights activist Sudhir Dhawale, Professors Rona Wilson and Shoma Sen, and activist Mahesh Raut were arrested by the Pune Police.<sup>77</sup>

**28 August 2018** - On 28 August 2018, poet Varavara Rao, lawyers Sudha Bhardwaj and Arun Ferreira, activists Gautam Navlakha and Vernon Gonsalves

<sup>71</sup> BK16 Campaign, India Civil Watch, available at

[https://indiacivilwatch.org/campaigns/ab\\_bhima-koregaon-campaign/](https://indiacivilwatch.org/campaigns/ab_bhima-koregaon-campaign/)

<sup>72</sup> Vishwas Kothari, “Plot to kill Modi’ in draft charges against 19 Elgar accused”, *The Times of India*, 19 December 2019, <https://timesofindia.indiatimes.com/india/plot-to-kill-modi-in-draft-charges-against-19-elgar-accused/articleshow/72877754.cms>

<sup>73</sup> Arun Ferreira, “How the system broke Stan Swamy: A cell mate recalls the activist’s last days in prison”, *Scroll.in*, 12 August 2021, <https://scroll.in/article/1002315/how-the-system-broke-stan-swamy-a-cell-mate-recalls-the-activists-last-days-in-prison>

<sup>74</sup> High Court of Bombay, *Dr.P.V. Varavara Rao v. National Investigation Agency & State of Maharashtra*, CrI.Appel.52/2021 in W.P. (CrI) 64/2021, order dated 21 February 2021

<sup>75</sup> Sharmeen Hakim, “Special NIA Court Paves Way For Sudha Bharadwaj’s Release in Bhima Koregaon Case, Sets Bail Conditions”, *LiveLaw*, 8 December 2021, <https://www.livelaw.in/news-updates/sudha-bharadwaj-bail-conditions-special-nia-court-bhima-koregaon-elgar-parishad-case-187189>

<sup>76</sup> *Supra Note 46.*

<sup>77</sup> S. Shantha, “The People’s Fighters: Meet the Five Arrested in the Bhima Koregaon Case” *The Wire*, 28 August 2018, <https://thewire.in/caste/meet-the-five-arrested-in-the-bhima-koregaon-case>

were arrested and placed under “house arrest”<sup>78</sup> by a special order of the Supreme Court of India.<sup>79</sup> Eventually, Sudha Bhardwaj, Vernon Gonsalves and Arun Ferreira were sent to house arrest on 26 October 2018.<sup>80</sup> Finally Sudha Bharadwaj was released on bail on 8 December 2021. Varavara Rao was also detained on 15 November 2018 until February 2021, when he was given bail on medical grounds.<sup>81</sup> Gautam Navlakha was taken into custody by the National Investigation Agency on 15 April 2020.<sup>82</sup>

**14 April 2020 – 9 October 2020** - In January 2020, the National Investigating Agency [NIA] took over the investigation from the Maharashtra police<sup>83</sup> and arrested activist Anand Teltumbde on 14 April 2020,<sup>84</sup> Delhi University Professor Hany Babu on 28 July 2020,<sup>85</sup> and activists – Ramesh Gaichor, Sagar Gorkhe and Jyoti Jagtap – on 8 September 2020.<sup>86</sup> Fr. Stan Swamy, the oldest activist among the group, aged 84, suffering from various medical ailments like Parkinson’s, was arrested on 09 October 2020.<sup>87</sup> All of the arrests were made by the NIA during the COVID-19 pandemic .

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<sup>78</sup> House arrest refers to confining a person’s movements within his house or any other place of choice. Apart from restricting communication, the person is also under constant police surveillance. The criminal laws in India have no provision to place a person under house arrest. According to the Code of Criminal Procedure, only two kinds of custody are possible – police custody or judicial remand. The court can pass such an order based on Article 142 of the Indian Constitution which grants the court power to pass any orders “necessary for doing complete justice in any cause or matter pending before it”. See Supreme Court, *Romila Thapar & Ors. V. UoI & Ors*, Writ Petition (Criminal)Diary No. 32319/2018, dated August 29, 2018 at [https://drive.google.com/file/d/1q90ETLeNF0\\_SsOYnivsHfma6THN99r6u/view](https://drive.google.com/file/d/1q90ETLeNF0_SsOYnivsHfma6THN99r6u/view)

<sup>79</sup> *Supra Note 70*.

<sup>80</sup> Frontline Defenders, 26 October 2018 - Human rights defenders remanded in police custody <https://www.frontlinedefenders.org/en/case/arrest-sudha-bhardwaj#case-update-id-8500>

<sup>81</sup> Bombay High Court, P Varavara Rao v. NIA & Anr. Criminal Appellate Jurisdiction Criminal Appeal No.52 Of 2021 (Criminal Appeal No.143 Of 2020), para. 7 and 8.

<sup>82</sup> V. Singh & S. Saigal, “Gautam Navlakha surrenders before NIA in Elgar Parishad case” *The Hindu*, 14 April 2020, <https://www.thehindu.com/news/national/gautam-navlakha-surrenders-before-nia-in-bhima-koregaon-case/article31338641.ece>

<sup>83</sup> *Ibid*.

<sup>84</sup> Parth MN, “India arrests activist Anand Teltumbde over 2018 caste violence”, *Al Jazeera*, 14 April 2020, <https://www.aljazeera.com/news/2020/4/14/india-arrests-activist-anand-teltumbde-over-2018-caste-violence>

<sup>85</sup> S. Shantha, “Elgar Parishad: NIA Arrests Hany Babu, 'Pressured Him to Implicate Colleagues, Others,' Says Wife”, *The Wire*, 28 July 2020, <https://thewire.in/government/nia-bhima-koregaon-hany-babu-arrest-gn-saibaba>

<sup>86</sup> A. Bhardwaj, “NIA arrests 3 members of Kabir Kala Manch for ‘inciting violence’ in Bhima Koregaon”, *The Print*, 08 September 2020, <https://theprint.in/india/nia-arrests-3-members-of-kabir-kala-manch-for-inciting-violence-in-bhima-koregaon/498241/>.

<sup>87</sup> A. Mandhani, “2 years, 3 charge sheets & 16 arrests – Why Bhima Koregaon accused are still in jail” *The Print*, 31 October 2020, <https://theprint.in/india/2-years-3-charge-sheets-16-arrests-why-bhima-koregaon-accused-are-still-in-jail/533945/>

The Pune Police filed the first charge-sheet<sup>88</sup> on 15 November 2018,<sup>89</sup> alleging that the accused defenders in the case were active members of the banned Communist Party of India (Maoist) [CPI(M)],<sup>90</sup> based on publicly available literature on CPI(M) and several unsigned letters allegedly recovered from the electronic devices seized from the accused defenders.<sup>91</sup> The Pune police filed a supplementary charge-sheet<sup>92</sup> on 21 February 2019 alleging the enrolment of Vernon Gonsalves and Arun Ferreira in banned CPI(M) and the allegation that the organization Indian Association of People's Lawyers (IAPL)<sup>93</sup> is a front organization for the CPI(M) being run by Vernon and Arun.<sup>94</sup> The charge-sheet alleged that the lawyer Sudha Bhardwaj was working through IAPL to accomplish the object of CPI(M) to destabilise the country.<sup>95</sup> The charge-sheet places strong reliance on "objectionable literature" recovered by police, some of which is publicly available literature. A third charge-sheet was filed by the National Investigation Agency(NIA) on 09 October 2020 claiming that the accused Anand Teltumbde, Gautam Navlakha, Hany Babu, Sagar Gorkhe, Ramesh Gaichor, Jyoti Jagtap and Stan Swamy had conspired with other accused persons to further the ideology of the banned organization CPI (M), abetted violence (S.107,IPC), brought into hatred and incited disaffection towards the government (S.124A,IPC).<sup>96</sup>

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<sup>88</sup> A chargesheet is a final report prepared by the investigating officer or law enforcement agencies after the completion of necessary investigation for proving the accusation of a crime in a criminal court of law and includes all the materials regarding the investigation which are collected under Chapter XII of the CrPC. The chargesheet is submitted by the police officer in order to prove that the accused is connected with the offences they are charged with or has committed any offence punishable under the penal statute(s) in India. The chargesheet includes all the stringent records, right from the lodging the FIR, which is the commencement of the investigation procedure till the completion of the investigation and preparation of the final report under Section 173 of the CrPC. As such, the chargesheet acts as a report that informs the magistrate that on the investigation of the offence, sufficient evidence has been found for the court to go further in the case and inquire into the offence.

<sup>89</sup> S. Shantha, "Bhima Koregaon: In 5,000-Page Chargesheet, Pune Police Say Activists Incited Violence", *The Wire*, 16 November 2018, <https://thewire.in/rights/bhima-koregaon-case-pune-police-chargesheet>

<sup>90</sup> The Indian government, led by the United Progressive Alliance, banned the CPI (Maoist) under the UAPA as a terrorist organization on 22 June 2009 on ground that it aimed aims to overthrow the Indian state through people's war. See Ministry of Home Affairs, Banned Organisation - <https://www.mha.gov.in/banned-organisations>

<sup>91</sup> *Supra Note 87*.

<sup>92</sup> Supplementary charge sheet is additional material collected against the accused - Karnataka High Court, *Santosh v. State of Karnataka*, Criminal Petition No. 101403 of 2021, decided on 03 August 2021.

<sup>93</sup> IAPL is a member an international organisation called International Association of People's Lawyer founded in 2004 to bring together lawyers involved in the legal support of collective struggles for peoples' rights and in situations of gross rights violations on a collective platform. See <https://www.theleaflet.in/indian-association-of-peoples-lawyers-condemns-maharashtra-polices-threat-to-arrest-justice-hosbet-suresh/>

<sup>94</sup> Sonam Saigal, "Two arrested activists are CPI Maoist cadres" *The Hindu*, 14 March 2019, <https://www.thehindu.com/news/cities/mumbai/two-arrested-activists-are-cpi-maoist-cadres/article26525914.ece>.

<sup>95</sup> Scroll Staff, "Bhima Koregaon case: Pune police file supplementary chargesheet against five activists", *Scroll.in*, 21 February 2019, <https://scroll.in/latest/914135/bhima-koregaon-case-pune-police-file-supplementary-chargesheet-against-five-activists>.

<sup>96</sup> ET Bureau, "NIA files supplementary charge sheet in Bhima Koregaon case", *Economic Times*, 09 October 2020, [https://economictimes.indiatimes.com/news/politics-and-nation/nia-files-supplementary-charge-sheet-in-bhima-koregaon-case/articleshow/78579054.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/politics-and-nation/nia-files-supplementary-charge-sheet-in-bhima-koregaon-case/articleshow/78579054.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).



As stated by 14 UN Special Rapporteurs led by the UN Special Rapporteur on Human Rights Defenders on 15 July 2021, “[a]ll have been active in peacefully defending human rights, including those of marginalised and minority communities, political prisoners, and women, and their arrests appear to be directly related to their human rights work.”<sup>97</sup> They have recognized in respect of these detainees that “defenders working on environmental, land or indigenous people’s rights are among the most vulnerable to being targeted.”<sup>98</sup>

For the purpose of this Report, the cases of the following activists are highlighted owing to multiple violations of their rights, in particular, denial of bail and refusal of medical care while in custody: Sudha Bhardwaj, Surendra Gadling, Stan Swamy, Varavara Rao, Gautam Navlakha, Rona Wilson, and Hany Babu.

### **Surendra Gadling**

Surendra Gadling, aged 50, is a human rights lawyer and a Dalit rights activist based in Nagpur, Maharashtra. The IAPL where Surendra Gadling is the General Secretary, alleges that the main reason for the Indian government to target Gadling is connected to his taking up cases on behalf of poor Dalit youth, who have been arrested in false cases.<sup>99</sup> Gadling was arrested on 6 June 2018 alongwith Sudhir Dhawale, Shoma Sen, Rona Wilson and Mahesh Raut by the NIA on the ground of his alleged involvement in the Bhima Koregaon violence.<sup>100</sup> His default bail application was rejected in June 2022.<sup>101</sup> Currently, Surendra Gadling remains in custody.

### **Rona Wilson**

Rona Wilson, aged approximately 50 years, is an activist, researcher and secretary of the Committee for the Release of Political Prisoners (CRPP) in Delhi. He has worked with people accused under the UAPA, including the legal team of GN Saibaba,<sup>102</sup> who has been convicted on the ground of having links with Naxalites.<sup>103</sup> Rona was arrested on 6 June 2018 by the Pune Police on the ground that he allegedly played a role in organizing the Bhima Koregaon event and was associated with the banned CPI (M) which funded the event. Rona has claimed that the allegations against him are based on fabricated evidence.<sup>104</sup> Rona Wilson was granted temporary bail for 14 days for his father’s last rites in September 2021

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<sup>97</sup> *Supra* Note 46.

<sup>98</sup> UN Special Rapporteur on the situation of human rights defenders et al, “India: Death in custody of priest Stan Swamy is devastating”, 15 July 2021, available at

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27313&LangID=E>

<sup>99</sup> IAPL press note about arrest of Advocate Gadling & other people’s activists, 08 June 2018, <http://sanhati.com/articles/18765/>

<sup>100</sup> Frontline Defenders, “Surendra Gadling arrested”,

<https://www.frontlinedefenders.org/en/case/surendra-gadling-arrested>

<sup>101</sup> Elgar Parishad-Bhima Koregaon case: Shoma Sen, Rona Wilson, 3 other accused denied default bail”, *Free Press Journal*, June 29 2022, available at <https://www.freepressjournal.in/legal/elgar-parishad-bhima-koregaon-case-shoma-sen-rona-wilson-3-other-accused-denied-default-bail>

<sup>102</sup> G. N. Saibaba, is an Indian scholar, writer, human rights activist, and professor. He is currently serving life imprisonment for his links with banned left wing extremist organizations.

<sup>103</sup> Vidya, “Bhima Koregaon case: Who is Rona Wilson and what does he want?” *India Today*, 11 February 2021, <https://www.indiatoday.in/india/story/bhima-koregaon-case-who-is-rona-wilson-what-does-he-want-1768037-2021-02-11>

<sup>104</sup> Arsenal Computing is a US-based independent digital forensics firm. In April 2021, Arsenal Computing provided a second report with evidence to show how more than 22 files were planted on activist Rona Wilson’s computer, one of the key-accused in the Bhima Koregaon cases.

and is currently in custody,<sup>105</sup> his default bail application being denied in June 2022.<sup>106</sup>

### **Sudha Bharadwaj**

Sudha Bharadwaj, aged approximately 60 years, is a trade unionist and a human rights lawyer. She has undertaken representation in cases concerning the diversion of forest land for mining that allegedly involved due process violations and defending the interests of small enterprises.<sup>107</sup> In all these cases, she has represented people whose rights have allegedly been violated. She was arrested in connection with the Bhima Koregaon violence on 28 August, 2018, by the Pune Police on charges of her involvement with the banned CPI (M) under the UAPA.<sup>108</sup> She was initially kept under house arrest for two months till October 2018 and was sent to judicial custody in Byculla jail on 28 October 2020.<sup>109</sup> Sudha has been denied bail several times.<sup>110</sup> On December 8, 2021, she was finally released on default bail, i.e. filing an application when her detention period was over – 90 days in this case – and the chargesheet had also not been filed.<sup>111</sup>

### **Gautam Navlakha**

Gautam Navlakha, aged approximately 70 years, human rights defender and journalist, has been critical of human rights violations committed in Kashmir and has produced analysis on the impact of heavy militarization on the economy and on the lives of people in Kashmir as well as on the sociology and organization of Maoist insurgency.<sup>112</sup> He was arrested on 28 August 2018 on the ground of alleged ties with banned Maoist organizations and kept under house-arrest for 34 days in Delhi, after which the Delhi High Court quashed his arrest as unlawful.<sup>113</sup> In January 2020, an FIR against Gautam was re-registered and he surrendered before the NIA on 14 April 2020.<sup>114</sup>

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<sup>105</sup> Sonam Saigal, "Rona Wilson granted 14 days bail for father's last rites", *The Hindu*, September 7, 2021, available at

<https://www.thehindu.com/news/national/other-states/rona-wilson-granted-14-days-bail-for-fathers-last-rites/article36340417.ece>

<sup>106</sup> *Supra* Note 101.

<sup>107</sup> Smita Gupta, "Why The State Fears My Friend, Sudha Bharadwaj" *The Wire*, 28 August 2020, <https://thewire.in/rights/sudha-bharadwaj-bhima-koregaon-case-arrest-bail-health>

<sup>108</sup> Special Correspondent, "Five arrested for 'Maoist links' in nationwide raids" *The Hindu*, 29 August 2018, <https://www.thehindu.com/news/national/five-arrested-for-maoist-links-in-nationwide-raids/article24804371.ece>

<sup>109</sup> Scroll Staff, "After dramatic midnight hearing, activist Sudha Bharadwaj placed under house arrest till August 30", *Scroll.in*, 28 August 2018, <https://scroll.in/latest/892295/activist-sudha-bharadwaj-taken-into-custody-despite-stay-on-transit-remand-by-punjab-haryana-hc>

<sup>110</sup> Rejected by the Pune Sessions Court/Trial Court on 28 October 2018; Medical bail rejected by the Special NIA Court/trial Court on 29 May 2020; Medical bail rejected by the Bombay High Court on 28 August 2020; Medical bail asked to withdraw by the Supreme Court on 24 September 2020; Medical plea rejected by the Bombay High Court on 21 May 2021.

<sup>111</sup> *Supra* Note 75.

<sup>112</sup> Majid Maqbool, "10 Must-Read Essays on Kashmir by Gautam Navlakha — curated by Majid Maqbool", *Inverse Journal*, 17 April 2020, <https://www.inversejournal.com/2020/04/17/10-must-read-essays-on-kashmir-by-gautam-navlakha-curated-by-majid-maqbool/>.

<sup>113</sup> High Court of Delhi, *Gautam Navlakha v. State (NCT of Delhi) & Ors.*, W.P. (Cr.) 2599/2018

<sup>114</sup> Press Trust of India, "SC rejects Gautam Navlakha & Anand Teltumbde's anticipatory bail in Bhima Koregaon case" *The Print*, 16 March 2020, <https://theprint.in/india/sc-rejects-gautam-navlakha-anand-teltumbdes-anticipatory-bail-in-bhima-koregaon-case/382114/>.

Since 12 October 2021, Gautam has been kept in solitary confinement,<sup>115</sup> and his plea for transferring to house arrest was rejected on 26 April 2022.<sup>116</sup>

### **Hany Babu**

Hany Babu, aged approximately 55 years, is an associate professor of English at Delhi University. An anti-caste activist, he is the secretary of Academic Forum for Social Justice, involving lower caste teachers. He has collected data to highlight the inefficiencies with regard to education, particularly the implementation of State policies for students belonging to disadvantaged caste groups. Before his arrest, he was advocating on behalf of GN Saibaba, a professor convicted for alleged links with the Maoist movement.<sup>117</sup> Hany Babu was arrested on 28 July 2020 by the NIA in Delhi,<sup>118</sup> accused of being a co-conspirator in the Bhima Koregaon case and propagating Maoist activities and ideologies, under the UAPA.<sup>119</sup> While hearing his interim bail plea, the Bombay High Court on 19 May 2021 directed the Maharashtra prison department to transfer him to a private hospital on medical grounds at the expense of his family.<sup>120</sup> He was released from hospital on 18 August 2021 and is back in prison.<sup>121</sup> His bail application has been rejected several times, including on 21 February 2022.<sup>122</sup> As of August 2022, the Bombay High Court has concluded hearings on his application for default bail and has reserved its order.<sup>123</sup>

### **Stan Swamy**

Stan Swamy, 84 years old at the time of arrest was a Jesuit priest and a tribal rights activist for several decades. He was the last activist to have been arrested on 9 October 2020 by the NIA.<sup>124</sup> Suffering from various ailments, including Parkinson's disease, for the last decade, he was admitted to Holy Family Hospital after direction from Bombay High Court.<sup>125</sup> He died on 5 July 2021 shortly after

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<sup>115</sup> Sonam Saigal, "Bombay HC dismisses Gautam Navlakha's plea seeking transfer to house arrest", *The Hindu*, April 26 2022, available at

<https://www.thehindu.com/news/national/other-states/bombay-hc-dismisses-gautam-navlakhas-plea-seeking-transfer-to-house-arrest/article65356720.ece>

<sup>116</sup> *Ibid.*

<sup>117</sup> "Guilty by association – A profile of Hany Babu" Dalit Camera, 18 January 2021,

<https://www.dalitcamera.com/guilty-by-association-a-profile-of-hany-babu/>.

<sup>118</sup> *Supra Note 85.*

<sup>119</sup> S. Yamunan, "Bhima Koregaon case: NIA summons Delhi University professor Hany Babu to Mumbai" *Scroll.in*, 12 July 2020, <https://scroll.in/latest/967287/bhima-koregaon-case-nia-summons-delhi-university-professor-hany-babu-to-mumbai>)

<sup>120</sup> S. Modak, "Elgar Parishad case: Status of medical bail pleas of other accused" *The Indian Express*, 06 July 2021, <https://indianexpress.com/article/india/elgaar-parishad-case-status-of-medical-bail-pleas-of-other-accused-7390742/>

<sup>121</sup> "Hany Babu fit for discharge from hospital", *Times of India*, August 18, 2021, available at <https://timesofindia.indiatimes.com/city/mumbai/hany-babu-fit-for-discharge-from-hospital/articleshow/85412733.cms>

<sup>122</sup> "No bail; 'prima facie evidence Hany Babu part of Maoist outfit': court", *Indian Express*, February 22, 2022, available at

<https://indianexpress.com/article/cities/mumbai/no-bail-prima-facie-evidence-hany-babu-part-of-maoist-outfit-court-7784612/>

<sup>123</sup> "Elgar Parishad case: HC concludes hearing of Hany Babu's bail plea", *Hindustan Times*, August 29 2022, available at

<https://www.hindustantimes.com/cities/mumbai-news/elgar-parishad-case-hc-concludes-hearing-of-hany-babu-s-bail-plea-101661789428003.html>

<sup>124</sup> S. Shantha, "NIA Arrests 83-Year-Old Tribal Rights Activist Stan Swamy in Elgar Parishad Case" *The Wire*, 08 October 2020, <https://thewire.in/rights/stan-swamy-arrested-elgar-parishad-case>

<sup>125</sup> S. Saigal, "Bombay HC directs govt. to shift Stan Swamy from jail to Holy Family Hospital" *The Hindu*, 28 May 2021, <https://www.thehindu.com/news/cities/mumbai/bombay-hc-directs-govt-to-shift-stan-swamy-from-jail-to-holy-family-hospital/article34664507.ece>



testing positive for COVID-19 while in judicial custody, one day before his bail hearing before the Bombay High Court.<sup>126</sup> Stan Swamy's bail had been rejected twice by the NIA court in October 2020 and March 2021.<sup>127</sup> Commenting on his death, the UN Special Rapporteur on Human Rights defender said the death in custody of Swamy, "a renowned human rights and social justice advocate for over four decades, will forever remain a stain on India's human rights record. There is no excuse, ever, for a human rights defender to be smeared as a terrorist, and no reason they should ever die the way Father Swamy died, accused and detained, and denied his rights".<sup>128</sup>

### **Varavara Rao**

Varavara Rao, aged approximately 81 years, is an Indian Telugu-poet arrested under the Bhima Koregaon case. His work has been banned for periods of time on the grounds of alleged sympathy to Maoist causes.<sup>129</sup> Varavara Rao was first arrested in 1973 by the Andhra Pradesh government under the then Maintenance of Internal Security Act (MISA) on charges of fuelling violence with his writings. On 28 August 2018, Rao was arrested from his residence in Hyderabad on the allegation of plotting to kill the Indian Prime Minister on ground of his association with other co-accused persons' alleged involvement in the Bhima Koregaon violence of 1 January 2018. The charges stem from speeches delivered at the Elgar parishad event of 31 December 2017, which were alleged to have incited the violence the next day.<sup>130</sup> Rao is currently one of two HRD accused to have been granted bail. Rao was granted bail on medical grounds, which has been extended several times by the Bombay High Court.<sup>131</sup> However, his application for permanent medical bail was rejected by the Bombay High Court on April 13, 2022.<sup>132</sup> Finally, on 9 August 2022, Varavara Rao was granted permanent medical bail by the Supreme Court on account of his age, medical conditions and the delay in the commencement of trial.<sup>133</sup>

## **Protests Against Citizenship (Amendment) Act and Delhi Riots Case**

In December 2019, the Indian Parliament passed the Citizenship (Amendment) Act (CAA) amending the Indian Citizenship Act to expedite the process for citizenship for migrants who are Hindu, Sikh, Jain, Parsi, Buddhist, and Christian from neighboring countries of Afghanistan, Bangladesh, and Pakistan, if they had

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<sup>126</sup> *Supra Note 98.*

<sup>127</sup> Medical bail rejected by Special NIA Court/ Trial Court on 22 October 2020; Bail on merits rejected by Special NIA Court/ Trial Court on 23 March 2021.

<sup>128</sup> *Supra Note 98.*

<sup>129</sup> Paromita Chakrabarti, "Varavara Rao: Understanding his politics, literary work and the Elgar Parishad case" *Indian Express*, 22 July 2020, <https://indianexpress.com/article/explained/varavara-rao-politics-jail-coronavirus-6510434/>

<sup>130</sup> *Ibid.*

<sup>131</sup> Vidya, "Elgar Parishad case: Varavara Rao needn't surrender till Dec 2, says Bombay HC", *India Today*, 18 November 2021, <https://www.indiatoday.in/law/story/elgar-parishad-bombay-hc-extends-varavara-rao-medical-bail-till-dec-2-1878323-2021-11-18>

<sup>132</sup> K. Dodhiya, "Bombay HC refuses permanent bail to Varavara Rao, extends temporary one for 3 months", *Hindustan Times*, April 13 2022, available at <https://www.hindustantimes.com/cities/mumbai-news/bombay-hc-refuses-permanent-bail-to-varavara-rao-extends-temporary-one-for-3-months-101649861119398.html>

<sup>133</sup> Supreme Court of India, *Dr. P. Varavara Rao v. National Investigation Agency & Anr*, Criminal Appeal No.1206 2022, 10 August 2022, available at [https://www.livelaw.in/pdf\\_upload/1888520222337164order10-aug-2022-430229.pdf](https://www.livelaw.in/pdf_upload/1888520222337164order10-aug-2022-430229.pdf)

entered India before 2014 following religious persecution.<sup>134</sup> The countries included are all Muslim-majority countries. While the law gave protected status to these religious groups, it excluded all Muslims from its scope.<sup>135</sup> The passage of this law resulted in nation-wide protests as the law violates rights to equality and non-discrimination.<sup>136</sup>

In February 2020, the protests organized in Delhi against the CAA became violent in north-east Delhi in Muslim majority neighborhoods, with clashes between Hindu and Muslim persons, leading to the death of over 53 people, the majority of whom are Muslims.<sup>137</sup> According to media sources, more than 200 people were injured and shops and houses were set on fire.<sup>138</sup> Some 15 activists were subsequently arrested in 2020, throughout the COVID-19 pandemic, even though there was a nation-wide lockdown from 22 March 2020 to 31 May 2020.<sup>139</sup>

Over 700 FIRs were filed by the police against student activists and other individuals.<sup>140</sup> On 6 March 2020, FIR 59/2020 was filed by the Special Cell Delhi Police<sup>141</sup> (Delhi riots FIR), accusing 15 youth activists of breaches of various sections of the IPC such as waging a war against the state (S. 121, IPC), rioting with a deadly weapon (S. 148, IPC) and being part of a conspiracy (S. 120B, IPC), as well as provisions under the UAPA, the Arms Act and the Prevention of Damage to Public Property Act.<sup>142</sup> Under the Delhi riots FIR, arrests were carried out by the Delhi police during the nation-wide lockdown from March 2020 till May 2020 and during the pandemic till October 2020.

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<sup>134</sup> In India, citizenship is regulated by the Citizenship Act, 1955. The Act specifies that citizenship may be acquired in India through five methods – by birth in India, by descent, through registration, by naturalisation (extended residence in India), and by incorporation of territory into India. See, The Citizenship (Amendment) Act, 2019, Section 2.

<sup>135</sup> The Citizenship (Amendment) Act, 2019, Section 2.

<sup>136</sup> A. Goel, "Nationwide protests against CAA, NRC are noisy and chaotic but vital to furthering constitutionalism" *Firstpost*, 31 December 2019, <https://www.firstpost.com/india/nationwide-protests-against-citizenship-amendment-act-nrc-are-noisy-and-chaotic-but-vital-to-furthering-interests-of-constitutionalism-7845211.html>; ICJ, Press Release: India: Authorities must cease the excessive use of force and ill-treatment of Citizenship (Amendment) Act 2019 protestors, 16 December 2019, available at <https://www.icj.org/india-authorities-must-cease-the-excessive-use-of-force-and-ill-treatment-of-citizenship-amendment-act-2019-protestors/>

<sup>137</sup> The Wire Staff, "Delhi Riots Death Toll at 53, Here Are the Names of the Victims" *The Wire*, 06 March 2020, <https://thewire.in/communalism/delhi-riots-identities-deceased-confirmed>.

<sup>138</sup> Press Trust of India, "It's Official: Police Says 53 Dead, 200+ Injured, 2200 Arrests in Delhi Riots" *The Wire*, 08 March 2020, <https://thewire.in/government/delhi-riots-official-toll-hurt-cases>; BS Webteam, "Delhi riots Highlights: 654 cases lodged, 1820 detained so far, says Police", *Business Standard*, March 6, 2020, available at

[https://www.business-standard.com/article/current-affairs/delhi-riots-live-death-toll-rises-in-north-east-delhi-violence-delhi-police-on-caa-protests-hindu-muslim-clash-120030200131\\_1.html](https://www.business-standard.com/article/current-affairs/delhi-riots-live-death-toll-rises-in-north-east-delhi-violence-delhi-police-on-caa-protests-hindu-muslim-clash-120030200131_1.html)

<sup>139</sup> The first lockdown in India was announced on 24 March 2020 for an initial period of 21 days that ended on 14 April 2020. The second lockdown was announced right after from 15 April 2020 to 03 May 2020, followed by the third one from 04 May 2020 to 17 May 2020 and the last one from 18 May 2020 to 31 May 2020, Ministry of Home Affairs, Government of India, COVID lockdown notifications.

<sup>140</sup> The Hindu Net Desk, "Parliament proceedings live | 700 FIRs registered; 2647 people detained/arrested in connection with Delhi violence: Home Minister." *The Hindu*, 11 March 2020, <https://www.thehindu.com/news/national/parliament-live-march-11-2020/article31037560.ece>

<sup>141</sup> The Special Cell of the Delhi Police has been established in order to prevent, detect and investigate cases of terrorism, organized crime and other serious crimes in Delhi.

<sup>142</sup> Jeev Prakash Sharma, "Delhi Riots 2020: Here's Why FIR No. 59 Is So Crucial To The Case" *Outlook India*, 17 September 2020, <https://www.outlookindia.com/website/story/india-news-delhi-riots-2020-heres-why-fir-no-59-is-so-crucial-to-the-case/360456>

The analysis focuses on the arrests of student activists who were detained by the authorities in relation to the anti-CAA protests and the Delhi riots for their involvement in organizing and leading protests against the CAA in various parts of the country, primarily in Delhi. In some instances this may have constituted impermissible interferences with the exercise of their rights to freedom of expression and peaceful assembly provided for under constitutional law and ICCPR Articles 19 and 21.<sup>143</sup>

12 UN independent experts jointly stressed that “[t]hese defenders, many of them students, appear to have been arrested simply because they exercised their right to denounce and protest against the CAA (Citizenship Amendment Act), and their arrest seems clearly designed to send a chilling message to India’s vibrant civil society that criticism of government policies will not be tolerated.” The experts expressed concern that authorities were invoking counter-terrorism or national security legislation, and using procedural police powers, to deny bail to protesters and issue charges carrying heavy sentences. They urged the government to “immediately release all human rights defenders who are currently being held in pre-trial detention without sufficient evidence, often simply on the basis of speeches they made criticising the discriminatory nature of the CAA.” They expressed concern that despite the Supreme Court order to decongest prisons due to COVID-19, “protest leaders continue to be detained” stating that “[t]he reported spread of the virus in Indian prisons makes their immediate release all the more urgent.”<sup>144</sup>

This Report evaluates the cases of– Natasha Narwal, Devangana Kalita, Asif Iqbal, Sharjeel Imam, Khalid Saifi, Umar Khalid, Ishrat Jahan and Safoora Zargar, all of whom were charged under multiple FIRs for the same incidents and on similar allegations.<sup>145</sup> Except for the cases of Safoora, Natasha, Devangana, Asif and Ishrat who were granted bail in FIRs under the Indian Penal Code, others continue to remain incarcerated in custody in Delhi Riots FIR in which UAPA has been invoked.<sup>146</sup>

The UN Special Procedures recognized that at least eight among the 11 cases “include serious allegations of human rights violations, several relating to due process failings during arrest and detention, as well as allegations of torture and ill-treatment.”<sup>147</sup>

### **Devangana Kalita and Natasha Narwal**

Devangana Kalita and Natasha Narwal, founding members of the Delhi feminist collective Pinjra Tod, were taken into custody on 23 May 2020.<sup>148</sup> Four FIRs were filed against Devangana on charges of allegedly being part of a pre-meditated conspiracy to cause riots (S. 120B, IPC), rioting with a deadly weapon (S.148,

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<sup>143</sup> Constitution of India, Art. 19(1) All citizens shall have the right(a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions....

<sup>144</sup> OHCHR, “UN experts urge India to release protest leaders” 26 June 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26002&LangID=E>

<sup>145</sup> S. Yamunan, “How Delhi Police is using UAPA and charging riots accused in multiple cases to keep them in jail” *Scroll.in*, 25 Jun 2020, <https://scroll.in/article/965573/how-delhi-police-is-using-uapa-and-charging-riots-accused-in-multiple-cases-to-keep-them-in-jail>

<sup>146</sup> *Ibid.*

<sup>147</sup> *Supra Note 144.*

<sup>148</sup> The Wire Staff, “Anti-CAA Pinjra Tod Activist Arrested for Third Time in 10 Days” *The Wire*, 01 June 2020, <https://thewire.in/rights/anti-cao-pinjra-tod-devangana-kalita-arrest>.

IPC) along with sections of the UAPA, Arms Act and Prevention of Damage to Public Property Act (PDPP Act).<sup>149</sup> Three FIRs were filed against Natasha. Natasha's bail order describes the main allegations as her involvement in "instigating the local population in certain Muslim dominated areas in Delhi, particularly women, to protest against the Citizenship Amendment Act 2019... by allegedly seeking to incite feelings of persecution". In addition, it mentions her participation in a "so-called larger conspiracy to commit certain offences that are subject matter of the subject FIR, which also led to riots that occurred in the North-East part of Delhi between 22.02.2020 and 26.02.2020"<sup>150</sup>

They were finally granted bail on 15 June 2021 by the Delhi High Court on the grounds that there was no reason to believe or any reasonable apprehension that they would either flee from justice, or tamper with evidence, or would otherwise attempt to frustrate trial.<sup>151</sup> While granting bail, the court stated that "*it seems, that in its anxiety to suppress dissent, in the mind of the State, the line between the constitutionally guaranteed right to protest and terrorist activity seems to be getting somewhat blurred. If this mindset gains traction, it would be a sad day for democracy*".<sup>152</sup>

### **Asif Iqbal Tanha**

Asif Iqbal Tanha, student and an anti-Citizenship Amendment Act activist, was taken into custody on 20 May 2021. He has been charged with being a member of an unlawful assembly (Section 142, IPC), involvement in rioting with a deadly weapon (Section 148, IPC), attempt to commit culpable homicide (Section 308,IPC), assaulting a public servant from discharging his duty (Section 353, IPC) and premeditated criminal conspiracy (Section 120B IPC).<sup>153</sup> Asif was granted bail on 15 June 2021 by the Delhi High Court on the ground that "*the three cardinal concerns against grant of bail pending trial, namely of evidence tampering, witness*

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<sup>149</sup> Details of FIRs filed against HRD Devangana Kalita - FIR No. 250/2019 dated 21.12.2019 registered at P.S.: Daryaganj; FIR No. 48/2020 dated 24.02.2020 registered at P.S.: Jafrabad; FIR No. 50/2020 dated 26.02.2021 registered at P.S.: Jafrabad; and FIR No. 59/2020 dated 06.03.2020 registered at P.S.: Crime Branch.

<sup>150</sup> High Court of Delhi, *Natasha Narwal v. State of Delhi NCT*, CRL.A. 82/2021, 15 June 2021, para 3, [https://www.livelaw.in/pdf\\_upload/natasha-narwal-bail-order-delhi-high-court-395020.pdf](https://www.livelaw.in/pdf_upload/natasha-narwal-bail-order-delhi-high-court-395020.pdf) page 2; Details of FIRs filed against HRD Natasha Narwal - FIR No. 48/2020 dated 24 February 2020 registered at P.S.: Jafrabad; FIR No. 50/2020 dated 26 February 2021 registered at P.S.: Jafrabad; and FIR No. 59/2020 dated 06 March 2020 registered at P.S.Crime Branch.

<sup>151</sup> High Court of Delhi, *Devangana Kalita v. State of NCT of Delhi*, Crl.A.90/2021, Judgment dated 15 June 2021; High Court of Delhi, *Natasha Narwal v. State of NCT of Delhi*, Crl.A.82/2021, Judgment dated 15 June 2021.

<sup>152</sup> High Court of Delhi, *Devangana Kalita v State of NCT of Delhi*, Crl.A. 90/2021 on 15 June 2021, [https://www.livelaw.in/pdf\\_upload/devangana-kalita-bail-order-395018.pdf](https://www.livelaw.in/pdf_upload/devangana-kalita-bail-order-395018.pdf); *Natasha Narwal v State of NCT of Delhi*, Crl.A. 82/2021 on 15 June 2021, [https://www.livelaw.in/pdf\\_upload/natasha-narwal-bail-order-delhi-high-court-395020.pdf](https://www.livelaw.in/pdf_upload/natasha-narwal-bail-order-delhi-high-court-395020.pdf); *Asif Iqbal Tanha v. State of NCT of Delhi*, on 15 June 2021, [https://www.livelaw.in/pdf\\_upload/asif-iqbal-tanha-ajb15062021crla392021105447-1-395008.pdf](https://www.livelaw.in/pdf_upload/asif-iqbal-tanha-ajb15062021crla392021105447-1-395008.pdf).

<sup>153</sup> Details of FIRs filed against HRD Asif Iqbal Tanha - FIR No. 298/2019 dated 16 December 2019 registered at P.S.: Jamia Nagar; FIR No. 59/2020 dated 06 March 2020 registered at P.S.: Crime Branch; India. 2020. *Jamia Millia student Asif Tanha arrested for role in December Delhi riots case, booked under UAPA*. <https://www.timesnownews.com/mirror-now/in-focus/article/jamia-millia-student-asif-tanha-arrested-for-role-in-december-delhi-riots-case-booked-under-uapa/595040>

*intimidation and abscondence, can be addressed by imposition of requisite conditions on grant of bail".<sup>154</sup>*

### **Safoora Zargar**

Safoora Zargar, student and anti-CAA activist, was arrested on 10 April 2020, while three months pregnant, on allegations of conspiring with other persons to instigate riots (Section 120A, IPC) and start riots in northeast Delhi (S. 153, IPC).<sup>155</sup> Safoora was granted bail by the Delhi High Court on 23 June 2020 on humanitarian grounds due to her pregnancy, after her bail application had been rejected three times by lower courts.<sup>156</sup>

### **Sharjeel Imam**

Sharjeel Imam, a PhD student at Jawaharlal Nehru University and anti-CAA activist, was taken into custody on 28 January 2020. He was charged with sedition (S. 124A, IPC), promoting enmity between groups (S. 153A, IPC) and engaging in unlawful activities to cause disaffection towards India (S. 2, UAPA). The charges were contained in seven separate FIRs, five of which arose from a single speech he gave in January 2020.<sup>157</sup> Notably, Sharjeel had been in Delhi police custody since 28 January 2020 when the Delhi riots took place in February 2020. In two cases, Sharjeel was granted default bail because the prosecution failed to file the charge-sheet within the time allotted to them.<sup>158</sup> On 27 November 2021, Sharjeel was granted bail for one charge by the Allahabad High Court,<sup>159</sup> but remains in prison under other charges. As of July 2022, Delhi High Court has asked the Delhi Police to respond to Imam's appeal for interim bail in the sedition case, as the Supreme Court has stayed all pending trials and proceedings on sedition. The case is yet to be heard.<sup>160</sup>

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<sup>154</sup> The trio along with several others have been accused of being part of a premeditated conspiracy that took place end of February 2020 during the anti-CAA protests in North-East Delhi. In the High Court of Delhi at New Delhi, *Asif Iqbal Tanha v. State of NCT of Delhi*, CrI.A.39/2021, Judgment dated 15 June 2021, para 79.

<sup>155</sup> Details of FIRs filed against HRD Safoora Zargar - FIR No. 48/2020 dated 24 February 2020 registered at P.S.: Jafraabad and FIR No. 59/2020 dated 06 March 2020 registered at P.S.: Crime Branch; India. 2020. *Pregnant Jamia student in jail for three weeks, family says believe in judiciary*. <https://indianexpress.com/article/india/pregnant-jamia-student-in-jail-for-3-weeks-family-says-believe-in-judiciary-6395952/>

<sup>156</sup> A. Gunasekar & S. Shukla, "Pregnant Jamia Student Safoora Zargar Gets Bail In Delhi Riots Case" *NDTV*, 23 June 2020, <https://www.ndtv.com/india-news/safoora-zargar-pregnant-jamia-millia-islamia-student-arrested-in-april-in-delhi-riots-case-granted-bail-by-high-court-2250814>

<sup>157</sup> Details of FIRs filed against HRD Sharjeel Imam – FIR No. 22/2020 dated 25 January 2020 registered at P.S.: Crime Branch; FIR No. 1/2020 dated 25 January 2020 registered at P.S.: Crime Branch Guwahati; FIR No. 55/2020 dated 25 January 2020 registered at P.S.: Civil lines, Aligarh; FIR No. 16(1)/2020 registered at P.S.: Imphal, Manipur; FIR No. 2/2020 registered at P.S.: Itanagar, Arunachal Pradesh; and FIR No. 59/2020 dated 06 March 2020 registered at P.S.: Crime Branch.

<sup>158</sup> FIR No. 16(1)/2020 registered at P.S.: Imphal, Manipur; FIR No. 2/2020 registered at P.S.: Itanagar, Arunachal Pradesh.

<sup>159</sup> Sparsh Upadhyay, "Allahabad High Court Grants Bail To Sharjeel Imam In Sedition Case Filed Over His Speech At AMU" *Livelaw*, 27 November 2021, available at <https://www.livelaw.in/news-updates/allahabad-high-court-grants-bail-sharjeel-imam-aligarh-sedition-case-speech-amu-186477>

<sup>160</sup> "HC asks Delhi police to respond to Sharjeel Imam's plea for bail in sedition case", *Indian Express*, July 29, 2022, available at <https://indianexpress.com/article/cities/delhi/sharjeel-imam-bail-sedition-delhi-hc-police-8059709/>



## Umar Khalid

Umar Khalid, an activist and former student of Jawaharlal Nehru University (JNU), was taken into custody on 14 September 2020. Umar is presently charged under two FIRs in connection with Delhi riots on the grounds of criminal conspiracy (S. 120B, IPC) and being the mastermind of the violence.<sup>161</sup> He was granted bail in one case on 16 April 2021 on the grounds that he had not been physically present at the scene of the crime on the date of the incident, but he continues to remain in custody under the other FIR on grounds of criminal conspiracy and the UAPA.<sup>162</sup> As of July 2022, the Delhi High Court was continuing to hear his appeal challenging the Trial Court's order refusing him bail on UAPA charges.<sup>163</sup>

## Khalid Saifi

Khalid Saifi, civil society group leader United Against Hate (UAH) and anti-CAA activist in Delhi was arrested on 26 February 2020 in connection with three Delhi riot related FIRs on charges of criminal conspiracy (S. 120B, IPC) and participating in a riotous mob (S. 141, IPC).<sup>164</sup> He was granted bail in two of them because there was no evidence "to establish the criminal conspiracy alleged against the applicant in the matter".<sup>165</sup> However, he remains in custody due to charges under UAPA.

## Ishrat Jahan

Ishrat Jahan, an advocate, has been in custody since 26 February 2020 under two FIRs, including the main Delhi riots FIR on allegations of inciting a crowd (S. 505, IPC), causing communal riots (S. 153, IPC).<sup>166</sup> She was granted bail in the case for inciting a crowd on 21 March 2020.<sup>167</sup> She was granted interim bail in the second case from 10 June 2020 to 19 June 2020 on account of her wedding on 12 June 2020.<sup>168</sup> She was finally released on bail on 15 March, 2022 by the special court on the basis that prima facie the prosecution's case was not met.<sup>169</sup>

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<sup>161</sup> M.S. Manral, "Delhi riots case: Former JNU student Umar Khalid arrested under UAPA", *The Indian Express*, 14 September 2020, <https://indianexpress.com/article/india/delhi-riots-case-jnus-umar-khalid-arrested-under-uapa-6594837/>

<sup>162</sup> S.R. Singh, "Umar Khalid granted bail in north-east Delhi riots case" *The Hindu*, 16 April 2021, <https://www.thehindu.com/news/cities/Delhi/umar-khalid-granted-bail-in-north-east-delhi-riots-case/article34331036.ece>

<sup>163</sup> N. Thapliyal, "Umar Khalid's Membership Of WhatsApp Groups Can't Make Him Criminally Liable: Argument For Bail Before Delhi High Court", *Livelaw* 28 July 2022, available at <https://www.livelaw.in/news-updates/delhi-riots-whatsapp-groups-umar-khalid-bail-hearing-205062>

<sup>164</sup> Under sections 147, 148, 120B, 124A, 302, 307, 353, 186, 212, 395, 427, 435, 436, 452, 109, 114, 153E, 34 of the IPC, section 3 and 4 of the PDPP Act, sections 25 and 27 of the Arms Act, section 13, 16, 17, 18 of the UAPA. Source: FIR 59/2020 dated 06 March 2020.

<sup>165</sup> Sessions Judge, Karkardooma Court, *State v. Khalid Saifi*, FIR No.101/2020, Bail Application No.1460/2020, order dated 04 November 2020.

<sup>166</sup> A. Bhatia, "Ishrat Jahan, ex-Congress municipal councillor, arrested for inciting violence during Delhi riots", *India TV News*, 29 February 2020, <https://www.indiatvnews.com/news/india/ishrat-jahan-ex-congress-municipal-councillor-arrested-for-inciting-violence-during-delhi-riots-593664>

<sup>167</sup> Court of Manjusha Wadhwa, ASJ-03, Shahdara District, Karkardooma Court vide order dated 21 March 2020.

<sup>168</sup> Additional Sessions Judge, *Ishrat Jahan v. State*, Bail Application No. 1125/2020, order dated 30 May 2020, [https://images.assettype.com/barandbench/2020-05/e8155168-b418-4f95-88e3-3ddd9dbaa562/Ishrat\\_Jahan\\_vs\\_State.pdf](https://images.assettype.com/barandbench/2020-05/e8155168-b418-4f95-88e3-3ddd9dbaa562/Ishrat_Jahan_vs_State.pdf).

<sup>169</sup> PTI, "Former Congress Councillor Ishrat Jahan Out On Bail In Delhi Riots Case", NDTV, 17 March 2022, available at <https://www.ndtv.com/india-news/former-congress-councillor-ishrat-jahan-out-on-bail-in-delhi-riots-case-2827379>

## V. HUMAN RIGHTS VIOLATIONS FACED BY DETAINED HUMAN RIGHTS DEFENDERS

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This Section examines the violations faced by the HRDs who are discussed in this Report. The major violations discussed in this Report include a) violation of rights to be informed about charges and production before court, upon detention, b) lack of access to lawyers and family members upon detention and in custody, c) torture or cruel, inhuman, or degrading treatment in prison, d) lack of medical care in prison, e) violations of right to health leading to contraction of COVID-19 in prison, and f) prolonged pre-trial detention due to denial of bail. While violations have been seen in all the cases involving prisoners in India, the cases of HRDs are the particular focus of this Report.

### A. Violation of Rights of Accused to be Informed about Charges and Produced Before Court

At least four human rights defenders, including Surendra Gadling, Gautam Navlakha, Sudha Bhardwaj and Umar Khalid, were allegedly not promptly informed about the grounds for their arrest in violation of both international and domestic law and were allegedly not produced in court within 24 hours of detention in violation of domestic law.

The right to liberty is protected under article 9 of the ICCPR. Article 9(2) ICCPR states that any person who is arrested has to be informed, at the time of their arrest of the reasons for their arrest, and promptly informed of any charges against him.<sup>170</sup> This must be done in a language that the arrested person understands.<sup>171</sup> Article 9(3) requires that an arrested person be brought promptly before a court, meaning within no more than 48 hours. The Human Rights Committee while interpreting Article 9 has stated that, “[a]ny delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.”<sup>172</sup> It has further reiterated that “[t]he requirement applies in all cases without exception and does not depend on the choice or ability of the detainee to assert it. The requirement applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity”.<sup>173</sup> Article 9(4) also provides for the right of a detained person to access the courts at any time to challenge the lawfulness of the detention or to complain about violation of other rights.

Article 22(1) of the Indian Constitution provides that police may not detain an individual without informing them of the grounds for arrest, and the right to legal assistance by a counsel of choice.<sup>174</sup> Further, Article 22(2) of the Indian Constitution guarantees the right of every person who is arrested to be produced in court within 24 hours of arrest excluding the time necessary for the journey

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<sup>170</sup> Article 9(2), International Covenant on Civil and Political Rights.

<sup>171</sup> *Supra Note 12*, paras 24 and 26.

<sup>172</sup> *Supra Note 12*, para. 33.

<sup>173</sup> *Supra Note 12*, para. 32.

<sup>174</sup> Article 22(2), Constitution of India.

from the place of arrest to the court of the magistrate and provides that no such person shall be detained in custody beyond 24 hours without a magistrate order.<sup>175</sup>

Sections 46 to 60A, CrPC, provide requirements to be followed by the police officer at the time of making arrest which include, among others, the prescription that at the time of arrest, the police officer shall inform the arrested person of the ground of the arrest and of right to bail. Under Section 50, CrPC, every police official with authority to arrest someone must inform the person subject to arrest about the crime for which the arrest is made and other relevant grounds for the arrest and of right to bail.<sup>176</sup>

However, Surendra Gadling, accused in the Bhima Koregaon case, alleged that he had not been informed of the grounds of arrest nor provided information as to the investigating agency associated or the court where he would be produced, to enable him to inform his lawyer. Surendra Gadling was kept in a local police station in Nagpur for an hour and then moved to another location without informing his lawyer or family, who were informed only after three days. He was not produced before a magistrate in 24 hours as required under law.<sup>177</sup>

Similarly, Umar Khalid was arrested on 13 September 2020 by Special Cell of the Delhi Police in connection with the main Delhi riots case where he was kept in police custody for 10 days and then sent into judicial custody in Tihar Jail.<sup>178</sup> While he was in judicial custody in Tihar jail, he was taken to a police station for interrogation in connection with another Delhi riot related case, and while in judicial custody, was re-arrested on 1 October 2020 in connection with the other Delhi riot related case in FIR 101/2020.<sup>179</sup>

In this second case, he was allegedly not informed about the grounds of his arrest nor provided an FIR copy,<sup>180</sup> which would have contained the offences he was charged with and the allegations against him, in violation of Article 22(2) of the Constitution of India. At the time of his arrest, it has been alleged that only his family was informed by the police, but his lawyers were not informed by the police. Only after his lawyer asked the trial court to direct the police to supply documents to them on 20 October 2020, Umar Khalid was able to access all the relevant documentation including the FIR and the remand application and reports of medical examination conducted by the police during custody.<sup>181</sup> The trial court reiterated that relevant grounds for the arrest must be informed to the person by police official: "It is settled proposition of law that no person shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest... Arrested person is entitled to full particulars of the offences for which he

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<sup>175</sup> *Ibid.*

<sup>176</sup> Section 50, Person arrested to be informed of grounds of arrest and of right to bail, Code of Criminal Procedure, 1973.

<sup>177</sup> N.B. Rathod, "Bhima Koregaon: Marking three years since the first arrest", *The Leaflet*, 07 June 2021, <https://www.theleaflet.in/bhima-koregaon-marking-three-years-since-the-first-arrest/>

<sup>178</sup> Press Trust of India, "Delhi Riots 2020: Ex-JNU Student Umar Khalid Arrested, Police Seek 10-Day Custody" *Outlook*, 14 September 2020, <https://www.outlookindia.com/website/story/india-news-delhi-riots-2020-ex-jnu-student-umar-khalid-arrested-under-uapa/360276>

<sup>179</sup> A.S. Iyer, "Umar Khalid Arrested in 2nd Case, Sent to 3-Day Police Custody" *The Quint*, 01 October 2020, <https://www.thequint.com/news/india/umar-khalid-arrested-delhi-riots-khajuri-khas-uapa-accused>

<sup>180</sup> ICJ Interview, Delhi, September 2021.

<sup>181</sup> ICJ Interview, Delhi, September 2021.



is arrested or other grounds for such arrest and his detention will be illegal if he has not been communicated the particulars of the offence.”<sup>182</sup>

## **B. Lack of Access to Lawyers and Family Members Immediately Upon Detention and in Custody**

Many of the detainees, particularly Stan Swamy, Khalid Saifi and Ishrat Jahan were unable to access their lawyers and family members immediately upon detention and in custody, in part, due to restrictions imposed on visits in response to COVID-19, violating the right to have legal assistance as well as access to family under international and domestic law.

Under international law, accused individuals have a right to prompt and confidential communication with counsel. Under Article 9 of the ICCPR, from the beginning of arrest and detention, “[p]rompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so requires, to family members.”<sup>183</sup> This is both to protect right to liberty and fair trial, but also as a safeguard to protect against torture and other ill-treatment. The Human Rights Committee further says that, “States ... should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention”<sup>184</sup> Further, when brought before a court, “[i]n the hearing that ensues, and in subsequent hearings at which the judge assesses the legality or necessity of the detention, the individual is entitled to legal assistance, which should in principle be by counsel of choice”<sup>185</sup> In respect of fair trial rights, Article 14(3)(b) of the ICCPR, provides that an accused must have “adequate time and facilities” to prepare his defence and to “communicate with counsel of his own choosing”.<sup>186</sup> The Human Rights Committee has clarified that the right to communicate with counsel includes prompt access and the ability to meet in private in conditions that respect the confidentiality of the communications.<sup>187</sup> The Human Rights Committee has emphasized that the right to legal representation must be available even during emergencies.<sup>188</sup> A number of UN standards relate to the State obligation to ensure prisoners’ right of access to legal advice.<sup>189</sup>

These standards also provide right to communicate and be visited by family members, subject to reasonable conditions and restrictions.<sup>190</sup> Regarding restrictions justified on the basis of the COVID-19 pandemic, UN agencies,

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<sup>182</sup> CMM North-East Delhi, *State v. Umar Khalid*, FIR No.101/2020, PS: Khajuri Khas/Crime Branch, order dated 20 October 2020, <https://districts.ecourts.gov.in/sites/default/files/20%20October%202020%20Sh%20Purshotam%20Pathak%2C%20CMM.pdf>.

<sup>183</sup> *Supra Note 12*, para. 58.

<sup>184</sup> *Supra Note 12*, para. 35.

<sup>185</sup> *Supra Note 12*, para. 34.

<sup>186</sup> International Covenant on Civil and Political Rights, Article 14(3)(b).

<sup>187</sup> *Supra Note 25*, para. 34.

<sup>188</sup> UN Human Rights Committee (HRC), General Comment No. 29: States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 12.

<sup>189</sup> See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, 9 December 1988; Nelson Mandela Rules), A/RES/70/175, 8 January 2016.

<sup>190</sup> Principle 19, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; See Nelson Mandela Rules, *Supra Note 30*.

including UNODC, WHO, UNAIDS and OHCHR issued a joint statement on COVID-19 in prisons and other closed settings which stressed that COVID restrictions imposed on family and lawyer visits must be “necessary, evidence-informed, proportionate (i.e. the least restrictive option) and non-arbitrary.”<sup>191</sup> It stated that restrictions must be facilitated through enhanced access to digital communication while ensuring the fundamental right to legal representation.<sup>192</sup> The WHO Interim Guidance for prisons in response to COVID-19 any restrictions on in-person prison visits should be mitigated for by video conferencing systems for the detainee’s family members and lawyers.<sup>193</sup>

International law also requires adherence to certain protections of domestic law. The Human Rights Committee has clarified that “Article 9 [ICCPR] requires that procedures for carrying out legally authorized deprivation of liberty should also be established by law and States parties should ensure compliance with their legally prescribed procedures. Article 9 further requires compliance with domestic rules that define the procedure for arrest by identifying the officials authorized to arrest or specifying when a warrant is required. It also requires compliance with domestic rules that define when authorization to continue detention must be obtained from a judge or other officer, where individuals may be detained, when the detained person must be brought to court and legal limits on the duration of detention. It also requires compliance with domestic rules providing important safeguards for detained persons, such as making a record of an arrest and permitting access to counsel.”<sup>194</sup>

Prisoner’s right to access to lawyers and families is protected by the Constitution and statutory law of India as well. Article 22 of the Constitution provides for the right of an accused to consult a lawyer and to be defended by a legal counsel of their own choice.<sup>195</sup> Similarly, Section 41D of the CrPC lays down the right of an accused to meet an advocate of their choice during interrogation, but not throughout the interrogation.<sup>196</sup> In the landmark case, *DK Basu v. State of Bengal*, the Supreme Court held that an arrestee “may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.”<sup>197</sup> The right of a counsel to interview their detainee client in confidence has been affirmed by the Supreme Court in *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors* in 1981 which held that “regulating the right of a detenu to have interview with a legal adviser of his choice is violative of Arts. 14 and 21 and must be held to be unconstitutional and void.” The Court further held that, “a detenu were to be entitled to have interview with his legal adviser at any reasonable hour ...which appointment should be given ..without any avoidable delay. Any other Jail

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<sup>191</sup> UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings, 13 May 2020, <https://www.who.int/news/item/13-05-2020-unodc-who-un aids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>.

<sup>192</sup> *Ibid.*

<sup>193</sup> World Health Organization, “Preparedness, prevention and control of COVID-19 in prisons and other places of detention: interim guidance”, 15 March 2020, page 22.

<sup>194</sup> *Supra Note* 12, para. 23.

<sup>195</sup> Constitution of India, Article 22(1) - Protection against arrest and detention in certain cases (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

<sup>196</sup> Code of Criminal Procedure, 1973, Section 41D - Right of arrested person to meet an advocate of his choice during interrogation.

<sup>197</sup> Supreme Court of India, *DK Basu v. State of West Bengal*, AIR1997SC610, <https://indiankanoon.org/doc/501198/>.

official may, if thought necessary, watch the interview but not as to be within hearing distance of the detenu and the legal adviser.”<sup>198</sup>

Further, the Supreme Court has observed the right of detainees to meet family and friends regularly as a part of right to life and liberty under Article 21.<sup>199</sup> The Court held that “as a necessary component of the right to life, [accused] would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure ... regulating the right to have interviews with the members of the family and friends can be upheld as constitutionally valid under Article 14 and 21, unless it is reasonable, fair and just.”<sup>200</sup>

However, on the pretext of the COVID-19 pandemic, restrictive measures were undertaken in respect of, to access lawyer and families upon detention. In May 2020, the Ministry of Home Affairs issued notification allowing telephonic calls or video meeting of prisoners with their visitors (e-mulakat),<sup>201</sup> restated by the Ministry in 20 April 2021 in response to the second COVID wave in India.<sup>202</sup> However, many of the detainees were unable to meet their lawyers or family members after being transferred to prison, as, despite the notifications, there was confusion for several months in the procedure to be followed for e-meetings.

In May 2020, Stan Swamy’s motor skills were reported to have degraded while inside the prison, due to his Parkinsons condition as well as growing ill-health in prison without adequate medical care. Owing to his health condition, he was not able to e-meet with his lawyer, as he was too weak to reach the phone for e-meeting. There were no alternative arrangements made to ensure access to communication with family and lawyers, in violation of international and Indian law.<sup>203</sup>

Even prior to the pandemic, Khalid Saifi and Ishrat Jahan were unable to meet their lawyers immediately upon detention on 26 February 2020 in violation of international and domestic law. When the lawyers reached the police station, the Delhi police allegedly refused to let them meet the accused and also allegedly refused to reveal the details regarding the arrests.<sup>204</sup> Khalid Saifi alleged that he was only able to call his wife later at night many hours after being in custody, after he had been produced before the Magistrate without the police giving him access to his lawyer or intimating his family.<sup>205</sup> After the emergence of COVID-19, Ishrat Jahan’s lawyer was allegedly allowed to meet Ishrat only after the Court passed direction to allow daily e-meetings on 23 March 2020. Further, the meeting

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<sup>198</sup> *Supra* Note 20; see High Court of Rajasthan, *Moti Bai v State of Rajasthan*, 1954CriLJ1591.

<sup>199</sup> *Supra* Note 198. See also Supreme Court of India, *Moti Lal Saraf v. Union of India*, 2007 (1) SCC Cri,180.- The Court observed that the concept of fair trial flows directly from the Article 21 of the Constitution of India.

<sup>200</sup> *Supra* Note 198, para 7.

<sup>201</sup> Ministry of Home Affairs, Government of India vide notification No. 17013/17/2020-PR dated 02 May 2020, Annexure Z – Standard Operating Procedure (SOP) for Handling Arrested Persons, Detainees and Inmates during the Pandemic, [https://www.mha.gov.in/sites/default/files/ManagementofCovid\\_07072020.pdf](https://www.mha.gov.in/sites/default/files/ManagementofCovid_07072020.pdf)

<sup>202</sup> Ministry of Home Affairs, Government of India vide notification No. 17013/17/2020-PR dated 22 April 2021, [https://www.mha.gov.in/sites/default/files/PreventionControlCOVID19\\_22042021\\_0\\_0.pdf](https://www.mha.gov.in/sites/default/files/PreventionControlCOVID19_22042021_0_0.pdf).

<sup>203</sup> ICJ Interview, May, 2021.

<sup>204</sup> ICJ Interview, October 2021.

<sup>205</sup> S. Akhtar, “Political prisoner Khalid Saifi is vulnerable to Covid-19”, *E News Room*, 20 July 2020, <https://enewsroom.in/social-activist-khalid-saifi-cao-nrc-npr/>

were restricted to a few minutes in the presence of police officer, thus violating the right to confidential access with counsel in domestic law and international law.<sup>206</sup>

### C. Prolonged Pre-Trial Detention Due to Denial of Bail to Human Rights Defenders

HRDs Surendra Gadling, Gautam Navlakha, Rona Wilson, Hany Babu, Sharjeel Imam, Khalid Saifi and Umar Khalid, among others, continue to be held in custody, as bail has been denied by Courts. Prolonged pre-trial detention violates international and domestic law on right to fair trial.

Article 9(3) ICCPR, guarantees the right to trial within a reasonable time or release and provides that pre-trial detention will be not a general rule.<sup>207</sup> The content of the State obligation under Article 9(3), ICCPR, has been detailed by the Human Rights Committee as follows: "It should not be the general practice to subject defendants to pre-trial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as 'public security'. Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity."<sup>208</sup>

Article 9(4) ICCPR entitles those in custody to go to court to decide on the lawfulness of the detention and the court must order release if the detention is found to be without a lawful basis.<sup>209</sup>

The Human Rights Committee has emphasized that right to presumption of innocence of the accused must be guaranteed throughout the period of pre-trial detention, and that prolonged pre-trial detention is a direct violation of the principle of presumption of innocence, especially when it has the effect of punishing the accused prior to trial.<sup>210</sup> If the accused has been denied bail, they must be tried expeditiously.<sup>211</sup>

These standards have been partly incorporated in the jurisprudence of the Supreme Court. For example, in *Hussainara Khatoon v. Home Secretary, State of Bihar* (1979) the Court held that where a person is in custody under a procedure which is not "reasonable, fair or just", the detention violates Article 21 of the Constitution and the detainee is entitled to secure release. In addition, the procedure must ensure a speedy trial for it to be considered "reasonable, fair or just".<sup>212</sup> In 2020, the Supreme Court in *Mahipal v. Rajesh Kumar and Anr* held

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<sup>206</sup> ICJ Interview, September 2021.

<sup>207</sup> Article 9(3), International Covenant on Civil and Political Rights.

<sup>208</sup> *Supra* Note 12, para 38.

<sup>209</sup> Article 9(4), International Covenant on Civil and Political Rights.

<sup>210</sup> *Supra* Note 25, para. 30.

<sup>211</sup> *Supra* Note 25, para. 35.

<sup>212</sup> *Supra* Note 21, para 180.

that with respect to provision of bail, the court will consider a *prima facie* view of whether the accused has committed the offence, the nature of the offence and the possibility of the accused obstructing the proceedings of the trial.<sup>213</sup> The Supreme Court in *Sanjay Chandra v. CBI*, held that deprivation of liberty is a punishment, and is a violation of presumption of innocence unless essential to ensure trial proceedings.<sup>214</sup> In 2020, a three-judge bench of the Supreme Court in the case of *P. Chidambaram v. Directorate of Enforcement* reiterated the basic jurisprudence that the grant of bail is the rule and refusal is the exception to ensure a fair trial.<sup>215</sup>

### **Lack of Access to Bail under UAPA**

Sections 436 to 450 of the Cr.P.C. provide for bail for accused persons.<sup>216</sup> Under these provisions, courts should not look into the allegations or the seriousness of the offence, only whether the accused will obstruct the proceedings of the trial and if that is unlikely, the person is to be released on bail.

However, under the UAPA, bail provisions are more stringent than those under the Code of Criminal Procedure, as under UAPA, bail is decided on merits. Section 43D(5) of the UAPA provides that a court must reject the accused's bail plea if, after examining the case diary and the police officer report, it is of the "opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true".<sup>217</sup> Thus, at the stage of bail, UAPA requires the court to examine evidence provided by the police in determination of the bail plea, which is not required under the CrPC.

In nearly all cases of detained human rights defenders discussed in this Report, UAPA charges have been added as well, thereby making access to bail nearly impossible, with the lone exception being the case of Ishrat Jahan. Section 43D(5) of the UAPA is not in accordance with the ICCPR and the rule of law and the presumption of innocence, as the judges' presumption that the person may be guilty cannot be a factor in determining the liberty of the accused.

In the case of *Zahoor Ahmed Shah Watali v. National Investigation Agency*, the Delhi High Court held that "courts cannot act as mere post-offices of the agency and must scrutinise the material presented to them with *extra care* in order to determine if a *prima facie* case exists" and granted bail to the accused under UAPA.<sup>218</sup> However, the Supreme Court cancelled the bail of Watali and set aside the decision of the High Court on the ground that the High Court had conducted a

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<sup>213</sup> Supreme Court of India, *Mahipal v. Rajesh Kumar and Anr.*, (2020) 2 SCC 118, 05 December 2019, para 12, [https://main.sci.gov.in/supremecourt/2019/21884/21884\\_2019\\_7\\_1502\\_18784\\_Judgement\\_05-Dec-2019.pdf](https://main.sci.gov.in/supremecourt/2019/21884/21884_2019_7_1502_18784_Judgement_05-Dec-2019.pdf).

<sup>214</sup> Supreme Court of India, *Sanjay Chandra v. CBI*, Criminal Appeal No.2179 Of 2011, SLP(Cr.) 5902/2011, 23 November 2011, paras 14 and 17, <https://indiankanoon.org/doc/1563495/>.

<sup>215</sup> Supreme Court, *P. Chidambaram v. Directorate of Enforcement*, 2020 (13) SCC 791, 04 December 2019, para. 21, [https://main.sci.gov.in/supremecourt/2019/41156/41156\\_2019\\_5\\_1501\\_18764\\_Judgement\\_04-Dec-2019.pdf](https://main.sci.gov.in/supremecourt/2019/41156/41156_2019_5_1501_18764_Judgement_04-Dec-2019.pdf).

<sup>216</sup> Section 436 - In what cases bail to be taken, The Code of Criminal Procedure, 1973. CrPC identifies two kinds of offences – bailable, in which the accused is entitled to bail as a matter of right, and non-bailable, in which bail may be granted to the accused on the discretion of the court considering the facts and circumstances of the case

<sup>217</sup> Section 43D(5), The Unlawful Activities (Prevention) Act, 1967.

<sup>218</sup> High Court of Delhi, *Zahoor Ahmad Shah Watali v. NIA*, CrI. A.768/2018, 13 September 2018, para. 37, <https://indiankanoon.org/doc/124771365/>.



“mini-trial” and that “bail can be denied by relying upon prosecution documents even though these would be inadmissible evidence during the actual trial”.<sup>219</sup>

### **Lack Of Provision Of Anticipatory Bail Under UAPA**

As indicated above, Article 9(3) ICCPR, provides that pre-trial detention will not be a general rule.<sup>220</sup> Release, whether with or without bail guarantees, is required except if detention is considered necessary to prevent accused absconding, destroying evidence, influencing witnesses or fleeing from the State’s jurisdiction.<sup>221</sup> Where it is necessary on such grounds to deny such release, they must be tried expeditiously.<sup>222</sup>

Anticipatory bail is a direction to release a person on bail before they are arrested.<sup>223</sup> Section 438 CrPC allows a person to seek bail in anticipation of arrest on accusation of having committed a non-bailable offence.<sup>224</sup> The Supreme Court has clarified that for granting of anticipatory bail, the nature of offence, antecedents of the accused, and the possibility of the accused running away, must be considered.<sup>225</sup> Section 43D(4) of the UAPA was the basis for denial of anticipatory bail to Navlakha and Teltumbde, lays down that Section 438 of the CrPC which provides anticipatory bail shall not apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under the UAPA.<sup>226</sup>

In the Bhima Koregaon case, arrests were made between June 2018 and October 2020. Of the accused, **Varavara Rao** was finally released on permanent bail on medical grounds in August 2022 and **Sudha Bharadwaj** was released on default bail. In the Delhi riots cases, the arrests were made between February 2020 and October 2020 and the bail applications for most of the accused are still pending before court. **Safoora Zargar** was granted bail on humanitarian grounds in June 2020 and **Natasha Narwal**, **Devangana Kalita** and **Asif Iqbal Tanha** were granted bail on 15 June 2021 on grounds of merit in their cases. **Ishrat Jahan** is the first to have gotten bail on the basis that the prosecution’s case had not been met on UAPA charges.

**Varavara Rao** applied for bail on 25 March 2020 and was finally granted bail on 22 February 2021. His first bail application was filed on 25 March 2020 on humanitarian grounds due to his age (81 years) and medical conditions before the NIA court in light of the recommendations of the High Power Committee constituted by the Maharashtra state government for release of prisoners on interim bail in view of the Covid-19 pandemic.<sup>227</sup> The application was rejected on

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<sup>219</sup> Supreme Court of India, *NIA v. Zahoor Ahmad Shah Watali*, Criminal Appeal 578/2019 (Arising out of SLP(Cr.)7857 of 2018, 02 April 2019, paras 13, 32, 33, 35, available at <https://indiankanoon.org/doc/117627977/>).

<sup>220</sup> Article 9(3), ICCPR.

<sup>221</sup> *Supra Note 12*, para. 38.

<sup>222</sup> *Supra Note 12*, para 38.

<sup>223</sup> Government of India. Ministry of Law, Law Commission of India, Forty-First Report, September 1979 (Vol.I), p. 320. <https://lawcommissionofindia.nic.in/1-50/Report41.pdf>.

<sup>224</sup> Section 438(1), Direction for grant of bail to person apprehending arrest, Code of Criminal Procedure.

<sup>225</sup> Supreme Court of India, *Gurbaksh Singh Sibbia v. State of Punjab*, 1980 AIR 1632, 09 April 1980, <https://indiankanoon.org/doc/1308768/>.

<sup>226</sup> Section 43D(4), The Unlawful Activities (Prevention) Act, 1967.

<sup>227</sup> Minutes Of The High Power Committee Meetings,

the ground that those arrested under the UAPA were not entitled to grant of such interim bail.<sup>228</sup> On 11 May 2020, the High Power Committee issued a direction that prisoners over the age of 60 years could apply for interim bail even if they were arrested under UAPA and that the courts would consider such applications on their facts after examining the medical reports and other relevant records.<sup>229</sup> Thus, on 15 May 2020, Rao applied for a second time for grant of bail on humanitarian grounds of age and medical sickness, which resulted in the NIA Court directing the Talaja Prison to provide a report regarding his health conditions.<sup>230</sup> A medical report was submitted before the NIA Court, but it rejected Rao's bail application on the ground that he was found to be fit for discharge by the hospital.<sup>231</sup> Rao filed an appeal before the Bombay High Court and was granted bail on 22 February 2021 on humanitarian grounds of old age and medical conditions for six months.<sup>232</sup> In granting bail, the court took into consideration details specific to the medical condition of the accused HRD and concluded: "*By appreciating the entire material on record, we are of the opinion that the old age, sickness, infirmity and health conditions, as also the admitted sufferings faced by the undertrial during incarceration including infection of Covid-19 virus, lead to a conclusion that upon his discharge ..placing the undertrial back in custody would be incompatible with his health conditions and it would endanger his life.*"<sup>233</sup> Since then his bail has been extended several times by the Bombay High Court.<sup>234</sup> However, his application for permanent medical bail was rejected by the Bombay High Court on April 13, 2022.<sup>235</sup> Finally in August 2022, his application for permanent medical bail was accepted by the Supreme Court.<sup>236</sup>

**Rona Wilson** has been in prison since June 2018.<sup>237</sup> The NIA granted temporary bail on 7 September 2021 after his father's death on 18 August 2021,<sup>238</sup> for 14 days.<sup>239</sup> He is back in custody.

**Safoora Zargar**, who was three months pregnant when she was arrested in April 2020,<sup>240</sup> was denied bail three times before finally being granted bail on 23 June 2020. On 26 May 2020, the bail application was filed for the third time on merits

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[https://maharashtra.gov.in/pdf/Minutes\\_of\\_Meetings\\_of\\_07\\_05\\_2021\\_and\\_11\\_05\\_2021\\_4.pdf](https://maharashtra.gov.in/pdf/Minutes_of_Meetings_of_07_05_2021_and_11_05_2021_4.pdf)

<sup>228</sup> High Court of Bombay, *Dr. P.V.Varavara Rao v NIA & State of Maharashtra*, Criminal Appeal 52/2021 in Criminal Appeal LDVC No.143/2020, on 22 February 2021, para. 2, <https://indiankanoon.org/doc/95912324/>.

<sup>229</sup> *Supra* Note 228, para 8.

<sup>230</sup> At this stage, while the medical report was not filed by the Superintendent of Talaja Central Prison before the NIA Court, Varavara Rao had to be admitted to the J.J. Hospital, Mumbai due to deterioration of his health. On 01 June 2020, the undertrial was discharged from J.J. Hospital and he was taken back to Talaja Central Prison where he was admitted in the jail hospital, High Court of Bombay, *Supra* Note 228.

<sup>231</sup> *Ibid* at paras 11,12,15-17.

<sup>232</sup> Six months of bail ended on 22 August 2021, after which the Bombay High Court has extended the bail till 2 December 2021. *Supra* Note 131.

<sup>233</sup> *Supra* Note 230.

<sup>234</sup> *Supra* Note 131.

<sup>235</sup> *Supra* Note 132.

<sup>236</sup> *Supra* Note 133.

<sup>237</sup> *Supra* Note 77.

<sup>238</sup> "Rona Wilson gets bail to attend father's death rituals" *The Indian Express*, 08 September 2021, <https://indianexpress.com/article/cities/mumbai/rona-wilson-gets-bail-to-attend-fathers-death-rituals-7495425/>

<sup>239</sup> *Ibid*.

<sup>240</sup> Safoora Zargar Arrested, Scholars at Risk available at <https://www.scholarsatrisk.org/report/2020-04-10-jamia-millia-islamia/>

stating that Zargar's role in riots had not been clarified in the chargesheet and the only allegation against her was her involvement in protests. This argument was rejected on 4 June 2020, on the ground that a *prima facie* case had been made out against her under UAPA.<sup>241</sup> On 18 June, Zargar approached the High Court for bail in appeal against the 4 June order and was finally granted bail by the Delhi High Court 23 June as an exception on humanitarian grounds and not on merits. This was based on the following police submission, "*Without in any manner conceding to the factual assertions and legal submission made by the petitioner and without in any manner diluting the contents and submissions made in the reply filed thereto and without making it a precedent either in ongoing investigations or any other investigation(s), purely on humanitarian ground, the prosecution agrees to the petitioner being released on regular bail. ...*".<sup>242</sup> The Court, while granting bail, observed that since the parties had not addressed the merits, this order would not be treated as a precedent, thus ensuring that the other detainees against whom the same or similar allegations had been made in the Delhi riots FIR could not file for bail on grounds of parity.<sup>243</sup>

**Natasha Narwal** was arrested on 29 May 2020. The first bail application was filed before the trial court on 25 September 2020 and was rejected on 29 January 2021, based on a *prima facie* case against her under UAPA. She appealed to the Delhi High Court on 18 February 2021.<sup>244</sup> In the case of **Devnagana Kalita**, who was arrested on 29 May 2020 the first bail application was filed before the trial court on 7 November 2020 and was rejected on 29 January 2021, on the basis of *prima facie* case against her under UAPA. She approached the Delhi High Court in appeal on 18 February 2021.<sup>245</sup> In the case of Asif Iqbal Tanha who was arrested on 17 May 2020, the first bail application was filed on 17 July 2020, which was rejected on 2 September 2020 on the basis of a *prima facie* case being made out under UAPA. Asif approached the High Court on 14 September 2020, which directed the bail to be refiled before the Trial Court. The bail application was again filed before the Trial Court on 05 October 2020, which was rejected on 26 October 2020. On 22 January 2021, Asif appealed to the Delhi High Court against the rejection of the bail by the Trial Court.<sup>246</sup>

On 15 June 2021, HRDs Asif Iqbal Tanha, Natasha Narwal and Devangana Kalita were granted bail by the Delhi High Court in the Delhi riots case, saying that "*it seems, that in its anxiety to suppress dissent, in the mind of the State, the line between the constitutionally guaranteed right to protest and terrorist activity seems to be getting somewhat blurred. If this mindset gains traction, it would be a sad day for democracy*".<sup>247</sup> However, the Delhi Police approached the Supreme

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<sup>241</sup> ICJ Interview, May 2021.

<sup>242</sup> High Court of Delhi, *Safoora Zargar v. State*, CrI. Bail Application 1318/2020, on 26 June 2020, para. 1.1, [http://delhihighcourt.nic.in/writereaddata/orderSan\\_Pdf/ras/2020/68611\\_2020.pdf](http://delhihighcourt.nic.in/writereaddata/orderSan_Pdf/ras/2020/68611_2020.pdf).

<sup>243</sup> *Ibid.*

<sup>244</sup> ICJ Interview, October 2021.

<sup>245</sup> ICJ Interview, October 2021.

<sup>246</sup> ICJ Interview, July 2021.

<sup>247</sup> High Court of Delhi, *Devangana Kalita v State of NCT of Delhi*, CrI.A. 90/2021 on 15 June 2021, [https://www.livelaw.in/pdf\\_upload/devangana-kalita-bail-order-395018.pdf](https://www.livelaw.in/pdf_upload/devangana-kalita-bail-order-395018.pdf); *Natasha Narwal v State of NCT of Delhi*, CrI.A. 82/2021 on 15 June 2021, [https://www.livelaw.in/pdf\\_upload/natasha-narwal-bail-order-delhi-high-court-395020.pdf](https://www.livelaw.in/pdf_upload/natasha-narwal-bail-order-delhi-high-court-395020.pdf); *Asif Iqbal Tanha v. State of NCT of Delhi*, on 15 June 2021, [https://www.livelaw.in/pdf\\_upload/asif-iqbal-tanha-ajb15062021crla392021105447-1-395008.pdf](https://www.livelaw.in/pdf_upload/asif-iqbal-tanha-ajb15062021crla392021105447-1-395008.pdf).



Court challenging the grant of bail on 16 June 2021.<sup>248</sup> While the Supreme Court on 18 June 2021 declined to cancel bail granted, it stayed “the effect of the high court order” on other detainees by clarifying that while the three activists, who were released from prison would remain released on bail, these orders could not be treated as a precedent in any other case or relied upon in any court proceeding.<sup>249</sup>

Thus, Kalita and Narwal, after having spent 13 months in custody and having had their bail rejected by the trial court, and Iqbal after having spent 13 months in custody after having his bail rejected twice by the trial court, were finally released on bail.

**Ishrat Jahan** was arrested on 26 February 2020 in connection with the Delhi Riots cases. The first bail application before the Trial Court was filed on 5 March 2021 and the arguments in the bail application were concluded on 27 July 2021. Eventually, Ishrat has been released on bail on 20 March 2022, granted by special court, which stated that the prosecution’s case under UAPA was not prima facie true.<sup>250</sup>

**Khalid Saifi**, arrested on 26 February 2020 was granted bail in two cases, the latest one being on 4 November 2021. However, he continues to remain in custody despite getting bail in two cases for another case under which he was arrested on 21 March 2020.<sup>251</sup>

**Meeran Haider** was arrested on 1 April 2020 and the first bail application was filed before the Trial Court on 28 June 2021. On 5 April 2022, his bail has yet again been denied. As of May 2022, the Delhi High Court has asked the Delhi police to respond to his bail plea.<sup>252</sup>

The increased bar for grant of bail in UAPA cases and the refusal of the court to grant bail in the cases of the human rights defenders is in violation of India’s international legal obligations under the ICCPR, as well as domestic law which has read the right to speedy trial and grant of bail under the principles of fair trial.

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<sup>248</sup> N. Sharma & A. Mathur, “Delhi Police moves SC challenging bail to Devangana Kalita, Natasha Narwal in riot case” *India Today*, 16 June 2021, <https://www.indiatoday.in/cities/delhi/story/delhi-police-sc-challenging-bail-devangana-kalita-natasha-narwal-riot-case-1815477-2021-06-16>

<sup>249</sup> SC Order dated 18 June 2021. See U. Anand, “Orders on students’ bail won’t be a precedent: Supreme Court” *Hindustan Times*, 19 June 2021, <https://www.hindustantimes.com/india-news/orders-on-students-bail-won-t-be-a-precedent-sc-101624040845797.html>

<sup>250</sup> PTI, “Former Congress Councillor Ishrat Jahan Out On Bail In Delhi Riots Case”, NDTV, March 17 2022, available at <https://www.ndtv.com/india-news/former-congress-councillor-ishrat-jahan-out-on-bail-in-delhi-riots-case-2827379>

<sup>251</sup> The Staff, “‘Total Non-Application of Mind’: Judge Castigates Delhi Police, Gives Bail to Khalid Saifi” *The Wire*, 05 November 2020, <https://thewire.in/law/total-non-application-of-mind-judge-castigates-delhi-police-gives-bail-to-khalid-saifi>

<sup>252</sup> Staff Reporter, “Delhi HC seeks police reply on bail plea of RJD youth wing leader Meeran Haider”, *The Hindu*, May 20, 2022, available at <https://www.thehindu.com/news/cities/Delhi/delhi-hc-seeks-polices-reply-to-rjd-youth-wing-leader-meeran-haiders-bail-plea/article65439469.ece>

## D. Torture and Ill-Treatment in Custody

Despite absolute prohibition on torture and ill-treatment in both international and domestic law, HRDs in India have faced physical and verbal violence as well as severe lack of medical care, amounting to torture or ill-treatment.

Torture and cruel, inhuman or degrading treatment or punishment (CIDT) are absolutely prohibited under international law. Article 7 of ICCPR provides, "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*".<sup>253</sup> The right to be free from torture and ill-treatment may not be subject to any derogation or limitation.<sup>254</sup> Under the ICCPR, there is an obligation on the State to criminalize and to conduct prompt, thorough, effective, independent and impartial investigations into allegations of torture and similar ill-treatment and bring those responsible for violations to justice.<sup>255</sup> The Human Rights Committee has stressed the connection between the prohibition on torture and the right to liberty, noting that the same safeguards necessary to prevent arbitrary detention are also necessary to prevent torture and ill-treatment, such as bringing a person promptly before a court.<sup>256</sup> Incommunicado detention is itself generally a violation of the prohibition of torture and ill-treatment, violating both articles 7 and 9 of the ICCPR.<sup>257</sup> Information, including "confessions" and other statements, extracted through the use of torture may not be used as evidence in courts or other official proceedings, and doing so violates both article 7 and article 14 (right to a fair trial) ICCPR; and "in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will."<sup>258</sup>

UNODC, WHO, UNAIDS and OHCHR in their joint statement on COVID-19 in prisons and other closed settings has urged leaders to ensure that fundamental human rights, including the prohibition on torture and CIDT are respected in planning and implementing COVID-19 responses in prisons and other closed settings, including compliance with the Nelson Mandela Rules.<sup>259</sup>

While Indian constitutional law and statutory law does not specifically prohibit torture, Indian Courts have determined that the prohibition on torture and ill-treatment is a component of the of fundamental right to life (Article 21). The

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<sup>253</sup> Article 7, International Covenant on Civil and Political Rights. Article 5, Universal Declaration of Human Rights, states, "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*".

<sup>254</sup> Article 4, International Covenant on Civil and Political Rights. Also, see Para 3, General Comment 20, Human Rights Committee, "The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority", *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

<sup>255</sup> UN Human Rights Committee (HRC), General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13 26 May 2004.

<sup>256</sup> *Supra Note 12*, paras 34, 56 and 58.

<sup>257</sup> *Supra Note 12*, para 56.

<sup>258</sup> *Supra Note 25*, para. 41.

<sup>259</sup> WHO, Regional Office for Europe, Preparedness, prevention and control of COVID-19 in prisons and other places of detention, Interim Guidance, 08 February 2021, page 6; <https://www.who.int/news/item/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>

Supreme Court in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Others* (1981) held that prohibition against torture and ill-treatment is part of the fundamental right to life and liberty, stating that any law or procedure that allowed use of torture or ill-treatment would fail the tests of reasonableness and non-arbitrariness required of law, and “plainly be unconstitutional and void as being violative of Articles 14 and 21.”<sup>260</sup> In the landmark judgment *DK Basu v. UOI*, on guidelines to be followed by prison authorities upon arrest, the Court also focuses on custodial violence, holding that the government using torture for extracting information is an action that is “neither right nor just nor fair” and violates Article 21.<sup>261</sup> The Court stated that “[c]ustodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law”.<sup>262</sup>

Indian criminal law and criminal procedural law does not contain an express prohibition on custodial torture and its laws in this respect comply with neither the ICCPR nor the Convention against Torture (UNCAT), the latter India has signed but not ratified.<sup>263</sup> Criminal law is limited to imprisonment of police officers for causing hurt/grievous hurt or wrongful confinement to extort “confessions”. Sections 330<sup>264</sup> and 331 IPC,<sup>265</sup> provide for punishment for police officers for causing hurt or grievous hurt to a person and inducing them to confess a crime or restore property, and Section 348, IPC includes punishment for wrongful confinement to extort “confession”.<sup>266</sup> Finally, Section 76, CrPC provides for the arrested person to be brought to court without delay, to prevent any ill-treatment to the accused.<sup>267</sup> Sections 25 and 26 of the Indian Evidence Act states that no confession made to a police officer may be used as proof against an accused.<sup>268</sup>

India’s National Human Rights Commissions (NHRC) as well as state human rights commissions are granted competency under the Protection of Human Rights Act to investigate cases where custodial human rights violations took place including torture and CIDT.<sup>269</sup> The NHRC investigates complaints of custodial violence and deaths, harassment of prisoners and poor jail conditions,<sup>270</sup> and can make recommendations to the appropriate authority for prosecution where the remedies include compensation. The Commission is required to publish an inquiry report which includes comments from the government and actions taken by the government based on its recommendations.<sup>271</sup> However, the recommendations of

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<sup>260</sup> *Supra* Note 20, para 13.

<sup>261</sup> *Supra* Note 197, para. 63.

<sup>262</sup> *Supra* Note 197, para. 63.

<sup>263</sup> India signed the UN Convention against Torture in October 1997.

<sup>264</sup> Section 330: Voluntarily causing hurt to extort confession, or to compel restoration of property, Indian Penal Code, 1860.

<sup>265</sup> Section 331: Voluntarily causing grievous hurt to extort confession, or to compel restoration of property, Indian Penal Code, 1860.

<sup>266</sup> Section 348, Wrongful confinement to extort confession, or compel restoration of property, Indian Penal Code, 1860.

<sup>267</sup> Section 76, Person arrested to be brought before Court without delay, Code of Criminal Procedure.

<sup>268</sup> Section 25, Confession to police officer not to be proved, Indian Evidence Act.

<sup>269</sup> Section 3, Constitution of a National Human Rights Commission, The Protection of Human Rights Act.

<sup>270</sup> “Promotion and Protection of Human Rights Through CSC”, available at <https://nhrc.nic.in/complaints/promotion-and-protection-human-rights-through-csc>

<sup>271</sup> Section 18, Steps during and after inquiry, The Protection of Human Rights Act.

the NHRC do not have binding authority, and is therefore not entirely effective when it comes to enforcing human rights in India.<sup>272</sup>

Many detained detainees complained of torture. Khalid Saifi and Ishrat Jahan have alleged that they were subjected to physical and verbal custodial torture and ill-treatment.

**Khalid Saifi**, arrested on 26 February 2020 in relation to Delhi riots and the anti-CAA protests, was allegedly subjected to torture in custody, where his legs were broken and his beard was pulled out during interrogation.<sup>273</sup> Video from immediately before the time of his arrest shows him walking towards the police.<sup>274</sup> However, while in custody he was seen wheel-chair bound, with both legs appearing broken. On 17 August 2020, Khalid Saifi's wife Nargis Saifi filed an affidavit stating that her husband had been subjected to torture in police custody and had injuries on his face, neck, and bloodstained clothes in the sessions court, which ordered an inquiry.<sup>275</sup> Khalid Saifi also alleged physical ill-treatment during interrogation in his bail application of August 2021.<sup>276</sup> Khalid Saifi met with his wife Nargis on 2 and 8 February 2021, almost a year since his arrest, and told her that he had been beaten with sticks and belts on his body by police officers for more than 30 minutes.<sup>277</sup>

In December 2020, **Ishrat Jahan**, accused in the Delhi Riots case, stated in Court that she had been beaten by inmates at Mandoli Jail and had faced continuous harassment in prison by other inmates. Jahan had stated that there was a second incident of violence against her in December 2020 alone and that she was under immense stress due to the continuous physical and verbal harassment.<sup>278</sup> Jahan said, "*This is the second incident in a month. In the morning today at 6:30 am, they (inmates) beat me badly and abused me verbally. One of the inmates even*

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<sup>272</sup> R. Naik, "Granted the National Human Rights Commission is a 'toothless tiger', but can't it even growl?", *Scroll.in*, 07 August 2017, <https://scroll.in/article/845857/granted-the-national-human-rights-commission-is-a-toothless-tiger-but-cant-it-even-growl>

<sup>273</sup> Khalid Saifi was arrested in three separate cases in FIR 44/2020 Police Station Jagatpuri on 26 February 2020, FIR 59/2020 (the Delhi Riots cases FIR) on 21 March 2020 and FIR 101/2020 Police Station Khajuri Khas on 6 June 2020. Saifi first applied for bail in FIR 44/2020 on 18 March 2020. His bail was rejected on the ground that the allegations levelled against him were serious and that the investigation was ongoing. The chargesheet in the FIR was filed on 20 April 2020. Saifi applied for bail for the second time on 17 July 2020 on the ground that the chargesheet made vague and general allegations of him being a part of a group of protesters who attacked the police and that there was no CCTV footage of Saifi committing any violence. Saifi was granted bail on 11 September 2020. He was granted bail in FIR 101/2020 on 4 November 2020. His bail application in other cases has been denied.

<sup>274</sup> Clarion India, "Video of Wheelchair-Bound Activist Khalid Saifi Raises Questions over Delhi Police Conduct in Jail", *Clarion India*, 13 March 2020, <https://clarionindia.net/video-of-wheelchair-bound-activist-khalid-saifi-raises-questions-over-delhi-police-conduct-in-jail/>.

<sup>275</sup> Videos surfaced on social media highlighting the continued violence inflicted on Saifi likely to be in police custody; Video by Maktoop Media channel on Youtube: <https://www.youtube.com/watch?v=y8NYbdxQhmk>, uploaded on 13 March 2020

<sup>276</sup> A.S. Iyer, "Delhi Riots: Six Months After 'Torture', Khalid Saifi Awaits Bail", *The Quint*, 03 September 2020, [https://www.thequint.com/news/india/delhi-riots-khalid-saifi-bail-karkadooma-court-jagatpuri-fir?fbclid=IwAR0pzSueA-Zw1THfRistN2oGwVTpTLRg2v\\_LXHHbc9gHI4ZtmFkarVU6ysI](https://www.thequint.com/news/india/delhi-riots-khalid-saifi-bail-karkadooma-court-jagatpuri-fir?fbclid=IwAR0pzSueA-Zw1THfRistN2oGwVTpTLRg2v_LXHHbc9gHI4ZtmFkarVU6ysI)

<sup>277</sup> B. Sharma, "Torture, Belief & A Love Letter: Khalid Saifi's Year In Jail", *Article 14*, 26 February 2021, <https://www.article-14.com/post/torture-belief-a-love-letter-khalid-saifi-s-year-in-jail>

<sup>278</sup> Press Trust of India, "Harassed, Abused: Ex-Councillor Ishrat Jahan, Jailed In Delhi Riots Case", *NDTV.com*, 22 December 2020, <https://www.ndtv.com/india-news/harassed-abused-ex-councillor-ishrat-jahan-jailed-in-delhi-riots-case-2342098>

*slit her hand so that I am punished on a false complaint. Fortunately, the jail officials did not listen to them. I have given a written complaint also. They keep calling me a terrorist. They also demanded money from me in the canteen”.*<sup>279</sup> The Court directed the prison authorities to take immediate steps to ensure Jahan’s security and to ensure that she was not harassed further and sought a detailed report from prison authorities on the steps that had been taken to address the issue and to assess if shifting to another facility was required.<sup>280</sup> Advocate Pradeep Teotia, appearing for Jahan, added that she was beaten up by her inmates earlier as well, following which one of the inmates was transferred to another jail. *“One of the inmates beat her up badly previously. A complaint was filed before the Deputy Superintendent and that inmate was shifted to another jail. There are two ladies in her prison cell who beat her up today. While she was offering her morning prayers, they objected to it and started abusing her and beating her,”* he stated.<sup>281</sup>

## **E. Lack of Medical Care in Custody**

Despite clear international and domestic law requiring the responsible State authorities to provide adequate medical care to those in its care and custody, the Indian state has neglected to respect the right of health of the detainees, resulting in severe illness faced by many of the HRDs discussed in the Report as well as custodial death of one HRD due to ill-health.

The obligation to provide adequate medical care is required under the ICCPR to ensure freedom from torture and ill-treatment (article 7), the right to liberty (article 9), the right to humane treatment (article 10), as well as to ensure right to health (article 12) under the International Covenant Economic, Social and Cultural Rights (ICESCR) to which India is a party.

Pursuant to its obligations under article 9, ICCPR “prompt and regular access should be given to independent medical personnel” to all persons in detention.<sup>282</sup> A “State ... by arresting and detaining individuals takes the responsibility to care for their life”<sup>283</sup> and it is “incumbent on States to ensure the right of life of detainees, and [is] not incumbent on the latter to request protection”.<sup>284</sup> Rule 24, Nelson Mandela Rules says, “[p]risoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.”<sup>285</sup>

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<sup>279</sup> *Supra Note 277.*

<sup>280</sup> Press Trust of India, “Delhi riots: Ishrat Jahan alleges in court beating, harassment by jail inmates” *The Indian Express*, 22 December 2020, <https://indianexpress.com/article/cities/delhi/delhi-riots-ishrat-jahan-alleges-in-court-beating-harassment-by-jail-inmates-7115452/>

<sup>281</sup> *Supra Note 280.*

<sup>282</sup> See the following cases: Human Rights Committee Concluding Observations: Georgia (2002) UN Doc A/57/40 vol I 53 para 78(7); *Pinto v. Trinidad and Tobago* (Communication No. 232/1987) Report of the Human Rights Committee vol 2 UN Doc A/45/40 p. 69 para 12.7.

<sup>283</sup> *Lantsova v. Russian Federation* (26 March 2002) UN Doc CCPR/C/74/763/1997 para 9.2.

<sup>284</sup> *Ibid.*

<sup>285</sup> *Supra Note 30*, Rules 24(1), 27, 31, 42, 118, Nelson Mandela Rules. Rule 27 calls for prisons to “ensure prompt access to medical attention in urgent cases”. Rule 31 provides for daily access of physicians or qualified health-care professionals to “all sick prisoners, all prisoners who complain of physical or mental health issues or injury and any prisoner to whom their attention is specially directed”. Rule 42 states that “General living conditions addressed in these rules, including those



Article 12 of ICESCR enshrines every person's right to enjoy the "highest attainable standards of physical and mental health",<sup>286</sup> and requires States to create conditions to "ensure to all medical service and medical attention"<sup>287</sup> without discrimination.<sup>288</sup> States are obligated to ensure equal access to health to prisoners and detainees and to refrain from discriminatory practices, including related to women's health needs.<sup>289</sup> The right to health also includes "minimum levels of housing, water, sanitation, nutrition and taking into account impact on health outcomes for those vulnerable to COVID-19 transmission".<sup>290</sup>

Rules 69 and 70 of the Mandela Rules indicate that in case of the prisoner's death, the next of kin should be immediately informed, and that the prisoner is entitled to get immediate information about the serious illness or death of a near relative or any significant other.<sup>291</sup> Under Rule 70, whenever circumstances allow, the prisoner should be authorized to attend the funeral in such cases.<sup>292</sup>

The Supreme Court has read into the fundamental right to life (Article 21) in *Parmanand Kataria v. Union of India* (1989) the State's duty to uphold the right to health of individuals regardless of the crimes alleged against them.<sup>293</sup> Further, the Supreme Court has said that if the detainee is in constant fear of violence, torture or lack of basic medical facilities and comfort, this treatment amounts to a violation of Article 21.<sup>294</sup> The Prison Act, 1894, provides that if a prisoner is subjected to abuse, the prison administration is held accountable.<sup>295</sup> Further, the 2016 Model Prison Manual by the Ministry of Home Affairs says that prisoners have right to access basic minimum needs of diet, medical care, drinking water, hygienic living conditions, sanitation, among others.<sup>296</sup> On 5 October 2020, the NHRC issued an advisory for police on human rights of prisoners during COVID-19, recommending provision of "essential healthcare facilities in every prison",

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related to light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space, shall apply to all prisoners without exception". With regard to care of prisoners with health conditions, Rule 109 states that they should be "observed and treated in specialized facilities under the supervision of qualified health-care professionals". Rule 118 lays down that "An untried prisoner shall be allowed to be visited and treated by his or her own doctor or dentist if there are reasonable grounds for the application and he or she is able to pay any expenses incurred".

<sup>286</sup> Article 12, International Covenant on Economic, Social and Cultural Rights.

<sup>287</sup> Article 12(2)(d), International Covenant on Economic, Social and Cultural Rights.

<sup>288</sup> Article 2(2), International Covenant on Economic, Social and Cultural Rights.

<sup>289</sup> *Supra* Note 31, para. 33.

<sup>290</sup> World Health Organization, Social Determinants of Health, available at: [https://www.who.int/social\\_determinants/en/](https://www.who.int/social_determinants/en/).

<sup>291</sup> *Supra* Note 30, Rule 69, Nelson Mandela Rules.

<sup>292</sup> *Supra* Note 30, Rule 70, Nelson Mandela Rules.

<sup>293</sup> Supreme Court of India, *Parmanand Katara v. Union of India*, 1989 AIR 2039, <https://main.sci.gov.in/jonew/judis/7839.pdf>.

<sup>294</sup> Supreme Court of India, *Charles Sobraj v. The Suptd., Central Jail Tihar*, 1978 AIR 1514, para. 17, <https://indiankanoon.org/doc/1518037/>.

<sup>295</sup> Section 12(3), The Prison Act

<sup>296</sup> Bureau of Police Research and Development, Ministry of Home Affairs, Government of India, New Delhi 2003: Model Prison Manual for the Superintendence and Management of Prisons In India, <https://bprd.nic.in/WriteReadData/userfiles/file/5230647148-Model%20Prison%20Manual.pdf>. Despite regulations and laws in place, lack of medical care in prisons caused close to 1,800 deaths across over 1,339 prisons in India in 2018. Source: "Poor Medical Care for Prisoners Explains Why Number of Custodial Deaths Is Only Rising", <https://thewire.in/rights/prison-custodial-death-medical-care>



testing for inmates, medicine stocks, isolation and distancing measures, as well as provision of soap, sanitizers, facemasks, among other things.<sup>297</sup>

However, during their incarceration and while in care and custody of the state, among others, Father Stan Swamy, Varavara Rao and Hany Babu have been denied medical care in prisons. They have had to make several representations before the government and courts for access to basic medical treatment, while the state authorities have often delayed treatment causing serious risks to their health.<sup>298</sup>

**Stan Swamy**, detained in October 2020, needed a straw and a sipper cup to drink due to his suffering from Parkinson's disease. While Swamy's lawyer arranged for all these articles to be delivered to him, the police failed to deliver these items and his prescription spectacles to him.<sup>299</sup> His lawyer made an application for arranging a straw and sipper for him on 6 November 2020, which was eventually provided by the NIA after a month of waiting.<sup>300</sup> In May 2020, Stan Swamy's motor skills were reported to have deteriorated. Nevertheless, there was no adequate mode of assessment of his health in prison, as there were only ayurvedic doctors, who were not trained to provide appropriate care, in violation of prison guidelines.<sup>301</sup> Stan Swamy tested positive for COVID-19 infection on 30 May 2021

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<sup>297</sup> NHRC India, Advisory On The Rights Of Prisoners and Police Personnel, 05 October 2020, Advisory 1, <https://nhrc.nic.in/sites/default/files/Advisory%20on%20the%20Rights%20of%20Prisoners%20and%20Police%20Personnel.pdf>.

<sup>298</sup> 1. Following her arrest in 2018, Nagpur-based Bhima Koregaon accused Shoma Sen, suffering from acute arthritis, had been unable to use the toilet facility at Yerawada jail. In July 2018, when Sen's family approached the Yerawada jail authorities to provide a portable western commode to her, they refused the same on ground that a court direction was needed to provide her with the facility. The Court directed the police to give Sen a commode if the rules permitted it. However, when Sen's daughter brought a commode chair, she was turned away twice. The third time, the authorities took the commode seat but gave the same to Sen only after delay of about a month. C. Deshmukh, "Jailed Shoma Sen's kin request court to give her portable commode" *Mid-Day*, 12 July 2018, <https://www.mid-day.com/mumbai/mumbai-news/article/jailed-shoma-sen-s-kin-request-court-to-give-her-portable-commode-19599151>; 2. Despite a court order, Gadling's wife was turned away by the jail administration when she took a thermal sweater for him on the ground that full-sleeved sweaters were not allowed and that she must get a half-sleeved one. On another occasion, Gadling developed a heart condition in custody and he was admitted in Pune's Nayar hospital for 3-4 days. While he was admitted, the police did not allow his wife to meet him. The police also refused to give Gadling's medical records to his wife and when she tried to obtain them through an RTI application. P. Goyal, "Bhima Koregaon case: Three years of legal and rights violations" *NewsLaundry*, 02 January 2021, <https://www.newslaundry.com/2021/01/02/bhima-koregaon-case-three-years-of-legal-and-rights-violations>; 3. Mahesh Raut suffered from a gastronomical disease and had to undergo a biopsy. The police refused to give him his biopsy report afterwards, telling him he was fine. P. Goyal, "Bhima Koregaon case: Three years of legal and rights violations" *NewsLaundry*, 02 January 2021, <https://www.newslaundry.com/2021/01/02/bhima-koregaon-case-three-years-of-legal-and-rights-violations>

<sup>299</sup> S. Saigal, "Do not have a straw and sipper to give Stan Swamy, NIA tells court", *The Hindu*, 26 November 2020, <https://www.thehindu.com/news/national/do-not-have-a-straw-and-sipper-to-give-stan-swamy-nia-tells-court/article33185647.ece>

<sup>300</sup> Condemning the delay in providing essentials to the octogenarian, citizens from across the country sent straws and sippers to Taloja jail. The Wire Staff, "Social Media Users Launch Campaign to Send Straw and Sipper to Stan Swamy in Taloja Jail", *The Wire*, 28 November 2020, <https://thewire.in/rights/social-media-campaign-straw-sipper-stan-swamy>

<sup>301</sup> ICJ Interview, May, 2021

while in hospital for his otherwise deteriorating health condition.<sup>302</sup> He died on 5 July 2021 while in hospital. Following his death, the UN High Commissioner for Human Rights spokesperson stated that they were “deeply saddened and disturbed” by the death of Father Swamy, and highlighted that the OHCHR and UN independent experts had “repeatedly raised the cases of Father Stan and 15 other human rights defenders associated with the same events with the Government of India over the past three years and urged their release from pre-trial detention.”<sup>303</sup>

On 28 May 2020, poet **Varavara Rao** fell unconscious in Taloja jail and was taken to JJ Hospital, and was discharged on 1 June 2020. He continued to face severe ill-health and since early July 2020, has been unable to walk unaided and has needed assistance in carrying out daily chores, such as brushing, cleaning his teeth, and going to the toilet.<sup>304</sup> He was also said to be hallucinating and spoke about his father’s funeral that took place more than 75 years ago.<sup>305</sup> He was suffering from a severe urinary tract infection but the prison authorities failed to provide for treatment.<sup>306</sup> On 16 July 2020, he tested positive for COVID-19 and was transferred to a state-run COVID facility, where he was finally treated, after insistence from his family.<sup>307</sup>

**Hany Babu**, a Bhima Koregaon accused, has been held in Taloja jail since 28 July 2020. On 3 May 2021, he developed an eye infection and complained of an acute eye infection, pain and gradual loss of vision. Only basic antibiotics were prescribed to him by ayurvedic doctors at the prison premises, who were not equipped to prescribe allopathic medicines for the ailment, and he was not taken to an allopathic doctor. His family and lawyers were worried that denial of adequate medical treatment would affect Babu’s mental faculties, and questioned the prison authorities regarding denial of immediate medical treatment to him. Hany Babu’s wife released a press statement saying, “Hany has little or no vision in his left eye due to the swelling, which has spread to the cheek, ear and forehead compromising other vital organs as well. It poses a significant risk to his life if it spreads to the brain.” She appealed to prison authorities to shift Hany Babu to a multi-speciality hospital where he could be treated for both the ailments.<sup>308</sup> Due to acute water shortage in the prison, Babu allegedly did not have access to clean

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<sup>302</sup> PTI, “Elgar Parishad case: Activist Stan Swamy tests positive for coronavirus”, *The New India Express*, 31 May 2021, <https://www.newindianexpress.com/nation/2021/may/31/elgar-parishad-case-activiststan-swamy-tests-positive-forcoronavirus-2309805.html>

<sup>303</sup> *Supra* Note 44.

<sup>304</sup> Scroll Staff, “‘Nothing allows state to endanger life’: 2,000 citizens call for immediate release of Varavara Rao” *Scroll.in*, 13 July 2020, <https://scroll.in/latest/967397/nothing-allows-state-to-endanger-life-2000-citizens-call-for-immediate-release-of-varavara-rao>

<sup>305</sup> Parth M.N., “Don’t Kill Him in Jail. His Brain is Getting Damaged,” says Varavara Rao’s Family” *News Click*, 12 July 2020, <https://www.newsclick.in/Varavara-rao-dont-kill-him-in-jail-says-family>

<sup>306</sup> S. Hakim, “Dr Varavara Rao’s catheter unchanged for three months” *Mumbai Mirror*, 18 November 2020, [https://mumbaimirror.indiatimes.com/mumbai/cover-story/dr-varavara-raos-catheter-unchanged-for-three-months/articleshow/79271379.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://mumbaimirror.indiatimes.com/mumbai/cover-story/dr-varavara-raos-catheter-unchanged-for-three-months/articleshow/79271379.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>307</sup> Sukanya Shantha, “Varavara Rao Tests Positive for COVID-19, Moved to St. George Hospital”, *The Wire*, 16 July 2020, available at <https://thewire.in/rights/varavara-rao-covid-19-positive-st-george-hospital>

<sup>308</sup> S. Vibhavari, “Hospitalized for eye infection, jailed prof Hany Babu tests COVID positive” *Siasat.com*, 14 May 2021, <https://www.siasat.com/hospitalized-for-eye-infection-jailed-prof-hany-babu-tests-covid-positive-2136631/>

water and to even wash his eye and was forced to dress his eye with soiled towels.<sup>309</sup> After repeated efforts by lawyers including repeated calls to the jail authorities and application filed before court, Babu was taken to JJ Hospital in Mumbai on 12 May 2021.

The Indian government has been violation of its international legal obligations under the ICCPR and ICESCR and Indian law by failing to provide adequate medical healthcare and by not taking action on the deterioration of health of inmates in prisons, particularly in the light of COVID-19 pandemic.

## **F. COVID Protocol not Maintained and Contraction of COVID-19 by HRDs in Custody**

A number of the detainees, including the elderly and immuno-compromised, Varavara Rao, Hany Babu, Sharjeel Imam, Akhil Gogoi, Stan Swamy contracted COVID-19 in prison, as a result of lack of COVID protocols, such as overcrowding, lack of social distancing within prison, and limited testing facilities. Stan Swamy, suffering from various ailments, including Parkinsons for the last decade, died shortly after testing positive for COVID-19 while in judicial custody, one day before his bail hearing before the Bombay High Court.<sup>310</sup>

As highlighted above, the right to health is protected under article 12 of the ICESCR. CESCR on 6 April 2020 stated that COVID-19 has had “deep negative impacts on the enjoyment of economic, social and cultural rights, especially the right to health of the most vulnerable groups”,<sup>311</sup> and clarified that states are “under an obligation to take measures to prevent, or at least to mitigate” the negative impacts of COVID-19 and that they must do so “within a human rights framework”.<sup>312</sup> Persons deprived of their liberty are among the categories of people at greater risk of infection in relation to COVID-19,<sup>313</sup> given “the spread of the virus can expand rapidly due to the usually high concentration of persons deprived of their liberty in confined spaces and to the restricted access to hygiene and health care in some contexts”.<sup>314</sup> The OHCHR issued an early warning about the threat of COVID-19 to detained persons, urging States “not to forget those behind bars”,<sup>315</sup> and the High Commissioner called on governments to take urgent action to protect the health and safety of people in detention.<sup>316</sup> The UNODC,

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<sup>309</sup> *Supra* Note 30, rule 18.

<sup>310</sup> *Supra* Note 98.

<sup>311</sup> UN Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, U.N. Doc. E/C.12/2020/1 (7 April 2020), para 2, <https://undocs.org/E/C.12/2020/1>

<sup>312</sup> *Ibid.* See International Commission of Jurists, “Failed Preparations and Fatal Denials: How India’s Executive Contributed to the Devastation Wrought by the Second Wave of COVID-19”, February 2022, available at <https://www.icj.org/wp-content/uploads/2022/02/India-second-wave-of-covid-19-publications-briefing-2022-ENG.pdf>

<sup>313</sup> *Supra* Note 311, para 5.

<sup>314</sup> COVID-19: Focus on persons deprived of their liberty (interim guidance jointly developed by IASC / OHCHR / WHO), 27 March 2020, page 2, available at [https://www.who.int/publications/m/item/covid-19-focus-on-persons-deprived-of-their-liberty-\(interim-guidance-jointly-developed-by-iasc-ohchr-who\)](https://www.who.int/publications/m/item/covid-19-focus-on-persons-deprived-of-their-liberty-(interim-guidance-jointly-developed-by-iasc-ohchr-who))

<sup>315</sup> Office of the United Nations High Commissioner for Human Rights, “Urgent action needed to prevent COVID-19 “rampaging through places of detention”, 25 March 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>

<sup>316</sup> *Ibid.*

WHO, UNAIDS in its joint statement (13 May 2020) urged political leaders to consider releasing people at particular risk of COVID-19, such as older people and people with pre-existing health conditions.<sup>317</sup> It further stated that arbitrarily detained persons including HRDs, activists and journalists should be released irrespective of the risk of COVID-19 compounds the violation of their detention.<sup>318</sup> The UN High Commissioner for Human Rights has emphasized that “every person detained without sufficient legal basis, including political prisoners, and those detained for critical, dissenting views” should be released.<sup>319</sup> Similarly, the Committee on the Elimination of Discrimination Against Women has recommended that women human rights defenders detained without adequate legal basis be released in light of the pandemic.<sup>320</sup>

The Supreme Court addressed the issue of prison overcrowding in the context of COVID-19 recognizing it as an issue of “serious concern” and highlighted the responsibility of the authorities to control the spread of COVID-19 in prisons in light of their Article 21 obligations, directed the constitution of a High Powered Committee to determine those prisoners that could be released on parole or bail.<sup>321</sup>

According to the NCRB Report, Prison Statistics India – 2019,<sup>322</sup> in Delhi, the prisons where the accused in the Delhi riots cases are lodged, “reported the highest occupancy rate (174.9%).”<sup>323</sup> In Maharashtra, where the accused in the Bhima Koregaon cases are lodged, “reported the highest number of undertrial prisoners of other states (16.0%, 4,675 inmates)”<sup>324</sup> at the end of 2019.

The persons whose cases are addressed in this Report were or are held in the following prisons:-

1. Taloja Jail, Maharashtra – Father Stan Swamy, Rona Wilson, Varavara Rao, Gautam Navlakha, Surendra Gadling, Hany Babu, Mahesh Raut, Sagar Gorkhe, Ramesh Gaichor, Arun Ferreira, Vernon Gonsalves, Anand Teltumbde, Sudhir Dhawale;
2. Byculla Jail, Maharashtra – Sudha Bhardwaj, Shoma Sen, Jyoti Jagtap,
3. Mandoli Jail, Delhi – Ishrat Jahan, Khalid Saifi,
4. Tihar Jail, Delhi – Natasha Narwal, Devangana Kalita, Asif Iqbal Tanha, Safoora Zargar, Gulfish Fatima, Sharjeel Imam.<sup>325</sup>

According to Maharashtra Prison Department, Taloja Prison, where the accused persons in connection with the Bhima Koregaon case are lodged, can officially house only 2,124 inmates, but as of 23 April 2021, it was holding 3,251 inmates,

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<sup>317</sup> *Supra Note* 191.

<sup>318</sup> *Supra Note* 191.

<sup>319</sup> *Supra Note* 315.

<sup>320</sup> CEDAW - Guidance Note on CEDAW and COVID-19, on 22 April 2020, para. 7.

<sup>321</sup> Supreme Court of India, in *In Re: Contagion Of Covid 19 Virus In Prisons*, Suo Motu Writ Petition (C) 1/2020, 23.03.2020, page 7.

<sup>322</sup> National Crime Records Bureau (Ministry of Home Affairs) Government of India, Prison Statistics – 2019, page 4, available at <https://ncrb.gov.in/sites/default/files/Executive-Summary-2019.pdf>

<sup>323</sup> *Ibid*, page 15.

<sup>324</sup> *Ibid*, page 24.

<sup>325</sup> Sabrang India, “Father Stan Swamy’s Health Deteriorates in Jail, Files Note in HC on Poor Facilities” *News Click*, 18 May 2021, <https://www.newsclick.in/Father-Stan-Swamy-Health-Deteriorates-Jail-Files-Note-HC-Poor-Facilities>

at over 150% occupancy.<sup>326</sup> Under the Maharashtra Prisons (Prison Hospital) Amendment Rules 2015, prisons should have a chief medical officer, medical officers, staff nurses, pharmacists, nursing assistants, laboratory technicians and psychiatric counsellors.<sup>327</sup> Instead, Taloja Hospital has only three health-care personnel, all of whom are practitioners in Ayurveda and not allopathy medicine.<sup>328</sup>

The Bombay High Courts took cognizance of the matter of congestion in Maharashtra's prisons in April 2021, where the accused in the Bhima Koregaon violence case are lodged, referring to media reports that at least 200 prisoners had already tested positive. The Court directed the revamping of facilities at Taloja jail, and ordered that new masks be issued to the inmates as they had been allegedly using the same masks since over a year.<sup>329</sup>

In July 2020, **Sharjeel Imam** tested positive for COVID while in Guwahati Central jail, which was only identified because he was tested while being transferred from Assam prison to Tihar jail in Delhi,<sup>330</sup> as required under the inter-state travel guidelines issued by the Ministry of Home Affairs and various state governments. Despite the positive test, Sharjeel Imam was kept in Guwahati Central Jail's COVID care centre in unsanitary conditions, however, no action was taken by the authorities despite repeated complaints.<sup>331</sup>

In July 2020, **Varavara Rao** was moved to JJ Hospital in Bombay on health grounds. While he was in the hospital, Rao tested positive during a routine swab. He was released from the hospital after COVID-19 treatment in August 2020, after which he was sent back to jail.<sup>332</sup> Rao was finally granted bail on medical grounds, which has been extended several times by the Bombay High Court.<sup>333</sup> However, his application for permanent medical bail was rejected by the Bombay High Court on April 13, 2022.<sup>334</sup> It was finally granted by the Supreme Court in August 2022.<sup>335</sup>

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<sup>326</sup> Maharashtra Prison Department, <http://mahaprison.gov.in/Site/Home/Index.aspx>

<sup>327</sup> Maharashtra Prisons (Prison Hospital) Rules 1970, Rule 2.

<sup>328</sup> K. Dodhiya, "Bombay HC seeks details of doctors, paramedics available in jails", *Hindustan Times*, 30 April 2021, <https://www.hindustantimes.com/cities/mumbai-news/bombay-hc-seeks-details-of-doctors-paramedics-available-in-jails-101619724403729.html>

<sup>329</sup> S. Hakeem, "Bombay High Court Takes Suo Motu Cognizance of Covid-19 Surge In Prisons", *LiveLaw*, 17 April 2021, <https://www.livelaw.in/news-updates/bombay-high-court-covid-19-cases-prisons-suo-motu-maharashtra-172687>

<sup>330</sup> T. Haiser & T. Pandey, "Sharjeel Imam tests positive for coronavirus, Delhi Police delays his transfer from Assam", *India Today*, 21 July 2021, <https://www.indiatoday.in/india/story/jamia-violence-accused-sharjeel-imam-coronavirus-delhi-police-assam-1702909-2020-07-21>.

<sup>331</sup> ICJ Interview, April 2021.

<sup>332</sup> V.K. Yadav, "Varavara Rao released from hospital after Covid treatment; back in jail", *Hindustan Times*, 28 August 2020, <https://www.hindustantimes.com/india-news/varavara-rao-released-from-hospital-after-covid-treatment-back-in-jail/story-OpdlkcToUZ45sOchRDmbQI.html>

<sup>333</sup> *Supra Note* 131.

<sup>334</sup> *Supra Note* 132.

<sup>335</sup> Supreme Court of India, *Dr. P. Varavara Rao v. National Investigation Agency & Anr*, Criminal Appeal 1206/ 2022, 10 August 2022, available at [https://www.livelaw.in/pdf\\_upload/1888520222337164order10-aug-2022-430229.pdf](https://www.livelaw.in/pdf_upload/1888520222337164order10-aug-2022-430229.pdf)



In June 2021, HRDs **Mahesh Raut, Sagar Gorkhe, Ramesh Gaichor** tested positive for the COVID-19 virus while in judicial custody in Talaja jail.<sup>336</sup> This was only identified as an RT-PCR drive was conducted after co-accused Stan Swamy had tested positive for the infection on 30 May 2021 while in hospital.<sup>337</sup> The three accused were staying in close proximity to help Swamy due to his poor health.

In May 2021, **Hany Babu** tested positive for COVID-19 which was found out during a routine test for a severe eye, when he got medical attention after his wife appealed to the authorities to shift him to a multi-speciality hospital where treatment for both his ailments could be given.<sup>338</sup> On 19 May 2021, the Bombay High Court directed the state prison department to transfer him to Breach Candy hospital in Mumbai to treat him for an eye infection and other ailments with the cost being borne by his family.<sup>339</sup> He received treatment in Mumbai, after which he was sent back to Talaja jail on 18 August 2021.<sup>340</sup> As of August 2022, the Bombay High Court has concluded hearings on his application for default bail and has reserved its order.<sup>341</sup>

The Courts have repeatedly rejected bail applications filed by the HRDs both on merit as well as on health grounds. Although UN experts,<sup>342</sup> civil society<sup>343</sup> and the detained themselves and their family members<sup>344</sup> have repeatedly raised concerns about the increased risk of COVID-19 contraction due to the lack of physical distancing in prisons and the lack of medical facilities in hospitals, the state and central governments have not responded effectively by reducing prison population and maintaining adequate COVID protocols. As a result, several of the persons as mentioned above, including the elderly and the immuno-compromised, have contracted COVID-19 while in prison.

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<sup>336</sup> Express News Service, "3 more accused test positive at Talaja jail", *The Indian Express*, 04 June 2021, <https://indianexpress.com/article/cities/mumbai/3-more-accused-test-positive-at-talaja-jail-7343165/>

<sup>337</sup> Press Trust of India, "Elgar Parishad case: Activist Stan Swamy tests positive for coronavirus", *New Indian Express*, 31 May 2021, <https://www.newindianexpress.com/nation/2021/may/31/elgar-parishad-case-activiststan-swamy-tests-positive-forcoronavirus-2309805.html>

<sup>338</sup> "Bhima Koregaon case: Accused professor Hany Babu tests positive for COVID-19", *New Indian Express*, 16 May 2021, <https://www.newindianexpress.com/nation/2021/may/16/bhima-koregaon-caseaccused-professor-hany-babu-tests-positive-for-covid-19-2303118.html>

<sup>339</sup> Express News Service, "Bombay HC permits Hany Babu to be shifted to Breach Candy Hospital, cost to be borne by family", *New Indian Express*, 20 May 2021, <https://indianexpress.com/article/cities/mumbai/bombay-hc-permits-hany-babu-to-be-shifted-to-breach-candy-hospital-cost-to-be-borne-by-family-7322197/>

<sup>340</sup> Press Trust of India, "Elgar Parishad case: Accused Hany Babu to be back in jail from hospital on Aug 18", *New Indian Express*, 17 August 2021, <https://www.newindianexpress.com/nation/2021/aug/17/elgar-parishadcase-accused-hany-babu-to-be-back-in-jail-from-hospital-on-aug-18-2345992.html>

<sup>341</sup> "Elgar Parishad case: HC concludes hearing of Hany Babu's bail plea", *Hindustan Times*, August 29 2022, available at <https://www.hindustantimes.com/cities/mumbai-news/elgar-parishad-case-hc-concludes-hearing-of-hany-babu-s-bail-plea-101661789428003.html>

<sup>342</sup> *Supra Note* 311, para 5.

<sup>343</sup> InSAF India, Prominent international figures support appeal for release of human rights defenders as India faces Covid emergency, <https://www.academicfreedomindia.com/covid-19-urgent-appeal-for-release>, 17 June 2021

<sup>344</sup> S. Dasgupta, "'Left to die': Families of Bhima Koregaon accused demand their release, say jail conditions poor", *The Print*, 12 June 2021, <https://theprint.in/india/left-to-die-families-of-bhima-koregaon-accused-demand-their-release-say-jail-conditions-poor/676575/>



## VI. RECOMMENDATIONS

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The ICJ offers recommendations with the aim of enabling the Indian authorities to better respect and ensure the human rights of all persons, but particularly human rights defenders in exercising their fundamental freedoms. When in confrontation with State authorities, they must be protected from arbitrary detention and enjoy the right to a fair trial and access to justice. They are made with particular applicability to the human rights defenders whose cases are highlighted in this Report in light of COVID-19 pandemic by ensuring the development of law and practices that are compliant with India's international legal obligations, and the Indian law and the jurisprudence of Indian courts.

### Key Recommendations

#### To the Parliament of India

- Repeal or amend the UAPA to meet fundamental guarantees under the Constitution of India and India's international legal obligations. In particular, repeal or amend provisions on anticipatory bail and default bail.
  - Anticipatory bail – Repeal or amend S. 43D(4), Unlawful Activities (Prevention) Act, 1967 which denies anticipatory bail to all cases under UAPA. It presently provides "Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act" to include the provision of anticipatory bail under UAPA.
  - Default Bail – Amendment of S.43D(5), Unlawful Activities (Prevention) Act, 1967, which reverses the burden of proof for grant of bail, as it prevents the Court from granting bail if based on the police case diary and police report the court believes that there is a prima facie case against the accused. This provision contravenes the principle of bail under international law which states that bail should be the rule and prolonged pre-trial detention should only be used exceptionally in cases where there is risk of the accused absconding, destroying evidence, influencing witnesses or fleeing from the State's jurisdiction.
- Amend or repeal the law on sedition (S. 124A, IPC) on the basis of the 2022 Supreme Court judgment *S.G. Vombatkere v. Union of India* where the Government has agreed with the prima facie view of the Court that sedition is not aligned with the "current social milieu" and needs to be reconsidered.
- Ratify the Convention Against Torture (CAT) in line with the recommendations of the Law Commission of India.<sup>345</sup>
- Adopt anti-torture legislation incorporating CAT provisions irrespective of ratification and India's existing obligations in respect of torture and ill-treatment, particularly under article 7 of the International Covenant on Civil and Political Rights.

#### To the Prison Administration

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<sup>345</sup> Law Commission of India, "Report 273: Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation", October 2017, <https://lawcommissionofindia.nic.in/reports/Report273.pdf>

- Upgrade the video-conferencing system to ensure continuous and effective communication between detainees and family members and lawyers.
- Adopt major upgrades to the provision of healthcare in all places of detention, in line with obligations under international human rights law; ensure that detention facilities have the capacity to protect the health of those detained, along with guaranteed access to treatment in the facility itself or at the hospital or other medical facility sanctioned by the government.
- In particular, ensure adequate prison hygiene in line with international law and standards and recommendations by the Ministry of Home Affairs, including regular sanitization, cleaning and disinfection of wards and common places.
- Ensure that all people deprived of their liberty are granted continuous and confidential access to their lawyers, in line with ICCPR articles 9 and 14, the Mandela Rules and the prescriptions of the Supreme Court in *Francis Coralie Mullin vs. Administrator, Union Territory of Delhi and Ors.*
- Refer complaints of torture or other ill-treatment by police to the prosecutorial authorities for a proper, thorough, impartial and independent investigation of any police officials accused of ill-treatment, either on complaint or even *suo motu* in line with international and domestic standards
- Address complaints of other forms of harassment by prisoners and jail officials promptly and if necessary refer these to public prosecutors.
- End prison overcrowding and ensure social distancing at places of gatherings in prison complex.
- Construct new facilities where required to meet standards of adequate housing.
- Ensure prison hygiene in line with international law and standards recommended by the Ministry of Home Affairs, including regular sanitization, cleaning and disinfection of wards and common places.

#### To Prosecutors

- Provide for early release of low-risk category of detainees in order to reduce overcrowding in jails, which makes it difficult to implement social distancing and maintaining proper hygiene and sanitation in light of the COVID-19 pandemic. Low-risk category of detainees include unfit detainees, aged persons with underlying health conditions and those who are in pre-trial detention for non-violent offences.
- Conduct a general review of all cases to determine if the original basis for charges was legitimate.



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