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Kandhamal: The Law Must Change its Course

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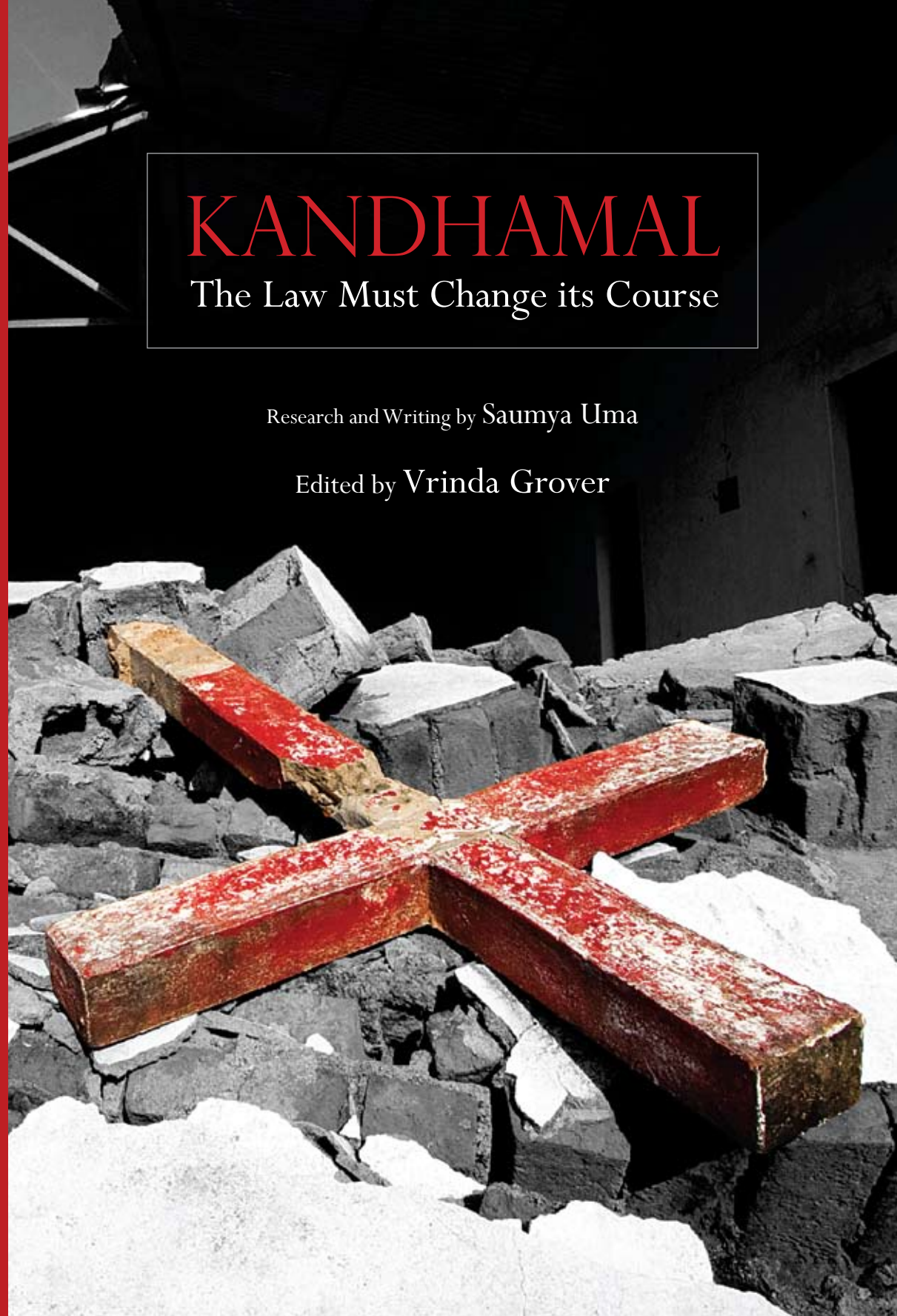
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The tragedy of Kandhamal is that the attack on the Christian community was familiar and the subsequent failure of the legal system to accord justice to the victim-survivors predictable.

This book critically examines the patterns of impunity as they unfold in Kandhamal. There is today a vibrant debate seeking legal reform to ensure accountability for mass crimes by extending culpability to those who sponsor and profit from the carnage. Rooted in the firm belief that without justice there can be no peace, this book seeks to contribute to the effort to forge new legal tools to alter patterns of continuing injustice and rampant impunity.



KANDHAMAL

The Law Must Change its Course

Research and Writing by Saumya Uma

Edited by Vrinda Grover

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205-206, 2nd Floor

Shahpur Jat, New Delhi -110049.

Tel: 91-11-26497483/26496925

Fax: 91-11-26495371

E-mail: marg@ngo-marg.org

Website: www.ngo-marg.org

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PREFACE

It takes approximately five to six hours travel by road to reach Kandhamal from Bhubneshwar, the capital of Orissa. A remote and barely known district of Orissa, it received national and international attention on account of the anti Christian violence of 2007 and again in August 2008. On my first visit to Kandhamal, what struck me was the abject poverty of the majority of its population. The Dalit Christians *Panas* and the *Kandha* tribals both counted amongst the poorest and most marginalized citizens. It is a shame that after 60 years of Independence, it is not development, growth and prosperity that have made an impact upon their lives, but hatred and communal prejudice.

In April 2009, I visited the Phulbani fast track courts set up to adjudicate cases related to the Kandhamal anti Christian violence. A senior member of the Phulbani Bar admonished me for doing so, stating that it was 'outsiders' like me who were causing trouble. He also suggested I visit the interior Blocks to see for myself that normalcy had returned to Kandhamal. I did as he advised and traveled to a few blocks. I found that almost a year later the Christian community continued to seek refuge in derelict relief camps or lived as outcasts on the fringe of villages. As they tried to cope with loss, they also faced an uncertain future due to a socio-economic boycott against them; and remained fearful of impending attacks. Has the Indian polity come to regard second class citizenship for religious minorities as the normal state of affairs? Has the guarantee of equal citizenship for all regardless of religion, caste, sex etc. inscribed in the Indian

Constitution been abandoned in Kandhamal? The photographs appearing in this book were taken during this trip. They bear silent testimony to the real meaning of the 'normalcy' and 'peace' that supposedly prevails in Kandhamal.

The tragedy of Kandhamal is that the attack on the Christian community did not surprise anyone and further more, that the subsequent failure of the legal system to accord justice to the victim – survivors was predictable. Despite warning signals that concerted communal mobilization was underway for almost two decades in Orissa, no preventive measures were taken to secure life and property. Perhaps governance was guided by lessons learnt from India's contemporary history - one of which appears to be that communal killings are expected to pay rich electoral dividends. The failure of the criminal justice system to punish those who planned the killing and destruction in Kandhamal has left a deep sense of injustice and discrimination. The state's failure to provide adequate reparation to the victim-survivors and their cruel abandonment has deepened this alienation.

The Nellie massacre of 1983; the anti Sikh pogroms of 1984; the Bhagalpur riots of 1989; the anti Muslim violence in Mumbai in 1992; the genocidal attack on the Muslims of Gujarat in 2002; and now the Kandhamal attack on Christians, indicates that mass crimes committed with overt or covert State sanction, pose a grave challenge to the secular, pluralist idea of India.

This book critically examines the pattern of impunity as it continues to unfold in Kandhamal. Civil society in India urgently requires to debate legal reforms on accountability for mass crimes. The claim to 'civilisation' by any society is dependent above all, on the degree to which it ensures the dignity of its citizens, and their equality in the eyes of the law. That is why it is essential to extend culpability to those who sponsor and profit from such acts. This publication seeks to contribute to the effort to forge new legal tools to alter this pattern of continuing injustice and rampant impunity. It is rooted in the firm belief that without justice there can be no peace.

Vrinda Grover

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MARG's foray into Kandhamal, Orissa, began with a modest scoping study for the purpose of legal empowerment. While discussing the preliminary findings of the survey, MARG's chairperson, Maja Daruwala suggested that the findings of the survey and research be published. This remark and the unstinting support of Navaz Kotwal encouraged this publication.

We express our deep appreciation to the Embassy of the Kingdom of the Netherlands, New Delhi and Commonwealth Human Rights Initiative (CHRI) for supporting the research, publication and dissemination of this book.

This book was conceptualised and edited by MARG's Executive Director, Vrinda Grover, whose understanding of entrenched impunity for mass crimes contributed to the analysis.

MARG would like to acknowledge the commitment with which Saumya Uma undertook the research and writing of this book.

Research assistance was provided by Seema Misra, Jawahar Raja and Mayur Suresh. The surveys were designed and supervised by Seema Misra and interviews and focus group discussions carried out enthusiastically by Mansoon Mohanty and Manyabar. MARG expresses its heartfelt gratitude to all the victim – survivors of Kandhamal who participated in the survey and group discussions.

A very sincere thanks to Dhirendra Panda for generously sharing his insights and coordinating MARG's work in Orissa. MARG is also grateful to Father Ajay, John Dayal and other social activists and lawyers of Orissa who answered our many queries. A special mention must also be made of the support and guidance provided by Abhilasha Kumari in the early stages of our work.

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Needless to say this book would not have been possible without the logistical and administrative support provided by the entire MARG team.

MARG

LIST OF ABBREVIATIONS

AIR	All India Reporter	IO	Investigating Officer
Art.	Article	IPC	Indian Penal Code, 1860
ATR	Action Taken Report	IPS	Indian Police Service
BDO	Block Development Officer	IPT	Indian People's Tribunal on Environment and Human Rights
BJP	Bharatiya Janata Party – political party of the Hindu Right	MLA	Member of the (state) Legislative Assembly
CAT	U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984	MP	Madhya Pradesh – a state in India
CEDAW	U.N. Convention on the Elimination of All forms of Discrimination Against Women, 1979	NCM	National Commission for Minorities, a statutory body
CRC	U.N. Convention on the Rights of the Child, 1989	NGO	Non-governmental organization
Cri.LJ	Criminal Law Journal	NCW	National Commission for Women, a statutory body
Cr.PC	Criminal Procedure Code, 1973	NHRC	National Human Rights Commission, a statutory body
CRPF	Central Reserve Police Force	PAC	Provincial Armed Constabulary – a type of police personnel
DCP	Deputy Commissioner of Police	PIL	Public interest litigation
DGP	Deputy General of Police	POTA	Prevention of Terrorism Act – a draconian law
DIG	Deputy Inspector General of Police	PUCL	People's Union for Civil Liberties
DM	District Magistrate	RAF	Rapid Action Force – a type of paramilitary force
DSP	Deputy Superintendent of Police	ROPA	Representation of the People Act 1951
FIR	First Information Report	RSS	Rashtriya Swayamsevak Sangh – National volunteer corps, the ideological organization of the Hindu right
ICC	International Criminal Court	SC	Supreme Court
ICCPR	International Covenant on Civil and Political Rights, 1966	SCC	Supreme Court Cases
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966	SC/ST Act	Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989
ICTR	International Criminal Tribunal for Rwanda	SIT	Special Investigation Team
ICTY	International Criminal Tribunal for Former Yugoslavia	SP	Superintendent of Police
IDPs	Internally Displaced Persons	ST	Scheduled Tribes
		TADA	Terrorist and Disruptive Activities (Prevention) Act 1987
		UAPA	Unlawful Activities (Prevention) Act 1967
		UDHR	Universal Declaration of Human Rights
		UN	United Nations
		UNHRC	United Nations Human Rights Committee
		UNDP	United Nations Development Program
		UP	Uttar Pradesh – a state in India
		UPA	United Progressive Alliance – a coalition government in India
		VHP	Vishwa Hindu Parishad (World Hindu Council)
		Vs.	Versus

I

INTRODUCTION

Orissa is one of the poorest states of India. The mean per capita expenditure per annum is Rs. 790 in Orissa and for members of the Scheduled Castes and Tribes (SC & ST respectively) it is Rs. 558. In rural areas of Orissa, the figure drops to Rs. 422 for SCs and STs. Kandhamal is one of the poorest districts of Orissa. It stands 29th out of Orissa's 30 districts on the Human Development Index prepared by UNDP. Kandhamal consists of about 2415 villages. Because of its hilly, forested areas, it has poor connectivity with other districts. Only 12% of its total area is cultivable. About 71% comprises of forests and the rest is barren land. *Adivasis* and *dalits* are not religious, but ethnic groups. However, the *Sangh Parivar*¹ considers them to be Hindu, and where they have adopted religions other than Hinduism, they become targets for re-conversion. The *dalits* in Kandhamal, otherwise known as *Panas*, constitute 17% of the district population. More than 90% of them are Christians.² The *dalits* are poorer than the *adivasis* and have no access to resources.³ However, the *adivasis* – *Kandhas* – are also a disenfranchised community. 78% of the *adivasis* in Kandhamal are living below poverty line.⁴ The *Panas* are designated as Scheduled Castes, comprise about 17% of the district population and hold

1 *The Sangh Parivar* consists of a group of organizations that are inspired by the goals of Hindu nationalism. It includes the *Rashtriya Swayamsevak Sangh* (RSS), *Vishwa Hindu Parishad* (VHP), *Bajrang Dal* and *Bharatiya Janata Party* (BJP). This report uses the term '*Hindutva forces*' interchangeably to refer to the *Sangh Parivar*.

2 Sudhir Pattnaik, 'Communalization of Social Relations in a Peaceful District: Critical Reflections on Kandhamal Violence', in Tanweer Fazal & Kaushikee (eds.), *Violence, Justice and Reconciliation: Communalism in Our Times* (Nelson Mandela Centre for Peace and Conflict Resolution, Jamia Millia Islamia: New Delhi, 2009), pp. 81-89 at p. 86

3 Ibid

4 Ibid at p. 87

9% of the cultivable land. By contrast, the tribal *Kandhas*, who are designated as Scheduled Tribes own about 77% of the cultivable land.⁵

The Context of Communal Politics and Violence in Orissa

The extreme right-wing nationalism propagated by *Hindutva* forces in India is aimed at creating a Hindu state. It operates with a mandate of perpetuating violence and discrimination against minority groups in order to maintain domination over them, and make them secondary citizens, living on sufferance, and subservient to the Hindu community. Christians, Muslims, *adivasis* and *dalits* are the minority groups who have been at the receiving end of such attacks by the *Sangh Parivar*.

The August 2008 violence against Christians in Kandhamal, Orissa, was not an isolated or one-off incident. As one report states, "the attacks were due"⁶. Reports of violence against religious minority communities across Orissa have been reported for the past two decades. Religious conversions have been used as a divisive issue in many such attacks. In December 1998, 92 Christian homes were burnt in the Ramgiri-Udaygiri areas of Orissa. A month later, in January 1999, Graham Staines, an Australian missionary and his two sons aged 10 and 6 years old were burnt to death in Manoharpur village in Keonjhar district by a crowd led by Dara Singh. While there was much evidence to conclude that *Sangh Parivar* organizations were responsible for the attack, a Commission of Inquiry set up to probe the attack exonerated them but held Dara Singh personally liable. A month after the attack on Graham Staines, a Catholic nun was gang-raped in Mayurbhanj district. Orissa's Christians have been the target of such attacks for a number of years.⁷

The violent intimidation of the Christian community has often been accompanied

5 *Crossed and Crucified: Parivar's War Against Minorities in Orissa*, Report by PUCL, Bhubaneswar & Kashipur Solidarity Group, (Delhi: PUCL Bhubaneswar & Kashipur Solidarity Group, April 2009) at p. 26

6 *From Kandhamal to Karavali: The Ugly Face of the Sangh Parivar*, A fact-finding report of nine human rights organizations that visited Orissa & Karnataka in Sept. – Oct. 2008, (March 2009) at p. 5

7 For a detailed list of various attacks against Christians and Christian property, see *Communalism in Orissa: Report of the Indian Peoples' Tribunal on Environment & Human Rights* (Mumbai: Indian Peoples' Tribunal Secretariat, 2006), hereinafter referred to as the IPT report, at pp. 23-26

by social sanctions against the practice of Christianity. In December 2000, a large mob prevented the erection of a statue of Jesus in Jharia, Orissa. Soon thereafter, 8 village *panchayats* in Balasore and Mayurbhanj districts announced that no conversions to Christianity would be allowed. In June 2001, 18 Hindu *dalits* converted to Christianity in Kendrapara district. Bowing to protests by the *Sangh Parivar*, the police arrested the people who converted and the pastors who administered the ceremony under the provisions of the Orissa Freedom of Religion Act. About 3 weeks later, 15 of the 18 persons were forcibly ‘re-converted’ or ‘returned’ to Hinduism by *Sangh* activists. In February 2004, seven Christian women were forcibly tonsured in Kilipal and were paraded naked around the village, for the reason that they were Christian and had refused to return to Hinduism. Subsequently, a social and economic boycott of these women was undertaken.⁸

A claim made by the *Bajrang Dal* – the militant wing of the *Sangh Parivar* – to the effect that Orissa is the second ‘Hindu *rajya*’ after Gujarat,⁹ indicates that Orissa has been the focus of *Hindutva* forces and their religion-based divisive politics in a manner similar to their campaigns in Gujarat. In the light of the fact that the Gujarat pogrom of 2002 resulted in the killing of over 2000 Muslims and a partly-achieved disruption of the community, a targeted attack on the minority communities in Orissa was a disaster in the waiting. The dynamic of *Kandha-Pana* tensions that could be manipulated to serve the purposes of religious fanatics make Kandhamal an ideal site for such an attack.

Kandhamal Violence 2008

24th August 2008 marked the beginning of gruesome violence against *dalit* and *adivasi* Christians in and around the Kandhamal district of Orissa. Violence against Christians in December 2007 in the same district was a sinister prelude to this.¹⁰ The purported trigger for the August 2008 violence was the killing

8 Ibid at p. 24

9 Claim made by Subhash Chouhan, State Convenor of Bajrang Dal in an interview to Angana Chatterji in July 2003, quoted in the IPT report, supra n. 7 at p. 1

10 An estimated 600-700 Christian houses, 90 churches and 100 other institutions were destroyed in the violence that started just prior to Christmas 2007 and continued beyond it. Many received grievous injuries, and the unofficial death toll is 11 persons, as stated by Angana Chatterji, ‘Kandhamal: Hindutva’s Terror’, *Communalism Combat*, January 2008.

of Swami Lakshmanananda, a Hindu religious leader, along with four of his disciples, at his Jalaspeta ashram on 23 August 2008, by attackers unknown at the time. Despite the media’s announcement the next day, quoting police sources, that Maoist involvement in the killings was suspected, the *Sangh Parivar* alleged that “extremist Christian groups” were responsible for the violence.¹¹ The seeds of hatred against Christians that had been sown for the past many years, became the foundation for the carnage that followed, executed in a planned, systematic and targeted manner for close to two months.¹² The socio-economic and historical differences between the two most underprivileged communities – the *Panas* and *Kandhas* of Orissa - were further manipulated by the *Sangh Parivar* to exacerbate the violence. The *Bajrang Dal* mobilized principally the *Kandhas* to attack the *Panas*.

Impact and Aftermath of the Violence

Between 75 and 123 people were killed in the violence – though the government has confirmed only 54 deaths in all.¹³ Majority of those killed were Christian *dalits* and *adivasis*. Many more were injured, close to 5000 houses belonging to Christians were destroyed partially or fully,¹⁴ and at least 264 churches and prayer halls were fully or partially desecrated and demolished.¹⁵ Valuables were looted, crops and cattle stolen, and hundreds of philanthropic institutions such as schools, orphanages, old age homes, leprosy homes, dispensaries, tuberculosis sanatoriums and NGO establishments were also looted, razed to the ground or burnt down.¹⁶ In Kandhamal district alone, approximately 25,000 – 40,000

11 *Crossed and Crucified: Parivar’s War Against Minorities in Orissa*, supra n. 5 at p. 5

12 For further details, see ‘Kandhamal Violence Premeditated’, *The Hindu*, 5 January 2008

13 Janvikas calculates that about 86 killings took place, in *Kandhamal in Chaos: An Account of Facts* (Ahmedabad: Janvikas, 2009) at p. 15. A list of 75 persons killed during the violence was submitted to the Supreme Court by Archbishop Raphael Cheenath of Bhubaneswar in February 2009, the details of which can be found in Anto Akkara, *Kandhamal: A Blot on Indian Secularism* (Delhi: Media House, 2009) at pp. 29-31. The Archbishop stated that the total killings would be approximately 100, but a compilation of the complete list was impossible as many villages were very sensitive, hostile and inaccessible. The Global Council of Indian Christians says between 75 and 123 killings took place, quoted in *Kandhamal: A Blot on Indian Secularism* at p. 26

14 *Kandhamal in Chaos*, ibid at p. 15

15 A detailed list of damages to religious places is given in *Kandhamal in Chaos*, supra n. 13 at pp. 21-24

16 *Kandhamal in Chaos*, supra n. 13 at p. 14

people became displaced and started living in 25 relief camps.¹⁷ The camps have now been closed. Many have migrated to other districts in Orissa and to other states, including Andhra Pradesh and Kerala. Of those who returned to their villages, many live in the outskirts, due to the socio-economic boycott and cultural exclusion that they face. They live homeless on unowned land, without any source of livelihood and with a bleak and uncertain future.

After the violence the legal machinery commenced its response to the violence. There has been an inordinate delay in the registration of First Information Reports (FIRs) because the victim-survivors had, perforce, to stay in the jungles for many days after fleeing their villages, and thereafter had moved to relief camps or other districts/states. Many of them say that the police refused to register FIRs against the perpetrators and also to deal with complaints of impending assaults which they had a duty to prevent.¹⁸ When FIRs were lodged, very few perpetrators were arrested, and when they were, it was only after a delay.¹⁹ In many other cases, the victim-survivors have not named the perpetrators in their FIRs for fear of attack and intimidation by them.²⁰ Investigation has been carried out by the local police. These aspects are discussed in detail in Chapter V of this publication.

Two Commissions of Inquiry were established by the state government and are functioning simultaneously. The Commission headed by Justice Basudev Panigrahi is charged with inquiring into the December 2007 communal violence; and that headed by Justice Sarat Chandra Mohapatra is mandated to inquire into the August 2008 communal violence. Neither Commission inspires the confidence of the victim-survivor community, with many of them boycotting the latter Commission for its partisan nature.²¹ Two fast

17 One report estimates the number of displaced as not less than 40,000 - *From Kandhamal to Karavali: The Ugly Face of Sangh Parivar*, supra n. 3 at p. 40, while *Kandhamal in Chaos* (supra n. 10 at p. 14) puts the figure at 25,000

18 *From Kandhamal to Karavali: The Ugly Face of Sangh Parivar*, supra n. 6 at p. 36

19 The arrest of some persons 38 days after lodging of the FIR by Sr. Meena, who was raped and sexually assaulted, is a case in point.

20 See for example, the statement of Raibati Digal from village Salapashi of Phirangia Block, a victim-survivor of the violence, in *Kandhamal in Chaos*, supra n. 13 at p. 15

21 For further details, see letter of Sampradayik Hins Prapidita Sangathana to the Commission, dated 13 January 2010 (letter no. 11/2010), available at <http://communalism.blogspot.com/2010/01/indiq-kandhamal-survivors-letter-to.html>, accessed on 26 February 2010

track courts have been set up at Phulbani and prosecutions are under way. Victim-survivors and witnesses are being threatened and intimidated by the perpetrators seeking a withdrawal of their complaints. They also face pressure from the police and the courts to testify. Petitions are pending in the Orissa High Court for transferring some cases out of these courts on the basis that the court atmosphere is intimidating and not conducive for witnesses to depose fully and freely.²² Writ petitions filed in the Supreme Court are also pending, with the apex court giving directions to and seeking reports from the

Orissa government at regular intervals with regard to discharge of various aspects of state obligations such as protection and rehabilitation of the victim-survivors. These are discussed in subsequent chapters. The National Commission for Minorities (NCM) has made at least three visits to Orissa and issued three reports, in January, April and September 2008. The first two reports were issued in the context of the December 2007 violence and the third one, in the context of the August 2008 violence. All the reports contain numerous recommendations to the state government, including on prevention, protection of members of Christian minority community, rehabilitation and re-integration of the victim-survivors in their communities. *Please find the NCM report on Kandhamal in Annexure IV of this publication.*

The government has announced a compensation package. However, many affected households are yet to be enlisted in the official records for compensation. Many issues pertaining to compensation have surfaced, including its determination, adequacy, the conditionalities attached to its payment, procedural requirements and administrative hurdles.²³ These are discussed in detail in Chapter IV.

Objectives of this Report

This report does not seek to narrate what happened and replicate the work of the many fact-finding groups that have published detailed reports on the

22 On 31st March 2010, the Orissa High Court ordered the transfer of the rape case of Sr. Meena from the Phulbani fast track court to the Sessions Court in Cuttack, on the ground that the court atmosphere in the fast track court was not conducive for her to depose in a free and fearless manner.

23 For further details of the difficulties faced by victim-survivors, see letter of Sampradayik Hins Prapidita Sangathana to the Chief Justice of Orissa High Court, dated 13 January 2010 (letter no. 10/2010)

communal attack of August 2008. Instead, based on such reports, court orders and judgments, press reports, as well as testimonies of victim-survivors and interviews conducted by MARG, the present report focuses on the implications of ground level realities for state responsibility and accountability in the context of the communal violence in Kandhamal. The nature and level of state obligation that has been discharged, will be measured against standards and norms set by Indian and international law. This report will also seek to explore the contours of law – the responses of the criminal justice system, the challenges faced in ensuring justice and accountability, inadequacies in existing law and policy, the lack of political will to implement existing legal provisions and mechanisms and possible ways of addressing these bottlenecks in the path of justice. We intend that this report is used as a tool for advocacy towards achieving justice and accountability for the communal violence in Kandhamal. It is also intended as a resource for present and future law-reform initiatives and processes for justice and accountability related to mass crimes in general and communal violence in particular.

Framework and Standards of State Accountability

The Indian Constitution, through the Preamble and the chapter on Fundamental Rights, enjoins upon the state to protect the rights of its citizens, including the right to life, livelihood, health, property and right against discriminatory treatment. Under Article 355, the central government has the duty to protect every state, which must include all people within the state, against internal disturbance and to ensure governance in every state in accordance with provisions of the Constitution. Indian criminal law recognizes that public officials are responsible and can be prosecuted for acts of omission or commission that contravene the Constitutional duties of the state.²⁴ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 contains provisions on offences by public servants including neglect of duties.²⁵ The Criminal Procedure Code contains provisions that extensively empower the civil administration

24 See for example, Chapter IX of the Indian Penal Code, dealing with "Offences By or Relating to Public Servants", which states the following acts as offences - public servant disobeying the law (S. 166), framing an incorrect document (S. 167), unlawfully engaged in trade (S. 168) and unlawfully buying or bidding for properties (S. 169), and illustrations under S. 330 (the act of causing hurt to extort a confession.)

25 S. 4 of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989

and police officials to use force and even take the assistance of the armed forces, to control 'public disorders'. The courts have reiterated the duty of the state in contexts of communal attacks and held governments accountable for paying compensation for losses incurred by persons due to the state's failure to control such situations and protect lives and property.²⁶ Please see Annexures V and VI of this publication for extracts of judgments that focus on state responsibility. In other contexts of communal violence, the reports of Commissions of Inquiry have recommended criminal prosecutions against errant public officials as well as recommended compensation to be awarded by the state to victims-survivors, thereby reiterating state responsibility for preventing, protecting and rehabilitating them.²⁷

The Constitution mandates upon the Indian state a fundamental duty to foster respect for international law.²⁸ International human rights treaties provide individuals with a range of guarantees related to human rights, and corresponding obligations by the state towards realizing those human rights. India is a state party to major treaties such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). These conventions primarily categorize state obligations to realize human rights of all in the following manner:

- **Obligation to respect:** This prohibits the state from interfering directly or indirectly with people's enjoyment of their rights. In other words, the state must not violate human rights. In addition, the obligation to respect entails the state to create an environment where fundamental human rights are respected, including by denunciations of violations by its political leaders. Obligation to respect is, therefore, not only a negative duty but also a positive obligation. This is an immediate obligation and includes respecting efforts that people themselves make in realizing their rights.

26 See *R. Gandhi and others vs. Union of India and another* AIR 1989 Mad 205, on state failure to protect lives and property of Sikh persons in Coimbatore after Indira Gandhi's assassination, and *Bhajan Kaur vs. Delhi Administration* AIHC 1996 Del 5644 where the victim-survivor of anti-Sikh violence in Delhi in 1984 was awarded compensation.

27 For example, Justice Srikrishna Commission, that inquired into the 1992-93 communal violence in Mumbai, recommended 'strict action' against 31 'delinquent officers'.

28 Article 51(C) of the Indian Constitution

- **Obligation to protect:** The state is duty-bound to stop others from interfering with or violating people's rights, primarily through effective regulation and remedies. The obligation to protect includes the state's duties to prevent, investigate, punish, provide reparations and ensure redress for the harm caused by perpetrators, irrespective of whether they are state or non-state actors.
- **Obligation to fulfil:** This calls upon the state to take legislative, administrative, budgetary, judicial and other measures to ensure that the standard of human rights is attained. It entails creating an enabling environment including institutional frameworks, building institutions, formulating laws and norms, facilitating access to resources and rights and providing for those unable to provide for themselves. This obligation is to be realized progressively.

The concept of *due diligence* is a yardstick that measures the extent of discharge of the three types of state obligations outlined above. It describes the minimum acceptable level of effort which a state must undertake to fulfill its responsibility to protect individuals from abuses of their rights.²⁹ The concept has been used as a key principle to hold states legally accountable for prevention, investigation, punishment and providing reparations for violations by state and non-state actors. The extent to which a state is duly diligent is assessed through the steps it takes in relation to each level of obligations.

The standards and framework provided by Indian and international law as discussed above, will be used to evaluate the extent to which the state has discharged its responsibilities towards the citizens in the Kandhamal context.

II

FREEDOM OF RELIGION IN THE CONTEXT OF VIOLENCE IN KANDHAMAL

29 'Domestic Violence as Torture' – paper of Amnesty International USA, available at <http://www.amnestyusa.org/women/violence/domesticviolence.html>, accessed on 20 February 2010

Freedom of religion is a fundamental right under the Indian Constitution and a human right that is recognized in international human rights treaties. This chapter focuses on the manner and extent to which this right could be exercised and has been violated in the context of Kandhamal; the responses of the law, judiciary and the executive to these violations; and the ambit of state responsibility in protecting the right to religious freedom.

Freedom of Religion and the Law

Article 25 of the Indian Constitution guarantees every person - citizen and non-citizen - freedom of conscience and the right to freely profess, practice and propagate religion.¹ This provision forms a part of the Fundamental Rights chapter, enumerated in Part III of the Constitution. It is not an absolute right, and is subject to restrictions such as public order, morality and health, other

¹ Article 25 of the Indian Constitution states as follows:
 25. Freedom of conscience and free profession, practice and propagation of religion.
 (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
 (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-
 (a) Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
 (b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.
 Explanation I. The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.
 Explanation II. In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

provisions of Part III (that is, other fundamental rights), laws providing for regulation or restrictions of economic, financial, political or other secular activity which may be associated with religious practice, and laws providing for social welfare and reform.

There are broadly two sets of freedoms protected by Article 25: the freedom of conscience and the right to freely profess, practice and propagate religion. Right to freedom of conscience ensures that a person is not liable to be questioned or made accountable for his / her religious beliefs, by the state or any other person.² The right to freely profess, practice and propagate religion not only protects freedom of religious opinion but also extends to acts done in pursuance of religious belief.³ This wide constitutional guarantee of religious freedom covers within its ambit the freedom to acknowledge publicly and to follow a particular faith; to act according to the belief and customs of religion including performances of ceremonies, rituals and observances⁴; and most importantly, to transmit one's religion by the exposition of its tenets.⁵ Article 26 guarantees the freedom of every religious denomination to manage its own religious affairs, subject to public order, morality and health.

The judiciary has explained the scope of Articles 25 and 26 in the following manner:

"The right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right to propagating religion which is subject to legislation by the State limiting or regulating any activity – economic, financial, political or secular which are associated with religious belief, faith, practice or custom. They are subject to reform on social welfare by appropriate legislation by the State. Though religious practices and performances of acts in pursuance of religious belief or matters of religion and religious practice is essentially a question of fact to be considered in the context of which the question has arisen and the evidence – factual or legislative or historic

² Explained by the Supreme Court in *Sardar Syedna Taher Saifuddin Saheb vs. State of Bombay* AIR 1962 SC 872.
³ *Commissioner, Hindu Religious Endowments vs. Sri Lakshmindra Thirtha Swamiar of Sri Sirur Mutt* AIR 1954 SC 282.
⁴ *N. Adithyan vs. Travancore Devaswom Board (2002) 8 SCC 106; H.H. Srimad Perarural Ethiraja Ramanuja Jeeyar Swami vs. State of Tamil Nadu* AIR 1972 SC 1586
⁵ Asghar Ali Engineer, Review: Changing Gods: Rethinking Conversion in India by Rudolf C. Heredia, available at <http://www.futureislam.com/20080701/Review/asgarali/Changing%20Gods-%20Rethinking%20Conversion%20in%20India.asp>, accessed on 28 February 2010

— presented in that context is required to be considered and a decision reached. The court, therefore, while interpreting Articles 25 and 26 strikes a careful balance between the freedom of the individual or the group in regard to religion, matters of religion, religious belief, faith or worship, religious practice or custom which are essential and integral part and those which are not essential and integral and the need for the State to regulate or control in the interest of the community.⁶

Courts have clarified that the Constitution of India seeks to “synthesise religion, religious practice or matters of religion and secularism”.⁷ In elaborating on the safeguards provided under Articles 25 & 26, courts have distinguished between freedom of religion and secular activities in the following manner:

“It is not every aspect of religion that has been safeguarded by Articles 25 and 26 nor has the Constitution provided that every religious activity cannot be interfered with... Secular activities and aspects do not constitute religion which brings under its cloak every human activity... The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practice.”⁸

Apart from the Constitutional provisions, freedom of religion is dealt with in provisions of the Indian Penal Code (IPC), Unlawful Activities (Prevention) Act (UAPA) 1967, the Religious Institutions (Prevention of Misuse) Act 1988, the Places of Worship (Special Provisions) Act 1991 and the Representation of the People Act (ROPA) 1951. Acts related to promoting enmity between different groups on the ground of religion are punishable offences under the IPC.⁹ Under the UAPA, an association that has an object of promoting enmity between different groups on the basis of religion can be considered an ‘unlawful association’ and its members subjected to prescribed punishments. The ROPA disqualifies a person convicted of the IPC offences mentioned above from being a member of either House of Parliament or Legislative Assembly or Legislative Council of a state.¹⁰

6 *A.S.Narayana Deekshitulu vs. State of A.P.* (1996) 9 SCC 548 at paras 87 & 88

7 *Ibid* at para 89

8 *Ibid* at para 86

9 S. 153A and S. 504 of the IPC.

10 S. 8 of The Representation of the People Act 1951

In addition, specific laws that govern religious conversions have been operative in five states, namely Orissa, Madhya Pradesh, Chhattisgarh, Gujarat and Himachal Pradesh, and passed but not implemented in two others – Arunachal Pradesh and Rajasthan.¹¹ These Freedom of Religion Acts prohibit persons from converting or attempting to convert any person from one religion to another through force, fraud or inducement. These laws prescribe imprisonment and fine for violations (and harsher penalties for conversion of children, women and persons belonging to SC and ST), and some of them prescribe a procedure for permission from state authorities prior to the intended conversion.

Freedom of religion has been recognized by the United Nations in the Universal Declaration of Human Rights.¹² This was further expanded in the International Covenant on Civil and Political Rights (ICCPR) where the right to freedom of thought, religion and conscience were specifically elaborated upon.¹³ Protecting freedom of religion is also one of India’s obligations under international law, since it has ratified the ICCPR¹⁴ and other international conventions that recognize and elaborate this right.¹⁵ The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,

11 Tamil Nadu passed a similar law in 2002 – Prohibition of Forcible Conversion of Religion Act – which was repealed in 2006.

12 Art. 18 of the UDHR states: *“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice.”*

13 Article 18 of ICCPR states as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

14 By declaration dated 10.04.1979, the Government of India ratified the ICCPR with certain reservations, which do not cover the right to freedom of religion.

15 Article 13 of the International Covenant on Economic, Social and Cultural Rights 1966, Article 2 of the Convention on Elimination of Discrimination Against Women (CEDAW) and Articles 2, 14 and 30 of the Convention on the Rights of the Child are other international human treaties that contain the right to freedom of religion, ratified by the Indian government.

1981, provides a legal framework and is pivotal in advancing the right to freedom of religion or belief. A UN Special Rapporteur on Freedom of Religion or Belief is an independent expert appointed by the UN Human Rights Council to identify existing and emerging obstacles to the enjoyment of the right to freedom of religion or belief and recommends ways and means to overcome such obstacles. The Special Rapporteur, Ms. Asma Jahangir, released her report on religious freedom in India on 26 January 2009, in which the anti-Christian attacks in Orissa in December 2007 and August 2008 as well as in other parts of the country were discussed.¹⁶ Please see Annexure VII of this publication for extracts from the Special Rapporteur's report.

Religious Conversions in India

Religious conversions have been a part of Indian reality for ages. There were historical processes by which Islam spread to India, through the Arab traders who visited the Malabar Coast for trade. Swami Vivekananda's opinion on conversions to Islam highlights the fact that the converted were active partners in the process of conversion by making pragmatic choices in life: "Why amongst the poor of India so many are Mohammedans? It is nonsense to say that they were converted by the sword, it was to gain liberty from Jamindars and priests."¹⁷ Many people converted from Hinduism to Sikhism in the early part of the twentieth century. Jainism and Buddhism had challenged the caste hierarchy in Hinduism, much before the advent of Christianity and Islam in India,¹⁸ leading to conversions to these religions. Dr. Ambedkar's experience of discrimination within the Hindu Brahminical social order inspired his decision to convert to Buddhism, which, in turn, motivated thousands of Hindus belonging to "lower" castes to convert to Buddhism by choice. Mass conversions of Hindus

16 Report of the Special Rapporteur on Freedom of Religion or Belief, A/HRC/10/8/Add.3 dated 26 January 2009. The report is available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/104/62/PDF/G0910462.pdf?OpenElement>, accessed on 14 March 2010 at paras 18-19. Please see Annexure VII of this publication for extracts from the report.

17 Collected Works of Swami Vivekananda, Vol. VIII, page 330, quoted in Dr. Ram Puniyani, "Terrorism: Facts Versus Myths", 1 November 2006, available at <http://www.countercurrents.org/puniyani011106.htm>, accessed on 1 March 2010

18 Dr. Ram Puniyani, 'Manufacturing History', 23 November 2003, available at <http://www.countercurrents.org/comm-puniyani231103.htm>, accessed on 13 March 2010

to Buddhism and Islam have taken place in recent Indian history.¹⁹

Experts point out that since Hinduism is not a religion based on the teaching of any prophet, spreading and preaching it to others has not been the norm. Hence exclusion of others was insisted upon more than proselytisation.²⁰ In contrast, Jainism, Buddhism and Sikhism, believed in propagating their religious tenets, resulting in their spread to other countries.²¹ However, in the twentieth century, the *Shuddhi* movement, started by Swami Dayanand Saraswati, aimed to re-convert those who had left the folds of Hinduism. This technique of conversion into Hinduism, introduced by the Arya Samaj, has been further developed by the Vishwa Hindu Parishad (VHP) into *Ghar Vapasi* rituals. This was aimed at bringing back to the Hindu fold members of the "lower" castes who had become "impure" by converting to Sikhism, Islam and Christianity. Simultaneous to the *Shuddhi* movement, the *Tabliq* and *Tanzim* movements preached Islam and converted people to Islam.

Adivasis are primarily animists and do not fall in the category of religion as a social phenomenon in the same way as Christians, Muslims and Hindus. *Adivasis* are one of India's most deprived and marginalized communities, and have been the target of attempts at religious conversion both by Christian missionaries and *Hindutva* forces bent upon "Hinduising" them.

Conversion to Christianity

Conversions to Christianity continue to take place all over India, including Orissa; this is not a new phenomenon. Christianity has been an Indian religion for centuries. Neither are such conversions restricted to Christianity alone.

Conversions to Christianity take place for a variety of reasons. Some believed that their basic needs were better taken care of – as in the case of a woman of Katingia who said "we became more clean after converting to Christianity. We had good

19 For example, a mass conversion of 'shudras' to Buddhism took place under the leadership of Dr. Ambedkar in 1956. In the 1980s, there were mass conversions of dalits to Islam in Meenakshipuram and other places.

20 Dr. Ram Puniyani, 'Question of Faith: Anti-Conversion Legislation in Tamil Nadu', available at <http://www.nilacharal.com/news/view/v74.html>, accessed on 12 March 2010

21 Ibid

clothes. And had education.”²² Others believed that it was only after conversion that they were able to raise their heads in society.²³ Some have converted out of superstitious belief that Jesus had cured them of illnesses, as in the case of a middle-aged man from Kalinga *panchayat*,²⁴ Niladri – a Christian convert from the *Sangh Parivar*²⁵, and Lohari Kanhar – mother of a teenage girl suffering from severe bleeding.²⁶ Many have sought conversion to Christianity as an escape from the oppressive caste system. Reports suggest that conversion to Christianity has not changed the socio-economic status in many instances. Conversely, many converts have been socially ostracized, and the conversion has brought about only symbolic changes in the material life of the people.²⁷

It has been pointed out that there has been no statistical evidence of the rise in the conversions to Christianity in the last few decades. The Census indicates that Christian population is on the decline: 2.60% in 1971, 2.44% in 1981, 2.32% in 1991 and 2.3% in 2001.²⁸ The Wadhwa Commission of inquiry, which investigated the murder of Graham Staines and his two minor sons, did not find any significant rise in the number of Christians in Manoharpur District. Staines was burnt alive along with his two minor sons on the charge of forcible converting people. Christian population in the area was more or less static in the area: 0.307% in 1998 as compared to 0.299% in 1991.²⁹

While part of the conversions must surely be taking place due to aggressive proselytization by some groups among Christian missionaries, experts state that there were crucial differences between conversions by Christian missionaries and by Swami Lakshmanananda in Orissa. Conversion was not the sole and

22 **Crossed and Crucified: Parivar’s War Against Minorities in Orissa**, Report by PUCL, Bhubaneswar & Kashipur Solidarity Group, (Delhi: PUCL Bhubaneswar & Kashipur Solidarity Group, April 2009) at p. 37

23 Stated by a 67-year old man from Raikia, quoted in *ibid*

24 *Ibid*

25 For a detailed discussion of the story of Niladri Kanhar, see Anto Akkara, **Kandhamal: A Blot on Indian Secularism**, (Delhi: Media House, 2009) at pp. 84-86

26 *Ibid* at p. 86

27 *Ibid* at p. 42

28 Dr. Ram Puniyani, ‘Conversion: A Political Weapon’, 6 May 2008, available at <http://www.countercurrents.org/puniyani060508.htm>, accessed on 14 March 2010

29 Dr. Ram Puniyani, ‘Reconversion: A Political Farce’, 29 August 2000, available at <http://www.truthindia.com/page53.html>, accessed on 14 March 2010

central object of the service that the missionaries gave; the missionaries provided secular education even if they taught the Bible in addition; and they did not use violence to convert to Christianity or to prevent conversion to Hinduism.³⁰ Investigations in Phulbani district of Orissa conducted by The Indian People’s Tribunal revealed that overwhelmingly, conversions to Christianity *did not* occur with the intent of destabilizing the Hindu community or other communities, and the content and program of church-based education did not foster communal hatred or divisiveness in thought or deed.³¹

The National Commission for Minorities has clearly rejected the explanation given by state authorities and others that alleged forced conversions to Christianity as the cause of the anti-Christian violence in Kandhamal. The NCM observed: “If indeed conversions by force or fraud were responsible for the feelings against Christians, it is absolutely amazing that the provisions of an Act designed precisely to address such conversions have never been invoked. It gives rise to the suspicion that conversion had really very little to do with the problem.”³² *Please see Annexure IV of this publication for the NCM report on violence in Kandhamal.*

Conversion and ‘Reconversion’ to Hinduism

Conversion and ‘reconversion’ of persons including *adivasis*, to Hinduism, has been taking place in many parts of the country. The coercive ‘reconversion’ ceremonies (euphemistically named *ghar vaapasi* or *shuddhikaran*), have been organized and initiated by *Hindutva* forces in and around Kandhamal, and other parts of the state as an accompaniment to anti-Christian violence. The

30 For further discussion of the differences, see **From Kandhamal to Karavali: The Ugly Face of the Sangh Parivar**, A fact-finding report of nine human rights organizations that visited Orissa & Karnataka in Sept. – Oct. 2008, (March 2009) at p. 11. See also Dr. Ram Puniyani, ‘Orissa: Tragedy Continues’, 19 April 2009 in www.countercurrents.org, accessed on 14 March 2010, where the author asserts that missionaries have not used violence for conversion in contrast to the *Hindutva* forces.

31 **Communalism in Orissa: Report of the Indian People’s Tribunal on Environment & Human Rights** (Mumbai: Indian Peoples’ Tribunal Secretariat, 2006), hereinafter referred to as the IPT report, at p. 49

32 Report of the Visit of the Vice Chairperson NCM to Orissa, 11th to 13th September 2008, available at ncm.nic.in/doc/Tour%20Report%20VC%20Orissa%20Sep.%202008.doc, accessed on 1 March 2010, at para 11. Please see Annexure IV of this publication for the report.

ghar vaapasi ritual has been elaborated in several reports.³³ The conversion and ‘reconversion’ initiatives are premised on the questionable assumption that innocent *adivasis*, who are originally Hindus, have been fraudulently and by allurements converted to Christianity, and that they need to be ‘brought back’ to their ‘original home’. This effort is claimed to be directed at ensuring that Hindus are not reduced to a minority because of the activities of Christian missionaries.

Vanvasi Kalyan Ashram, an RSS affiliate, was established as ‘an instrument to Hinduise the *adivasis*.’³⁴ It has intensified its activities in *adivasi* areas in the last two decades, where vicious anti-Christian propaganda is accompanied by conversions to Hinduism. In these areas various influential persons with RSS affiliation, direct or indirect, have either been setting up their *ashrams* or extending their influence, including Aseemanand in Dangs (Gujarat), Lakhmanand in Orissa, Asaram Babu in Jhabua region of Madhya Pradesh and Narendra Maharaj in Maharashtra.³⁵ It is no coincidence that sites of massive violence, such as Dangs, Jhabua, Phulbani and Kandhamal (Orissa) have also been places that have seen conversions of *adivasis* to the Hindu fold.

Swami Lakshmanananda took charge of the *Sangh Parivar*’s programme in Kandhamal in 1969, with his headquarters at Chakapada. Reports state that the purpose he was sent to Kandhamal was to hinder the spread of Christianity and to facilitate the spread of the *Sangh Parivar* ideology.³⁶ His efforts at establishing Sanskrit schools with a saffronized syllabus, his inculcation of brahminical practices in the tribal villages in the name of the right way of life, his claim that India was a ‘Hindu *rashtra*’ and his vicious campaign against Christianity over the last few decades have been well-documented.³⁷ Activities propagated by him have been found to be of “serious concern to the health of the society, and prompt anti-minority propaganda and hate actions.”³⁸ These activities formed the backdrop to conversions and re-conversions to Hinduism in and around Kandhamal.

33 See for example *From Kandhamal to Karavali: The Ugly Face of Sangh Parivar*, supra n. 30 at pp. 21-22

34 Ibid at p. 21

35 Dr. Ram Puniyani, ‘Conversion: A Political Weapon’, supra n. 28

36 *From Kandhamal to Karavali: The Ugly Face of Sangh Parivar*, supra no. 30 at p. 21

37 See ibid at pp. 20-23; see also *IPT Report*, supra n. 31 at pp. 45-46

38 *IPT Report*, supra n. 31 at p. 52

Forcible Conversions to Hinduism During the Attacks

As explained by Sudhir Pradhan, a religious leader who initiated ‘re-conversion’ ceremonies for Christians to Hinduism, the VHP leader Pravin Togadia had already announced: “*there is no place for Christians. If Christians don’t become Hindus, they have to go. We don’t care where they go. They must leave Orissa.*”³⁹ The attacks on Christians in Kandhamal were an implementation of this aggressive stance.

During the attacks in Kandhamal that commenced on 25 August 2008, there were reports of thousands of Christians being chased and herded in groups into Hindu temples and forced to undergo ‘reconversion’ ceremonies with their heads tonsured. They were made to drink cow-dung water as a mark of ‘purification’ and some of them forced to burn Bibles or damage churches to prove that they had forsaken the Christian faith.⁴⁰ The ‘reconverted’ Christians were forced to sign ‘voluntary declarations’ stating that they were becoming Hindus voluntarily – a condition required by the anti-conversion law in Orissa.⁴¹ Others speak of being forcibly reconverted in order to save their families, after having been called to meetings where deadly weapons such as axes, swords and iron rods were displayed. They were asked to sign a piece of paper saying that they were “renouncing foreign religion”. The ‘converted’ were also forced to say “*Jay Sriram*” and “*Jay Bajrang Bali*” in a loud voice.⁴² The incidents echo the experiences of Muslim victim-survivors of the Tellicherry attacks of 1971, where mobs asked the victim-survivors to go around their house three times repeating the words ‘*Rama Rama*’ if their lives were to be spared.⁴³

Many testimonies of family members and eye witnesses, speak of how their loved ones were killed or grievously injured for refusing to convert. Abhimanyu Nayak was killed by a mob that tied him to a tree and set him on fire because of his repeated refusal to convert to Hinduism.⁴⁴ Mathew Nayak – superintendent

39 Quoted in Vijay Simha, ‘In the Name of God’, *Teheka Magazine*, Vol. 5. Issue 36, dated 13 September 2008

40 Anto Akkara, *Kandhamal: A Blot on Indian Secularism*, supra n. 25 at p. 25

41 Ibid

42 Extract from the affidavit filed by Suresh Nayak, a farmer from Pirigada near Dharampur with state authorities, quoted by Vijay Simha, ‘In the Name of God’, supra n. 39

43 Report of Justice Vithayil Commission that inquired into the Tellicherry violence of 1971, extract available at <http://www.sabrang.com/srikrish/hinrole.htm>, accessed on 14 March 2010

44 For more details, see *Kandhamal: A Blot on Indian Secularism*, supra n. 25 at pp. 26-29

of the Church of North India hostel at Udaigiri and Rajesh Digal – a young pastor – were similarly killed after they refused to renounce their faith and convert to Hinduism.⁴⁵ 30-year old Ajit Kumar Digal was paraded naked by a mob for refusing to give up his faith. His life was spared due to the intervention of a well-respected Hindu in the village.⁴⁶

In some places, the Christians were given a deadline to convert to Hinduism. This was the case in Gonjuguda village near Rudangia, where 12 Christian families were given a one month deadline to renounce Christianity and convert to Hinduism. When they refused to convert, they were attacked by a mob, and as they fled, one of them, a woman named Ramani Nayak – was brutally killed.⁴⁷ Victim-survivors and witnesses have spoken of many forcible mass ‘re-conversion’ ceremonies that took place across Kandhamal even weeks after the killing of Swami Lakshmanananda.⁴⁸

The interviews conducted by MARG indicated that a majority of the people interviewed were Christians by birth, a few had converted more than twenty years ago and some had become Christians after marriage. The interviews further showed that a majority of the victim-survivors were aware that no one could force them to change their religion, and that religion was a personal choice of an individual. On enquiring they said that the pastor had given them this information. This is indicative of the overall environment and the pressure on Christians who convert, which required the pastors to inform people in the villages that they had a their right to follow the religion they believe in. *Please see Annexure I of this publication for a summary of the interviews and focused group discussions conducted by MARG.*

Many of the victim-survivors interviewed said that after the 2007 December attacks, they had celebrated Christmas in a subdued and quiet manner.⁴⁹ This

45 For more details on the killing of Mathew Nayak, see *ibid* at p. 29; facts related to the killing of Rajesh Digal are detailed in the same report at p. 79

46 *Ibid* at p. 83-84

47 *Ibid* at p. 82

48 Subarna Mallick speaks of how he and others were chased by a mob and forcibly ‘reconverted’, in *Kandhamal: A Blot on Indian Secularism*, *supra* n. 25 at pp. 82-83; Simon Nayak spoke of the forcible conversion of 15 Christian families by local RSS leaders, referred to in the same report at p. 34

49 The August 2008 violence in Kandhamal was preceded by widespread communal violence in Kandhamal in late December 2007. A large number of Christian properties including houses,

is indicative of cultural restrictions and an underlying pressure to convert. A number of them had been attacked in the 2007 attacks, but had not taken any specific actions. They said that the police knew that they had been attacked. Some people said that the *Durga Vahini* had told them to convert to Hinduism if they wanted to be “prosperous”.⁵⁰

Yet another dimension of conversion during the violence is the false allegation of forcible conversions made against Christian priests and nuns. For example, in Badimunda, Tikabali block, 80 Christian families were asked, under threat, to make a written statement to the effect that Christian priests and nuns had given them money to convert and that they were now voluntarily converting to Hinduism. As per the statement of Gabriel Nayak – a pastor at the village – 33 families agreed and stayed behind, while the others moved to a relief camp at Tikabali.⁵¹ Such instances show that the *Hindutva* forces sought to forcibly convert Christians to Hinduism, taking advantage of the fear and insecurity that the caused by the violence. At the same time, they kept avenues open for harassing priests and nuns either with or without the use of the anti-conversion law at a later point in time.

Conversion as a Pre-condition for Returning Home After the Violence

By the beginning of October 2008, the Orissa government claimed that thousands of people had begun leaving the relief camps and returning home, and that normalcy was being restored in the district. It is reported that one section of the people did return to their villages, but only after accepting the *Sangh Parivar*’s condition that they convert to Hinduism.⁵² Some victims in relief camps are also reported to have said that they were asked to fulfill one of the several conditions, which was that they had to “convert as Hindus if they want

churches and other welfare institutions were damaged or destroyed, as well as a smaller proportion of Hindu-owned property. Assault on minority communities resulted in death and injuries. In a few instances, retaliations on the offenders were also reported.

50 For further details of the MARG interviews, see Annexure I to this publication

51 For more details, see *From Kandhamal to Karavali: The Ugly Face of Sangh Parivar*, *supra* n. 30 at pp. 36-37

52 See ‘Conversion to Hinduism a Condition for Christians to Return Home in Kandhamal’, *The Hindu*, 10 October 2008

to come back to their native villages and live peacefully”.⁵³ Victim-survivors who dared to return to their villages were threatened by the *Hindutva* forces, who said that “as long as CRPF is there, we will not touch you. But when they leave, we will send you to another world.”⁵⁴ The victim-survivors who attempted to return home were also prevented from going anywhere near the charred remains of their houses unless they converted to Hinduism.⁵⁵

The Orissa government claimed before the Supreme Court that it had organized over 1000 village level peace committee meetings with the participation of both committees in order to facilitate the return of the displaced Christians to their villages. However in practice, the meetings of peace committees served as yet another avenue for laying down conversion to Hinduism as a pre-condition for living peacefully in the village. As Archbishop Cheenath stated in his affidavit before the Supreme Court, “the purpose of the peace committee is to withdraw criminal cases by force, coercion and also to convert to Hinduism to return to their villages for peace. Very often the assailants or their political representatives are on the Peace Committees.”⁵⁶

Strategies for conversion to Hinduism executed in the relief camps range from inducement to coercion and physical threat. Photocopies of application forms that expressed a desire to convert to Hinduism were reportedly circulated in the relief camps, and signed forms were collected by local RSS leaders.⁵⁷ The *Hindutva* forces thus exploited the helplessness of the victim-survivors in the relief camps, where conditions and facilities were poor and their future so bleak that they must have longed to return home.

There were many who attempted to return to their villages, in the hope that normal conditions had returned, only to face severe threats to convert to Hinduism. The testimonies of Kilos Pradhan⁵⁸ and Savitri Nayak⁵⁹ testify this. State officials have forcibly returned victim-survivors to their villages, where they would be socially ostracized through the dictates of *Hindutva* groups. This

53 Kandhamal in Chaos: An Account of Facts (Ahmedabad: Janvikas, 2009) at p. 10

54 Kandhamal: A Blot on Indian Secularism, supra n. 25 at p. 38

55 Ibid at p. 37

56 Ibid at p. 38

57 Crossed and Crucified: Parivar’s War Against Minorities in Orissa, supra n. 22 at p. 12

58 Kandhamal: A Blot on Indian Secularism, supra n. 25 at p. 34

59 Ibid at p. 13

appears to be a collusive tactic used by public officials and *Hindutva* forces to coerce victim-survivors to convert to Hinduism. A case in point is that of Jehan Digal, a daily wage earner, who along with his family was bundled out of the Nuagam camp and dumped near Dibari village near Raikia. He is forced to live with his family in the open, on unclaimed land near his village without even a tent.⁶⁰ Joseph Digal, who is forced to live with his family on an unclaimed land near Badawanga, 15 kms from Raikia, states that when they tried to return to their village, they were told: “you can live here only as Hindus” and prevented them from entering the village.⁶¹ Christians in many villages were prevented from going near their torched houses or drawing water from the village well. An economic boycott continued against Christians for many months, with Christian shops and business houses shut down in many places, such as the main road in Raikia.⁶²

Not only were victim-survivors who attempted to return to their villages threatened to force them to convert. Hindu villagers who supported their return during peace committee meetings were also attacked subsequently, as in Tiangia, as a means of ensuring that social ostracism was complete and the pressure to convert absolute.⁶³ In other instances, persons who worked for Hindu-Christian amity were killed in a gruesome manner.⁶⁴

The National Commission for Minorities (NCM) observed in its report, “In every camp I visited the main feeling was one of despair and hopelessness at the cruel turn of events. Practically everyone complained of the threats they had received that their return to their homes was predicated on their acceptance of the Hindu religion. I was even shown a letter addressed by name to one woman stating that the only way she could return to her home and property again was if she returned to the village as Hindu. (A copy of the letter, written in Oriya, complete with the picture of a blood stained dagger is attached with this report – Annexure “B”).”⁶⁵

Please see Annexure IV of this publication for the NCM report.

60 Ibid at p. 39

61 Ibid at pp. 39-40

62 Ibid at p. 14

63 Ibid at p.13

64 Anto Akkara speaks of the killing of Dasrath Pradhan of Tiangia who was killed with his mother watching, by cutting his body into three parts. Ibid at p.92

65 Report of the Visit of the Vice Chairperson NCM to Orissa, 11th to 13th September 2008, supra n. 32 at para 10

The interviews among victim-survivors, conducted by MARG, reiterated the ongoing socio-economic boycott of Christians in the villages of Kandhamal. Ten people from Pirigargh village in K Nuagaon block who were living in makeshift shelters on the outskirts of their village said that they were not being allowed to use the village wells and were facing a social boycott. They said that the VHP had imposed a fine on anyone in the village helping or speaking with them. In Raikia relief camp the people said that the BDO had taken 14 families back to their village but the Hindu families did not allow them to enter and could not be persuaded by the BDO. They said “*Now we have been put up under one roof literally with four bamboos at the corners. We all are staying under that roof.*”⁶⁶

Judicial Response to Anti-Conversion Laws

The right to propagate religious belief has been the subject matter of many judicial pronouncements of the High Courts and the Supreme Court, most of which acknowledged the broad sweep of its application. The most serious challenge to its scope however came from the Orissa Freedom of Religion Act of 1967 (hereinafter, the ‘Orissa Act’) and the Madhya Pradesh Dharma Swatantraya Adhinyam, 1968 (hereinafter, the ‘M.P. Act’). Both these laws sought, firstly, to regulate all conversions by instituting a system of administrative controls - including the filing of returns on every conversion - and secondly, to prevent conversions by force, fraud or inducement/ allurement.⁶⁷ Significantly however, although the terms ‘force’, ‘fraud’ and ‘inducement’ were clearly defined under the Indian Penal Code (IPC), the Orissa and M.P. Acts deviated so substantially from this established definition as to leave little doubt that they were aimed specifically at making Christian proselytizing a criminal offence. ‘Force’ was expanded to include the threat of divine displeasure or social excommunication, ‘inducement’ to include the offer of any gift or gratification, in cash or kind, including the grant of any benefit, pecuniary or otherwise and ‘fraud’ was defined to include misrepresentation or any other fraudulent contrivance. The Orissa law provided for imprisonment of up to one year and / or fine of upto Rs. 5000 for persons convicted of the offence of forcible conversion, and prescribed for double the punishment if the person so convicted is a woman,

66 For further details of the MARG interviews, see Annexure I to this publication

67 The Orissa Act uses the term inducement, while the M.P. Act uses the term allurement. The definition of both terms their respective acts, however, is identical.

minor, or belongs to a Scheduled Caste or Scheduled Tribe.⁶⁸

Rules enacted in 1989 under the Orissa law require a person intending to convert his / her religion to give a declaration before a First Class Magistrate about the intention to convert voluntarily. The concerned religious priest is further required to provide details of persons (names and addresses) as well as details of the conversion ceremony (date, time and place) to the District Magistrate (DM) 15 days in advance. The DM is duty-bound to pass on the information to the Superintendent of Police, who has to investigate the same and report back to the DM. The DM is required to maintain a register of conversions and send monthly reports of the conversions in the district to the state government.⁶⁹ As observed by the National Commission for Minorities, there are hardly any cases of forcible conversion registered under this stringent law in Orissa.

The constitutionality of both the Orissa and the M.P. Acts were challenged. The challenge to the Orissa Act in the case of *Mrs. Yulitha Hyde and Ors. Vs. State of Orissa and Ors.*⁷⁰ was on the basis that the law violated not only the right to propagate the Christian faith but also militated against the right to practice Christianity, since proselytizing was central to the practice of the Christian faith. The petitioners also contended that one of the methods of propagating the Christian faith, mandated by religious dicta, was to hold out mild threats including threats of divine displeasure and that the expanded definition of the term force to include ‘threat of divine displeasure’ or ‘social ex-communication’, of ‘fraud’ to include misrepresentation and of ‘inducement’ to include grant of any benefit, pecuniary or otherwise was an interference with the practice of Christianity, unprotected by any of the limitations found in Article 25.

The Orissa High Court however, in the context of the claim of the petitioners that people of down trodden sections of society took to Christianity as an escape, came to the conclusion that the threat of divine displeasure numbed the mental faculty; more so of an “undeveloped mind” and the actions of persons thereafter were not free or according to conscience and that social ex-communication was a serious malady that forced the ex-communicated to live a hazardous life. The High Court, without explicit reasoning, brushed aside the contention that the

68 Section 4 of Orissa Freedom of Religion Act, 1967

69 *Kandhamal: A Blot on Indian Secularism*, supra n. 25 at pp. 69-70

70 AIR 1973 Ori 116

term 'misrepresentation' used in the definition of 'fraud' was vague. It concluded that although threat of divine displeasure or social excommunication may be an essential part of the practice of the Christian religion, and although the term "misrepresentation" may also cover some such practices, the criminalization of such acts was protected by the restrictions that were a part of Article 25. (The High Court did not refer to which of the restrictions of Article 25 permitted the criminalization). However, the High Court came to the conclusion that the definition of the term inducement to include gratification in cash or kind, including the grant of any benefit, pecuniary or otherwise, also covered legitimate methods of proselytizing and was violative of the fundamental right to religion guaranteed by Article 25.

Significantly, the High Court also came to the conclusion that the scope of the guarantee under Article 25(1) of the Constitution extended, in so far as Christians are concerned, to the right to convert others into Christianity, as a necessary corollary of the right to propagate religion. Also very significantly, the High Court found that the subject matter of the law was 'religion' and not 'public order', 'criminal law' or 'penal law', and that the state legislature lacked the power to enact the said anti-conversion law.

On appeal to the Supreme Court however, the Supreme Court in *Rev. Stainislaus vs. State of Madhya Pradesh and Ors.*⁷¹ over-ruled the judgment of the Orissa High Court and upheld the validity of the Orissa Act on the understanding that there was a fundamental right to transmit the tenets of a religion but no fundamental right to convert another person to one's own religion. The Supreme Court came to this conclusion on the basis of this understanding that recognizing a fundamental right to convert another would impinge on the 'freedom of conscience' guaranteed all persons under the first part of Article 25. At no point in the judgment however, is there any discussion of the crux of the challenge before the Orissa High Court, that the right to practice and propagate Christianity had been unconstitutionally curbed by overbroad definitions of force, fraud and inducement that specifically targeted particular practices of Christianity.

The Supreme Court also rejected the challenge to the law on grounds of legislative competence by concluding that the law related to 'public order',

71 AIR1977 SC 908: 1977 Cri LJ 551: (1977) 1 SCC 677

which gave the state legislatures competence. In this context it has been noted by some scholars that as soon as restrictions to rights are associated with public order, courts seem reluctant to pursue further questions.⁷² This has serious repercussions for the ambit and scope of Fundamental Rights, given that any activity which some section or group finds disagreeable can, theoretically, give rise to problems of public order. For the reasons discussed above, the Supreme Court held the Orissa and MP anti-conversion laws to be constitutionally valid.

Dominant discourse around conversion has been dogged by the assumption of the convert as 'victim' of the predatory 'converter'; incapable of rational choice, independent agency or control over their lives. The judgments discussed above resonate this discourse. The assumption that certain groups are particularly vulnerable to being lured, duped and tricked into changing their religion pervades anti-conversion laws, court decisions and government committee reports, thereby reinforcing the social stereo-typing of women and marginalized groups as inherently naïve and susceptible to manipulation.⁷³ The 1989 Rules under the Orissa law, which prescribe double the punishment for conversions of women, minors, members of ST and ST are a case in point.

By not naming any one religion but criminalizing all conversions that are not voluntary, these laws have served to mask the real purpose - targeting Christian missionary activities. As detailed above, forcible conversions to Hinduism is not confined to Orissa. Dangs in Gujarat is one of the many examples of how the Christian *adivasis* were threatened and terrorized till they agreed to 'convert' themselves to Hindu religion. Interestingly, other states have even proposed amendments to exempt such 're-conversions' / *ghar vaapasi* ceremonies undertaken by the VHP' from penalties under conversion laws even though those being 're-converted' are subjected to extremely coercive and violent circumstances, thereby removing the last fig-leaf of pretence that these laws are not targeted at Christian missionary activity alone.⁷⁴

72 Rajeev Dhavan, "Religions Freedom in India", *The American Journal of Comparative Law*, Vol. 35, No. 1 (Winter, 1987), at pp. 209-254

73 Even the judgement of the Orissa High Court finding the Orissa Freedom of Religion Act to be unconstitutional relied on the explicit assumption that downtrodden people are of an "undeveloped mind"

74 Laura Dudley Jenkins, *Legal Limits on Religious Conversion in India*, at [http://www.law.duke.edu/shell/cite.pl?71+Law+&+Contemp.+109+\(spring+2008\)](http://www.law.duke.edu/shell/cite.pl?71+Law+&+Contemp.+109+(spring+2008)), (accessed on 21 March 2010)

Secularism, the State and Religious Conversions

If conversions are taking place as an escape route from the oppressive caste system, in pursuit of better education and livelihood opportunities, and increased access to basic needs such as water, sanitation, housing and health, this is indicative of the state's failure to formulate and implement a policy towards the socio-economic upliftment of marginalized communities in Kandhamal.

Many experts working on freedom of religion have opined that the anti-conversion laws enacted by states including Orissa, ironically titled the Freedom of Religion Act, in fact, violates freedom of religion guaranteed by the Indian Constitution.⁷⁵ The UN Special Rapporteur on Freedom of Religion or Belief has expressed her deep concern "that laws and bills on religious conversion in several Indian states are being used to vilify Christians and Muslims."⁷⁶ Please see Annexure VII of this publication for extracts from the report. Though worded in neutral terms without specific mention of any religious denomination, this law targets Christian missionaries and organizations, and provides scope for its arbitrary use to harass precisely those organizations which seek to address the socio-economic needs of underprivileged people. For example, Father Chellen who was director of Divyajyoti Pastoral Centre, said that though he had never baptized anyone during his seven years' stay at the pastoral centre, the officials from the state home ministry and vigilance department had contacted him several times to say there were complaints of forced conversion against him. The priest had asked them to bring the complainants or witnesses, but this was never done.⁷⁷

On the other hand, the testimonies highlighted above indicate that a range of coercive tactics were used for conversion or re-conversion of a person into the Hindu fold, including intimidation, threat, social boycott and coercion. Though these tactics clearly fall within the ambit of the anti-conversion law that is in force in Orissa, there are no known cases of complaints registered, investigated, persons prosecuted and convicted for such forcible conversions.

75 See for example Dr. Ram Puniyani, 'Question of Faith: Anti-Conversion Legislation in Tamil Nadu', supra n. 20; John Dayal, 'Hindutva Conspiracy Clear in Rajasthan Freedom of Religion Bill', 6 April 2006, available at http://www.milligazette.com/dailyupdate/2006/20060406_hindutva_rajasthan.htm, accessed on 14 March 2010

76 Report of the Special Rapporteur on Freedom of Religion or Belief, supra n. 16 at paras 47-48

77 Kandhamal: A Blot on Indian Secularism, supra n. 25 at p. 70

The National Commission for Minorities (NCM) had recommended that the provisions of the Orissa Freedom of Religion Act be used against "the pernicious threats to Christians to convert forcibly to Hinduism or lose all their property and their right to return to their homes."⁷⁸ It unequivocally stated that the provisions of an Act that seeks to outlaw and punish conversions made by force and fraud must now be used to achieve that purpose, viz. to take action against those who seek to convert others to Hinduism by using threats and force.⁷⁹ Please see Annexure IV of this publication for the NCM report.

Despite such directives, the state agencies have deliberately failed to register, investigate and prosecute persons such as Swami Lakshmanananda and other members of *Hindutva* forces, who have openly conducted coercive re-conversion ceremonies to Hinduism, and institutionalized humiliating rituals for the same. By paying no heed to the suggestion of the National Commission for Minorities, that "the role of the Sangh Parivar activists and the anti-conversion campaign in fomenting organized violence against the Christian community deserves close scrutiny," the State of Orissa lays itself bare to the charge of complicity with *Hindutva* forces who have used forced conversions as a tool to unleash terror on a vulnerable community. Failure to arrest persons and groups for forcible conversion to Hinduism has fostered a climate of complete impunity, allowing the VHP and its affiliates to terrorize Christian populations at will, resulting in loss of life, property, dignity and equal citizenship rights among the victim-survivors.

Nor did the state administration address the issue of forced conversions in the relief camps, where the helplessness of the most marginalized and vulnerable people was exploited, although a complaints register in each camp was mechanically provided.⁸⁰ Government complicity in imposing re-conversion to Hinduism as a pre-condition for victim-survivors to return home stands exposed, as such conditions have been conveyed to the victim-survivors in the presence of state officials. The local BJP leader laying down this condition in the presence of the Block Development Officer and the Collector is a case in point, and forms part of the affidavit submitted by Archbishop Cheenath to the

78 Report of the Visit of the Vice Chairperson NCM to Orissa, 11th to 13th September 2008, supra n. 32 at para 13

79 Ibid

80 Crossed and Crucified: Parivar's War Against Minorities in Orissa, supra n. 22 at p. 12

Supreme Court.⁸¹ Further, the state government's claim that compensation for damage to religious institutions does not fall within its "secular policy" indicates its hypocrisy and double standards.⁸²

Nearly all of the persons interviewed as part of the MARG study stated that they had faced some threat as a result of practicing Christianity. Most of the respondents also indicated that although they did celebrate and practice their religion and rituals, they had to do so quietly without attracting attention. A few, who lived in Christian majority villages, did not perceive a restriction in their practice of Christianity and celebration of Christian festivals. Apart from immediate impacts in terms of prosecutions and harassment, anti-conversion laws seem to send out the message that it is criminal to be Christian or to express one's faith, leading to a loss of citizenship rights.

Religious conversions through coercion are not only violative of the fundamental rights enshrined in the Indian Constitution, but are also violations of international law. As pointed out by the UN Special Rapporteur on Freedom of Religion or Belief, international human rights law clearly prohibits coercion that would impair the right to have or adopt a religion or belief, including the use or threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Similarly, a general prohibition of conversion by a State necessarily enters into conflict with applicable international standards.⁸³ *Please see Annexure VII of this publication for extracts from the Special Rapporteur's report.*

The Supreme Court, in elaborating the Constitutional mandate of a secular state, said:

"The secular State, rising above all differences of religion, attempts to secure the good of all its citizens irrespective of their religious beliefs and practices. It is neutral or impartial in extending its benefits to citizens of all castes and creeds. Such a state has to ensure, through its laws, that the existence or exercise of a political or civil right

81 **Kandhamal: A Blot on Indian Secularism**, supra n. 25 at p. 38

82 This was asserted by the counsel of the Orissa government before the Supreme Court, in justification of the government stand opposing the demand for compensation for destruction and damage to churches and prayer halls. Cited in **Kandhamal: A Blot on Indian Secularism**, supra n. 25 at p. 44

83 Report of the Special Rapporteur on Freedom of Religion or Belief, supra n. 16 at para 52

*or the right or capacity to occupy any office or position under it or to perform any public duty connected with it does not depend upon the profession or practice of any particular religion."*⁸⁴

The facts of the Kandhamal violence, seen through the experiences of victim-survivors discussed in this chapter, when measured against the standards laid down by the Supreme Court, indicate that the state government has failed in discharging its constitutional mandate to be secular, apart from its dismal failure in protecting the fundamental rights of all its people.

84 **Z.B. Bukhari vs. B.R. Mehra** (1976) 2 SCC 17 at paras 44 & 45

III

ROLE OF THE STATE IN PREVENTING VIOLATIONS, PROTECTING & RESPECTING HUMAN RIGHTS

The state has an obligation under the Constitution, various domestic laws and international law, to protect and promote the fundamental and human rights of its people and prevent the violation of such rights. This chapter will examine the extent to which this obligation has been discharged in the context of the communal violence in Kandhamal in 2008, in accordance with the standards and framework of state obligation outlined in Chapter 1. The state obligation to respect, protect and fulfil have been further categorized in this chapter, and each duty examined against reported facts and events.¹ The chapter will also examine whether state agencies have been duly diligent in discharging their obligations.

The State's obligation to protect the lives and property of its citizens in times of communal violence is mandated by the law and reiterated by the judiciary.

¹ The obligation to '*respect*' would require the state not to violate human rights. In contexts of communal violence, such an obligation would entail that state officials do not participate in or are not complicit in the violence, that the state does nothing that would make the victim community vulnerable to attacks through means such as disarming members of the community, that it does not prevent or prohibit relief work among victim-survivors, that it does not forcibly return people to their place of residence when their safety is in question, that their opportunities for livelihood and education are not undermined, that relief camps are set up and with adequate facilities and security, and that they are not arbitrarily closed. Further, the obligation entails the state to create an enabling environment for respecting the human rights, including by condemnation / denouncement of violence by its political leaders. The obligation to '*protect*' would entail creating and administering an adequate and efficient system of police, investigation, prosecution, law enforcement, civil and criminal justice, in addition to the duty to regulate, monitor and control hate propaganda and other acts that could trigger / contribute to communal violence. The obligation to '*fulfil*' calls upon the state to create an enabling environment, such as by taking efforts at facilitating communal harmony, curbing hate propaganda, guaranteeing livelihood and educational opportunities to communities of victim-survivors, containing the spread of communal hatred and prejudice through text books, perspective-building of public officials and checking communalization of its cadres and departments.

In the words of the Delhi High Court, “it is the duty and responsibility of the State to secure and safeguard life and liberty of an individual from mob violence. It is not open to the State to say that the violations are being committed by private persons for which it cannot be held accountable.”² Under the Constitutional scheme, the maintenance of public order is a responsibility of the State government³ whereas the Union has a duty to ensure that the state is run in accordance with the provisions of the Constitution and to protect the State against any internal disturbance.⁴ Furthermore, under the Code of Criminal Procedure the local Magistrate has the power to call upon the armed forces of the Union to aid in the civilian administration to ensure that public order is maintained.⁵ It would appear therefore that both the state and the central governments have a responsibility to ensure that citizens’ fundamental rights guaranteed by the Constitution are not violated through incidents such as communal violence. The courts have clarified that since secularism is a basic feature of the Indian Constitution, “any State Government which pursues unsecular policies or unsecular course of action acts contrary

2 *Bhajan Kaur vs. Delhi Administration through the Lt. Governor* ILR 1996 Delhi 754: 3 (1996) CLT 337

3 Item 1, List 2, Seventh Schedule of the Constitution of India.

4 Article 355 of the Indian Constitution obligates the Central government “to protect every state against external aggression, internal disturbance and to ensure that the government of every state is carried out in accordance with the provisions of this Constitution.” Article 356 (1) states as follows:

“(1) If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation –

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.”

The Supreme Court, in *S.R.Bommai vs. Union of India* AIR 1994 SC 1918, has stated that the power under Art. 356 should be used sparingly and only when the President is fully satisfied that a situation has arisen where the government of the state cannot be carried on in accordance with the provisions of the Constitution, based on objective material before him / her.

5 Section 130, Code of Criminal Procedure, 1973.

to the constitutional mandate and renders itself amenable to action under Art. 356.”⁶ Further, the courts state that “the acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the government of the State cannot be carried on in accordance with the provisions of the Constitution.”⁷

The duty to ensure that the concerned state is run in accordance with the Constitutional provisions entails the central government to supervise and monitor the adequacy of the steps taken by the state government in maintaining public order and addressing the violations.

Duty to Prevent Violence

In the context of the violence in Kandhamal, the state’s duty to prevent the violence could have been exhibited in many ways. It could have made preventive arrests of key *Sangh Parivar* leaders prior to the funeral procession of Swami Lakshmanananda and called an all-party meeting seeking support of leaders of all political parties to ensure peace. If Chief Minister Naveen Patnaik had, through electronic media, personally appealed to the public and assured them that his government was taking steps to investigate and identify the persons who killed Swami Lakshmanananda, and further issued a strict warning to the people against taking law into their own hands, such an initiative may have prevented violence to some extent.

Further, there are three potential ways in which it could have prevented violence, namely:

- by implementing the recommendations made by the National Commission for Minorities (NCM), that visited Kandhamal in January and April 2008 – in the wake of the Christmas 2007 violence;
- by preventing the funeral procession of Swami Lakshmanananda across a long route of 150 kms that passed through communally sensitive areas; and
- by preventing hate speeches and propaganda from being spread, as these inflamed communal passions and incited violence.

6 Opinion of B.P.Jeevan Reddy J in *S.R.Bommai vs. Union of India*, ibid

7 Opinion of P.B.Sawant J in *S.R.Bommai vs. Union of India*, ibid

a. Non-Implementation of Recommendations of the NCM:

The first NCM report released in January 2008 was based on a visit by two of its members to Orissa soon after the first outbreak of violence in December 2007. Some of the major recommendations of the NCM made in the January 2008 report were that the state government must examine the speeches of Lakshmanananda Saraswati to determine whether they amount to incitement of violence and take appropriate action, that it must issue a white paper on conversion to dispel fears and suspicions raised about the Christian community and its institutions and that it should set up a statutory state Minorities Commission for safeguarding the rights of minorities.⁸ The NCM also called upon the state government to “show greater vigilance to prevent the outbreak of violence” and to “urgently address issues of social exclusion and structural inequities.”⁹ In its April 2008 report, the NCM observed that its earlier recommendation of determining if Swami Lakshmanananda’s speeches amounted to incitement of violence “does not appear to have been acted upon.”¹⁰ It re-emphasized the preparation of a White Paper on conversion, and setting up of a state Minorities Commission.¹¹ It further said: “The confidence of the people in the impartiality of the law enforcing administration and the sanctity of the rule of law must be re-established through speedy and concrete measures to bring the guilty in the riots to book. They should be identified and named as early as possible.”¹²

None of these recommendations were acted upon by the state government, and there was no apparent effort to even attempt implementing these recommendations. A White Paper on conversions, as recommended by the NCM, could have countered some of the myths and hate rumours propagated against Christians and Christian organizations, which mobilized hatred against the community. If the state had taken concerted effort at apprehending, investigating and prosecuting perpetrators of the December 2007 violence, this could have had a deterrent effect among (at least) some of the potential

8 Report of the NCM visit to Orissa, 6-8 January 2008, available at <http://ncm.nic.in/pdf/orissa%20report.pdf>, accessed on 1 March 2010, at paras 3, 4 & 7 of Conclusions & Recommendations

9 Ibid at para 9 of the Conclusions & Recommendations

10 Report of the Visit of the Vice Chairperson, NCM to Orissa 21-24th April 2008, available at <http://ncm.nic.in/pdf/VC%20Tour%20Report%20of%20Orissa.pdf>, accessed on 16 March 2010, at para 3 of Conclusions & Recommendations

11 Ibid at paras 3 & 6 of Conclusions & Recommendations

12 Ibid at para 7 of Conclusions & Recommendations

perpetrators and sent out a strong message that the government was determined to protect the life and rights of the minority community and to enforce the rule of law. Its failure to do so contributed to a widespread climate of impunity that allowed the *Hindutva* forces a free hand in unleashing violence against the minority community.

b. Failure to Prevent the Funeral Possession:

The NCM report that was released after its visit to Orissa in September 2008 is unequivocal in highlighting the failure of the state government to prevent the inflammatory funeral possession. *Please see Annexure IV of this publication for the report of the NCM.* The report stated that despite knowing that public reaction to the murder of a prominent religious leader like Laxmanananda would be extreme, “there is little evidence of application of mind by Orissa’s political and administrative authorities”.¹³ The report further states that: “Given the near certainty that a procession of about 170 km with the body of the slain leader was bound to arouse huge passions, it would have been proper for the senior leadership of the state to try to persuade the Swami’s followers to avoid a long procession and bury him in the ashram where he was murdered. Even if his followers had been adamant that he had to be buried at the site of his first ashram in Chakpad, the alternative of airlifting the body should have been examined.”¹⁴

The State Government is armed with sufficient powers to prevent violence. The district administration can impose prohibitory orders, curfews and prevent assemblies of people under Section 144 of the Code of Criminal Procedure. The local police is also armed with broad prohibitory powers under the Orissa Urban Police Act, 2003 – none of which were enforced. Prohibitory orders under Section 144 of the Cr. PC (prohibiting assembly of more than 5 persons at a place) were indeed promulgated throughout the district on 25th August 2008, and curfew was in force in the troubled areas thereafter.¹⁵ But surprisingly, this

13 Report of the Visit of the Vice Chairperson NCM to Orissa, 11th to 13th September 2008, available at <http://ncm.nic.in/doc/Tour%20Report%20VC%20Orissa%20Sep.%202008.doc>, accessed on 1 March 2010, at paras 8 & 9

14 Ibid at para 8

15 S. 144 of Cr.PC gives powers to Magistrates to impose restrictions on the personal liberty of individuals, either in a specific locality or in a town, where the situation has the potential to cause unrest or danger to peace and tranquility in such an area. It is used in urgent cases of nuisance or apprehended danger, when immediate prevention or speedy remedy of the situation is warranted.

made no difference to the assailants.¹⁶ They looted, burnt, killed and tortured with impunity. The prohibitory orders were evidently not enforced and applied only in name.

It is further evident that though a statewide *bandh* on 25th August 2008 was announced by the RSS and VHP and supported by the BJP on the night of 23rd August 2008 (soon after the Hindu leader was killed), the government did not take adequate measures to prevent communally-motivated attacks during the *bandh*.¹⁷ The day before the *bandh*, the government suspended Nikhil Kumar Kanodia – the Superintendent of Police at Kandhamal – along with the local police inspector, purportedly for failing to provide security to Lakshmananada, and did not post any substitute senior police officer. This was done despite anticipating violence the subsequent day, and indicates that the state government not only ‘failed’ to prevent violence but also deliberately created a situation wherein the communal attacks the following day would be intensified and the damage maximised.

c. Failure to Prevent Incitement of Violence:

Incitement of violence through hateful rumours, propagated both orally and in written form, is often a precursor to actual violence. The Orissa government’s duty to prevent incitement of violence can only be understood in the context of the hate rumours that were propagated in and around Kandhamal against the Christian minority. As in most other communal situations, the scale, intensity and barbarity with which the violence was unleashed on the Christians would not have been possible but for the hate campaign that preceded and existed during the violence. The rumours disseminated myths about, dehumanized and made an enemy of the “other” community. Intentional dissemination of wrong information and fabricating facts became powerful tools in the hands of the *Hindutva* forces, not only to tarnish the reputation of the *dalit* and *adivasi* Christians, but to portray them as alien, working against national and local interests and therefore deserving of brutal treatment. Some of the common myths / hate rumours propagated include:

16 From Kandhamal to Karavali: The Ugly Face of the Sangh Parivar, A fact-finding report of nine human rights organizations that visited Orissa & Karnataka in Sept. – Oct. 2008, (March 2009) at p. 35

17 Kandhamal in Chaos: An Account of Facts (Ahmedabad: Janvikas, 2009) at p. 13

- **Hate rumour 1: Christians forcibly converted Hindus, as a result of which the Christian population was increasing while the Hindu population was decreasing.** The National Commission for Minorities (NCM), in its report subsequent to the Christmas 2007 violence in Kandhamal, observes that though the 1991 and 2001 census indicated that the Christian population in Kandhamal increased substantially, from 8.7% to 18.2% during this period, there was no evidence “that this increase occurred under duress or on account of inducement to conversion”.¹⁸ It further noted that though a stringent anti-conversion law – The Orissa Freedom of Religion Act – had been in existence for the past four decades, on an enquiry to district and senior officials of the state secretariat, it was found that there had not been any cases reported or registered under the same in the last decade. The NCM therefore concluded that there was no justification whatsoever for the anti-conversion campaign and that this campaign has created “an atmosphere of prejudice and suspicion against the Christian community and Christian priests and organizations.”¹⁹ Other reports have attributed the apparent increase in the Christian population of Kandhamal as per the census reports, to an uneven distribution of population during the separation of Phulbani district into Kandhamal and Boudh in 1994.²⁰
- **Hate rumour 2: Christian groups had conspired to and were responsible for the killing of Swami Laxmanananda and his disciples, and they had to be given a fitting reply.** The reasoning about the ‘Christian conspiracy’ was that the Hindu leader was doing what the Christian missionaries claimed to be doing, that is, addressing the basic needs of health and education – and thereby preventing *adivasis* from converting to Christianity.²¹ A PUCL report elaborates on the sequence of events after the killing of the Hindu leader. It states that the day after the killing, almost all the local newspapers quoted police sources as reporting Maoist involvement in the killings. The *Sangh Parivar*, however, invented and publicized the theory that extremist

18 Report of National Commission of Minorities’ Visit to Orissa, 6-8 January 2008, supra n. 8 at para 8.

19 Ibid at para 12

20 For a detailed discussion of this explanation through an analysis of population statistics, see *Kandhamal in Chaos*, supra n. 17 at p. 11 and Anto Akkara, *Kandhamal: A Blot on Indian Secularism*, (Delhi: Media House, 2009) at pp. 68-69

21 From Kandhamal to Karavali: The Ugly Face of Sangh Parivar, supra n. 16 at p. 11

Christian groups were responsible, because the Swami had opposed conversion and cow slaughter.²² Police suspicions were confirmed when the Maoist leadership admitted its role in the killings on NDTV on 5 October 2008. By way of refuting this, the Hindu Jagaran Samukhya – a saffron outfit – convened a press conference on 6 October 2008, where the Christian conspiracy was reiterated, and the original minutes book of Beticola church produced as ‘proof’ of the same. The *Sangh Parivar* has no explanation as to why a criminal conspiracy of this kind, if it had been hatched, would have been minuted in detail in the Minutes book. The alien language and criminal intent that is explicit in the minutes indicate clearly that the document had been manufactured. A Rs. 50 crore defamation suit has been filed by the aggrieved persons against the outfit.²³

- **Hate rumour 3: The violence was a consequence of grabbing of adivasi lands by dalits, and hence the nature of violence was ethnic and not communal.** As a source not only of livelihood, but of dignity and power, land has been a contentious issue among the two most marginalized communities in Orissa.²⁴ To protect tribal land, the Orissa government passed the Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribe) Regulation Act 1956. In 2002, the state government amended the same by directing that all land transfers from ST to non-STs between October 1956 and 4 September 2002 be verified to ascertain their genuineness and the persons possessing such land must prove to the sub-collector by a certain date that the transfer was legal.²⁵ A study conducted by a government research institution refutes the theory of *Panas* grabbing land from the *Kandhas*, and that *sundhis* (caste Hindus) were responsible for land grabbing.²⁶ After a detailed analysis of existing statistics on landholdings by scheduled tribes and scheduled castes in Kandhamal, a report concludes that there is a small section that owns a large amount of land. However, there is no struggle

22 See *Crossed and Crucified: Parivar's War Against Minorities in Orissa*, Report by PUCL, Bhubaneswar & Kashipur Solidarity Group, (Delhi: PUCL Bhubaneswar & Kashipur Solidarity Group, April 2009) at p. 5 and 13

23 For more details of the fabrication of the minutes to show Christian conspiracy, see *Kandhamal: A Blot on Indian Secularism*, supra n. 20 at pp. 64-67

24 *Crossed and Crucified: Parivar's War Against Minorities in Orissa* – supra n. 22, at p. 22

25 *Ibid* at p. 24

26 *Ibid* at p. 27

against large land owners, as usually seen in other land movements.²⁷ Another report states that a senior official of the state government had admitted that more tribal land was grabbed by caste Hindus than by the *Panas*, against which there has never been an agitation by the *Sangh Parivar* or any one else.²⁸ If at all land-grabbing and economic exploitation was the cause of the violence, it is more probable that the *Kandhas* would have attacked persons from the caste Hindu communities in the district. However, there were no such attacks. Conversely, reports state that the caste Hindus participated in many attacks along with the *Kandhas*.²⁹ Even if there have been instances of land grabbing by *Panas*, that certainly does not justify the brutal attacks on the entire community in Kandhamal. Besides, the NCM was unequivocal in its observation that the violence was “*undoubtedly communal in nature and people were attacked on the basis of their religion.*”³⁰

- **Hate rumour 4: The violence was a spontaneous reaction by Hindus against Christians.** All evidence points to the planned, systematic, targeted and coordinated violence against the Christians. Reports indicate the supply of kerosene by traders to burn houses and places of religious worship,³¹ the holding of meetings by local RSS units in *panchayat* offices, schools, *anganwadi* centres of villages prior to the attacks as well as the distribution of notices that stated the time at which the *Hindutva* forces would attack the respective village,³² selective targeting of houses, places of worship and property belonging to Christians in order to economically ruin the community, and a sinister pattern in the attacks carried out and the destruction of evidence afterwards, especially of the bodies of persons killed so that compensation could not be claimed from the government.³³
- **Hate rumour 5 – Violence was caused because of fake certificates that were made by dalits to corner the privileges of the adivasis.** The two

27 *Ibid*

28 See *From Kandhamal to Karavali: The Ugly Face of Sangh Parivar*, supra n. 16 at p. 18

29 *Ibid* at p. 20

30 Report of the Visit of the Vice Chairperson, NCM to Orissa 21-24th April 2008, supra n. 10 at p. 2, para 2

31 *From Kandhamal to Karavali: The Ugly Face of Sangh Parivar*, supra n. 16 at p. 6

32 *Ibid* at p. 8

33 For details, see *Kandhamal: A Blot on Indian Secularism*, supra n. 20 at p. 32

most disenfranchised communities in Orissa – the *adivasis* and the *dalits* – have had to depend on government policies and schemes for self-betterment. The benefits obtainable under many such schemes are dependent on the Scheduled Caste/Scheduled Tribe status of the person concerned. Since independence, the designation of Scheduled Castes and Scheduled Tribes has created a controversy over the status of the *Panas* and *Kandhas*. The definition of Scheduled Castes in the Constitutional (Scheduled Castes) Order, 1950 issued by the President of India excludes those who convert to religions other than Hinduism. Subsequent amendments have permitted conversion to Buddhism and Sikhism without a loss of SC status, but not conversion to Christianity or Islam. As a result, a Scheduled Caste person loses his / her SC status upon conversion to Christianity. Conversely, Scheduled Tribes have been given land and reservations which they do not lose upon conversion. The 1950 Order has caused many Christian *Panas* to lose their reservations and other benefits to which they were entitled as SCs. It is in this context that an allegation has been leveled against the *Panas*, of using fake certificates to avail of SC benefits despite conversion to Christianity, and that by doing so, they were eating into the benefits meant for *adivasis*. There is no information on how widespread this practice is in Orissa in general, or in Kandhamal, but it is reported to be prevalent in all states,³⁴ and is rooted in the unreasonable character of the 1950 Order. As stated by the *Pano Kalyan Samiti*, if there has been a case of forgery, the culprits should be booked, but the entire community of *Panas* ought not to be slandered.³⁵ Furthermore, it is no justification for violence against the *Panas*. After the violence in August-September 2008, the government appointed 10 police inspectors to examine allegations of forged certificates, pursuant to which 801 cases are being investigated.³⁶ While the *Sangh Parivar* has propagated a hate rumour that the demand for reservation benefits by converted *Panas* (*dalits*) is the root of the problem, the fact that both *dalit* and *adivasi* Christians have been at the receiving end of the violence exposes the hollow nature of this claim.

Against this backdrop of hate rumours, the NCM had recommended that the

34 From Kandhamal to Karavali: The Ugly Face of Sangh Parivar, supra n. 16 at p. 20

35 Crossed and Crucified: Parivar's War Against Minorities in Orissa – supra n. 22, at p. 39

36 Samaj, 10 March 2009, quoted in Crossed and Crucified: Parivar's War Against Minorities in Orissa, ibid

speeches of Swami Lakshmanananda be examined for incitement of violence. The state government failed to do so. After he was killed, senior leaders of the *Sangh Parivar* began visiting Kandhamal. Praveen Togadia – the general secretary of the VHP and a person known for his inflammatory speeches against Christians and Muslims, arrived in Kandhamal within 24 hours of the killing. An example of Togadia's speech is as follows: "*They (Christians) eat cows. We (Hindus) worship cows... people who eat cows should be given the same treatment that they give the cows.*"³⁷ Even if the state administration had not been able to anticipate the killing of the Hindu leader, it could have certainly anticipated the consequences of the presence and speeches of Togadia, who has earlier been disallowed entry by various state governments into their territory because his speeches are designed to mobilize hate and incite violence. The state government's due diligence in preventing the communal violence would have been evident, had it prevented Praveen Togadia and other BJP leaders from entering the state. Instead, Togadia was allowed to visit Orissa at a very sensitive period, with police escort, and given a free hand. Togadia was allowed to travel the full distance of the funeral procession for two days and lead it, deliver inflammatory speeches throughout Kandhamal, spreading hatred and disharmony, and incite people to attack Christians, their property and places of worship. The state government's failure to prevent Togadia from entering the sensitive area of Kandhamal in August 2008 stands in stark contrast to its issuance of prohibitory orders to him in March 2010, barring him from entering Kandhamal³⁸ and is indicative of the selective use of its preventive powers. A similar exercise by the state government in 2008 could have saved many lives, property and prevented the trauma caused to many members of the Christian minority.

Further, the state failed to come down heavily on the *Hindutva* forces and groups for the series of programmes it announced and implemented, commencing with the Orissa *bandh* of 25th August 2008, followed by a plan of a *Kalash yatra*. The state government's decision to disallow the *Kalash yatra* was perhaps because it was apprehensive of a stern directive from the Supreme Court.³⁹ The third

37 Quoted by Vijay Simha, 'In the Name of God', *Teelka Magazine*, 13 September 2008

38 'Togadia Arrested in Kandhamal, Out on Bail', *The Indian Express*, 21 March 2010.

39 On 3 September 2008, the Supreme Court had asked the state government to submit an affidavit on whether permission was granted to VHP leader Praveen Togadia for his proposed yatra, carrying the ashes of slain leader Swami Lakshmananda Saraswati. See 'SC Directs Orissa to Submit Report on Kandhamal by Thursday', *The Times of India*, 3 September 2008

program consisted of *Shraddanjali Sabhas*—memorial meetings—held throughout the district, which provided platforms for anti-Christian hate speeches, threats and provocative statements. It is reported that almost all the meetings made demands to end cow slaughter and conversion to restore peace in Kandhamal, and resolutions were passed in one of the meetings on 6 September 2008 to bring people who had converted to Christianity back to Hinduism.⁴⁰ An excerpt from the speeches is as follows: “*Attack on Swamiji is the same as attacking the ‘Hindu Religion’ . All the saints / sadhus need to counter-attack unitedly otherwise the entire India will be converted into a Christian nation.*”⁴¹ The fourth set of programmes involved *dharna* by Hindu religious leaders of Orissa – *sadhus, sanths* and the Maharaja of Puri – whose demand included action to be taken against Sister Meena – a survivor of gang rape – on the ground that her allegation of rape is false. They also performed *yagnyas* to “eliminate the enemies of Hinduism”.⁴² The state did not invoke the anti-hate speech provisions of the Indian Penal Code,⁴³ take any of the preventive actions provided for under the Code of Criminal Procedure⁴⁴, or make efforts to extern such persons under Section 46 of the Orissa Urban Police Act, 2003.⁴⁵ In a context already surcharged with communal hatred, the state government’s decision to allow these programmes that were intended at inciting violence indicates that it lacked the political will to exercise its powers to prevent the violence.

The print media also played an irresponsible role and its partisan reporting inflamed passions during the violence after the Hindu leader’s assassination. For example, *Samaj*, a leading Oriya daily, stated that even if Maoists committed the murder they must have been hired by the Christian missionaries.⁴⁶ The same daily (on 24 October 2008) as well as *Dharitri* (on 28 October 2008) indulged in vicious character assassination of the nun Sister Meena, who had been gang-

40 **Crossed and Crucified: Parivar’s War Against Minorities in Orissa** - supra n. 22 at p. 14

41 Excerpt from the speech of Swami Arupananda Maharaj at one of the shraddhanjalis, quoted by Dharendra Panda in ‘The Christians Will be Wiped Out From Kandhamal: VHP Vows’, 11 September 2008, at <http://orissaburning.blogspot.com/>, accessed on 11 March 2010

42 Ibid

43 Sections 153A and 153B of the Indian Penal Code 1860.

44 Sections 107, and 108 of the Code of Criminal Procedure, 1973.

45 The Orissa Urban Police Act, 2003, is only applicable to urban areas. The notified urban areas in Kandhamal are Phulbani and G.Udaygiri.

46 **From Kandhamal to Karavali: The Ugly Face of Sangh Parivar**, supra n. 16 at p. 33

raped, and alleged that she was in the habit of sexual intercourse. Reports have established the fact that the local dailies were partisan in their reports as many were controlled by local politicians, inciting violence and suppressing material facts that could have had a counter-effect on the violence.⁴⁷ However neither the State administration nor the local administration intervened or issued a warning to the local dailies.

One of the key persons whose duty it was to prevent violence was the District Collector, Dr. Krishan Kumar. The Collector pleaded helplessness in preventing the violence and is quoted to have said: “*we declared S. 144 but did not have enough forces to enforce it. No permission was asked for nor given for the funeral procession. It went on the strength of the mob. We could not do much due to lack of forces at our command.*”⁴⁸ The quote highlights two issues: (1) did the available forces perform their job diligently to prevent the violence, by making preventive arrests and taking other necessary action? (2) why were additional forces not made available, when was the request made and who obstructed the same? Krishan Kumar’s superiors ought to have done all in their power to enable him to discharge his responsibilities in an effective manner, rather than obstruct the same for political gain. An issue for consideration is – which administrative officials and political executives ought to be held responsible for the failure to take preventive action - which led to the loss of life and property?

Duty to Protect Persons and Property

The Supreme Court’s observations to the Orissa government on 5 January 2009 summarize the manner in which the state government discharged its duty to protect Christian persons and property caught in the vortex of the Kandhamal violence of 2008. It is quoted to have said: “*You had failed in your duty to protect minorities. . . You had done it much later after 50,000 Christians fled to the jungles. You can’t run your government like this. We can’t tolerate persecution of minorities. If your government is unable to protect Christians, you better resign. We are a secular country and no minority should feel insecure in our country.*”⁴⁹

47 See **Crossed and Crucified: Parivar’s War Against Minorities in Orissa** – supra n. 22 at pp. 16-17 for a detailed discussion on the role of the media during the violence

48 **Kandhamal: A Blot on Indian Secularism**, supra n. 20 at p. 22

49 Quoted in ‘Court: Keep Central forces in Kandhamal Till Elections’, *The Hindu*, 6 January 2009

On Christmas day, 2007, the VHP and allied organisations had called for a *bandh* and declared that Christmas would not be celebrated in Kandhamal this year. Instead of protecting the Christmas celebrations, a few police officers in Tikabali had requested leaders of the religious minority not to hold the usual service and cautioned that if they did so it would be at their ‘own risk’. Christian groups had met the District Collector and Superintendent of Police days before the Christmas attack of 2007, and submitted a memorandum asking for protection to their properties. No protection was extended, properties were damaged and the Hindu symbol ‘Om’ was written on the walls of several churches.⁵⁰

During the August 2008 violence too, the police abdicated its duty to protect Christians and their property in Kandhamal. In some instances, as in Rupagaon, 2-3 km from the Chakapada ashram, the police alerted Christian families about the possibility of attacks, but took no steps to protect them.⁵¹ There are many reported incidents when the police did not answer phone calls from Christians seeking protection from impending attacks. In other instances, there were unpardonable delays in the police arrival at the scene of the crime. For example, in a case of brutal killing of Abhimanyu Nayak of Borapali village near Phulbani, his wife had to guard his partially burnt body from dogs for five days before the police would arrive with a doctor and conduct postmortem, although the FIR was lodged on the first day itself.⁵² These facts reveal that the police was acting on the dictates of political masters rather than being guided by their statutory duties; and that its actions were communally biased. Pramod Kumar Pradhan, a victim-survivor, speaks of how when he and others sought assistance from the fire station in G. Udayagiri for their houses burnt by violent mobs, they were told that the fire station would respond only if the police made a request.⁵³

One quote attributed to the police by many people is as follows: “*the guns are in our hands, but the bullet is in Naveen Patnaik’s hands. If he gives written orders we will control the riots in two days.*”⁵⁴

The police do not need written orders from Chief Ministers to discharge their

50 Kandhamal: A Blot on Indian Secularism, supra n. 20 at p. 96

51 Crossed and Crucified: Parivar’s War Against Minorities in Orissa, supra n. 22 at p. 6

52 Kandhamal: A Blot on Indian Secularism, supra n. 20 at pp. 27-28

53 From Kandhamal to Karavali: The Ugly Face of Sangh Parivar, supra n. 16 at p. 32

54 Ibid at p. 36

Constitutional duties. If correct, the quote indicates that the police may have had instructions *not* to control the situation and to refrain from protecting people and their properties.

With regard to the state’s duty to protect the citizens, another significant issue relates to its deployment of CRPF / RAF and other paramilitary forces. It was alleged that in the initial days of the violence, the paramilitary forces sent by the Central government were deliberately deployed only in towns. They were not sent to the villages – where the actual violence was taking place in the full knowledge of the state government. The non-cooperation of the state government and the local police with the CRPF were highlighted by the Commandant of CRPF – Darshan Lal Gola, who pointed out that there was “*a complete breakdown of the state’s law and order machinery*” and that the CRPF had rounded up 75 rioters in Deegei village under Raikia police station, but the “*local police refused to put them behind bars.*”⁵⁵ The mala fide act of keeping the paramilitary forces away from the actual sites of violence and non-cooperation with them not only indicates an abdication of constitutional duties, but also makes a case of connivance of government machinery with communal mobs.⁵⁶ The Supreme Court responded by directing the state government to “*deploy sufficient central paramilitary forces.*”⁵⁷

In subsequent chapters of this publication, we shall discuss the difficulties of ensuring that all police officers, administrators and political executives who failed to discharge their duty or who discharged them in a mala fide manner are made accountable and penalized for their acts of omission and commission.

Duty to Respect Rights of Victim-Survivors

Duty to respect rights of victim-survivors entails the state government does not interfere, directly or indirectly, with the enjoyment of their rights. The state has an obligation not to do anything, directly or indirectly, that would violate their

55 The Indian Express, 29 August 2008, quoted in <http://www.cbn.com/cbnnews/shows/cwn/2008/September/Police-Do-Little-to-Protect-Christians-in-Orissa-India-/>, accessed on 17 March 2010

56 Alleged by Archbishop Raphael Cheenath in the writ petition filed in the Supreme Court (Writ Petition No. 404 of 2008), based on victim testimonies and media reports, at paras 11 and 48.

57 Supreme Court order dated 4 September 2008, reported in ‘Orissa Assures Apex Court of Christians’ Safety’, 4 September 2008, Indo Asian News Service

rights. Some actions that indicate this duty was not fulfilled in Kandhamal are as follows:

a. Complicity and Participation in the Violence, Through Action and Inaction:

While the brutal violence against Christians that took place on 25 August 2008 – the day of a *bandh* across Orissa – has been documented in various reports⁵⁸, the Chief Secretary to the Orissa government glossed over this violence and claimed that the *bandh* was “complete, under control and peaceful.” It is impossible to believe that the state bureaucracy was not aware of or did not have knowledge of the targeted attacks and brutal killings of Christians in Kandhamal that day, especially since the BJP – which participated in the *bandh* and the anti-Christian violence – was a coalition partner in the state government.

The statement of Sister Meena, who was sexually assaulted and gang-raped by a mob, speaks volumes of the complicity of the police with the attacks against Christians. She speaks of weeping bitterly and asking the police to protect her, when she was taken to the market place and paraded in a semi-naked condition, and even sat between two policemen but they did not move. Subsequently, the policemen who arrived at the police outpost at Nuagaon talked in a very friendly manner with a perpetrator of the assault. The Inspector-in-Charge at the Baliguda police station first tried to dissuade her from lodging a First Information Report (FIR), and when he did not succeed, he prevented her from writing the FIR in detail, omitting details of the complicity of the police. Afterwards, they put her onto an Orissa State Transport bus to Bhubaneswar and abandoned her half-way, with no protection until her destination.⁵⁹

There have also been reports of the presence of police officials and other government officials along with groups that desecrated churches.⁶⁰

58 The brutal gang rape of Sister Meena at the Divyajyoti Pastoral Centre in K.Nuagaon and the killing of Rasananda Pradhan – a paralytic patient – who was burnt alive in the village of Gadragam on 25 August 2008 are examples of the brutal violence on the day of the *bandh*.

59 Statement of Sister Meena, released at a press conference in New Delhi on 24 October 2008, reproduced in *Kandhamal: A Blot on Indian Secularism*, supra n. 20 at pp. 60-62

60 An example is the desecration of the Catholic church in Phulbani, when the motorcade carrying the body of Swami Lakshmanananda was stopped in front of it. Top police officials and the district collector were reportedly present at the time of the incident, and did nothing to stop the desecration. For further details, see *Kandhamal: A Blot on Indian Secularism*, ibid at p. 19

b. Making Members of The Victim Community Vulnerable To Attacks:

The ordeal of Rajnikant Pradhan of Bapuriya is an illustrative example of how members of the victim community were made vulnerable to attacks, through the overt or covert complicity and culpable inaction of the police. Rajnikant fled from his rented house at Bapuriya along with his wife as the anti-Christian violence started. In his hurry to flee, he could not carry valuable documents such as his vehicle registration papers, driving license and his wife’s education certificates. He tried to register a complaint on the lost documents and household possessions at Udaigiri, and was made to visit the police station a second time, only to be shunted to Tikabali police station, and thereafter to Sarangod police station, on the pretext that Bapuriya did not fall within the jurisdiction of the former two police stations. Even after repeated attempts, the police at Sarangod police station refused to register his complaint and forced him to return to his camp.⁶¹ This is in a context where the police was well-aware of the danger to the life of Christians who moved around.

c. Violation of Fundamental Right to Speech and Expression, Freedom of Movement:

The state’s partisan role in the violence is evident in that, while the *Hindutva* forces and media were given a free hand at making inflammatory speeches spreading hate propaganda and inciting violence, concerned citizens’ freedom of speech and expression was curtailed and violated. A case in point is the arrest of Lenin Kumar, an engineering graduate who wrote and sold to the public an 80-paged book in Oriya titled ‘River of Bloodshed in Kandhamal in the Name of Religion’, along with two associates. The book criticized the activities of *Hindutva* leaders who preached hatred and violence in the name of religion to enhance their political agenda. The arrested persons were charged with “attempt to destroy communal harmony” under S. 153A of the IPC and with “insulting the religion of any class...” under S. 295A of the IPC, and 700 copies of the book were seized from the printing press.⁶²

Another case in point is the police arrest of victim-survivors of communal violence – Niladri Kanhar and pastor Pavitra – based on trumped up charges

61 Ibid at pp. 99-100

62 For further details, see *Kandhamal: A Blot on Indian Secularism*, ibid at pp. 55-57

of inducement to conversion that was filed by persons who had earlier attacked the two survivors.⁶³

d. Preventing Relief and Fact-finding Work Among Victim-Survivors:

An appalling feature of the violence in Kandhamal is the blockage of relief material to victim-survivors, and the prevention of relief and fact-finding work among them for several days after the violence. In the anti-Christian violence of December 2007, Manish Kumar Verma – the Collector of Kandhamal – banned relief work by non-profit organizations including Christian groups for the families of victim-survivors of the violence with an executive notification. Even ten days after the violence, the government kept the affected area out of bounds for human rights organizations as well as for a fact-finding team led by the opposition leader of the State Assembly.⁶⁴ The ban was lifted in May 2008, five months after the violence, through an order of the Supreme Court that quashed the Collector's notification. Precious time was lost in the process in saving lives, attending to the injured and providing relief and rehabilitation to all victim-survivors. This notification resulted in ensuring maximum damage to persons and property, as well as served the purpose of buying time for a cover-up of the violence through destruction of evidence. The notification is an indication of the impunity with which the state government acted, and its scant respect for rule of law.

The Supreme Court order quashing the malicious notification ought to have caused embarrassment and deterrence to the state government. However, this was not so. In the August 2008 violence, the government once again prevented the entry of the Central Minister of State, Home Affairs - Sriprakash Jaiswal - and opposition leaders of the state into the affected areas for first hand information on the scale and nature of violence, and banned relief agencies, non-profit and charitable organizations from conducting relief work among the victim-survivors.⁶⁵ The state not only abdicated its responsibility towards providing relief measures in a prompt and adequate manner, but also ensured that help did not reach the devastated victim-survivors, and that the attacks

⁶³ Ibid at p. 87

⁶⁴ Kandhamal: A Blot on Indian Secularism, supra n. 20 at pp. 98-99

⁶⁵ Crossed and Crucified: Parivar's War Against Minorities in Orissa, supra n. 22 at p. 40

against the vulnerable population continued.

The victim-survivors' access to relief and rehabilitation was further curtailed once they were lodged in relief camps. Once in the camps, they had no access to or communication with the outside world, because all 'outsiders' were denied permission to enter. Reports state that permissions were denied to nuns, priests and local nurses for many months.⁶⁶ However reports also point out that members of the *Bajrang Dal* and *Durga Vahini* were able freely to walk into the camps and threaten the victim-survivors,⁶⁷ thereby aggravating the psychological repercussions on them and increasing their sense of fear and insecurity even within the camps. The Supreme Court took note of this, and directed the Orissa government to ensure that "*no outsiders will be allowed to visit the relief camps*".⁶⁸

e. Forcible Return of Victim-Survivors to their Villages Without Guarantee of Safety

Reports state that many victim-survivors were duped into returning to their villages, while others were forcibly abandoned near their villages by state officials.⁶⁹ This was probably a desperate attempt to reduce the number of relief camps, as the state government faced pressure to reduce the strength of the Central Reserve Police Force (CRPF), as 40 battalions had been deployed in Kandhamal especially around the relief camps. Moreover the closure of relief camps would signal the return to normalcy and peace.

An example of the forcible return of victim-survivors to their villages is the ordeal of 17 families who were forcibly dumped near their houses at Gunjibadi near Dharampur in early February 2009 by government officials eager to wind up the Nuagam relief camp. Not only were they abandoned, the officials had not bothered to provide them any shelter material. Since their houses were charred or damaged, and they were prevented from entering their village because they

⁶⁶ Kandhamal in Chaos: An Account of Facts, supra n. 17 at p. 14

⁶⁷ From Kandhamal to Karavali: The Ugly Face of Sangh Parivar, supra n. 16 at p. 38, and Kandhamal: A Blot on Indian Secularism, supra n. 20 at p. 35

⁶⁸ Supreme Court order dated 4 September 2008, reported in 'Orissa Assures Apex Court of Christians' Safety', 4 September 2008, *Indo Asian News Service*

⁶⁹ The illustrations highlighted in this section are discussed in detail in *Kandhamal: A Blot on Indian Secularism*, supra n. 20 at pp. 38-39

were Christians, these families, including that of Joseph Digal, were reported to have been sleeping in the open. Similarly, Chandrakant Digal's family along with five others, had to pitch tents on unowned land at Dibari village near Raikia. At least a dozen other families are reported to have been living under similar conditions on unowned land near Badawanga, 15 kilometers from Raikia. Such families had lived in these kind of conditions for at least four months, struggling to find food to keep themselves alive. Their present condition is not known.

In all the situations mentioned above, there was no semblance of an effort on the part of public officials to ensure the safety of the victim-survivors who were being abandoned near their villages. Officials abandoned victim-survivors near their villages, where they faced hostility and remained exposed to attacks and threats to their lives from villagers and fundamentalist forces. Such deeds expose the culpable inaction and lack of due diligence on the part of public officials in the fulfilment of their constitutional duties.

Duty to Register Complaints, Investigate Offences and Prosecute Perpetrators

The duty to register complaints, investigate offences and prosecute perpetrators is an important aspect of the state's obligation towards protecting human rights. The state has a duty to establish the rule of law, safeguard human rights and ensure justice and accountability for the violence. The extent to which this state obligation has been discharged will be discussed in subsequent chapters.

Conclusion

While it is the state government that is primarily responsible for protecting the lives and property of Christians in Kandhamal, the Central government needs to go beyond rhetorical gestures such as naming the Kandhamal violence a 'national shame'.⁷⁰ It is also obliged to ensure that the state government discharges its duty in a diligent and non-discriminatory manner. Four days after the violence began, half a dozen Christian leaders met the Prime Minister and appraised him of the situation. Despite assuring them of active interventions, the central

70 Quoted in 'Situation in Kandhamal Out of Control: Archbishop', *The Hindu*, 29 September 2008

government decided not to do so, on political considerations.⁷¹ As referred to at the beginning of this chapter, the Central government is mandated by the Constitution to "ensure that the government of every state is carried out in accordance with the provisions of this Constitution."⁷² The Central government has failed to discharge this obligation in a duly diligent manner.

The complicity of the state administration, particularly the police, in communal violence is not unique to Kandhamal. In the Gujarat carnage of 2002, Inspector K.K. Mysorewala had said that there were no orders from the higher authorities to protect the Muslims. The Srikrishna Commission which inquired into communal violence in Mumbai in 1992-93 indicted 31 police officials from the rank of Deputy Commissioner of Police to constable. The Madon Commission on the Bhiwandi-Jalgaon riots of 1970 had pointed out that the Bhiwandi Superintendent of Police had forged the daily diaries to make false implications against minority leaders. Despite repeated findings of the complicity of public officials in contexts of communal violence, they have not been made accountable. This has spawned a culture of impunity.

The state authorities in Orissa did not exercise due diligence in anticipating the violence and acting effectively to prevent it. Once it commenced, the state government was not duly diligent in taking effective and adequate measures to protect persons and property. In many instances, its actions were communally biased and the state machinery colluded with the mobs enacting violence. After the violence abated, the state authorities did not bring the perpetrators to book; but rather, chose to violate the fundamental rights of victim-survivors as well as of the concerned citizens who criticized the actions of the perpetrators. In short, the state government and the central government have both failed to discharge their obligation to prevent violation of human rights, protect persons and property and to respect the human rights of the affected people in Kandhamal. This is an abdication of duty and a blatant violation of the Constitutional mandate as well as of standards of international human rights.

71 *Kandhamal: A Blot on Indian Secularism*, supra n. 20 at p. 50

72 Article 355 of the Indian Constitution

IV

ROLE OF THE STATE IN PROVIDING RELIEF, REHABILITATION & REPARATIONS

This chapter focuses on the role of the state vis-à-vis relief, rehabilitation and reparations. Using the yardstick of Indian and international standards, we examine the extent to which the government has discharged its obligations in the context of Kandhamal. The difficulties caused by the lacunae in existing Indian law and jurisprudence in accessing and securing justice are discussed and further detailed in Chapters V and VI.

The state's duty to provide relief, rehabilitation and reparations stems from the Constitutional mandate to protect the life and liberty of the people, which envisions a life with dignity and not a mere animal existence.¹ In addition, the international community has been increasingly concerned with the issue of internal displacement, even though it considers it primarily as the responsibility of national governments. One of the significant steps taken by the United Nations system was to appoint a Special Representative of the UN Secretary General who drafted the 'Guiding Principles on Internal Displacement' in 1998. These guidelines are not part of any international convention that requires ratification by countries. While the Guiding Principles on Internal Displacement do not constitute a binding legal document, they "reflect and are consistent with international human rights law and international humanitarian law,"² and have

1 *Francis Coralie Mullin vs. Administrator, Union Territory of Delhi* AIR 1981 SC 746

2 The Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, dated 11 February 1998. This document is hereinafter referred to as the 'Guiding Principles'. See "Introduction: Scope and Purpose", para 3

become widely accepted at the international, regional and state levels.³ They are intended to guide governments and international humanitarian agencies in providing assistance to and protecting the rights of persons affected by internal displacement, through a human rights-based approach. The Guiding Principles address all phases of displacement – protection from displacement, protection and assistance during displacement, and guarantees for return, settlement or reintegration with safety and dignity.

The Guiding Principles prescribe standards to be followed for protecting the rights of “internally displaced persons” (IDPs). The term IDPs refers to “*persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.*”⁴ Two elements are decisive in identifying who is an IDP: (1) the coercive or otherwise involuntary character of the movement of people due to circumstances beyond their control; and (2) the fact that such movement takes place within national borders.

The violence that commenced on 25 August 2008 led to large-scale internal displacement of Christian people from Kandhamal. Approximately 27,000 – 40,000 people were displaced and while some shifted to the 25 relief camps, many left for other towns in Orissa and some even for other states.⁵ The movement of people away from their homes was coercive and involuntary, as it was caused by the communally-motivated attacks over persons and property by violent mobs. The movement of such people was within the nation’s borders. The victim-survivors of Kandhamal violence, therefore, fall within the definition of IDPs according to standards of international law.

3 Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, A/HRC/10/13 dated 9 February 2009 at para 3. It primarily addresses three thematic issues including the status of the Guiding Principles on Internal Displacement 10 years after their submission to the Commission on Human Rights. This document is hereinafter referred to as ‘10 years of Guiding Principles’.

4 The Guiding Principles on Internal Displacement, supra n. 2, at para 2

5 One report estimates the number of displaced as not less than 40,000 - From Kandhamal to Karavali: The Ugly Face of the Sangh Parivar, A fact-finding report of nine human rights organizations that visited Orissa & Karnataka in Sept. – Oct. 2008, (March 2009) at p. 40, while Kandhamal in Chaos: An Account of Facts (Ahmedabad: Janvikas, 2009) at p. 16 puts the figure at 27,000

The Right against Displacement

The Guiding Principles place an obligation upon the state to ensure that individuals and groups are not subjected to involuntary displacement except when absolutely necessary and that in such cases, displacement is not carried out in an arbitrary manner, in violation of international law.⁶ The state is further duty-bound to take positive steps to prevent foreseeable displacement and mitigate particular populations’ existing vulnerability to displacement. Displacement is absolutely prohibited when based on “policies of apartheid, “ethnic cleansing” or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population.”⁷ The State is also under an obligation to prosecute and punish those persons who commit crimes that result or may have resulted in the displacement of persons.

On one hand, there is a glaring gap in Indian legal jurisprudence on the issue of IDPs, discussed more elaborately in Chapter VI of this publication. On the other hand, the international standards set by the Guiding Principles have been violated in the Kandhamal context. Through a failure to prevent the violence and protect the people and their properties, the state has failed in its duty to take positive steps to prevent foreseeable displacement and mitigate the marked populations’ vulnerability to displacement, as mandated by the Guiding Principles. Targeting of Christians for attacks, which caused them to flee from their homes, leaving behind their personal belongings, land and other properties, as well as barring their re-entry into their villages unless they converted to Hinduism are acts that resulted in continued displacement of Christians from their homes. These are violative of the right against displacement outlined above.

Right to Relief and Humanitarian Assistance

a. Non-Provision of Basic Facilities in Relief Camps:

While the state administration claimed before the Supreme Court that the victim-survivors are well-cared for and protected in the 25 relief camps set up in the district, almost all reports on the Kandhamal violence speak of the

6 Principles 5-9 of Section II of the Guiding Principles, supra n. 2

7 Principle 6 of the Guiding Principles, supra n. 2

appalling conditions in relief camps, indicative of government indifference to the plight of victim-survivors. Some problems highlighted include overcrowding, lack of privacy, sanitation, electricity, nutritional food, water, education for children, health care and recreation.⁸ The women's special health needs during menstruation, pregnancy, child birth and period of lactation were also not taken care of.⁹ It is reported that as the women went outside the camp to urinate and defecate, they were chased by aggressive mobs that said they did not have any place in *adivasi* lands.¹⁰ There were a few deaths reported from the relief camps due to want of medicine,¹¹ and death of children due to unhygienic conditions in the camps.¹²

Despite the inhospitable conditions in the camps, the Orissa government did not allow members of relief agencies and charitable organizations access to the victim-survivors in the camps. The unjustified restriction and prohibition of all religious, cultural, civil and political activities in the camps hindered the healing process of victim-survivors, almost all of whom suffered from acute trauma. The report of the fact-finding team of civil society organizations including the Red Cross under the banner 'Odisha Sadhbhavana Manch' that visited Kandhamal in September 2008 speaks of the inhospitable conditions in the relief camps.¹³

A fact-finding team from nine human rights organizations contacted the Relief Commissioner (Southern Region) to express their concerns about the conditions at the G. Udayagiri camp, which was located in water-logged open land, and requested for relocating it in a concrete structure. The Commissioner's reply reportedly, that this was not possible as 'other communities' were objecting to the allotment of any government building for the refugees, indicated that the state government was guided by the dictates of the perpetrators rather than its statutory obligation to provide relief to the victim-survivors.¹⁴

Reports by non-governmental sources state that hundreds of Christian families

8 *Kandhamal in Chaos: An Account of Facts*, supra n. 5 at p. 14

9 *Ibid.* For more details, see also John Dayal, 'Camp and Culpability', *Combat Law*, April 2009

10 *Ibid.*

11 *Ibid.*

12 Anto Akkara, *Kandhamal: A Blot on Indian Secularism*, (Delhi: Media House, 2009) at p. 36

13 For details, see <http://www.indianet.nl/pb080919.html>, accessed on 10 March 2010

14 *From Kandhamal to Karavali: The Ugly Face of Sangh Parivar*, supra n. 5 at p. 29

left the relief camps, not for their villages, but for cities such as Bhubaneswar, Cuttack, other parts of Orissa and outside the state, due to the conditions in the relief camps.¹⁵ The Orissa government disputed this and claimed before the Supreme Court that the refugees "*did not leave the camps on account of poor living conditions. They left the camps since they felt it safe to return home.*"¹⁶

b. Absence of Security in the Relief Camps:

The relief camps, though guarded by the CRPF, did not provide physical and psychological security to the traumatized victim-survivors. There were incidents of locals from nearby villages threatening people staying in the camps and of abusing women.¹⁷ Women were most vulnerable to victimization and were not able to move out of the camp sites without security. Reports point out that members and leaders of *Bajrang Dal* and *Durga Vahini* were able to walk into the camps freely and threaten the victim-survivors.¹⁸ It took a Supreme Court intervention for the state government to ensure that no outsiders would be allowed to visit the relief camps of the Christians.¹⁹ Further, crude bombs were hurled at the camps at G. Udaigiri and K. Nuagaon, causing panic.²⁰ Such incidents increased the sense of helplessness, vulnerability and insecurity experienced by the inmates.

In international law, the IDPs have an inviolable right to relief and aid. They have a right to request and to receive protection and humanitarian assistance from the national authorities.²¹ States have a corresponding duty and responsibility to provide the same. Further, while the Guiding Principles acknowledge that providing protection and humanitarian assistance to IDPs is the primary responsibility of the national authorities, "international humanitarian organizations and other appropriate actors have the right to offer their services

15 *Kandhamal: A Blot on Indian Secularism*, supra n. 12 at p. 35

16 *Ibid.* at p. 34

17 *Kandhamal in Chaos: An Account of Facts*, supra n. 5 at p. 18

18 *From Kandhamal to Karavali: The Ugly Face of Sangh Parivar*, supra n. 5 at p. 38, and *Kandhamal: A Blot on Indian Secularism*, supra n. 12 at p. 35

19 Supreme Court order dated 4 September 2008, reported in 'Orissa Assures Apex Court of Christians' Safety', 4 September 2008, *Indo Asian News Service*

20 See 'Crude Blasts Hit Kandhamal Relief Camps', *The Times of India*, 1 October 2008

21 Principle 3 of the Guiding Principles, supra n. 2

in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.²² The state is also duty-bound to provide "free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced."²³

All IDPs have a right to an adequate standard of living. Regardless of circumstances and without discrimination, the state authorities are duty-bound to provide IDPs with safe access to essential food and potable water, basic shelter and housing, appropriate clothing and essential medical services and sanitation.²⁴ The right of people to be united with their families, the responsibility of the state to coordinate and undertake tracing and reunification activities and identification and proper disposal of mortal remains²⁵ are other rights stated in the Guiding Principles.

The Guiding Principles discussed above have been blatantly violated in the Kandhamal context in several ways. Preventing the access of relief agencies that provide humanitarian assistance to the victim-survivors of the violence was a deliberately retrogressive measure aimed at depriving the victim-survivors of their fundamental right to live with dignity. Further, the poor conditions in the relief camps in general and the lack of sanitation facilities in particular, and the act of the state government in winding up the relief camps prior to the creation of a conducive atmosphere for the safe integration of victim-survivors in their villages, violate various rights of IDPs as prescribed by international standards.

In India, there is no domestic law or policy to deal with the obligation of the state to provide protection and humanitarian assistance to displaced persons in the event of displacement caused by communal violence. This has resulted in a situation where providing relief and humanitarian assistance as well as the setting up and closing of relief camps is left to the unguided discretion of the concerned state government - the same government whose agents were

22 Principle 25(2) of the Guiding Principles, supra n. 2

23 Principle 25(3) of the Guiding Principles, supra n. 2

24 Principle 18 of the Guiding Principles, supra n. 2

25 Principles 16 & 17 of the Guiding Principles, supra n. 2

complicit in the communal violence in the first place. In the Indian context, right to relief and assistance are not considered inviolable rights of the victim-survivor but as facilities that are doled out as charity in an arbitrary, *ad hoc* and subjective manner.

Right to Safe Return Or Resettlement

The Guiding Principles emphasize the right of IDPs to voluntarily return to their places of habitual residence, or to re-settle voluntarily in another part of the country. The state authorities have a corresponding primary duty and responsibility to establish conditions for such a voluntary return, fully respecting the safety and dignity of the IDPs.²⁶ The Principles also prescribe that state authorities ought to make special efforts to ensure the full participation of IDPs in planning and management of their return or resettlement and reintegration.²⁷ The state authorities are further mandated to assist returned and / or resettled IDPs to recover, to the extent possible, their properties and possessions which they left behind at the time of displacement, and where such a recovery is not possible, to provide adequate compensation or another form of just reparation.²⁸

The Orissa state government's act of forcibly closing relief camps before the victim-survivors felt secure enough to return to their places of habitual residence, or resettle elsewhere, is violative of the right of IDPs to safe return or resettlement with dignity. The state government is reported to have given an assurance that the relief camps would continue to provide shelter and security as long as it was required by the people.²⁹ However, the government was reportedly under pressure to reduce the number of CRPF personnel guarding the camps, as a result of which it decided to close down a number of camps prior to the assembly elections in May 2009. As discussed in the previous chapter, many victim-survivors were duped into returning to their villages, while others were forcibly abandoned near their villages by state officials, without any care for their safety, in clear violation of the IDPs' right to fully participate in their

26 Principle 28(1) of the Guiding Principles, supra n. 2

27 Principle 28(2) of the Guiding Principles, supra n. 2

28 Principle 29(2) of the Guiding Principles, supra n. 2

29 Quoted in *Kandhamal: A Blot on Indian Secularism*, supra n. 12 at p. 36

own return / resettlement. The testimonies of Kilos Pradhan³⁰ and Savitri Nayak³¹ indicate the predicament faced by many, who returned to their villages in the hope that normalcy would have returned, only to face severe threats to convert to Hinduism, and to suffer social and economic boycott in the event of their refusal to convert. The interviews among victim-survivors, conducted by MARG reiterated the ongoing socio-economic boycott of Christians in the villages of Kandhamal, and the reluctance to return to their villages of origin in apprehension of the hostility they would face. These are discussed more elaborately in Chapter II. *Please see Annexure I of this publication for a summary of interviews conducted by MARG among victim-survivors.*

The lack of safety of the victim-survivors in their village of origin, the coercion they potentially faced to convert, the possible violation of their right to life with dignity as well as the use of socio-economic boycott as a coercive tool for conversion to Hinduism ought to have been considered by the state authorities, prior to its decision to close the relief camps. Yet, except in one instance where the BDO had tried to persuade the Hindu villagers to allow 14 Christian families to return,³² there is no evidence of any government initiative at ensuring the safe integration of the affected persons once they returned to their villages. The state government has provided virtually no assistance to affected persons in recovering their properties, including agricultural lands, house and business premises such as shops. In fact, the socio-economic boycott has deprived the victim-survivors of their properties, leaving them with virtually no livelihood options. Due to the government's forcible and premature closure of relief camps, and its failure to help recover the properties in the villages of origin, many people have been rendered homeless and destitute, with little money for food and basic needs, in blatant violation of the state's Constitutional mandate to protect life with dignity as well as international standards related to IDPs.

Right to Rehabilitation

While providing relief is a short-term obligation of the state, that addresses

30 Ibid at p. 34

31 Ibid at p. 13

32 This was narrated during the MARG interviews by victim-survivors from the Raikia camp. For more details, see Chapter II, subhead F of this publication.

the immediate needs of victim-survivors, the state is also obliged to provide rehabilitation - which includes provision of medical, psychological, legal and social services including education and training to develop new livelihood options. The core principle of rehabilitation in the case of mass crimes and natural disasters is that the government must ensure that survivors are restored at least to the situation they were in before the violence, and preferably that they are better off. This would necessarily involve generous packages of grants, subsidies and soft loans, for house repair and building and livelihoods from the state. News reports indicate that even after a year after the violence of August 2008, many of the displaced persons have received no rehabilitation aid by the government.³³ There is no evidence of any rehabilitation package having been given to the victim-survivors so that they could be restored to their standard of life prior to the violence. The meager compensation amounts awarded in an arbitrary manner to some has been discussed separately below.

Right to Reparations

In the absence of any specific law requiring the government to provide reparations to victim-survivors, the duty to do so stems from the Constitutional mandate to protect life and dignity of its people. In the international standards related to IDPs, the Guiding Principles place an obligation upon the State to ensure that "appropriate compensation or another form of just reparation" is given to displaced people if they are unable to recover their property or possessions.³⁴ While the primary obligation upon the state is to ensure that displaced persons are returned or resettled, the Guiding Principles place an obligation to compensate only where the recovery of property is not possible. International law also articulates the principle of 'reparations' which is more expansive than compensation, and includes restitution and rehabilitation.³⁵ Restitution is the

33 See 'One Year On, Kandhamal Victims Still Await Rehabilitation', 19 August 2009, available at http://www.thaindian.com/newsportal/uncategorized/one-year-on-kandhamal-victims-still-await-rehabilitation_100234975.html, accessed on 22 March 2010

34 Principle 29(2) reads: "Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation."

35 Article 75 of the Statute of the International Criminal Court

re-establishment, as far as possible, of the situation that existed before the wrongful act was committed.³⁶ Under the concept of restitution, the state is made responsible for restoring *status quo ante* – for example, rebuilding houses, educational institutions, places of worship and other such places destroyed during the attack.

A public apology and guarantee of non-repetition of the crimes are other possible forms of reparations that seek to ‘repair’ the harm caused to the victim-survivors. The right to reparations is a right of all victim-survivors of violations of international law, and not only for IDPs. The discussion below highlights the wide gap between international standards and state practice in India, in implementing the rights of victim-survivors to reparations.

a. Compensation for Loss of Life, Injury & Property

Compensation for loss of lives has been a contentious issue. One aspect relates to an accurate estimation of the number of people killed in the violence. As is the usual practice in situations of communal violence, the state government has arrived at a relatively low figure – a casualty list of 32 persons. Janvikas, an NGO, calculates that about 86 killings took place.³⁷ A list of 75 persons killed during the violence was submitted to the Supreme Court by Archbishop Raphael Cheenath of Bhubneshwar in February 2009.³⁸ The Archbishop stated that the total killings would be approximately 100, but a compilation of the complete list was impossible as many villages were very sensitive, hostile and inaccessible. The Global Council of Indian Christians says that between 75 and 123 killings took place.³⁹ The consequences of the low official figure are that on one hand, the amount of compensation that the state is duty-bound to pay is reduced considerably. On the other hand, victim-survivors have to contend with state machinery that has been both complicit in the violence and apathetic to their sufferings, to prove that their family member was indeed killed in order that the death is included in the government list.

36 <http://www.enotes.com/genocide-encyclopedia/restitution>, accessed on 13 August 2009

37 *Kandhamal in Chaos: An Account of Facts*, supra n. 5 at p. 15.

38 The details of this can be found in *Kandhamal: A Blot on Indian Secularism*, supra n. 12 at pp. 29-31.

39 *Ibid* at p. 26

The difficulty for victim-survivors to prove that their family member was indeed killed is further compounded by the fact that many of the bodies were destroyed to leave behind no trace. Reports suggest that this strategy has been adopted precisely to deny compensation to the families of the deceased. Contemporary history shows that this device has been deployed in the past to destroy all evidence of mass murder, thereby denying the families of deceased persons any justice. Throwing bodies into rivers echoes the Hashimpura killings of Muslim youth in 1987, while destruction of bodies (and therefore evidence) after torturing and killing the deceased occurred in the Delhi pogrom against Sikhs in 1984 and again in the Gujarat genocidal carnage of Muslims in 2002.

After the first spate of violence in December 2007, the state government had announced the following compensation package:⁴⁰

1. Ex-gratia to the next of kin of the deceased @ Rs. 1 lakh
2. Relief camp with food, clothing, tents, lighting etc. arrangements for as many days as required by the victims
3. Construction assistance for fully damaged dwelling houses @ Rs.50,000/- and for partially damaged dwelling houses @ Rs. 20,000/-
4. Shops/shops-cum-residence @ Rs.15,000/- to Rs.40,000/- depending upon the damage assessment made by the District Administration.
5. Assistance for bicycles damaged @ Rs. 2,000/-
6. Construction assistance for damage of Public Institutions like school, clinic, hostel, hospital etc @ Rs.2 lakh.

After the August 2008 violence, the Orissa government announced the same package of entitlements from 2 to 6 stated above, in addition to an *ex gratia* payment of Rs. 2 lakhs to the next of kin of deceased persons from the Chief Minister’s Relief Fund.⁴¹ *Please see Annexure III of this publication for the concerned order of the state government.* Compensation for injury caused during the violence does not feature in the package announced. The central government announced an additional compensation of Rs. 3 lakhs per person killed during the violence. Taking the cost of inflation into account, Rs.2 lakhs is substantially lower, in real

40 Vide order of the Revenue and Disaster Management Department, available at <http://orissa.gov.in/revenue/kandhamal/Kandhamal.htm>, accessed on 17 March 2010

41 *Ibid*

terms, than the paltry sum of Rs. 1,50,000 announced by the Gujarat government after the carnage in 2002. It is also much lower than the compensation awarded for killings in anti-Sikh violence and the Bhagalpur riots. In the case of anti-Sikh violence of 1984 in Delhi, the state government paid a compensation of Rs. 3.5 lakhs, which was further enhanced in 2006 through a scheme declared by the central government.⁴² The compensation for injuries to victims of the anti-Sikh violence was enhanced in 2005 by the Delhi High Court.⁴³ Twenty years after the Bhagalpur riots of 1989, the families of 844 people killed in the riots were paid by the central government, on par with those killed in the anti-Sikh violence of 1984 – a compensation of Rs. 3.5 lakhs each, and those injured Rs. 1,25,000 each, from which the amounts paid by state government were reduced.⁴⁴ There are substantial disparities between amounts awarded by the state and central governments in other contexts of communal violence with that of Kandhamal. As discussed above, there are no uniform criteria or principles laid down for compensation to victim-survivors of communal violence, as a result of which the grant of compensation is determined arbitrarily by the concerned state governments.

b. Compensation for Damage to & Destruction of Property

In the context of widespread arson and looting of Christian houses and properties, the government announced a compensation package of Rs. 50,000 for fully damaged houses and Rs. 20,000 for partially damaged houses.⁴⁵ The government stated to the Supreme Court, through an affidavit in early January 2009, that a total of 3876 houses have been damaged, which include 2807 partially damaged and 1069 fully damaged houses. As per the statistics of relief and social work organizations, the actual number of damaged houses is above

42 Vide Ministry of Home Affairs, order dated 16 January 2006, No. U.13018/46/2005-Delhi-I(NC), available at <http://www.mha.nic.in/pdfs/victims.pdf>, accessed on 31 March 2010; extension of time for disbursement of the rehabilitation package to some state governments, issued by the Ministry of Home Affairs, order dated 30 September 2009, No. U/13018/8/2006-Delhi 1 (NC), available at <http://www.mha.nic.in/pdfs/victims1984-130310.pdf>, accessed on 31 March 2010.

43 *Manjit Singh Sawhney vs. Union of India & Others*, order of Justice Gita Mittal dated May 2005 in Writ Petition (Civil) No. 2338/2001, available at <http://www.carnage84.com/homepage/Judge-te.htm>, accessed on 31 March 2010

44 See 'Bhagalpur Riot Victims Get Justice', *Deccan Herald*, 26 August 2009

45 *Kandhamal: A Blot on Indian Secularism*, supra n. 12 at p. 36

5,000.⁴⁶ At least 1000 houses are missing in the government list of damaged houses, causing further destitution to the victim-survivor families.

While the District Emergency Officer said that interim relief of Rs. 10,000 each had been distributed to more than 2800 Christian families by mid-March 2009, Archbishop Cheenath highlighted before the Supreme Court, that the state officials had conveyed to the victim-survivors that their eligibility to receive further compensation was contingent upon their vacating the relief camp and returning to their villages. While conditional compensation is abhorrent in itself, linking it up with a compulsion to vacate the relief camps and return to the villages is unconstitutional and amounts to mal-governance.

In Kandhamal the state government made the payment of the second installment of the compensation for rebuilding the damaged homes conditional upon the house being constructed up to the plinth level. However, due to the scant relief and care provided by the state, most families spent the interim compensation of Rs. 10,000 in meeting their basic and emergency needs. This has rendered many victim-survivors ineligible to claim the next installment of compensation that they are entitled to. The punitive approach adopted by the Orissa government is contrary to the concept of victim's inviolable right to reparations.

The other issue related to compensation that is of serious concern is the arbitrary nature of assessing a house as 'partially' and 'fully' damaged. Reports state that many of the houses that are assessed as partially damaged by the government, cannot be inhabited.⁴⁷ An illustrative example is the two-floored house of John Pradhan, whose ceiling has caved in and all household items reduced to ashes, and yet the government assesses it as 'partially damaged', entitling him to a meager Rs. 20,000 compensation.⁴⁸

c. Compensation for Damage to & Destruction of Churches and Prayer Halls

Since the December 2007 violence in Kandhamal, the state government was reluctant to provide compensation for damage to and destruction of churches

46 Ibid at p. 41

47 Ibid at p. 42

48 Ibid

and prayer halls, stating that there was no precedent for giving compensation for places of worship. The NCM refuted this argument stating that, "...the argument that compensation for damage to religious places has not been given in other riots is not valid. There have not been many instances where places of worship have suffered the extensive, inhuman and brutal damage seen in Kandhamal district."⁴⁹ The NCM further pointed out that, "it is the hurt inflicted to the psyche of the people through the destruction of places of worship that must be cured and one important way in which it can be done is by assisting through monetary compensation in the work of re-construction."⁵⁰

After the August 2008 violence, the government had strongly opposed the demand for a total of Rs. 3 crores compensation for reconstruction of damaged and destroyed places of religious worship in Kandhamal, stating that: "It is against the secular policy of the State to pay any compensation for the religious institutions."⁵¹ Hindutva forces such as the VHP and Bajrang Dal, responsible for the violence, had also opposed the demand for compensation. It was only after the Supreme Court intervened and directed the state government to compensate, that the government finally conceded.

The Orissa government notification announced the following scheme of compensation for damage to and destruction of churches and prayer halls:

Scheme of Compensation for Damage and Destruction of Places of Worship

Partially damaged church	Rs. 1 lakh
Fully damaged church	Rs. 2 lakhs
Partially damaged prayer hall	Rs. 20,000
Fully damaged prayer hall	Rs. 50,000

A careful scrutiny of the notification providing for compensation reveals that,

49 Report of the Visit of the Vice Chairperson, NCM to Orissa 21-24th April 2008, available at <http://ncm.nic.in/pdf/VC%20Tour%20Report%20of%20Orissa.pdf>, accessed on 16 March 2010, at page 4, para 2

50 Ibid

51 Affidavit on behalf of the State of Orissa, dated 17 October 2008 in *Archbishop Raphael Cheenath, S.V.D. vs. State of Orissa & Others*, Writ Petition (Civil) No. 404 of 2008 before the Supreme Court of India, at para 15.3

as in the case of compensation to property discussed above, this compensation too carried conditionalities that were designed to deny compensation to the beneficiaries. Firstly it excluded compensation for movable property that had been damaged / burnt during the violence, irrespective of the scale of loss, "due to difficulties in making a realistic assessment at this stage".⁵² Secondly it required the representatives of the institutions to furnish an undertaking that in case the place of worship had been built on objectionable land, the building would be constructed at an unobjectionable site.

It is difficult to imagine that the Orissa state government would not have known that in Kandhamal, due to severe restrictions on land transfer to non-tribals, many of the churches were built on tribal lands with the consent of the owners. The consequence of the directive is that all such churches which were damaged during the violence, would be eligible for compensation only if they were being built at an alternative place from the original structure. On the other hand, the compensation of Rs. 50,000 for a fully damaged prayer hall and Rs. 2 lakhs for a fully damaged church was highly inadequate to secure land and construct a church on it.

The state government has prepared a list of 195 churches and church institutions that were damaged, as against a list of over 250 damaged churches and prayer halls prepared and submitted to the government by the victim-survivor community.⁵³ Out of 195 structures, only 60 are listed to be free of any legal flaws on ownership. In other words, destruction of / damage to 135 structures would be compensated only if they agreed to be relocated. The government had earmarked Rs. 15.19 lakh as compensation to 60 churches and prayer halls free of legal impediments, while it has earmarked Rs. 26.6 lakhs to 135 churches provided they agree to relocate to non-objectionable land.⁵⁴

Duty Towards Peace-building

The state's obligation towards peace-building in contexts of communal violence is an important component of the state's obligation to 'fulfil' human rights.

52 Notification of the Revenue and Disaster Management Department of the government of Orissa, dated 15 November 2008

53 *Kandhamal: A Blot on Indian Secularism*, supra n. 12 at p. 46

54 Ibid at p. 47

Addressing the issue of internal displacement is inextricably and unavoidably linked with the achievement of lasting peace. So long as insecurity remains, lost property is not restored or compensated for, or basic conditions for sustainable solutions are not in place, durable solutions simply cannot be achieved.⁵⁵ Peace-building processes include re-establishing law and order, reconstruction, economic and psychological rehabilitation, and reconciliation. It has been emphatically stated by the Representative of the UN Secretary General, Walter Kalin, that reconciliation can truly and meaningfully be achieved only if restitution of property or compensation for losses is comprehensively addressed.⁵⁶ The Representative has outlined four universal elements that require to be resolved to enable IDPs to restart a normal life:⁵⁷

- Return must be voluntary and based on an informed decision, without coercion of any kind. IDPs' right to freedom of movement and right to choose their place of residence has to be respected.
- The safety of persons returning to their place of habitual residence must be ensured. They must be protected from attacks, harassment, intimidation, persecution or any other form of punitive action upon return to their home community or integration in a new community.
- Property must be returned to the IDPs and their houses reconstructed. They should have access to mechanisms for property restitution and compensation.
- An environment must be created that can sustain the IDP's return or local integration through access, without discrimination to basic public services, legal and personal documentation, and to livelihoods or income-generating opportunities.

In addition, increased representation of women at all decision-making levels in national mechanisms for the prevention, management and resolution of the conflict has to be ensured. Women's contribution to conflict resolution and sustainable peace has to be recognized, in accordance with UN Security Council Resolution 1325.⁵⁸

55 10 Years of Guiding Principles, supra n. 3 at para 30

56 Ibid at para 31

57 Ibid at para 32

58 The UN Security Council Resolution 1325 was passed unanimously on 31 October 2000. Resolution (S/RES/1325)

If these standards are applied to the Kandhamal context, the dismal failure of the state government to assist the IDPs resume a normal life is obvious. As already discussed in this chapter, in many cases, return of the victim-survivors to their village of origin was neither voluntary nor based on an informed decision. The government did not take pro-active measures to ensure the safety of the victim-survivors at their place of origin. The government has not comprehensively addressed the prevalence of socio-economic boycott and cultural exclusion faced by the victim-survivors who have attempted to return to their communities. Reintegration of the victim-survivors into their communities cannot happen without an effort to tackle communal hatred and prejudice, both among ordinary citizens as well as public officials who implement such processes.

The holding of peace and reconciliation meetings organized in the villages may have a more immediate goal of ensuring that Christians are accepted back in the villages without any threat, intimidation or harassment. However, these meetings could also play a role in facilitating communal harmony, if they are conducted in a secular and diligent manner. In early January 2009, the Orissa government filed an affidavit before the Supreme Court, claiming to have organized over 1000 village level peace committee meetings with the participation of both communities. However, Archbishop Cheenath stated in his affidavit before the Supreme Court that the purpose of the peace committee was to withdraw criminal cases by force, coercion and also to convert to Hinduism to return to their villages for peace, and that very often, the assailants or their political representatives were on the Peace Committees.⁵⁹

The extreme reluctance of the state government to allow a delegation of representatives of European Union to visit Kandhamal in February 2010 is revealing. Father Ajay Singh of the Cuttack-Bhubneshwar archdiocese said: *"the government was reluctant about outsiders seeing Kandhamal because it projected a rosy picture telling the world that normalcy has returned, victims have gone home, and justice has been done for them. The truth will damage that picture."* In February 2010, Archbishop Raphael Cheenath stated: *"Fifteen months after they were uprooted, thousands still live in makeshift shanties along the road and in forests with no seeming hope of rehabilitation."*⁶⁰ This indicates the failure of the state government in

59 Kandhamal: A Blot on Indian Secularism, supra n. 12 at p. 38

60 Press statement of Archdiocese of Cuttack-Bhubneshwar, dated 6 February 2010

restoring the confidence of the affected persons by providing them security and redressing their grievances at the local level. The government's plan in February 2010, to make announcements through newspapers, appealing to victim-survivors to return to their villages, maybe a case of doing too little, too late.⁶¹

The state's duty towards restitution of property and reconstruction of houses of the victim-survivors leaves much to be desired, as already discussed above. Further, in the Kandhamal context, state policies for livelihood opportunities and income-generating schemes, which ordinarily form a part of rehabilitation schemes, are conspicuous by their absence. Though welfare schemes launched by the state government such as the 'Biju Kandhamal Yojana' focus on basic needs and livelihood initiatives in the district of Kandhamal⁶², there is no guarantee that members of the Christian minority will not be discriminated against in the implementation of the scheme. This is substantiated by the MARG interviews, which highlight the fact that most victim-survivors interviewed have been deprived of a right to work, guaranteed under the National Rural Employment Guarantee Act, even though they have the required job cards; and that this deprivation is allegedly due to their religious identity.⁶³ *Please see Annexure I of this publication for further details.*

Conclusion

There is an urgent need to create a statutory duty on the part of governments to establish relief camps and to keep them functioning till such time that the inmates feel secure enough to return to their places of habitual residence or resettle elsewhere voluntarily. However, the absence of a specific policy framework for IDPs allows the government to act arbitrarily and capriciously. Further, there is a need to recognize the right to compensation as an inviolable right of the victim-survivors.

In the Kandhamal context, no uniform criteria have been fixed for awarding compensation, leading to arbitrary determination by the concerned state

61 For more details, see 'Orissa to Release Ads Asking People to Return to Kandhamal', *DNA*, 12 February 2010

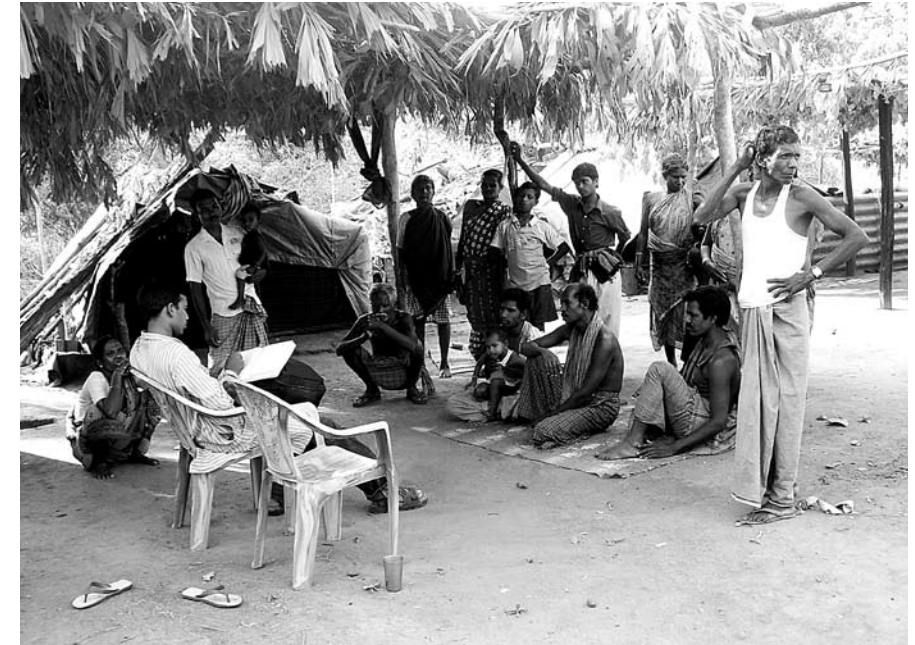
62 See 'CM Launches Welfare Scheme for Kandhamal', *The Times of India*, 1 October 2009

63 For more details, see Annexure 1 of this publication

government. The award of meager compensation to some and its denial to many, has been another way of humiliating and harassing the community of victim-survivors further and reinforcing its subordinate status. While the absence of genuine employment, livelihood and education schemes prevents the victim-survivors being restored to a life with dignity; the climate of impunity and the absence of justice for the brutal crimes committed deprive them of any hope for peace. The experiences of victim-survivors of Kandhamal violence, and the abject failure of the state at facilitating their re-integration in their communities in a substantive way show that a durable and sustainable solution has not been reached.



A relief camp set up by displaced Christian families



A Focus Group Discussion in Daringabadi block with victims – survivors



Christians living outside their village in temporary shelters in April 2009, eight months after the attack



A government relief camp in Tikabali block



A woman outside her home broken during the communal attack on Christians in August 2008.



A damaged Christian home in Raikia block, Kandhamal



One of the broken churches that dot the landscape in Kandhamal



Broken and damaged homes stand abandoned eight months after the attack

V

THE CONTOURS OF LAW & JUSTICE

The failure of state agencies to prevent violence, protect persons and property and rehabilitate victim-survivors is, beyond doubt, a grave abdication of statutory duty. Equally, if not more egregious, are the acts of omission and commission by state agencies in the post-violence phase, with particular regard to processes of justice and accountability.

A brief look at the statistics (as of 6 February 2010) points to a saga of justice being scuttled and the prevalence of rampant impunity among the perpetrators. Victims had filed 3,232 complaints with the police in Kandhamal. Of these, the police registered only 832. Between 75 and 123 people were killed in the violence that commenced in August 2008, yet only 26 murder cases were registered as crimes under the IPC. As many as 341 cases involve people in G Udaigiri alone, 98 in Tikabali and 90 in Raikia, followed by others. Even out of this small number, only 123 cases were transferred to the two Fast Track courts that have been set up by the government. So far, 71 cases have been tried in the two courts, out of which 63 have concluded and a final judgment delivered. Of these, a conviction was obtained in only 25 cases, a partial conviction at best since most of the accused have not been arrested or brought to trial. In a total of 123 cases before the Fast Track courts, there have been 89 convictions and 303 acquittals so far – mainly due to the lack of witnesses.¹

Many prominent leaders of BJP, VHP and *Bajrang Dal*, who had been named by complainants, have been acquitted. Amongst those acquitted is Manoj Pradhan - a state legislator and a member of the BJP. Pradhan, who is also

¹ Sanjana, 'First the Sorrow Now the Shame', *Tehelka Magazine*, Vol. 7, Issue 12, 27 March 2010

accused of murdering 7 Christians, was acquitted of burning down several houses of Christians in Kandhamal, on the ground that there was insufficient evidence. Ashok Sahu – a former Additional General of Police, state president of *Hindu Jagaran Samukhya* and a BJP candidate for the Legislative Assembly from Kandhamal – has been charged with hate speech under S. 153(a) of the IPC and was arrested in April 2009. At the centre for any claim to justice in situations such as Kandhamal, is the centrality and credibility of the criminal justice system.

Commissions of Inquiry

Two Commissions of Inquiry were established by the state government and are simultaneously functioning – one headed by Justice Basudev Panigrahi to inquire into the December 2007 communal violence, and the other headed by Justice Sarat Chandra Mohapatra to inquire into the violence that commenced in August 2008. If the objective of the Commissions of Inquiry is to restore public faith in the rule of law, inform the Government and the people about the true facts of the communal violence, it is imperative that the person appointed to conduct the Inquiry inspire the confidence of the victim-survivor community.

Despite their reservations on the independence of the Commission, advocates for victim-survivors appeared before the Panigrahi Commission and filed statements on behalf of at least 275 victims. As they began to participate in the proceedings before the Commission, the second spate of violence took place from 25 August 2008 onwards. Not only were the victim-survivors facing a renewed threat of assault but also their advocates. Many victim-survivors were without food, their houses were being burnt, members of their families were tortured, brutally assaulted, and killed. In an atmosphere that was thick with hatred towards members of the Christian community, and where the Christian community itself was gripped with fear and insecurity, it became impossible for the victim-survivors and their advocates to participate freely in the Commission's proceedings. Many were too traumatized and intimidated to freely depose before the Commission. Many of the victim-survivors continued to live in Kandhamal with their families, but in extremely vulnerable and precarious situations, as many of the perpetrators roamed freely in Kandhamal. Victim-survivors also faced an imminent fear of attacks from the perpetrators for participating in the Commission's proceedings. Although a formal order for

witness protection had been made by the Commission, this did not change the reality on the ground – the threats and intimidation – that the victim-survivors had to face.

For these reasons, a request was made to the Commission to adjourn the hearings for two months until law and order was restored, and the confidence of the victim-survivor community restored. However, the Commission lacked an understanding of social dynamics in situations of communal violence, and did not empathize with the difficulties faced by victim-survivors. Contrary to the request made, the Commission is reported to have proceeded with undue haste. Archbishop Raphael Cheenath speaks of how the experiences of victim-survivors in engaging with the Panigrahi Commission have been demoralizing, and concludes as follows: “... *the Justice Panigrahi Commission is more interested in covering up the misdeeds of the state government and its police force whose actions have been truly shameful, rather than to identify the organizations and prominent individuals behind the fascist attacks. The Commission wishes to produce its report in undue haste with a view to giving the Chief Minister and his officers a clean chit. In the circumstances I have no hesitation in stating that I have no faith whatsoever in the Justice Panigrahi Commission.*”² Not surprisingly, one of the hearings of the Panigrahi Commission at Baliguda camp in October 2009 was wound up ahead of schedule due to non-availability of witnesses.³ The Panigrahi Commission is yet to submit its report.

Similarly, when the Mohapatra Commission commenced functioning, the aftershock of the violence had not settled down. Many victims continued to be in hiding in the forests of Kandhamal at this time. Many others had fled to other parts of Orissa and to other states. The poorest of the poor among the victim-survivors were in relief camps, with little food, no money and livelihood, traumatized and facing threat and intimidation from the perpetrators who were allowed free access to the camps. They were more likely to fend for their survival than locate a lawyer to represent their interests before the Commission. Without acknowledging the difficulties faced by the victim-survivors, the Commission set an unrealistic deadline of 15 November 2008 for filing of their affidavits.

2 Press release of Archbishop Raphael Cheenath, dated 21 October 2008, at para 5

3 See ‘Kandhamal Riot: Panigrahi Commission Winds Up Camp’, *Zee News*, 6 October 2009, available at <http://www.zeenews.com/news568835.html>, accessed on 3 March 2010

Even before the inquiry had begun fully, Justice Mohapatra had reportedly opined that the violence was not communal but ethnic in nature, echoing the government claim and pre-judging the nature and cause of the violence. This statement sent alarm bells ringing in the minds of the victim-survivors, who were hoping for an impartial and independent inquiry that would make perpetrators accountable without fear or favour. Thereafter, the Commission adopted a novel practice of holding a press briefing everyday, in which that day's proceedings were disclosed. This caused further discomfort to the victim-survivors. The Commission also formulated leading questions on sociological aspects of conversion, without any concern for the anxiety of the victim-survivors that response to such questions may further incite violence, which was still being perpetrated in an unchecked manner.

Further, the presence of the BJP's state unit president - Suresh Pujari - during the Commission's proceedings, was intimidating for the victim-survivors and witnesses. It may be recalled that in September 2008, when the violence in Kandhamal continued unabated, Suresh Pujari and two others proceeded to Kandhamal to attend a special prayer meeting that was scheduled to be held in Chakapada in memory of Swami Lakshmanananda. However, by then, the Supreme Court was apprised of the tension in Kandhamal and strictures were issued to the state government, barring Pujari from entering Kandhamal, and instructions were given to arrest him near the entry point of Kandhamal if he proceeded. This was obviously in view of the role he played in inciting anti-Christian violence in Kandhamal. Justice Mohapatra could have taken steps, likewise, to create a congenial atmosphere for the witnesses to depose fearlessly. However, he failed to do so, which made the victim-survivors lose further confidence in the fair and independent functioning of the Commission. An association of victims-survivors has boycotted the Commission for its partisan and biased nature, based on pre-conceived notions that are not rooted in facts or investigations.⁴

The Mohapatra Commission submitted an interim report to the state government on 1 July 2009. As apprehended, despite evidence to the contrary, the report did not pin responsibility on *Hindutva* forces, and instead, concluded

4 For further details, see letter of Sampradayik Hinsa Prapidita Sangathana to the Commission, dated 13 January 2010 (letter no. 11/2010), available at <http://communalism.blogspot.com/2010/01/indiq-kandhamal-survivors-letter-to.html>, accessed on 26 February 2010

that the sources of the violence were “*deeply rooted in land disputes, conversion and re-conversion and fake certificate issues*”⁵ – echoing the line of explanation adopted by the state government.

Setting up Commissions of Inquiry has been used since long as a diversionary tactic by governments, to convince the public that some action was being taken, knowing well that all will be forgotten once the controversy dies down after a passage of a few years.⁶ At one end of the spectrum are those Commissions that are set up precisely to exonerate the state of any responsibility, and in whose impartiality and independence the victim-survivors have no confidence. On the other end of the spectrum are those Commissions that prepare a report based on facts and rigorous analysis that holds perpetrators responsible (including public officials), only to be kept aside and the recommendations not implemented by the state governments concerned. The Srikrishna Commission that inquired into the communal violence in Mumbai in 1992-93 is an example of the latter. Justice Saldanha (retd.) has stated that an Inquiry Commission is on par with the verdict of a High Court, and the Action Taken Report (ATR) of the government is identical to an execution of a decree or judgment.⁷ Some experts therefore suggest that it be made mandatory to implement the recommendations. Clearly, substantive amendments to the Commission of Inquiry Act are warranted if these inquiries are to serve a public purpose.

Registration of First Information Reports (FIRs) & Arrests of Accused Persons

The law is unambiguous that every information of a cognizable offence, irrespective of the source of the information or its credibility, must mandatorily be registered by the officer in charge of the police station in a special register, the

5 For further details, see ‘Conversion, Re-conversion Led to Kandhamal Riots’, *Outlook India.com*, 3 July 2009, available at <http://news.outlookindia.com/item.aspx?662128>, accessed on 3 March 2010

6 For a comprehensive critique on Commissions of Inquiry established for contexts of communal violence, see Murali Krishnan, ‘Do Commissions of Inquiry Serve Any Purpose?’, *Boloji.com*, 7 October 2007, available at <http://www.boloji.com/opinion/0416.htm>, accessed on 3 March 2010; S.K.Agnihotri, *Commissions of Inquiry on Communal Disturbances: A Study* (National Foundation for Communal Harmony, Ministry of Home Affairs, Government of India, 2007)

7 Charu Lata Joshi, B.R.Srikanth & Saira Menezes, ‘A Slur on the Judiciary’, *Outlook*, 24 August 1998

First Information Report Register.⁸ The information as entered is then referred to as the First Information Report and must be investigated by the police. This is a crucial step since the FIR is meant to set the criminal investigation machinery in process. To make a complaint, a victim / other complainant ought to locate and travel to the police station with jurisdiction to investigate – usually that which covers the scene of the offence. This is contrary to modern police response systems in other countries, where a central call center receives complaints that are automatically recorded, contacts local police to respond promptly to reported crimes, and monitors developments.

Even in situations of relative peace, getting the police to register an FIR is often a difficult first step. Bias and prejudice among police personnel deter members of poor, illiterate, minority and *dalit* communities from registering an FIR. Victims of gender-based violence frequently fail to report crime because they fear for their safety at the police station. There are consistent reports of the police refusing to register FIRs against the perpetrators of the violence.⁹ Although the law provides redress for such situations, in contexts where the victims fear for their lives, these legal options are too onerous.¹⁰ In a communally vitiated atmosphere, with the police often empathetic to or complicit with the perpetrators of the violence, the problem is exacerbated.¹¹ Since FIR is important to set the criminal law in motion, and is a crucial piece of evidence at the trial, registering the FIR promptly and accurately with all relevant details is imperative to a successful prosecution of the offence.

In the Kandhamal context, victims complained that the local police stations refused to accept the FIRs. The interviews conducted among victim-survivors

8 Section 154 of Code of Criminal Procedure; A series of judgments of the Supreme Court reiterate the mandatory nature of the duty to register FIR, including *Ramesh Kumari vs. State (N.C.T. of Delhi) & Others*, 2006 (2) SCC 677 and *State of Haryana and others vs. Ch. Bhajan Lal and others* AIR1992 SC 604

9 See for example, 'Broken System' – a report of Human Rights Watch, 4 August 2009, available at <http://www.hrw.org/en/node/84624/section/7>, accessed on 3 March 2010

10 For example, the complainant can complain to superior police officers, can petition the Magistrate to direct the police to register an FIR and investigate, and can also choose to prosecute a private complaint by petitioning the area Magistrate directly, without seeking police investigation.

11 See Vrinda Grover, 'The Elusive Quest for Justice: Delhi 1984 to Gujarat 2002' in Siddharth Varadarajan (ed.), *Gujarat: The Making of a Tragedy* (New Delhi: Penguin Books, 2002) at pp. 355-388, where she discusses in detail the scuttling of justice through failure to register FIRs and deliberate, inaccurate registration of FIRs in contexts of communal violence.

by MARG indicate that almost all of them tried to lodge the FIR at the local police station but the police refused to register the same until three months subsequent to the events.¹² Please see Annexure I of this publication for a summary of the interviews conducted by MARG. Sister Meena's testimony highlights the fact that she was first dissuaded by the police from registering an FIR with regard to the gang rape and sexual assault on her, and when she insisted, she was prevented from writing details of the crime including the complicity of certain police officials.¹³ The ordeal of Rajnikant of Bapuriya, who was shunted between the police stations at Udaigiri, Tikabali and Sarangod to register a complaint on lost documents and household possessions, and whose attempt was unsuccessful even after several trips to the police station, bears testimony to the large scale impunity enjoyed by the police in their refusal to perform their duty of registering FIRs.¹⁴ The police official at Sarangod police station is quoted to have informed Rajnikant that they were taking complaints "only about those who have gone up (killed)" and directed him to return to the relief camp.¹⁵

In certain cases, when the FIRs were accepted, the accused were not arrested. A case in point is that some perpetrators in Sister Meena's case were arrested and handed over to the Crime Branch only 38 days after the lodging of the FIR by the nun. Delay in arresting the perpetrators not only facilitates multiple crimes by them, but also emboldens the offenders and has the potential to intimidate and silence victim-survivors. Pertinently the victim-survivors who sought justice and those who criticized *Hindutva* leaders and exposed their crimes were arrested, in order to overawe and deter the Christian community from pursuing justice. The cases of Niladri Kanhar and Pastor Pavitra are examples of the former¹⁶ while that of Lenin Kumar who wrote a book titled 'Bloodshed in Kandhamal in the Name of Religion' is an example of the latter.¹⁷ Some perpetrators, who were influential with the district administration, became members of the

12 For more details, see Annexure 1 of this publication for a summary of interviews conducted by MARG

13 For further details, see statement of Sr. Meena released at the news conference in New Delhi on 24 October 2008

14 For more details, see Anto Akkara, *Kandhamal: A Blot on Indian Secularism*, (Delhi: Media House, 2009) at pp. 99-100

15 Ibid at p. 100

16 Ibid at p. 87

17 Ibid at pp. 55-57

village level peace-committees sponsored by the administration,¹⁸ which gave them new opportunities to harass the victim-survivors, and coerce the victim-survivors to withdraw their complaints as a pre-condition for their return to the village. Archbishop Cheenath stated to the Supreme Court in an affidavit that in one instance, senior officials in Raikia police station had tipped off perpetrators about impending arrests and helped them evade arrest.¹⁹ In another instance, a CRPF commandant in Kandhamal told the media in the end of August 2008 that the CRPF had rounded up 75 rioters in Deegei village under Raikia police station, but that the local police refused to arrest them.²⁰ Honest police officials who attempted to arrest the perpetrators were threatened, and violent mobs representing the *Hindutva* forces marched to the police stations to free the arrested persons.²¹ Reports suggest that it was only after mounting pressure from national and international sources, including by the Orissa High Court and the Supreme Court of India, that the government was forced to take some action. The prospects of President's rule being imposed in the state or the Centre declaring Kandhamal as a 'disturbed area' and handing it over to the army led the government to take steps to arrest and apprehend some perpetrators.²² Prompt arrest of the accused persons could have reduced the intensity and widespread nature of the anti-Christian violence that engulfed Kandhamal, and acted as a deterrent and enabled the restoration of rule of law.

Suspension of errant police officials is a routine strategy adopted by the government to assuage public outrage against police complicity. For example, five police officials were reportedly suspended in Sister Meena's case for 'misconduct and negligence of duty' on the basis of a joint report filed by the Kandhamal Collector Krishan Kumar and Superintendent of Police Prabin Kumar.²³ In August 2008, the Superintendent of Police and the Officer-in Charge of the Tumudibandha police station had been suspended for failing to

18 *Crossed and Crucified: Parivar's War Against Minorities in Orissa*, Report by PUCL, Bhubaneswar & Kashipur Solidarity Group, (Delhi: PUCL Bhubaneswar & Kashipur Solidarity Group, April 2009) at p. 11

19 *Kandhamal: A Blot on Indian Secularism*, supra n. 14 at p. 85

20 *Ibid* at p. 92

21 *Ibid* at p. 85

22 See 'Orissa Violence: Left Not Likely to Oppose Prez Rule', *The Tribune*, 9 October 2008

23 'Five Cops Suspended in Orissa Nun's Rape Case', *Indianexpress.com*, 31 October 2008, available at <http://www.indianexpress.com/news/five-cops-suspended-in-orissa-nun-rape-case/379835/>, accessed on 3 March 2010

provide security to Lakshmanananda. While a suspension is usually made public as it is intended to convince the citizens that some stern action has been taken by the government, reinstatement of a suspended official is often shrouded in secrecy, making it a farcical exercise for public consumption, having little or no impact on the errant officials.

Investigations and Prosecutions

Once the FIR is registered, it is then incumbent on the officer in charge of the police station to either investigate each cognizable offence himself / herself, or to depute a subordinate to conduct a prompt and thorough investigation, i.e. proceed to the spot of the occurrence, secure the area, ascertain the facts and circumstances of the case, discover and arrest the suspected offender, collect evidence relating to the commission of the offence by examining various persons (including the accused) and reduce their statements into writing, search places and seize things considered necessary for the investigation and to be produced at the trial.²⁴ Delay in performing these functions can result in crucial evidence being frittered away or destroyed.

As in other contexts of communal violence, the impartiality of the investigations in Kandhamal has been undermined.²⁵ This is mainly due to the fact that the police, that was complicit in the violence through myriad acts of omission and commission, has itself been conducting the investigations. Investigations have been conducted in a biased and shoddy manner, prompting demands for investigation to be conducted by a Special Investigation Team for all cases of murder and arson.²⁶

Police complicity in the violence has been officially recognized, with the suspension of some police officials (discussed above) as well as the letter

24 H.N. Rishbud and Inder Singh vs. State of Delhi AIR 1955 SC 196: 1955 Cri L J 526

25 Vrinda Grover states: "There is comprehensive documentation to irrefutably establish that during the 1984 pogrom and 2002 Gujarat genocide the police totally abdicated their statutory responsibilities and instead provided overt and covert support to the rampaging mobs enabling them to kill, rape and loot the marked community.", Vrinda Grover, 'Impunity A Rule, Justice An Exception', in Tanweer Fazal & Kaushikee (eds.), *Violence, Justice and Reconciliation: Communalism in Our Times* (Nelson Mandela Centre for Peace and Conflict Resolution, Jamia Milia Islamia: New Delhi, 2009), pp. 90-99

26 See Archbishop Cheenath's address in a press conference in Bhubaneswar dated 6 February 2010, reported in 'PM, Naveen Draw Church Flak', *The Telegraph*, 7 February 2010 and 'Government Failed to Fulfil Promises in Kandhamal: Archbishop', *The Hindu*, 6 February 2010

of A.K.Upadhyay, IPS to the state government. In the letter written by A.K.Upadhyay, IPS, who works as DIG (training) at the Biju Patnaik State Police Academy, he accuses and names 13 police officials including former Director General of Police – Gopal Nanda – of dereliction of duties in protecting the life and properties of the Christians in Kandamal. He further recommended withdrawal of medals that had been awarded to four of them.²⁷

The role of *Hindutva* organisations in fuelling and orchestrating the carnage has been officially acknowledged. In response to a question posed in the Legislative Assembly, the chief minister of Orissa – Naveen Patnaik – candidly admitted, through a written response, that it has been found from the investigation that “members of the RSS, VHP and Bajrang Dal” were involved in the violence. The Chief Minister also disclosed that police had arrested 85 people from the RSS, 321 members of the VHP and 118 *Bajrang Dal* members in the attacks. He said that only 27 members from these groups were still in jail.²⁸

Even in cases which may be investigated thoroughly by sincere officials, the lack of forensic evidence has been a major stumbling block. For example, the government did not conduct an autopsy on Swami Lakshmanananda’s body, which would have been crucial to establish the nature and cause of death. Many have been unable to locate the bodies of their family members, which partially explains for the huge disparities in the numbers of killed as per official statistics and victim-survivor testimonies. With the motive of eliminating all incriminating evidence, the mob, in many instances, burnt or otherwise disposed of the bodies of the Christian victims after brutally killing them.²⁹ This was so in the killing of Sidheswar Pradhan, an important Hindu local tribal leader, who defended the Christians from attacks by the mobs. Eyewitnesses say that he was stabbed repeatedly, his body was burnt and the perpetrators left the place of the crime only after they set his house on fire. His nephew was able to file a complaint with the police only 12 days after the incident. Senapati Pradhan, Revenswar Pradhan and Tidinja Pradhan were accused and stood trial in this case. They were acquitted of murder but punished with 3 years hard labour and fine for

27 Published in Oriya newspaper, *Dharitri*, 3 September 2009

28 Question posed by MLA Adikanda Sethi, on 23 November 2009, UD-581. See also ‘Sangh Parivar is Behind Kandhamal Riot: CM’, <http://news.oneindia.in/2009/11/24/sangh-parivar-is-behind-kandhamal-riot-cm.html>, 24 November 2009, accessed on 7 March 2010

29 *Kandhamal: A Blot on Indian Secularism*, supra n. 14 at p. 32

destruction of evidence.³⁰

In other cases, delay has further weakened the quality of forensic evidence that could be collected. As an illustrative example, in the killing of Jubraj Digal of Nuagam, it was a month after his ‘disappearance’ that the police managed to trace his bones hidden in a rivulet after his body had been burnt by the assailants secretly.³¹ Similar difficulties were faced in holding the perpetrators accountable for the burning alive of Padisti Nayak, a 65 year old widow who lived in Adaskupa near G.Udayagiri. She was visiting her married daughter who lived in the village of Solesoru, where she was burnt alive by a violent mob. Her son-in-law who witnessed the incident fled to a relief camp, and was able to give information to a district magistrate only 12 days after the attack on 25 August 2008. The authorities finally found some charred human remains, flesh and bones from the family’s burnt down house in Solesoru. Senapati Pradhan, Revenswar Pradhan and Tidinja Pradhan, who stood trial in Sidheswar Pradhan’s killing case mentioned above, were also prosecuted for the killing of Padisti Nayak. Once again, they were acquitted of murder but convicted of destruction of evidence under Section 201 of the IPC – an offence that is substantially minor.

The acquittals in the killings of Sidheswar Pradhan and Padisti Nayak has left the civil society shaken and disturbed. John Dayal – a human rights activist - termed it a miscarriage of justice. Dharendra Panda - an Orissa-based activist - said that some of those who carried out the investigation have links with the *Sangh Parivar*, and were determined to protect the accused rather than ensure justice for the victims. He said: “It is not only the religious rights of people that are at stake, but also the core values of humanity and democracy”.³²

There have been rare convictions for murder even in contexts where the evidence is destroyed, partially if not fully, based on circumstantial evidence. An example is the horrific killing of Akbar Digal, a Protestant pastor from the village of Totomaha in Raikia. He was attacked by a mob on 26 September 2009,

30 ‘Orissa: They Kill and Burn Two People, Convicted Only for Destruction of Evidence’, *AsiaNews*.it, 11 February 2010, available at [http://www.asianews.it/index.php?l=en&art=16756&size=.](http://www.asianews.it/index.php?l=en&art=16756&size=), accessed on 5 March 2010

31 Ibid

32 Ibid

and upon his refusal to convert to Hinduism, he was decapitated, his body cut into pieces and burnt. Once the extremists left the village, his wife found his body burnt and in pieces. Perhaps her prompt action, and her testimony which provided corroborative evidence helped convict five of the perpetrators – Papu Pradhan, Sabito Pradhan, Dharmaraj, Mania Pradhan and Abhinav Pradhan.³³

In the absence of forensic evidence, corroborative evidence would be crucial to prove culpability of the perpetrators. However, in a context where many have fled from the district and the state, and others are being constantly threatened and intimidated, corroborative evidence is not easy to come by except from some family members who are resilient and determined enough to withstand the intimidation. Given the large-scale displacement in the district, it would also need a committed and sincere Investigating Officer to identify witnesses who can give corroborative evidence, protect them from possible intimidation / coercion by the perpetrators and ensure that they testify in court in an uninhibited manner. Such is not the case in Kandhamal.

Concerned citizens have demanded for a Special Investigative Team to investigate every case of murder and arson. While such a team may also be handicapped by the poor quality or quantity of forensic evidence available, the investigation by a more impartial, professional and objective team could help the cause of justice through corroborative evidence such as witness testimonies, provided it ensures effective protection of victim-survivors from the pre-trial to post-trial phases.

Weak forensic evidence, coupled with the fact that the Special Public Prosecutors treat these cases as routine work and are indifferent to the extraordinary circumstances influencing these trials, make justice a bleak prospect for most of the victim-survivors. Commenting on the dire need for legal assistance for the victims, it was reported that in Gajapati district, on one single day in June 2009, the lawyers counselled and drafted petitions for 30 persons.³⁴

33 For more details, see 'First Time in Orissa, Sentenced to Life Imprisonment for Anti-Christian Pogrom', in *Minorities: Christians 2009*, a report by Indian Social Institute, at p. 49. Available at http://www.isidelhi.org.in/hrnews/HR_THEMATIC_ISSUES/Christians/Christians-2009.pdf, accessed on 4 March 2010

34 Stated by Sam Paul, spokesperson of All India Christian Council, quoted in Vishal Arora, 'Death Threats Buffet India Prosecutions of Orissa Strife' *Compass Direct News*, August 2009, available at http://www.christianexaminer.com/Articles/Articles%20Aug09/Art_Aug09_15.html, accessed on 19 March 2010

In addition to the institutional and personal bias of the police against non-Hindu communities, investigations in Kandhamal were also seemingly dogged by ineptness. Police in Orissa, as indeed in the rest of the country, are untrained or under-trained and ill-equipped apart from being far fewer in number than optimum. The Orissa Police Manual dates back to the year 1940. While an Urban Police Act was enacted by Orissa in 2003, this enactment only applies to the towns of Phulbani and G. Udaygiri, in Kandhamal district. Police officials are therefore not trained and not effectively instructed in conducting a thorough forensic investigation of cases. Further, incidents of communal violence which seem a disturbingly repetitive occurrence, throw up their own peculiarities in the conduct of investigation. Where entire communities are subjected to extreme forms of violence including murder, arson and rape and those surviving are in constant fear of further violence, how does the police ensure that the investigation is adequate and thorough? And how may it remain sensitive to the safety concerns of the victims/witnesses, and ensure that they are not subjected to further trauma? The situation clearly requires police officials adequately trained in dealing with situations of mass violence. However, to our knowledge, there has been no sharing of knowledge or attempt to learn from the experiences of previous incidents of communal violence on the part of the police.

The deliberate attempt by the police and investigative agencies to scuttle justice in contexts of communal violence has been noted by the judiciary. The Supreme Court observed: "*The genesis of a communal riot, its development as it goes along and the consequences have been identified / underlined by dozens of commissions of inquiry both judicial and administrative for more than four decades now and there appears to be near unanimity that a deliberate attempt is made by the police and the investigating agencies to forestall fair investigation in attacks on the minority communities and on the contrary to connive with the perpetrators.*"³⁵ In the context of the anti-Sikh pogrom 1984 in Delhi, the Sessions Court at Karkardooma, Delhi observed as follows: *In the name of investigation a farce was carried out. Cryptic statements of some of the victims were recorded. No attempt was made to trace the dead bodies or to get them identified. Even the formality of preparing a site plan of the places where various incidents occurred was not completed in most of the cases.... It seems the prosecution expected that the*

35 Observations of Justice H.S. Bedi, in *Harendra Sarkar vs. State of Assam* 2008 (7) SCR 589: 2008 (9) SCC 204:2008 (7) SCALE 135 at para 7

*trial will be equally a farce and cases would be summarily disposed of thereby drawing a curtain on the legal drama.*³⁶

Impartiality in investigations in contexts of communal violence has been an issue of concern to the National Police Commission. In its sixth report, it opined that in situations of communal violence, “adequate interest is not paid in investigation of heinous and serious crimes.” For investigation of such crimes, it suggested the establishment of special investigating squads under the state CID, comprising of officers “of proven integrity and impartiality”. While the Commission had further suggested the separation of the investigation wing from the law and order wing of the police in its sixth report,³⁷ it contradicted its own recommendation in the seventh report, where it stated that bifurcation of the police in such a manner was not desirable as the work of the police could not be put in water-tight compartments.³⁸

The Supreme Court, in *Prakash Singh’s case*, supported the idea of separation of law and order wing from the investigation wing of the police.³⁹ This constituted one of its seven directives related to police reform. Both investigation and law and order are vital and specific police functions. In order to

encourage specialization in the two vital police functions and to improve the overall performance, the Supreme Court directed a gradual separation of investigative and law and order wings, starting with towns and urban areas with a population of one million or more. It is felt that this will streamline policing, ensure speedier and more expert investigation and improve rapport with the people.⁴⁰ The Court has not said how this separation is to take place in practice but clearly indicates that there must be full coordination between the two wings of the police.⁴¹ This much-needed reform will:

- Free investigators from law and order duties;

36 ASJ, O.P. Dwivedi Karkardooma, Delhi, S.C. No. 53/95, FIR No. 426/84 p.1, quoted in Vrinda Grover, ‘Impunity the Rule, Justice An Exception’, supra n. 25

37 National Police Commission, Sixth Report, March 1981 at para 49.15

38 National Police Commission, Seventh Report, May 1981 at para 50.22

39 *Prakash Singh & Others vs. Union of India & Others* (2006) 8 SCC 1

40 For more details, see http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/seven_steps_to_police_reform.pdf, accessed on 22 March 2010, at para 5.4

41 Ibid

- Create a cadre of officers trained, experienced and specialised in investigation;
 - a separate cadre of investigating officers, operating out of different police stations/ premises than police officers tasked with ‘Law and Order’.
- At least theoretically, this will cause less occasion for a conflict of interest where the investigating officer is required to investigate criminal misconduct by other police officers.

However most states, including Orissa, have yet to adopt this directive.

Appreciation of Evidence

Based on the registration of the FIR, investigation and prosecution in a criminal case, the evidence adduced is placed before the court, based on which the court determines the innocence / guilt of the accused persons. The evidence presented before the court consists of both oral and documentary evidence, direct, as well as collaborative and circumstantial evidence.⁴² The appreciation of evidence is normally the function of the trial court, while the High Court and the Supreme Court have the power to order further investigation and re-trial.⁴³

In some cases, the order of acquittal passed by the Kandhamal Fast Track courts indicate that the evidence placed before the court was appreciated in a technical manner, without any understanding of the circumstances in which the crimes were committed or the evidence collected. For example, in a case related to the killing of Kantheswar, whose body was found in a mutilated state 14 days after he was dragged out of a public bus by the accused (Manoj Pradhan and Mannu Ganda), the court acquitted the accused, on the ground that there were no credible witnesses to the murder and nothing conclusively established that the accused had committed the murder.⁴⁴ The court dismissed the testimony of Kantheswar’s wife Pira Digal, who identified Manoj Pradhan as one of the two accused who had forcibly taken away her husband from the bus, by casting a

42 Documentary evidence includes the FIR, post mortem report, other medical reports, death certificates, forensic reports and the *panchnama*. Oral evidence includes testimonies of the victim-survivor(s), witnesses to the crime and other expert witnesses such as medical, psychiatric, forensic and ballistic experts.

43 These powers are derived from provisions in the Constitution including Articles 136 & 142

44 Sanjana, ‘First the Sorrow Now the Shame’, supra n. 1

doubt on her ability to identify Manoj Pradhan in the crowd since she had never met him previously.⁴⁵ In doing so, the court disregarded the fact that Manoj Pradhan being a sitting MLA and a public figure, could have been identified by lay persons.

In a case of setting fire to the house of Butia Digal, the court questioned the credibility of Butia's and seven other witnesses' testimonies, who had identified Manoj Pradhan among the attackers, on the ground that the incident took place "during the dark night in an area without electricity", disregarding the fact that the homes were being burnt down and the witnesses could see the faces of the attackers because of the flames. Further, the judge found that the investigating officer (IO) at Raikia police station noted Butia's age as 35 years whereas he was actually 60 years old, and had failed to mark the exact location of the bush behind which the witnesses hid and watched their homes being burnt down. The accused were acquitted on these grounds.⁴⁶ Notably, there was no detailed examination and cross-examination of the IO, and the court failed to seek any explanation from the IO or direct any actions against him for failure to investigate in a diligent manner.

While the appreciation of evidence determines the outcome of the criminal trial in all cases, such an appreciation of evidence is even more crucial in cases related to communal violence, where communal prejudice and institutional bias by the police, investigating and prosecuting agencies do not allow for the best evidence to be placed before the court. The situation warrants the court to appreciate the evidence with a clear understanding of the contexts under which the evidence has been gathered. The Bombay High Court has emphasized the approach warranted by trial courts in appreciating the evidence before it: "*It is for the Courts to appreciate the intrinsic evidence with the sensitivity and humanistic approach to evaluate and appreciate nothing other than the merits of the case brought out by the prosecution, unfettered by technical and procedural requirements which may hold good in other criminal actions.*"⁴⁷

The assumption of the law that all stakeholders in the criminal justice system are performing their functions diligently and professionally stands compromised in

45 Ibid

46 Ibid

47 *State of Maharashtra through P.S.O. vs. Sharad Rambhau Khande & Another*, Bombay High Court judgment dated 25 Feb 2010

situations of communal violence. Cases relating to targeted communal violence whether in Delhi, Mumbai, Gujarat or Kandhamal, pose a serious challenge to criminal law. As many grave crimes committed during communal violence go unpunished, such concerns can be heard within the judiciary. In *Harendra Sarkar's*⁴⁸ case, while one judge of the Supreme Court opined that "*marshalling and appreciation of evidence must be done strictly in accordance with law*",⁴⁹ the other judge of the apex court reasoned that rules and arguments made "*on the premise that the incident had happened in a normal civil society where the access to the police is presumed to be easy and where the investigation suffers from no bias*" cannot be applied "*to a case where there is a complete break down of the civil administration, the police has lost control of the situation, a curfew imposed and the Army called out and the real possibility (if precedents are to be applied) that the investigation could be directed against the complainant who belonged to a minority community.*"⁵⁰

Fast Track Courts – Sites of Speedy Injustice

Two Fast Track courts were established in Phulbani – the district headquarters of Kandhamal – in the aftermath of the violence, purportedly to deliver speedy justice to victim-survivors. However, reports state that these courts have failed to deliver justice. The Association of Victims of Kandhamal Violence has expressed its deep distrust in the current justice delivery system, saying the Fast Track courts are working perhaps too fast in trying to finish off the cases without looking closely at the evidence.⁵¹ For example, in cases involving 12 murders, there has been a conviction in only one case.

a. Hostile Atmosphere in Court and Threat to Victims & Witnesses:

As per the scheme of the law, trials are ordinarily to be conducted in an open court that allows all free access to the same,⁵² but the judge is duty-bound to

48 *Harendra Sarkar vs. State of Assam*, supra n. 35. The judgment relates to a killing of members of a Muslim family in Assam in the context of anti-Muslim violence subsequent to the destruction of Babri Masjid in 1992.

49 Ibid at para 43 of Justice S.B.Sinha's judgment

50 Ibid at para 14 of Justice H.S. Bedi's judgment

51 John Dayal, 'Victims Unite in Kandhamal, Boycott Mohapatra Commission, Seek Peace with Justice and Security', 10 December 2009, available at http://groups.google.com/group/johndayal/browse_thread/thread/1590316a4b324c03, accessed on 7 March 2010

52 S. 327 (1) of the Cr.PC states: *The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open court to which the public*

regulate the atmosphere in court such that it is conducive to a free and fair trial. Contrary to this, the Fast Track court premises are full of members of *Hindutva* organizations and groups of perpetrators who had taken part in the carnage. Activist Dhirendra Panda who supports victim-survivors in the courts says that in each Fast Track court, there are not less than 20 RSS lawyers and 50 RSS goons, including perpetrators. Their presence in court in such large numbers intimidates the victim-survivors and witnesses, and prevents them from fearlessly deposing before the court.

Threatening of victim-survivors and witnesses has been rampant and has reached an unprecedented level in the context of Kandhamal violence. The sense of insecurity among witnesses is adding to the gross miscarriage of justice in the two Fast Track courts. Victims and witnesses are being coerced, threatened, cajoled and sought to be bribed by alleged murderers and arsonists facing trial. For example, the victim-survivors and eye witnesses in the gang rape case of Sister Meena were threatened with death while being asked not to participate in the trial. Hence they are afraid to attend the trial at the Fast Track court at Phulbani.⁵³ Many witnesses are threatened in their homes, and even their distant relatives are being coerced.⁵⁴ The accused Manoj Pradhan, BJP MLA, threatened one of the witnesses in the presence of the police personnel inside the Fast Track Court, and he also reportedly threatened the police, indicating the impunity with which perpetrators operate at scuttling justice. One strategy used by lawyers for victim-survivors is to lodge transfer petitions in the Orissa High Court for transferring sensitive case out of Kandhamal courts, preferably to courts in Cuttack or Bhubaneswar. Several transfer petitions have been filed and are pending in the Orissa High Court, awaiting final decisions. On 31st March 2010, the Orissa High Court ordered the transfer of the rape case of Sr. Meena from the Phulbani Fast Track court to the Sessions Court in Cuttack, on the ground that the court atmosphere in the Fast Track court was not conducive for her to depose in a free and fearless manner.

generally may have access, so far as the same can conveniently contain them.

53 *Thomas Chellan & Others vs. State of Orissa & Others* TRP CRL 17/2009 relating to transfer of S.T. 1/2009, pending trial in Fast Track Court I at Phulbani, dated 17 April 2009, before the Orissa High Court at para 8

54 John Dayal, 'Victims Unite in Kandhamal, Boycott Mohapatra Commission, Seek Peace with Justice and Security', supra n. 47

The grounds for transfer of a murder trial to a court outside Kandhamal, elaborated in a transfer petition before the Orissa High Court, highlight the reality faced by victim-survivors and witnesses:⁵⁵

- One of the main accused persons in the case is Manoj Pradhan (a sitting member of the Orissa Legislative Assembly), who is using all his means and power to threaten and terrorize the victims as well as witnesses of criminal cases where he has been prosecuted, thereby vitiating the process of justice delivery.
- The police have arrested only one of several accused persons in the case, while others are roaming freely in the locality. No action is taken to arrest them, because they are strong and influential people in the area and are supporters of *Hindutva* groups. They regularly threaten victim-survivors and witnesses with death, asking them not to depose against them during the trial in this case.
- The victim-survivors and witnesses are also threatened with death if they inform the police about the threats.
- Though some petitioners have orally informed the police about the threats, no action is taken by the police and no protection provided.
- The court atmosphere is not conducive for free and fair trial, as on each date of hearing, the court is packed with accused persons, their family members, supporters and cadres of *Hindutva* groups.
- The petitioners are unable to appear and depose before the Fast Track court as they are not sure if they can return to their villages safely after deposing before the court.

At present, the perpetrators continue to threaten witnesses in the remote villages where they live, due to which the witnesses are in panic and do not dare to speak in court. Many witnesses have even refused to come to court as

55 *Ranchi Pradhan and others vs. State of Orissa & Manoj Pradhan* TRP CRL 47/2009, relating to transfer of S.T. 38/2009, arising out of Raikia P.S. Case No. 57/2008, corresponding to G.R. Case No. 209/2008 of J.M.F.C. Court, G. Udayagiri, pending trial in Fast Track Court-1 at Phulbani. Similar grounds are stated in the case of gang rape of Chandrika Digal in which Manoj Pradhan is one of the accused – *Parikhita Digal & others vs. State of Orissa & Others* TRP CRL 40/2009, relating to transfer of S.T. 18/2009 arising out of Tikabali PS Case No. 149/2008, pending trial in Fast Track Court II at Phulbani.

they do not dare to travel anymore.⁵⁶ The Association of Victims of Kandhamal Violence, in its meeting in Berhampur in December 2009, decided to restore public confidence and ensure that the victims and witnesses felt safe enough to depose in court. However, by this time, a majority of the trials have already resulted in acquittals due to an absence of witness testimonies to corroborate the commission of the offence. The acquittal of Manoj Pradhan – a local BJP MLA – in 6 out of 14 instances of violence against him, including for the murder of 7 Christians, is a case in point. In all the 6 cases, the acquittal took place because the witnesses were too intimidated to testify against him – which, in legal parlance, is described as “insufficient evidence”.

Another example is a case where the complainant, who was the brother of a person killed during the violence, testified in court that he did not know anything about the case. The witness, who lived in the village of Salapsahi, had been threatened with death.⁵⁷ It was further reported that three men – Sanjeeb Pradhan, Bikram Pradhan and Pratap Pradhan – carried pistols and threatened witnesses in the Gondaguda area of Kandhamal. Information on the threats has been provided to the sub-collector (an administrative officer in charge of a sub-district), the sub-divisional police officer and the district collector (administrative head), and an FIR registered at the local police station.⁵⁸

On 27 February 2010, 52 people were acquitted by the two Fast Track courts as the charges against them could not be proved.⁵⁹ The scale and speed with which acquittals are taking place in the Fast Track courts indicates the dire need for victim and witness protection measures. In addition, in cases where the witnesses have deposed against the accused despite intimidation and threats, the manner in which the Fast Track courts have ascertained evidence is not beyond suspicion and indicates an inherent bias and a lack of objectivity. For example, in a certain case Manoj Pradhan and others were charged under various sections of the IPC for ransacking and burning a house. Despite 8 out of 9 prosecution

56 Letter of Association of Victims of Kandhamal Violence to the Chief Justice of Orissa High Court, dated 13 January 2010

57 Stated by Dibya Paricha, coordinator of the Christian Legal Association's legal cell at Kandhamal, quoted in Vishal Arora, 'Death Threats Buffet India Prosecutions of Orissa Strife', *Compass Direct News*, August 2009, available at http://www.christianexaminer.com/Articles/Articles%20Aug09/Art_Aug09_15.html, accessed on 19 March 2010

58 Ibid

59 '52 Acquitted in Kandhamal Riot Cases', *The Times of India*, 27 February 2010

witnesses deposing before the court that they had witnessed Manoj Pradhan in the mob that committed the offence, he was acquitted.⁶⁰

Provisions exist in the Cr.PC which could have been invoked in order to enable the witnesses to depose freely and fearlessly. For example, the court can hold the trial *in camera*.⁶¹ This is a provision which is useful, especially in trials for serious crimes as in the Kandhamal context, where the testimony of victims and witnesses may be vitiated by a hostile / voyeuristic court atmosphere and a passive trial court that fails to regulate proceedings. Where witness after witness had resiled in the Fast Track courts from their earlier statements, or failed to appear before them due to coercive circumstances they were subjected to, it was incumbent on the prosecution to apply to the court and have the trials conducted *in camera*. Even if the prosecution failed to do so, the court had the power to suggest this. There seems to have been no move to hold the trials *in camera*, by the prosecution or by the courts themselves.

Provisions exist for the police officer, in his / her report upon completion of investigation, not to disclose the identity of the witness to the accused, if it is “not essential in the interests of justice or is inexpedient in the public interest.”⁶² Rules of evidence protect victims from being asked indecent, scandalous, offensive questions, and questions intended to annoy or insult them.⁶³ The law permits recording of evidence by way of video conferencing.⁶⁴ In *State of Maharashtra*

60 State, Complainant vs. Manoj Pradhan & Others S.T. No. 39 of 2009, arising out of G.R. no. 320/2009, Corresponding Raikia P.S. Case No. 93/09, before the Fast Track Court II. Prosecution witnesses who had deposed against Manoj Pradhan are Acharjya Kumar Mahondo, Ratha Nayak, Chandrika Nayak, Sunil Digal, Santosh Kumar Nayak, Jasabanto Nayak, Rabi Narayan Barik and Sudhansu Bhusan Jena.

61 S. 9 (6) of the Criminal Procedure Code states as follows: “The Court of Sessions shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.” S.327 (2) of Cr. PC provides for in camera trials for offences involving rape under S. 376, S. 376A to S. 376D of the Indian Penal Code. S. 327(2) is formulated as an exception to the general rule of trial in the open court.

62 S. 173(6) of Criminal Procedure Code, S. 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000 respectively

63 S. 151 & 152, Indian Evidence Act, 1872

64 The Supreme Court has recently stated that recording of evidence by way of video conferencing is permissible, provided it is recorded in the presence of the accused, and that such evidence would be as per “procedure established by law”, in *State of Maharashtra vs. Dr. Praful B. Desai*

vs. *Dr. Praful B. Desai*, the Supreme Court ruled that the evidence taken from a witness through video-conferencing is compatible with the requirements of the Criminal Procedure Code.⁶⁵

In their zest to dispose of cases, the Fast Track courts appear to have ignored the existing provisions of law and the guidelines issued by the judiciary on victim-witness protection, as well as some of the best practices that the judiciary has followed to ensure that aspects of fair trial are not vitiated through a hostile court atmosphere and threatening of victims and witnesses. The Delhi High Court was critical of the CBI for treating the 1984 trials as “routine and ordinary”. However, lawyers associated with the Fast Track courts of Kandhamal opine that the courts treat every case as “routine and ordinary,” and do not accord these cases the seriousness they deserve. The courts further treat the source of violence as an ethnic (and not communal) conflict. Advocate Rasmi Ranjan Jena says that in one case, when a witness complained to the court about having been threatened by the perpetrator, he was admonished and informed: “*I am not your bodyguard. If you do not want to depose, why did you file the complaint in the first place?*” The Fast Track courts do not view protection of witnesses as integral to the court’s duty to ensure fair trial.

The proceedings before the Fast Track courts would have better served the interests of justice if the Supreme Court’s words had been heeded: “*fair trial would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm... If the witnesses are threatened or are found to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.*”⁶⁶ Where victim-survivors and witnesses are threatened in a rampant and brazen manner, as in the Kandhamal context, and no protection has been accorded to enable them to depose in a free and fearless manner, aspects of fair trial have been severely compromised.

The Supreme Court has also emphasized on the interests of the victim in a criminal trial in the following words: “*The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these*

(2003) 4 SCC 601; Criminal Procedure Code (Amendment) Act 2008 provides for all statements / confessions made before the police / magistrate through audio / video electronic means.

65 Ibid

66 *Himanshu Singh Sabharwal vs. State of M.P. & Others* AIR 2008 SC 1943 at para 9, page 1947

principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of (the) victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences”.⁶⁷ Since the victim’s testimony forms an important piece of evidence in a criminal trial, it is essential that the victim ought to be able to give his / her testimony in court freely, without fear or coercion. Unfortunately, the proceedings before the two Fast Track courts in Kandhamal have made little effort at advancing the interests of the victim-survivors, and have, in the process, undermined the principles of fair trial. The gaps in and possible contents of a law / scheme on the issue of victim-witness protection are discussed in the next chapter.

b. Lenient Sentences:

Even in those few cases where some of the accused are convicted, instead of awarding exemplary punishments that would have a deterrent effect on potential perpetrators of such heinous crimes, lenient sentences are awarded, indicating that the judges did not consider the crimes to be serious enough to warrant stringent sentences. The first conviction for the violence took place in June 2009, for the act of the accused – Chakradhar Mallik of Dampidhia village – in burning down the house of a co-villager – Loknath Digal. Mallick, a tribal leader, was also accused of instigating other people in the village to set fire to houses of Christians in the village. Yet he was awarded only two years’ punishment.⁶⁸ On 30 January 2010, Fast Track Court I headed by Judge Subhendu Das convicted 11 people and acquitted 17 others for burning the house of Gugula Das of Sorangada village on 18 September 2008. In addition to awarding a punishment of 5 years imprisonment, only Rs. 2000/- was imposed on each of the convicted persons as fine.⁶⁹ Similarly, Fast Track court II headed by Judge C.R.Das sentenced 12 persons to concurrent jail terms of four years and one year, and Rs. 2000/- fine after convicting them of arson and unlawful assembly under S. 436 and S. 148 of the IPC respectively. They had torched the house and rice mill and looted household articles of Dubraj Digal of Karpiguda

67 *Zahira Habibulla Sheikh vs. State of Gujarat*, (2004) 4 SCC 158

68 ‘Fast Track Court Convicts Man in Kandhamal Riot Case’, *Outlook India*, 30 June 2009, available at <http://news.outlookindia.com/item.aspx?661988>., accessed on 7 March 2010

69 ‘11 Convicted, 17 Acquitted in Kandhamal Riot Case’, *Indo Asian News Service*, 30 January 2010

village under Baliguda police station on 25 August 2008.⁷⁰ On 24 December 2009, two persons were convicted by Fast Track court I and awarded five years imprisonment and Rs. 2000/- fine for torching the house of Subhash Digal and Kuli Digal of Pradhanpat village on 26 August 2008. In another case, a person was awarded four years imprisonment and Rs. 2000/- fine in connection with arson in Penela village on 27 August 2008.⁷¹

As seen in the above cases, it appears that Rs. 2000/- fine has been routinely imposed on all convicted persons without taking into consideration the gravity of the crime committed, and the value of the property damaged. The Judge did not invoke S. 357 of the Code of Criminal Procedure, and impose a higher amount of fine, which, when recovered, could have been paid to the victim-survivor as compensation. This could have helped bring some reprieve to victim-survivors, particularly since many have had difficulties accessing the compensation awarded by the state government.

c. Access to Justice:

In many situations in Kandhamal, Christians have not been allowed to resettle until they convert to Hinduism and therefore many live in temporary shelters on the outskirts of their villages. At the same time, the state administration has forcibly closed all relief camps before the circumstances permitted victim-survivors to return without fear to their places of origin. For witnesses to reach the court to depose against members of the majority community in such a situation would be fraught with danger, and render the victims/ witnesses vulnerable to threats and intimidation. The Christian community had directly experienced the complicity of the police and state authorities in the violence against them. Hence, unless the trials were to be conducted in a relatively neutral venue and unless they were assured safe passage to and from the trial venue, the victims would not be able to depose truthfully and fearlessly. Since the victims are members of underprivileged and marginalized communities, there is also a dire need to engage competent lawyers to represent their interests (as opposed to that of the prosecution) at state expense.

70 '12 Convicted, Two Let Off in Kandhamal Riot Case', *The Times of India*, 28 November 2009

71 'Orissa Fast Track Court Convicts 3 for Kandhamal', 25 December 2009, available at <http://www.india-server.com/news/orissa-fast-track-court-convicts-3-for-18376.html>, accessed on 7 March 2010

The Legal Services (Authorities) Act 1987 prescribes the criteria for legal services to eligible persons. Various categories of persons listed under the Act are entitled to legal services at state expense in situations where they have to file a petition or defend themselves in a case. Interestingly, one of the categories refers to victims of natural disasters and ethnic violence but not communal violence.⁷² In the light of the dire need for legal aid for victim-survivors in Kandhamal, this list ought to be amended to include victim-survivors of communal violence as beneficiaries of free legal aid.⁷³ The need for legal aid has been endorsed by the U.N. Special Rapporteur on Freedom of Religion or Belief, who observed as follows: "*Legal aid programmes should be made available to survivor groups and minority communities in order to effectively prosecute and document cases of communal violence.*"⁷⁴

Conclusion

On the one hand, the victim-survivors have scant confidence in Commissions of Inquiry and are best viewed as paper tigers. On the other hand, deliberate sabotage through a combination of refusal to register FIRs, shoddy investigations, diluted chargesheets, failure to appreciate the available evidence in the context of realities on the ground, and a rampant intimidation of victims and witnesses, has created a situation where the two Fast Track courts churn out speedy injustice.

The failure of police to register and investigate criminal offences violates the Indian government's obligations under the International Covenant on Civil and Political Rights (ICCPR).⁷⁵ The UN Human Rights Committee (UNHRC),

72 S. 12(e) of the Legal Services (Authorities) Act 1987

73 Under S. 12 of the Act, the following categories of persons are eligible to free legal aid: a member of SC / ST, a victim of trafficking in human beings or beggar, a woman, a child, a mentally ill / disabled person; a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; an industrial workman; a person in custody and a person whose annual income is less than Rs. 9000 if the case is before other courts and Rs. 12,000 if the case is before the Supreme Court.

74 Report of the U.N. Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, Mission to India, A/HRC/10/8/Add. 3, dated 26 January 2009, at para 67. For excerpts of the report, see Annexure VII of this publication.

75 International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, entered into force on March 23, 1976.

which monitors the compliance of state parties to the ICCPR, has clarified that governments must ensure that victims have “accessible and effective remedies” to vindicate their rights under the treaty.⁷⁶ This obligation applies even when such violations are committed by private actors – as in the case of Kandhamal.

A criminal trial is not a mere formality. When an offence is committed and the court is seized of the case either through a complaint or a police report, it becomes the duty of the court to ascertain the truth and render justice. Failure to do so results in miscarriage of justice.⁷⁷ When a criminal goes unpunished, society at large suffers because the victim-survivors become demoralized and criminals encouraged. It is therefore the duty of the court to use all its powers to unearth the truth and render justice in order that the crime is punished.⁷⁸ From the cases discussed above, it appears that the Fast Track courts in Kandhamal have displayed neither the determination nor the rigour to ensure this. The latest figures indicate that in 123 cases before the Fast Track courts, 89 persons have been convicted and 303 persons acquitted.⁷⁹ Such practices on the part of judicial organs of state give rise to the suspicion that communal bias and contempt for the spirit and letter of the Constitution have cast a baleful effect even upon those sworn to uphold it. It is for the highest state and judicial officials to reflect on the impact that this behaviour will have upon the fabric of civil society, whose integrity depends on the independence and objectivity of the justice system.

The cases discussed above further indicate that the Fast Track courts are appreciating the available evidence without recognizing the context of communal violence; the trauma faced by witnesses which might cause discrepancies in statements; the difficulties and reasons for delay in registering FIRs, and the institutional and communal bias of the police and investigating agencies that prevented the best evidence from being presented to the courts. Further, where

76 UN Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004) at para. 15.

77 *National Human Rights Commission vs. State of Gujarat & Another*, Special Leave Petition of 2003, against the final judgment and order dated 27 June 2003 of the Additional Sessions Judge, Fast Track Court No. 1, Vadodara, Gujarat, passed in Sessions Case No. 248 of 2002, at Ground I, page 18

78 *Ibid* at Ground J, page 18

79 Sanjana, ‘First the Sorrow Now the Shame’, *supra* n. 1

witnesses and victim-survivors are made to depose in a court of law in a hostile atmosphere and fearing for their own safety, and without any witness protection systems in place, the Constitutional guarantee of fair trial stands vitiated.

There has been an inordinate delay of several years in providing justice in contexts of communal violence. 19 police officials of UP’s Provincial Armed Constabulary (PAC), charged with killing 43 Muslims in Hashimpura and throwing their bodies into canals in 1987, have successfully prolonged the trial for 22 years, during which time witnesses have died or become untraceable, crucial evidence has been lost, original documents destroyed and memories blurred, drastically weakening the prosecution’s efforts to ensure accountability of the perpetrators.⁸⁰ On 8 February 2010, the Delhi High Court directed all trial courts to conclude cases pertaining to the 1984 anti-Sikh violence within six months. In the Hari Masjid firing case that took place during the Mumbai communal violence 1992-93, it was only in 2009 that the court ordered the CBI to investigate the case.

However, judicial inertia is not the cause but a manifestation of a deeper problem – the need for a different legal regime to deal with mass crimes such as communal violence. This is discussed in detail in subsequent chapters. The experiences of victim-survivors and lawyers in the Fast Track courts set up for the Kandhamal violence indicate that the answer does not lie in mechanically setting up such courts, which end up examining the available evidence in a superficial manner devoid of the socio-political contexts in which the crimes were committed, and deliver judgments exonerating the accused. The U.N. Special Rapporteur on Freedom of Religion and Belief has cautioned against conducting inquiries into communal violence “in indecent haste” while emphasizing the need to accord the highest priority and urgency by investigation teams, the judiciary and any commission appointed to study the situation.⁸¹

80 Vrinda Grover, ‘Arrears of Justice’, *Indian Express*, 11 February 2010

81 Report of the U.N. Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, Mission to India, A/HRC/10/8/Add. 3, dated 26 January 2009, at para 68

VI

GAPS IN INDIAN LEGAL JURISPRUDENCE

This chapter examines the gaps and shortcomings of Indian law and legal jurisprudence, and how addressing such gaps could achieve two purposes:

- a) enhance the accountability of public authorities in matters regarding the prevention of communal violence; towards speedy investigation, prosecution and punishment of perpetrators, as well as for providing comprehensive reparations; and,
- b) promote justice and security to victim-survivors and strengthen their right to complete and comprehensive reparations. This chapter will focus on the gaps, not only in criminal law, but also in other laws and policies with ramifications for the rights of victim-survivors of communal violence.

Ill-suited Framework of Criminal Law

Indian criminal law is not equipped to address and redress crimes of communal violence / mass crimes and to make the perpetrators criminally liable. It is geared towards crimes against individuals rather than collectivities. Barring a few provisions that deal with promoting enmity between different groups, rioting and offences related to religion, the scheme and intent of the Indian Penal Code is to codify offences committed against individuals. Communal violence, conversely, involves crimes committed against collectivities. Victim-survivors are targeted because of their religious identity, and in situations where there is an extraordinary deviation or collapse of state institutions, functionaries and agencies with the statutory duty to govern in accordance with Constitutional principles and provisions fail to do so. Even in those few provisions in the IPC

that deal with crimes against collectivities, the approach of the law is to construe these crimes as ‘unlawful assembly’ and ‘riot’, terms that do not accurately reflect the realities of communal violence.¹ In our understanding, a communal riot is spontaneous and involves clashes between two groups possessing more or less equal power. Communal violence, on the other hand, is planned and involves the more powerful launching attacks upon the less powerful, with state complicity and its overt or covert sanction. The description of communal violence situations (such as anti-Sikh violence in 1984, post-Babri Masjid violence in 1992-93 and Gujarat carnage in 2002) as ‘pogrom’, ‘carnage’ and ‘genocide’ indicates that these were planned attacks upon religious minorities, with state complicity and sanction to varied extents.

Due to its colonial origins, an underlying presumption in the IPC is that the sovereign power cannot commit a crime. Hence, the IPC spells out crimes *against* the state – such as waging or attempting to wage war², sedition,³ abetment of mutiny⁴ and counterfeiting Indian currency and stamps⁵; but does not mention crimes committed *by* the state. The IPC framework seeks to protect the state from its people, but in situations of communal violence, it is the people who need protection from the state. This presumption in the IPC completely contradicts the principles of constitutional democracy, which warrant that people be protected against the arbitrary exercise of power wielded by the state and its functionaries.

State complicity and connivance in contexts of communal attacks has been dealt with in the reports of many Commissions of Inquiry established by the government. The features are ably summed up by the Supreme Court and are as follows:⁶

1. that police officers deliberately make no attempt to prevent the collection of crowds;

1 For details of relevant IPC crimes, see Table 1 at the end of this chapter

2 Ss. 121-123, IPC

3 S. 124A, IPC

4 Ss. 131-132, IPC

5 Ss. 231-260, IPC

6 *Harendra Sarkar vs. State of Assam* 2008 (7) SCR 589; 2008 (9) SCC 204; 2008 (7) SCALE 135. The judgment relates to a killing of members of a Muslim family in Assam in the context of anti-Muslim violence subsequent to the destruction of Babri Masjid in 1992. See para 14 of Justice H.S. Bedi’s judgment.

2. that half-hearted attempts are made to protect the life and property of the minority community;
3. that in rounding up people participating in the riots, most of the time it is the victims rather than the assailants who are picked up;
4. that there is an attempt not to register cases against the assailants; and where cases are registered loopholes are provided with the intention of providing a means of acquittal to the accused;
5. that investigations are unsatisfactory and tardy and no attempts are made to follow up complaints made against the assailants; and finally;
6. that the evidence produced in Court is often deliberately distorted so as to ensure an acquittal.

In light of the above, the practice of using existing substantive criminal law (the IPC), procedural law (Cr PC) and evidentiary law (Indian Evidence Act) for situations of communal violence reduces the criminal trial to a farcical exercise and makes a mockery of justice. A basic premise of criminal law – the assumption that the state as the custodian of society’s interests is bound to render accountable the perpetrator of a crime, is overturned in contexts of communal violence, because state connivance and complicity transform the ‘protector’ into the ‘perpetrator’. Further, it has been pointed out that the prosecution of communal crimes warrants that the Public Prosecutor enjoy a measure of institutional autonomy and functional discretion, which is not available under the present legal framework. This is partly because the Cr.PC requires the Executive (which stands deeply implicated) to appoint Public Prosecutors.⁷

Absence of Recognition of the Context and Gravity of Communal Crimes

While offences committed during episodes of communal violence may constitute offences under the IPC,⁸ they do not reflect the gravity of the context or the

7 Vrinda Grover, ‘Impunity A Rule, Justice An Exception’, in Tanweer Fazal & Kaushikee (eds.), *Violence, Justice and Reconciliation: Communalism in Our Times* (Nelson Mandela Centre for Peace and Conflict Resolution, Jamia Milia Islamia: New Delhi, 2009), pp. 90-99

8 Please see Table 1 at the end of this chapter for a detailed (but not exhaustive) list of IPC provisions that may be used for crimes committed in contexts of communal violence

intent with which such crimes take place. They do not show the complicity of state institutions and functionaries either. This poses a major limitation for the prosecution of such crimes and the court's approach to the trial. The commission of a murder, rape, destruction of property or defiling a place of religious worship by one individual pitted against another, is drastically different from the commission of the same offences by a group or mob motivated by a philosophy of hatred. In these latter cases, the intention is to systematically hurt, subjugate and/or destroy communities on account of their religious or other identities. Indian criminal law does not recognize this difference.

International law has made big strides towards holding individuals accountable for intending to destroy a group or collectivity, in whole or in part⁹, including through the destruction of culture or religion.¹⁰ However, Indian law continues to be blind to this glaring reality and speaks only in the language of 'riot' and 'unlawful assembly'. For example, the destruction of and/or damage to over 264 churches and prayer-halls in Kandhamal point clearly to the intent to destroy a culture and religion, based on a false construct that Christianity is an alien religion and has no place in India. Yet, the relevant IPC provisions speak only of "injuring / defiling place of worship with intent to insult religion of any class;" and "deliberate and malicious acts intended to outrage religious feelings;"¹¹ – failing to capture the gravity of the crimes and the context in which they were committed. Therefore, each case of desecration or destruction

9 Article 6 of the Statute of the International Criminal Court defines genocide as follows:
For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 (a) Killing members of the group;
 (b) Causing serious bodily or mental harm to members of the group;
 (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 (d) Imposing measures intended to prevent births within the group;
 (e) Forcibly transferring children of the group to another group.

The definition is reproduced verbatim from Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948

10 Judgment of the Appeals Chamber of International Criminal Tribunal for former Yugoslavia (ICTY) in *Prosecutor vs. Radislav Krstic* IT-98-33 (2004) ICTY 7 (19 April 2004)

11 S. 295 of the IPC states: "Injuring or defiling place of worship, with intent to insult the religion of any class.- Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both."

of a church or prayer hall is treated by the courts as a separate offence and tried in isolation, without recognition of the fact that the offence was part of a systematic, widespread or targeted attack against a community.

The killings in Kandhamal were not isolated events targeted at individuals, but were part of an overall plot to target and maim the entire Christian community and relegate its members to a status of secondary citizenship. People were killed in a cruel manner, in the presence of mobs that watched the brutal events voyeuristically. Rajni Majhi, a 20 year old girl, was suspected of being gang-raped, tied up and thrown into a bonfire and burnt alive by a mob at a church-run orphanage in Orissa's Bargah district where she worked.¹² Though she was a Hindu, she was mistaken to be a Christian. The mob used sickles, shovels and other weapons to prevent her from running away from the fire. Father Edward Sequeira, who was present at the place of the incident and was also attacked, said "I could hear the cries of Rajni, and the mob was cheering and shouting through the windows."¹³ Asmith Digal, a young mother of two, spoke of how her husband, Rajesh Digal, was buried alive by a mob and his body was never recovered.¹⁴ 60 year old Kantheswar Digal was dragged out of a crowded public bus by a mob on his way to Phulbani, his leg slashed to prevent him from running, and his body was found after 12 days, with acid charred face and in a naked state, with the genitals chopped off. The brutal killings of Rajni Majhi, Rajesh Digal and Kantheswar Digal would fall within the legal category of 'murder' under the IPC, which is defined as 'act by which the death is caused is done with the intention of causing death' or 'with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to

12 Though there are some media reports of Rajni having been gang-raped before being burnt alive, this cannot be proved as the post mortem and medical examination of the woman found no evidence of rape. However, Peter, procurator of the Sambalpur diocese, alleged that she was gang-raped before being burnt alive and reportedly said he was willing to testify in any court of law. For further details, see 'Orissa Police to Probe Rape, Burning Alive of Woman', 5 October 2008, available at http://www.thaindian.com/newsportal/uncategorized/orissa-police-to-probe-rape-burning-alive-of-woman_100103790.html, accessed on 22 March 2010

13 Described by Fr. Edward Sequeira, who miraculously escaped from the site of violence, quoted in <http://orissaburning.blogspot.com/2008/09/father-they-are-going-to-burn-me-rajnis.html>, 4 September 2008, accessed on 4 March 2010

14 'Indian Christians Caught up in Murderous Power Struggle', The Times, 14 April 2009, available at <http://www.timesonline.co.uk/tol/news/world/asia/article6087988.ece>, accessed on 20 March 2010

whom the harm is caused'.¹⁵ In Kantheswar Digal's case, additionally, the provision of 'voluntarily causing grievous hurt' would be attracted.¹⁶ Crimes as presently defined in the provisions of the IPC are inadequate to capture the gravity of the crimes committed, and to understand the intent and purpose of what the gruesome killings of Rajni Majhi, Rajesh Digal, Kantheswar Digal and many others amounted to cumulatively.

The law's isolated response to each offence in a context of communal violence leads to other absurd results. For example, in the cases discussed in Chapter V of this publication, in the section on 'investigations and prosecutions', the courts have convicted perpetrators of destroying evidence but not for actual murder, without acknowledging the fact that the destruction of evidence after brutal assault and killing is part of the systematic strategy adopted by the perpetrators to scuttle processes of justice.

While the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989 seeks to protect and redress atrocities / attacks committed against *dalits* and *adivasis* because of their caste or tribal identity, similar jurisprudence has not been developed with regard to communal violence. A specific law on communal violence, as in the case of atrocities against members of SC / ST communities, could help the judiciary take cognizance of the overall context in which particular crimes are committed, and enable it to perceive the crime as part of a widespread / systematic / targeted attack against a community based on its religious identity.

In addition, concepts of 'crimes against humanity' and 'genocide' in international law are potentially relevant to Indian efforts directed at legal recognition of contexts in which communal crimes are committed. Crimes such as murder, torture and sexual assault would be construed as crimes against humanity if committed as part of a widespread or systematic attack against a civilian population in pursuance of state or organizational policy, with the perpetrator possessing a general knowledge of the attack.¹⁷ Where certain listed crimes are

15 S. 300 of the IPC

16 S. 322 of the IPC states: "Voluntarily causing grievous hurt.- Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt."

17 Article 7 of the Rome Statute of the International Criminal Court (hereinafter referred to as the ICC Statute)

committed with intent to destroy a group in whole or in part, based on the national, ethnic, religious or racial identity of the group, such crimes would fall within the legal definition of genocide.¹⁸

'Missing Crimes' in Indian Criminal Law

The nature of offences committed in Kandhamal, as in other contexts of communal violence, highlight the absence in penal law of language to describe or define experiences of victim-survivors. In other words, there are crimes that technically do not exist, that are "missing" from the register of Indian criminal law. Certain sexual offences, torture and persecution are some of these "missing crimes". While the absence of these crimes contributes to the failure to make perpetrators accountable for such acts in "normal" or "peace" times, this is further exacerbated in contexts of communal violence.

Sexual offences: Many have critiqued on the limitations of the IPC definition of 'rape', particularly its emphasis on penile penetration of the vagina.¹⁹ All other forms of sexual assault fall within the ambit of 'outrage of modesty', for which a significantly milder punishment is prescribed. The serious limitation of legal provisions on sexual assault during "peacetime" is further aggravated in contexts of communal violence such as in Kandhamal, where sexual violence is committed in a coercive environment and used as a strategy for destroying, humiliating and punishing a community. A woman survivor of Kandhamal recalled: "When the attackers came to attack us, they shouted slogans, *Bharatmata ki jai and Bajrangbali ki jai. They threatened us saying 'We will do to your young women what you have done to our mataji.*"²⁰

The rape and sexual assault on Chandrika Digal and Sister Meena of Nuagaon cannot be understood outside of this communal context. For example, it would be a cruel injustice to the victim-survivor – Sister Meena – whose clothes were torn, and who was forcibly made to walk in the market by a mob, which jeered

18 See supra n. 9 for the relevant provision

19 The Law Commission of India, in its 172nd Report, acknowledged the limitations of the present definition of rape and recommended its broadening. The government has initiated a law reform process through the Criminal Law (Amendment) Bill 2010, in acknowledgment of this.

20 **Crossed and Crucified: Parivar's War Against Minorities in Orissa**, Report by PUCL, Bhubaneswar & Kashipur Solidarity Group, (Delhi: PUCL Bhubaneswar & Kashipur Solidarity Group, April 2009) at pp. 6-7

at her, made lewd remarks such as “hi beautiful” and commented on the size of her breasts – to describe the offence as an “*outrage of modesty*”²¹ or as a use of “*word, gesture or act intended at outraging a woman’s modesty*”.²² It may be recalled that in the context of the Gujarat carnage 2002, many testified to insertion and threats of insertion of objects into women’s vaginas, cutting of breasts, cutting open the abdomen of pregnant women, and to having been stripped and made to walk naked in public by mobs.²³ These acts were committed in a context where sexual violence and sexuality were central to the *Hindutva* project.²⁴ Unlike international law, Indian penal law has neither the provisions nor the language to capture invasive sexual assault other than penile penetration of the vagina, and other acts such as forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity.²⁵ Indian law also lacks a nuanced understanding of the coercive atmosphere in which such crimes take place, necessitating different standards of procedure and evidence for effective investigation and prosecution of such crimes.

Torture: The Kandhamal violence includes many instances of sadistic torture and killings. For example, Mathew Nayak – a superintendent of the Church of North India – was beaten up by a mob, immersed in water, cut into pieces and his body parts burnt in front of the church while the crowd cheered, as narrated by the CNI bishop of Phulbani Bijay Kumar Nayak, who witnessed the same.²⁶ 45 year old Ramani Nayak was chased by a mob of fundamentalists,

21 S. 354 of the IPC states: *Assault or criminal force to woman with intent to outrage her modesty.-Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

22 S. 509 of the IPC states: *Word, gesture or act intended to insult the modesty of a woman.-Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.*

23 For details of sexual and gender-based violence in the context of the Gujarat carnage, see **Threatened Existence: A Feminist Analysis of the Genocide in Gujarat**, International Initiative for Justice in Gujarat, 2003 at pp. 33-45

24 For more details, see **Threatened Existence**, *ibid*

25 See Art. 7(1)(g)-1 for definition of rape, Art. 7(1)(g)-4 for definition of forced pregnancy, Art. 7(1)(g)-5 for definition of enforced sterilization and Art. 7(1)(g)-6 for definition of sexual violence of the Statute of the International Criminal Court.

26 Anto Akkara, **Kandhamal: A Blot on Indian Secularism**, (Delhi: Media House), at p. 29

hit with a sword on her head which broke her skull, and after she collapsed, they continued hitting her and chopped off her fingers, in the presence of her husband Christudas.²⁷ The facts of cases discussed above further indicate that torture was perpetrated in a widespread, systematic and targeted manner against members of the Christian community. Many victim-survivors live with those memories of torture. We may presume they are scarred for life. Yet Indian criminal law uses the language of ‘assault’ and ‘grievous assault’ but not torture – considered one of the most serious crimes in international law.²⁸ Aspects of physical torture constitute offences under S. 330 & 331 of the IPC²⁹ while that of mental torture in S. 503 of the IPC.³⁰ However, these are vastly different from the definitions of torture under the Convention Against Torture (CAT) and the Statute of the International Criminal Court (ICC) in international law. While CAT requires evidence of state nexus as an intrinsic part of the definition of torture, later developments in law and jurisprudence, particularly through the ICC Statute, have dispensed with the criteria of state nexus for crimes against humanity.³¹ Therefore international law recognizes acts of torture by non-state / private actors as torture, when committed in a widespread or systematic manner against a civilian population – as was the case in Kandhamal. The Indian government has ratified neither the CAT nor the ICC Treaty.

The absence of an explicit definition of torture in the IPC has not prevented the Indian judiciary from applying international laws domestically or by interpreting Indian laws in such a manner as to outlaw the crime.³² The Supreme Court, in

27 *Ibid* at p. 82

28 Prohibition of torture is considered as a *jus cogens* norm under international law – a norm that is accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted.

29 S. 330 & 331 of IPC speak of voluntarily causing grievous hurt to extort a confession / any information or for the purpose of constraining the sufferer or to cause the restoration of any property or to satisfy any claim or demand.

30 S. 503 of the IPC deals with criminal intimidation - if any person threatened to be injured, to his / her property or reputation with intent to cause to cause harm or asking him / her to do something illegal or asking the person to omit an act which he / she is legally entitled to do then it amounts to criminal intimidation.

31 Art. 7(2)(e) of the ICC Statute defines torture as follows: “*Torture*” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

32 See for example, judgments in *Khatri (IV) vs. State of Bihar* AIR 1981 SC 1068, *Nilabati Behera vs. State of Orissa and Others* AIR 1993 SC 1960 and *Arvind Singh Bagga vs. State of UP* AIR 1995 SC 117

Ktaer Abbas Habid Al Qutaiji and Another vs. Union of India and Others, held that where no construction of the domestic law is possible, courts can give effect to international conventions and treaties by harmonious construction.³³ In addition, both government and civil society in India have made efforts to address the ‘missing crime’ of torture in Indian criminal law, through the formulation of a law on torture.³⁴

Persecution: Christians in Kandhamal continue to face social ostracism and economic boycott till date. Reports state that despite the state administration holding the cosmetic exercise of peace meetings to facilitate the return of Christians to their villages of habitual residence, the *Hindutva* forces prevent them from going near their torched houses, drawing water from village wells besides avoiding social or economic relations with Christians.³⁵ Christian shops and businesses have been drastically affected. The words of Jehan Dugal are illustrative of how the livelihood of victim-survivors who have returned to their villages is at stake: ‘*fundamentalists are holding secret meetings and do not communicate with us. We do not know what is their next plan. Unless they hire us to work for them, we cannot survive here.*’³⁶ The National Commission for Minorities (NCM) observed that in parts of Orissa, Christians were unable to celebrate their most important festival, and that by preventing the celebration of Christmas, the VHP and its affiliates had “*ensured that the minority should not be in a position to enjoy the rights guaranteed to it by the Constitution.*”³⁷ The social and economic boycott, as well as the restriction of cultural practices faced by the Christians in Kandhamal resonate similar experiences of victim-survivors in Gujarat after

33 1999 Cri LJ 919. In this case, the principle of non-refoulement was interpreted to be a part of the fundamental right to life guaranteed under Art. 21 of the Indian Constitution. Non-refoulement is a principle in international refugee law that protects refugees from being returned to places / countries where their lives or fundamental human rights could be threatened.

34 See report of National Consultation of Experts for a domestic law on torture in India, August 2008 in www.pwtn.org/.../PW%20NL%20August%20-%20November%202008.pdf, accessed on 5 March 2010 for civil society initiatives on a domestic law on torture. For a report on the government draft, see ‘Govt Plans Tough New Law to Punish Torture in Custody’, *The Indian Express*, 17 February 2009. Asian Human Rights Commission has critiqued the proposed Bill by the government as too weak, in its statement dated 24 June 2009, available at <http://www.ahrchk.net/statements/mainfile.php/2009statements/2108/>, accessed on 22 March 2010

35 **Kandhamal: A Blot on Indian Secularism**, supra n. 26 at p. 14

36 *Ibid* at p. 39

37 Report of the NCM visit to Orissa, 6-8 January 2008, available at <http://ncm.nic.in/pdf/orissa%20report.pdf>, accessed on 1 March 2010, at para 10

the 2002 carnage³⁸ and those in Mumbai after the 1992-93 violence, leading to ghettoisation. It is a matter of grave concern that on 12 February 2010, Praveen Togadia – a VHP leader – had reportedly given a call for economic boycott of Muslims throughout India.³⁹ Calls for socio-economic boycott are made with impunity by leaders of fundamentalist groups, partly because there is no law to outlaw the practice. Though it violates an enjoyment of fundamental rights guaranteed by the Constitution, fundamental rights can be enforced only against state actors, while socio-economic boycott and restrictions on cultural practices are imposed mostly by non-state actors and groups, with or without state complicity.

International law has addressed such practices through the crime of ‘persecution’. Persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity,⁴⁰ on political, racial, national, ethnic, cultural, religious and gender identity. Persecution is treated as a serious crime in international law, as it threatens the existence of human beings to live with dignity, and involves covert ways of destroying a community.

Obstacles to Making Public Officials Accountable

The law’s assumption that public servants do not commit serious crimes has been repeatedly proven incorrect by the reports of several Commissions of Inquiry into communal violence. The communal prejudice of police officials is not an exception but the rule. The police force has repeatedly displayed an institutional bias against minority communities. The Jagmohan Reddy Commission highlighted the anti-minority bias among the police by observing that in more than half a dozen instances, Muslim religious places adjoining police stations or police lines were attacked and damaged, while not a single case of

38 For more details, see paras 1.11-1.14 of the report of the Concerned Citizens Tribunal – Gujarat 2002, available at <http://www.sabrang.com/tribunal/vol2/ecodest.html>, accessed on 7 March 2009

39 ‘VHP Leader Togadia Gives Call for Economic Boycott of Muslims in India’, available at <http://www.punjabnewslines.com/content/view/23318/38/>, accessed on 7 March 2009

40 Definition of ‘persecution’ as a crime against humanity, as stated in Article 7 (1)(g) of the Statute of the International Criminal Court.

damage to a Hindu place of worship near a police station was reported.⁴¹ The Madon Commission found the working of the Special Investigation Squad to be “a study in communal discrimination” as officers of the squad systematically set about implicating as many Muslims and exculpating as many Hindus as possible irrespective of whether they were innocent or guilty.⁴² In the context of anti-Sikh violence of 1984, Ranganath Misra Commission found several instances of police personnel marching behind or mingling with the mobs that attacked the minority community. Since they did not make any attempt to stop the mob from indulging in criminal acts, the Commission drew an inference that they were part of the mob and had “the common intention and purpose.”⁴³

Under criminal law, which is of colonial origin, crimes are viewed as crimes against society, and the state as the institution that would protect society and prosecute the perpetrator. Such a view becomes untenable in situations of communal violence, where the state is complicit, through overt or covert acts or failures to act. Because of this, prosecutions for communal violence are confronted with an absurd situation wherein state agencies investigate and prosecute themselves, and are motivated to shield the wrong-doers and further their own interests rather than that of the victim-survivors and / or society at large. In such circumstances investigations and prosecutions are unlikely to be conducted in an impartial, objective and *bona fide* manner, and may be expected to result in very few convictions. Experience has made it apparent that state participation, sanction and complicity have become a central feature of incidents of communal violence. The norms of constitutional democracy warrant that people be protected against the arbitrary exercise of power wielded by the state and its agencies. The present framework of Indian criminal law is ill-equipped to protect the people against the culpable actions and inactions of state functionaries due to its presumptions that the “king / sovereign power can do no wrong” and that the state protects its people.

Another stumbling block to the prosecution of public officials is the legal immunity for public servants - a status that entails government sanction prior to

41 Report of the Justice Jagmohan Reddy Commission on the attacks against Muslims in Ahmedabad in 1969

42 Report of the Justice D.P. Madon Commission on the attacks against Muslims in Bhiwandi, Jalgaon and Madad in 1970

43 Report of the Justice Ranganath Misra Commission on the anti-Sikh violence of 1984 in Delhi

their criminal prosecution under the Criminal Procedure Code⁴⁴ as well as under other laws.⁴⁵ This creates hurdles for securing accountability and bringing guilty officials to book, since sanction for prosecution has to be sought from the same Executive which, for self-serving reasons, seeks to shield the guilty. While this provision has been consistently justified on the ground of preventing malicious prosecution of public officials, in actuality such provisions institutionalize impunity and embed it in law.⁴⁶ In the words of the Chief Justice of India, Dr. K.G. Balakrishnan, even in instances where the investigating agencies have gathered substantial material to proceed against a person, necessary sanction is not given on extraneous considerations.⁴⁷ Many state governments have taken no action on files seeking permission to prosecute scores of civil servants for alleged corruption.⁴⁸ Government sanction is neither easy nor prompt, thereby entrenching a culture of unwritten impunity to officers who allegedly commit murder in the name of encounters.⁴⁹ As pointed out by PUCL, even if sanction comes forth, the next stumbling block comes in the form of a long-drawn judicial battle that might last for years.⁵⁰ By the time the judgment is pronounced, the alleged perpetrators might have gained multiple promotions, salary increments, rewarded with awards and medals or retired from service. Partisan and arbitrary decisions of the government that decline sanction for prosecution of public officials, lead to a lack of accountability and a large-

44 S. 132 of Cr.PC deals with law enforcement agencies and the armed forces of India for whom the sanction is required to be taken before commencing any criminal prosecution and it also gives them immunity under certain circumstances; S. 197 of Cr.PC makes it mandatory to obtain sanction of the government for prosecution of public servants and judges, where such a person is accused of any offence alleged to have been committed in discharge of his official duty. The sanction is to be issued by the authority that has powers to remove the public servant by office - the Central government in cases of members of armed forces or officers of the Central government; and the state government in all other cases.

45 Provisions similar to S. 197 of Cr.PC feature in S. 19 of Prevention of Corruption Act 1988 and S. 6 of the Armed Forces (Special Powers) Act 1958

46 A.G. Noorani argues that the courts have ample powers to punish frivolous or vexatious complaints, and that the need to protect honest public servants will surely weigh with the courts, in A.G.Noorani, 'The Law and its Potency', *Frontline*, Vol. 17 Issue 22, Oct. 28 - Nov. 10, 2000

47 'CJI Flays Requisite Sanction for Prosecution', *Indian Express*, 14 September 2009

48 Dr. Jayaprakash Narayan, paper presented on governance reforms agenda, to the National Advisory Council, Government of India, on 17 December 2005, available at http://pmindia.nic.in/nac/concept%20papers/Governance%20_by%20_jpnarayan.pdf, accessed on 20 March 2010

49 Pushkar Raj and Shobha Sharma, 'Encounter Culture and Accountability of Police', *PUCL Bulletin*, December 2007

50 Ibid

scale impunity for serious crimes, including those committed in contexts of communal violence. The signal sent to the police and other officials is that communal crimes carry rich dividends.

The judiciary has acknowledged the negative ramifications of the provision, by restricting the scope of the requirement of sanction for prosecution of public officials. The Supreme Court does not perceive S. 197 as a provision that contributes to impunity. It stated: “*the object of the section was to save officials from vexatious proceedings against judges, magistrates and public servants but it is no part of the policy to set an official above the common law.*”⁵¹ The Supreme Court has further ruled that in the case of a Chief Minister, it is the Governor who is competent to accord the sanction; not on the advice of his / her Council of Ministers, but in his / her discretion.⁵² Grant or refusal of sanction is open to judicial review. The Supreme Court has also stated that the protection under S. 197 of Cr.PC does not extend to every act or omission done by a public servant in service, but is restricted to only those acts or omissions which are done with the discharge of official duty.⁵³ It has further been clarified by the apex court that criminal activities do not form part of the functions required of a public servant, and to that extent, S. 197 has to be construed narrowly and in a restricted manner.⁵⁴ In cases concerning extra-judicial killings by the police, courts have held that sanction for prosecution is not required as it is not a part of official duty and “*by no stretch of imagination can take the colour of an offence, as required to be protected under S. 197 of Cr.PC.*”⁵⁵

In its eighth report, the National Police Commission recommended that the protection available to police officials under S. 132 and 197 of the Cr.PC. should be withdrawn. Experts have opined that the sanction provisions ought to be challenged in and struck down by courts of law as violative of the fundamental right to equality before the law and equal protection of the laws, as enshrined in Article 14 of the Constitution.⁵⁶ Provisions related to the requirement of prior

51 *Gauri Shankar Prasad vs. State of Bihar* 2000 (5) SCC 15

52 *State of Maharashtra vs. Ramdas S. Nayak & Ors.* (1982) 2 SCC 463

53 *Jayasingh vs. K.K.Velayutham & Another* AIR 2006 SC 2407: 2006 (4) Scale 591

54 *Rakesh Kumar Mishra vs. State of Bihar & Others* 2006 1 SCC 557

55 *Ravinder Kumar Singh vs. Central Bureau of Investigation* 2006 (4) Criminal Court Cases 850 (P & H)

56 For more details, see A.G.Noorani, ‘The Law and its Potency’, supra n. 46

sanction for prosecution of public officials warrant an urgent deletion from the statute books, or at the very least, a modification.

Challenges to Secure Criminal Liability of Leaders

The culpability of political leaders in communal violence is public knowledge, but does not lead to successful prosecutions and convictions. The crimes of ‘conspiracy’ and ‘abetment’ in the Indian Penal Code have proven to be inadequate in making such leaders and masterminds accountable for planning, sponsoring and executing attacks. The Kandhamal situation further reiterates this difficulty, as Manoj Pradhan – a local MLA of the BJP – has been exonerated in case after case despite witness testimonies that speak of having seen him lead mobs of fundamentalists that tortured and killed Christians and looted and burnt Christian property.⁵⁷ Dereliction of duty by public officials and deliberate planning and instigation of crimes by political leaders have been features of not only the Kandhamal violence, but also of other contexts of communal violence including the anti-Sikh violence in Delhi in 1984, the Mumbai violence of 1992-93 and the Gujarat carnage 2002. Indian criminal law does not extend criminal liability to those who sponsor, plan and benefit from violence engendered by a politics of hate.

To attribute criminal responsibility to leaders, both of state (such as military and other government bodies) and non-state structures (such as fundamentalist groups), the principle of ‘command / superior responsibility’ in international criminal law is of utmost importance and needs to be included in Indian criminal law. This concept would hold leaders criminally responsible for failing to take appropriate measures to prevent crimes committed by subordinates under their effective control and about which they can be reasonably presumed to have had knowledge. It would render useless the favourite escape routes of political leaders, such as concocted alibis, ignorance or inaction, while their party-men kill and burn.⁵⁸ It has been suggested that incorporating the concept of command / superior responsibility within Indian law could ensure that “*future day Neros can be held strictly liable for their fiddling in the face of mass crimes*”

57 See for example, case of *State, Complainant vs. Manoj Pradhan & Others*, n. 60 of Chapter V of this publication

58 Vrinda Grover, ‘The Arrears of Justice’, *Indian Express*, 11 February 2010

and that the Special Investigation Team's interest in questioning Narendra Modi for the Gujarat carnage underlines the reason why the new Communal Violence Bill must embrace the command / responsibility doctrine.⁵⁹

Gap Between Procedural and Evidentiary Standards and Reality in Context of Communal Violence

The rules of criminal procedure and evidence presume the existence of a peaceful society whose institutions, such as police stations, hospitals and fire stations, not only function, but function in an objective, unbiased manner. This presumption does not apply in situations of communal violence, where civic prejudice and hatred affect the officials of state agencies as well, leading to state connivance with the attacks. In such situations, state institutions and organs are either dysfunctional or mal-functional, and deny the victim-survivors effective access to the services these institutions are meant to provide. Norms such as the prompt registration of FIR's, medical examination for bodily injuries and the conduct of inquest and *post mortem* without delay, become difficult, if not impossible, to apply in situations of communal violence, when victim-survivors flee from their attackers for days and weeks at length, and are unable to access state institutions.⁶⁰ In any case, rampant communal prejudice within such agencies, and the experience of being treated with contempt or disregard when they approach the police for complying with legal procedures, leads to a loss of confidence in state agencies. The deliberate exclusion of the names of certain accused persons and/or of other material information in statements recorded by the police can lead the court towards adverse inferences against the victim, without recognizing the complicity of the police in shielding the perpetrators. The acquittal of MLA Manoj Pradhan by Fast Track Court I of Kandhamal in case no. 48/16 of 2009, on the ground that the informant's age was shown as 35 years by the Investigating Officer (IO), while he was found to be 60 years at the time of the trial, is an example where the deliberate dereliction of duty by the IO resulted in an absence of justice to the victim-survivors.

Justice H.S. Bedi of the Supreme Court has emphasized the need to take

59 Siddharth Varadarajan, 'The Buck Must Stop at the Very Top', *The Hindu*, 20 March 2010

60 The summary of MARG interviews of victim-survivors given in Annexure 1 of this publication indicates that most victim-survivors were hiding in the forest for 3-8 days and subsequently in relief camps, and had registered their FIRs only three months after the incidents of crime.

cognizance of socio-political reality whilst examining if the existing procedures and evidentiary standards are being upheld. He has stated:

"...the arguments with regard to the delay in the FIR or some minor contradictions in the statements under section 161, vis-a-vis the statements in Court or a flaw in the recording of the post-mortem or the inquest reports or the non-recovery of murder weapons etc. are a matter of little concern as these issues would be relevant and in normal circumstances and to a situation where the civil administration was functioning effectively, but in a case of a complete break down of the civil administration, these broad arguments are wholly inapplicable."⁶¹

A judge who takes cognizance of the socio-political context of communally motivated crimes may adopt this approach. However, a majority would interpret the evidence available before them in accordance with existing law. This would result in the perpetrators being exonerated, and in a failure of justice. These anomalies highlight the need for new procedural and evidentiary standards for contexts of communal violence.

Need for Independent Prosecution and Recognizing Rights of Victim-Survivors

The law assumes that the interests of the victim are synonymous with that of the prosecution. Hence the premise of the criminal justice system that the state represents the victim. But this assumption cannot apply in cases of state-sponsored communal violence wherein the state has more in common with the accused rather than the victim. A state that has, in myriad ways, been complicit in the violence, is unlikely to pursue rigorous prosecution against the accused. For example, the Gujarat government's appointment of public prosecutors associated with *Hindutva* forces to conduct prosecution of communal violence cases related to the Gujarat carnage 2002, and the partisan nature of prosecutors' work in those cases have been well documented.⁶² The

61 Supra n. 6, see para 19 of Justice H.S. Bedi's judgment. Since the two judges of the Supreme Court who dealt with this case had a difference of opinion on the approach to be taken in ascertaining the evidence before them, the case was placed before a three-judge Bench of the Supreme Court in 2008 and is pending judgment at the present point in time.

62 See for example, Smita Narula, 'Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India', *Harvard Human Rights Journal*, Vol. 16, Spring 2003 at p. 50

criminal justice system needs to hear the distinct voice of the victim without compromising the principles of fair trial, including the rights of the accused. The Supreme Court, in *National Human Rights Commission vs. State of Gujarat*, stated as follows:

*It needs to be emphasized that the rights of the accused have to be protected. At the same time the rights of the victims have to be protected and the rights of the victims cannot be marginalized. Accused persons are entitled to a fair trial where their guilt or innocence can be determined. But from the victims' perception the perpetrator of a crime should be punished. They stand poised equally in the scales of justice.*⁶³

The role of public prosecutors in ensuring a fair trial has been recognized by the Supreme Court.⁶⁴ In 1995, the Supreme Court had emphasized the desirability of separating the prosecution agency from investigation agency.⁶⁵ It was observed that Assistant Public Prosecutors could not be allowed to continue as personnel of the Police Department and to function under the control of the head of the Police Department. State governments were directed to constitute a separate cadre of Assistant Public Prosecutors by creating a separate prosecution Department whose head would be directly responsible to the State Government. By an amendment to the Criminal Procedure Code in 2006, the creation of a Directorate of Prosecution was legislated upon.⁶⁶ Despite these initiatives, institutional and functional autonomy to the prosecutors is conspicuous by its absence as prosecutors continue to function under the control of the state government even in cases where the state was complicit in the communal violence through acts of omission and commission. There has been an attempt to overcome this lacuna by resorting to the appointment of Special Public Prosecutors.

Victims and witnesses would be amenable to approaching the system and to give truthful testimonies only if the system guaranteed to protect their and

63 *National Human Rights Commission vs. State of Gujarat & Others*, Criminal Writ Petition No. 109 of 2003, judgment dated 1 May 2009, delivered by Justice A. Pasayat, at para 26

64 *Ibid* at para 28

65 *S.B. Shahane & Others vs. State of Maharashtra and Another* 1995 Supp (3) SCC 37

66 S. 25A was inserted in the Criminal Procedure Code through a 2006 amendment. This provided for the state government to establish a Directorate of Prosecution in every state, to be headed by the Director of Prosecution. It is prescribed that such a person would function under the administrative control of the Head of the Home Department in the state.

their families' privacy, security, identity and dignity. The UN Declaration of Basic Principles for Victims of Crime and Abuse of Power spells out victims' rights as follows:⁶⁷

- The right to be treated with respect and recognition;
- The right to be referred to adequate support services;
- The right to receive information about the progress of the case;
- The right to be present and give input to the decision-making;
- The right to counsel;
- The right to protection of physical safety and privacy;
- The right of compensation, from both the offender and the State.

The victim-survivor's right to be dealt with fairly in a criminal trial has been emphasized by the Supreme Court as follows: "*It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society...*"⁶⁸

A perspective on rights of victims includes three key issues: protection, participation and reparations. Right to protection and reparations are discussed below under separate sub-heads. Traditionally, in the Indian criminal legal system, the victim-survivor is merely considered a witness for the prosecution. However, the criminal justice system is increasingly acknowledging the needs and concerns of victims. The 2008 amendments to the Cr.PC have provided for the victim to have a counsel of her / his own, without spelling it out as a statutory right of all victims.⁶⁹ However, for such a provision to become operational, overhauling the legal aid system is a pre-requisite, as every victim-survivor may not be able to afford to engage a counsel for herself / himself.⁷⁰ Scope exists for ensconcing victims' participatory rights in other stages of a

67 Known as 'Victims' Declaration', adopted by the General Assembly in November 1985

68 *National Human Rights Commission vs. State of Gujarat & Others*, Criminal Writ Petition No. 109 of 2003, order dated 1 May 2009, at p. 11

69 This is effected through an amendment to S. 24 of the Cr. PC

70 For state of legal aid in India, see S. Muralidhar, *Law, Poverty and Legal Aid: Access to Criminal Justice* (New Delhi: LexisNexis, 2004), Chapters 3 – 6, at pp. 77-300

trial, including the sentencing process, suspension, remission, commutation of sentences and compensation. The rights of victim-survivors to participation would also include a right to information of the proceeding in all its stages, including copies of charge-sheets and other legal documents and a right to participate and be heard at all stages of the trial. Legal aid should be provided to all victims and survivors of communal violence on the same scale as the aid provided to state actors.

The citizens' draft of Communal Crimes Bill 2008 is an illustration of how international standards on victims' rights can be incorporated into Indian law reform initiatives.⁷¹ Taking inspiration from the Victim Witness Unit established in the ICC, the Bill envisages creation of a special apparatus at the Sessions Court, comprising a public prosecutor, an official of the investigating agencies, experts in trauma and psycho-social counseling and members of non-profit organizations. The Mandate of the apparatus includes:

- Providing information on the status of investigations;
- Providing a list of legal aid lawyers to victims and witnesses;
- Disseminating information of the Act including responsibilities of public servants and rights of victims and survivors;
- Directing victims and survivors to appropriate agencies for relief and rehabilitation;
- Facilitating protection of victims and witnesses, in accordance with guidelines stated by the Supreme Court, reports of Law Commission of India and other existing standards of law;
- Directing victims and survivors to medical and psycho-social assistance; and
- Facilitating interpretation and translation of courts proceedings for victims, survivors and witnesses where necessary.⁷²

By keeping victims' interests, concerns and rights among its primary objectives, the Indian criminal justice system would be poised to do "justice" and help the

71 Communal Crimes Bill 2008, submitted to the Prime Minister's Office by activists including Vrinda Grover, Vahida Nainar, Farah Naqvi, Uma Chakravarty, Saumya Uma, Usha Ramanathan, Harsh Mander and others, on 24 January 2008.

72 Ibid at Chapter XI, S. 14

healing process and recovery of the victims, which is and ought to be a primary goal. It must be emphasized, though, that the rights of the victim are not to be strengthened at the cost of the safeguards enjoyed by the accused.

Urgent Need for a Law on Victim Witness Protection

The rampant threats to victims and witnesses in the Kandhamal context, leading to an increasing number of acquittals, highlight the urgent need for a legal regime on victim and witness protection. Legal responses to the growing menace of intimidation, coercion, threat and inducement to victims and witnesses have been mainly through suppressing the identity of the witness, holding trials *in camera* or in undisclosed locations, and in very rare instances, transferring trials under the provisions of S. 406, Cr.P.C. The transfer of trials from one place to another has been found crucial, particularly where perpetrators include public officials and in cases of mass crimes, such as the *Best Bakery case*⁷³ and *Hashimpura case*.⁷⁴ Criminal law reform in India has been much more preoccupied with punishing hostile witnesses than providing protection to victims and witnesses, without acknowledging the fact that absence of protective measures are often the cause for victims and witnesses turning hostile in court. The incarceration of Zahira Sheikh, a victim of the Gujarat carnage 2002, is a poignant reminder of this trend.

Provisions exist in Indian statutory law as well as through judicial interpretations, which are geared towards protection of victims and witnesses. These include holding *in camera* proceedings;⁷⁵ upon completion of investigation, provisions allowing the police officer need not to disclose the identity of the witness to the accused, if it is "not essential in the interests of justice or is inexpedient in the public interest;"⁷⁶ protection to victims from being asked indecent, scandalous,

73 *Zahira vs. State of Gujarat* ('Best Bakery' case), (2004) 4 SCC 158. This involved transfer of trial from Gujarat to Maharashtra.

74 *Hashimpura case* involves communally motivated custodial killings of 42 Muslim youth by Provincial Armed Constabulary - a section of the police, in Meerut, U.P. in May 1987. The trial was commenced in Ghaziabad (U.P.), transferred to Delhi's *Tees Hazari* (Sessions) court in September 2002 after petitioning the Supreme Court.

75 S. 9(6) of the Cr. PC

76 S. 173(6) of Criminal Procedure Code, S. 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000 respectively

offensive questions, and questions intended to annoy or insult them;⁷⁷ recording of evidence by way of video conferencing;⁷⁸ prohibition of male persons under the age of 15 years and women from being summoned to the police station, and direction to the police to record their statement at their ordinary place of residence;⁷⁹ payment of reasonable expenses incurred by the witness or complainant for attending the court;⁸⁰ and restriction of rights of accused to cross-examine prosecution witnesses on grounds of witnesses' fear of reprisal.⁸¹ However, such provisions are neither adequate, nor do they meet the concerns of victim-survivors and witnesses in a comprehensive manner.

The Supreme Court has issued repeated directives to the lower judiciary on the need for witness protection, and the role of the state with regard to the same. For example, it stated:

*The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in the court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology.*⁸²

The proactive role that a trial court ought to play has been further emphasized by the Supreme Court in the following words:

77 S. 151 & 152, Indian Evidence Act, 1872

78 The Supreme Court has stated that recording of evidence by way of video conferencing is permissible, provided it is recorded in the presence of the accused, and that such evidence would be as per "procedure established by law", in *State of Maharashtra vs. Dr. Praful B. Desai* (2003) 4 SCC 601; Criminal Procedure Code (Amendment) Act 2008 provides for statements / confessions made before the police / magistrate through audio / video electronic means.

79 S. 160, Cr. PC

80 S. 312, Cr. PC

81 *Gurbachan Singh vs. State of Bombay* AIR 1952 SC 221; *Kartar Singh vs. State of Punjab* (1994) 3 SCC 569

82 *Zahira Habibullah Sheikh (5) and Anr. v. State of Gujarat and Ors.* (2006 (3) SCC 374) at para 41

*If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves.*⁸³

The Law Commission of India's 198th Report, released in 2006, focuses on victim and witness protection. It has drafted a Bill on Witness Identity Protection (applicable during investigation and in court), as well as a detailed framework with elaborate rules of procedure for preventing the witness (including victim-survivors) from trauma and intimidation at the stages of investigation, during inquiry and before recording evidence at the trial, during the trial and post-trial. Some of the recommendations are significant and path-breaking for the manner in which they seek to balance the rights of the accused with the need for protecting the anonymity of the witness and the victim-survivor from further trauma.

A law on victim and witness protection would necessarily include the following components, all of which would need to be balanced with aspects of fair trial and rights of the accused:

- preventing the identification of victims and witnesses to the public and media;
- preventing further trauma to the victim-survivor caused by confronting the accused;
- ensuring anonymity from the accused and defence counsel;
- delaying the disclosure of witness identity prior to trial; and
- general measures concerning the protection of witnesses and victims prior to, during and subsequent to the trial (commencing from the stage of investigation and prosecution to conviction and appeal).

Victim and witness protection measures ought to specifically include:

- a guarantee of the safety, physical and psychological well-being, dignity and privacy of victim-survivors, witnesses and their families;

83 *Ibid* at para 35

- Since family members are often at grave risk due to the testimony given in court, it is important to extend protective measures, security arrangements, counseling and other appropriate measures not only to victim-survivors and witnesses that appear before the court but also to their family members and other dependents;
- Protecting the identity of such persons from the media and public by conducting any part of the proceedings by video camera or allowing the presentation of evidence by electronic or other special means;
- A special obligation to protect women victims and witnesses, in particular, where the crimes involve sexual or gender-based violence; and
- A special effort to protect child victims and witnesses from further trauma through court proceedings, including by conducting any part of the proceedings by video camera or presentation of evidence by electronic means, as well as assigning a child-support person to assist the child through all stages of the proceedings, with the consent of the child's parents or legal guardian.

The horizons of legal initiatives at victim and witness protection ought to extend beyond anonymity and allowances, keeping human dignity, respect, privacy and right against repeated trauma as its focal points. While protective measures are urgently warranted for all victim-survivors of communal violence, including child victims and victims of sexual violence, issues pertaining to which agencies / institutions are to be made responsible to provide protection, and at which stages of the proceedings; their non-partisanship (in order to inspire the confidence of the persons to be protected), need to be considered with care.

Advocating a Right to 'Reparations'

While international law has adopted the broader and more progressive concept of reparations, of which compensation is only a component, Indian law has focused only on compensation.⁸⁴ The term 'reparations' does not feature in Indian law, although its components – compensation, rehabilitation and

84 According to Article 75 of the Statute of the International Criminal Court, 'reparations' include compensation, restitution and rehabilitation.

restitution – have been recognized through statutory law and jurisprudence to varied extents. Interestingly, a Draft National Policy on Criminal Justice, 2007, mentions the need for a statutory scheme of 'reparation' to victims of communal violence.⁸⁵

While provisions exist in criminal procedural law for payment of compensation to victim-survivors of crimes,⁸⁶ there is neither comprehensive legislation nor a well-designed statutory scheme or a policy statement in India's criminal justice system permitting a crime-victim to seek compensation from an offender or the state as a matter of right.⁸⁷ As seen in the Kandhamal context, compensation to victim-survivors of mass crimes, such as communal violence, has been more of a token gesture rather than a means of substantial relief. Scales of compensation have been *ad hoc* and arbitrary, delayed due to red-tape and corruption, and left often to the whims and fancies of state governments, some of which are complicit in the violence. Uniform criteria and scales of compensation ought to be spelt out, for loss of lives, injuries caused, as well as property damaged / destroyed during the communal violence, taking into consideration the market value of the loss incurred. Such uniform criteria would help avoid disparities in quantum and reduce the discretion of the state government in awarding compensation. Compensation ought to be granted unconditionally, and with least possible delay, and through simplified administrative procedures so as not to cause harassment to the victim-survivor.

Compensation has to be spelt out as a right of victims and not as a charity to be doled out by the respective state governments as per their discretion. While the Victims Compensation Scheme brought about through the 2008 amendment

85 A Draft National Policy on Criminal Justice, prepared by the Committee appointed to draft a Paper on National Policy on Criminal Justice for India, by Ministry of Home Affairs, Government of India, under the chairpersonship of Dr. Madhava Menon, March 2007 at p. 37

86 S. 357 of Cr. PC allows a court to direct the accused to pay compensation even in situations where fine is not imposed as part of its sentence. Other provisions include S. 250 (compensation to people accused by complainant without reasonable cause), S. 265A (compensation to victim in plea bargaining), S. 358 (compensation to persons arrested without sufficient grounds) and 359 (costs to complainant). A victim-survivor may also approach a higher court under S. 482 of the Cr. PC to claim compensation, as the said provision vests inherent power in courts in the interests of justice, as laid down by various judgments of the Supreme Court, including *Shri Bodhisattwa Gautam vs. Ms. Subhra Chakraborty* AIR 1996 SC 922

87 K. I. Vibhute, 'Justice to Victims: Emerging Trends and Legislative Models in India' in K.I.Vibhute (ed.), *Criminal Justice* (Lucknow: Eastern Book Co., 2004)

to the Cr.PC is a step in the right direction⁸⁸, care needs to be taken to ensure that the use of the Fund is not determined solely by bureaucrats, but by a multi-disciplinary team including concerned citizens, activists and members of the medical and legal fraternity. There needs to be a broad understanding that the Fund would be used for rehabilitative needs of victims too.

The rehabilitative needs of victims of sexual assault were clearly spelt out by the Supreme Court in *Delhi Domestic Workers' case*.⁸⁹ The court emphasized the need for legal representation of the victim, stating that the role of the victim's lawyer would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her at the police station and in the court, but also to provide her with guidance in obtaining help from other agencies including for counseling and medical assistance. In this case, the court directed the National Commission for Women (NCW) to draw up a statutory scheme for rehabilitation of victims of sexual assault. The scheme, called Scheme for Relief and Rehabilitation of Victims of Rape, 2005, proposes to establish a Criminal Injuries Relief and Rehabilitation Board to implement any scheme for

88 The scheme is introduced through an amendment to S. 357A of the Cr.PC and states as follows:

"357A. (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

89 *Delhi Domestic Workers' Forum vs. Union of India* (1995) 1 SCC 14. In this case, where six women working as domestic maids in Delhi were raped by eight army personnel on a moving train, the members of the Delhi Domestic Workers' Forum petitioned the court when it was prevented by the employers from meeting the victims.

rehabilitation of rape victims, and to consider claims and award financial relief and rehabilitation. Civil society groups have suggested modifications to the Scheme proposed by the NCW, including that the scheme / Act be de-linked from the verdict in the criminal trial, and its focus be on 'injuries' and not the 'offence.'⁹⁰ Inclusion of a preamble stating that gender-based violence is a human rights violation perpetrated on women, as well as the state's responsibility to compensate for failure to prevent the violence has also been suggested.⁹¹

Legal recognition of rehabilitation for victim-survivors of mass crimes such as communal violence is conspicuous by its absence and merits legal discourse and rigorous implementation. In particular, schemes ought to be formulated by which uniform criteria are set for provision of soft loans, the construction / repair of houses damaged or destroyed during the violence, subsidies for education, grants and subsidies related to livelihood opportunities and income generation. As in the case of compensation, the right to rehabilitation ought to be spelt out as a right of victim-survivors of communal violence, with the objective of restoring them at least to the condition they were in before the violence, and preferably to an improved one.

Restitution as a concept, merits discourse in Indian law, particularly in contexts of communal violence. Rebuilding places of habitat, worship and education destroyed during such violence, and ensuring conditions conducive to the victims' return to their places of residence prior to the violence, can enhance the victim-survivors' citizenship rights. Indian law-makers ought to be vigilant to ensure that restitution is not defined narrowly, only in terms of restoring the property destroyed. Restitution also includes restoration of a person's life, liberty and dignity, through public apology, guarantee of non-repetition of crime and remorse expressed by the perpetrator, even if they are of symbolic value. Such components of restitution ought to be taken into account even while recognizing the fact that several aspects of a victim-survivor's loss can and cannot be restored.

Public apology has featured in the discourse on state responsibility for Kandhamal

90 Recommendations Submitted by NGOs on the Proposed Scheme for Relief and Rehabilitation of Victims of Rape, submitted by Partners for Law in Development & MARG in 2009, to the National Commission for Women and Ministry of Women and Child Welfare.

91 Ibid

violence. Prime Minister Manmohan Singh termed the Kandhamal violence as a ‘national shame’ and the Home Minister P. Chidambaram apologized to the victim-survivors of the violence.⁹² While a public apology from the perpetrators or the leaders of the *Sangh Parivar* could contribute to the healing process of the victim-survivor, it is clear that public apology without remorse cannot be used for political expediency and as a substitute for justice and accountability, as it neither assuages the feelings of those affected by the crimes nor guarantees non-repetition of the crimes committed.

Standards Related to Internally Displaced Persons (IDPs)

Unlike other countries, India does not have any normative standards related to rights of internally displaced persons (IDP) as well as corresponding duties of the government. Chapter IV of this publication discusses the state failure to discharge its obligations towards providing relief, rehabilitation and reparation in the Kandhamal context. The absence of normative standards in India on state obligation with regard to victim-survivors of communal violence who become IDPs, coupled with a lack of institutional arrangements for discharging such obligations towards IDPs, result in blatant violations of the fundamental and human rights of victim-survivors in contexts of communal violence.

Hence there is a need for incorporating the Guiding Principles on Internal Displacement⁹³ into the national policy framework of India, in order to address internal displacement through factors including communal violence. Such a policy ought to aim at ensuring full protection of rights of IDPs in consonance with standards prescribed by the Guiding Principles. It ought to address all elements of the problem of displacement – prevention, protection and assistance, as well as emphasize the state’s obligation to find durable and sustainable solutions.

Some rights of IDPs that require to be spelt out in such a policy/scheme include:

- **Right against displacement** – and a corresponding state obligation to ensure that individuals and groups are not subjected to involuntary displacement

92 ‘I am Sorry: Chidambaram tells Kandhamal Riot Victims’, *The Indian Express*, 26 June 2009

93 Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, dated 11 February 1998.

except when absolutely necessary and that in such cases, displacement is not carried out in an arbitrary manner, in violation of established standards of fundamental and human rights. The state’s duty to prevent foreseeable displacement and mitigate particular populations’ vulnerability to displacement also needs to be recognized.

- **Right to relief and humanitarian assistance as an inviolable right of IDPs** – this includes the right to request and receive protection and humanitarian assistance from state authorities. While the state authorities ought to be vested with the primary duty of providing relief and humanitarian assistance, the duty ought to be cast on the state authorities to facilitate (and not prohibit) the work of international and Indian relief and humanitarian organizations who offer their services to IDPs.
- **Right of all IDPs to an adequate standard of living** – this entails a duty of the government to provide basic needs in the relief camps, including security; and to do so without any form of discrimination or conditionalities.
- **The right of IDPs to be united with their family members**, and the duty of the state to coordinate and undertake the tracing and re-unification processes.
- **Right to safe return or resettlement** – the right of IDPs to voluntarily return to their places of habitual residence or re-settle voluntarily in another part of the country. The government’s duty to establish conditions for such voluntary return / resettlement, with full respect to the safety and dignity of the IDPs concerned, ought to be spelt out. The IDPs must be protected from attacks, harassment, intimidation, persecution or any other form of punitive action upon return to their home community or resettlement in a new community. The right to safe return or resettlement should also cast a duty on the state not to wind up relief camps before the inmates feel secure enough to return to their places of habitual residence. Further, IDPs should have the right to fully participate in planning and managing their return or resettlement.
- **State assistance in recovering properties** – the state authorities ought to be mandated with a duty to assist IDPs to recover, to the extent possible, all those properties they left behind whilst fleeing from communal violence – including houses, agricultural land, household and other movable properties,

vehicles, cattle and farm produce, and essential documents.

- **Right to adequate compensation and other just forms of reparation** – the duty to award compensation would arise particularly in situations where the properties of IDPs left behind at the time of the violence could not be recovered, either partially or fully.
- **Right to rehabilitation** – includes state obligation to provide medical, psychological, legal and social services including education and training to develop new livelihood options, with the core principle of ensuring that IDPs be restored to the condition they were in before the violence, and preferably to a better one.
- **State's obligation towards peace-building and the IDPs' right to integration / re-integration** – including a duty to re-establish justice and the rule of law, reconstruction, economic and psychological rehabilitation, and reconciliation. The state has the duty to create an environment that can sustain return or local integration through access, without discrimination, to basic public services, legal and personal documentation, and to livelihoods or income-generating opportunities
- **Right to reparations** – further elaborated under sub-head I above.

Any Indian policy on IDPs ought to incorporate provisions and principles from international standards set by the Guiding Principles on Internal Displacement and 10 Years of Guiding Principles.⁹⁴ Indian efforts at formulating policies of a similar nature in other contexts (such as natural disasters) should also be taken into consideration because they provide useful pointers to appropriate government obligations in contexts of communal violence. For example, The Disaster Management Act, 2005 – a central piece of legislation in India – provides for the establishment of a National Disaster Management Authority with the power to lay down policies on the minimum requirements to be provided in relief camps in relation to shelter, food, drinking water, medical cover and sanitation. The Orissa Relief Code 1996, enacted to deal with instances of flood, famine, drought, earthquakes and other natural disasters, lays down the

94 Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, A/HRC/10/13 dated 9 February 2009

types of relief that are to be given for different sets of people⁹⁵, and provides clear duties for specified government departments.⁹⁶ The National Policy on Resettlement and Rehabilitation for Project Affected Families, 2003,⁹⁷ which extends to instances wherein agricultural families are displaced from their lands due to developmental activities, recognizes the right of the families to be given cattle, land, houses and other property commensurate to what they owned prior to their displacement.

Conclusion

As stated by Justice Vithyathil, “There is much truth in saying that if you want peace you must work justice.”⁹⁸ We have tried to show that there are glaring inadequacies in the framework of Indian law and policy when used to address contexts of communal violence, and these inadequacies cause severe obstacles to justice. The present laws are not designed to adjudicate mass crimes wherein an entire community is targeted with the willful and culpable acts of commission and omission by state agencies. The yardstick of “normal times” cannot be indiscriminately applied to trials marked by an extraordinary collapse of state agencies and institutions.⁹⁹ To prosecute and convict extraordinary crimes committed in contexts of communal violence and to provide justice, security and restore a life with dignity to victim-survivors, India needs a different legal regime, for which some pointers may be taken from international law.

95 Farmers and cultivators, for example are to be given seeds for sowing and aid in plantation, and water pumps.

96 For example, the Health and Family Welfare department is responsible for “Health measures (both preventive and curative), formation of Health Squads in case of necessity, mobile health units, establishment of temporary hospitals, prevention of epidemics, disinfection of wells and other drinking water sources, care of children's health, collection of damage statistics and restoration work etc.”

97 Published in the Gazette of India, Extraordinary Part-I, Section 1, No.-46, dated 17th February, 2004.

98 Report of the Justice Joseph Vithyathil Commission on the Tellicherry riots, 1971

99 Vrinda Grover, ‘The Arrears of Justice’, supra n. 58

Table 1: HIGHLIGHTS OF PROVISIONS OF INDIAN PENAL CODE APPLICABLE TO COMMUNAL VIOLENCE

SECTION NO.	OFFENCE
120B	Criminal conspiracy
141-145	Unlawful assembly, punishment for being member of unlawful assembly, joining unlawful assembly armed with deadly weapon etc.
146-148	Rioting, punishment for rioting, rioting armed with deadly weapon
149-151	Offence committed in prosecution of common object, hiring, conniving at hiring of persons to join unlawful assembly, knowing joins / continues in assembly after it has been commanded to disperse
152	Assaulting or obstructing public servant when suppressing riot etc.
153	Wantonly gives provocation with intent to cause riot
153A	Promoting enmity between different groups on grounds of religion, race, place of birth, residence language etc. and doing acts prejudicial to maintenance of harmony
153B	Imputations, assertions that are prejudicial to national integration
295-298	Offences relating to religion, including injuring / defiling place of worship with intent to insult religion of any class, deliberate and malicious acts intended to outrage religious feelings, disturbing religious assembly, trespassing on burial places, uttering words etc. with deliberate intent to wound religious feelings

302	Punishment for murder
304	Punishment for culpable homicide not amounting to murder
307, 308	Attempt to commit murder, culpable homicide
312-316	Causing miscarriage, injuries to unborn children
322-335	Offences related to causing hurt and grievous hurt, with or without dangerous weapons, to extort property, to deter public servant from doing his duty etc.
339-348	Offences related to wrongful restraint and wrongful confinement
349-358	Offences related to assault or criminal force, including to woman with intent to outrage her modesty
362-369	Kidnapping and abduction
375, 376	Rape and punishment for rape
378-402	Offences related to theft, extortion, robbery and dacoity
410-412	Receiving stolen property
425-427, 435- 436	Mischief and punishment for mischief, mischief causing damage, mischief by fire or explosive substance with intent to cause damage / destroy house
447-462	Offences related to criminal trespass
504	Intentional insult with intent to provoke breach of peace
506	Criminal intimidation
509	Word, gesture or act intended to insult the modesty of a woman

VII

AN AGENDA FOR REFORM

As this report is being written, the victim-survivors of the 2008 violence in Kandhamal continue to experience the repercussions of the targeted and pre-meditated attacks against the Christian minority. On one hand, many of them are striving painfully to cope with the loss of their loved ones, and grappling with issues of livelihood and survival, housing, food, education and other basic needs, whilst rebuilding their lives. They have to contend with *Hindutva* forces that have enforced a socio-economic and cultural boycott upon them in their places of habitual residence, preventing their reintegration in society, and subverting their citizenship rights. Simultaneously they confront state apathy, prejudice and bureaucratic red-tape whenever they claim their right to compensation and rehabilitation. Additionally, they engage with the criminal justice process, which offers them little solace and virtually no justice as few are arrested and even fewer are convicted of crimes committed.

Unfortunately, Kandhamal is not the exception but a part of a distinct pattern of communal violence witnessed across the country. Targeted, widespread and systematic communal violence has occurred with alarming regularity causing large scale disturbances, social disruption, numerous fatalities and injuries, destruction of property, dislocation of lives, sexualized violence against women, and violence and trauma to children. It has threatened the right to life and livelihood and inflicted untold misery and social suffering, particularly on minority communities.¹ There are frightening similarities between the

¹ Para 1 of Statement of Objects and Reasons to The Communal Crimes Bill 2008 – an alternative draft law on communal violence drafted by Vrinda Grover, Farah Naqvi, Uma Chakravarthi, Saumya Uma, Vahida Nainar, Harsh Mander and others, submitted to the government in January 2008.

communal violence in Kandhamal, the Gujarat carnage of 2002, the post-Babri Masjid violence in 1992-93, the anti-Sikh violence of 1984 and other contexts. These common features include:

- Claims made by certain political groups that the attacks were an expression of spontaneous rage, when they were in fact, pre-meditated;
- The representation of certain incidents as a purported “trigger” for the eruption of the so-called spontaneous popular rage. Such incidents most famously, were the assassination of the erstwhile Prime Minister Indira Gandhi; destruction of the Babri Masjid; the burning of a coach of the Sabarmati Express; and the killing of Swami Lakshmanananda;
- the hate propaganda and rumours that preceded the attacks;
- the complicity of the state and public officials through culpable actions and failures to act;
- the systematic targeting of minority houses, religious structures and business houses;
- the targeting of women’s bodies for sexual and gender-based violence of a brutal nature;
- the systematic destruction of evidence after killings by means of burning, or otherwise disposing of the bodies of the deceased;
- the mobilization of marginalized communities to execute attacks;
- the closure of relief camps before victimized people felt safe to return home;
- the doling out of arbitrary and inadequate amounts of compensation to victim-survivors by the state in an *ad hoc* manner;
- the polarization of the citizenry based on religious identity, prior to and subsequent to the communal violence;
- the social and economic boycott, and cultural exclusion of the victim-survivor community; and;
- the failure to secure justice and accountability through the criminal justice process.

The methodology of the *Sangh Parivar* for provoking communal violence has been aptly summarized by Justice Venugopal in the following manner:

“The RSS methodology for provoking communal violence is: a) rousing communal feelings in the majority community by the propaganda that Christians are not loyal citizens of this country; b) deepening the fear in the majority community by a clever propaganda that the population of the minorities is increasing and that of the Hindus is decreasing; c) infiltrating into the administration and inducing the members of the civil and police services by adopting and developing communal attitudes; d) training young people of the majority community in the use of weapons like daggers, swords and spears; e) spreading rumours to widen the communal cleavage and deepen communal feelings by giving a communal colour to any trivial incident.”²

While contexts and players in incidents of communal violence have varied with time, the methodology spelt out by Justice Venugopal in the 1980s continues to operate in communal events such as those that unfolded in Kandhamal. The regularity of such events, and the sinister pattern that can be detected in violence directed at minority communities is alarming, and presents a grave and imminent danger to the idea of India as a secular constitutional democracy and a plural society. This danger needs to be addressed urgently through processes of law, as well as social and political action.

Failure to Fulfill State Obligations in the Context of Kandhamal

In the Kandhamal context, the central and state governments have failed to discharge their constitutional mandate to protect the fundamental rights of citizens; and their obligations under various international treaties on human rights. The culpability of state agencies, including the police force, bureaucrats, politicians and others, through their actions and inactions, has unfolded at various levels, including:

- The failure to discharge the constitutional mandate without discrimination and the failure to safeguard the foundational principle of secularism. The state has discriminated between citizens on grounds of their religious

² Report of the Justice Venugopal Commission on the Kanyakumari riots of 1982 between Hindus and Christians

identity – something expressly prohibited by the Constitution. This is manifest in the state's wilful neglect of its duty to prevent communal violence, to protect victim-survivors and redress their grievances.

- The failure to protect the right to freedom of religion of the minority community;
- The bias displayed by state institutions and their inaction. This was especially evident in the failure to prevent violent incitement through hate propaganda, during funeral processions and other means;
- The lack of political will and the abdication of the statutory duty to protect the lives and properties of victim survivors;
- The blatant failure to respect the rights of victim-survivors, such as by violating their right to freedom of expression and movement, by preventing relief and fact-finding work among victim-survivors, and the enforced return of victim-survivors to their place of habitual residence when their safety was at stake;
- The complicity, connivance, participation in and support to the violence through acts of omission and commission;
- The deliberate failure to register criminal cases against perpetrators of the violence and the absence of due diligence in conducting unbiased investigations and in initiating prosecution in a non-partisan, expeditious and fair manner. This has led to impunity among perpetrators and insecurity among victim-survivors;
- The denial of institutional support to victim-survivors and their protection from further harassment;
- The failure to prevent ostracism, socio-economic boycott and reinforcement of the subjugated status of victim-survivors by non-state actors;
- The arbitrary, *ad hoc* and callous approach to relief, rehabilitation and reparations in blatant violation of the Constitutional mandate to protect the lives and dignity of citizens.

- The flouting of international standards that protect the rights of internally displaced persons (IDPs); and
- The failure to 'fulfil' human rights via substantive measures to restore confidence in the victim-survivors, by providing institutional support to rebuild their lives, and promoting re-integration and communal harmony.

Political will stands at the fulcrum of state obligation. On 19 March 2010, the Orissa police arrested Praveen Togadia when he tried to enter Kandhamal in violation of prohibitory orders.³ A similar exercise by the state government in August 2008 could have saved lives and property, and prevented the trauma caused to victim-survivors. The elaborate arrangements and effort made by the state government to ensure that victim-survivors cast their votes, during the elections to the Orissa state assembly and Lok Sabha in April 2009⁴, further illustrate that institutional machinery of the state can be put to good use to advance the rights of its citizens when the state has the political will to do so.

There is overwhelming evidence of support provided by Orissa's state machinery to *Hindutva* forces, making a case for breakdown in constitutional governance. Given this fact, the central government has failed abysmally to ensure that Orissa is governed in accordance with the provisions of the Constitution. It has prioritized political expediency over its duty to protect the lives and property of its people, thereby betraying the faith reposed on it by the minority community in Kandhamal. As repeatedly urged by the National Commission for Minorities, immediate remedial measures are required to be taken on all counts, to insulate against recurrence of the violence and devastation in Kandhamal and other parts of Orissa.

Bottlenecks to Justice

Efforts at addressing impunity for Kandhamal violence 2008 through the legal system have brought into view the following factors that obstruct justice:

- Absence of credibility of the Panigrahi and Mohapatra Commissions of Inquiry and a loss of confidence in the eyes of the victim-survivors;

³ See 'Togadia Arrested in Kandhamal, Out on Bail', *Indian Express*, 21 March 2010.

⁴ See 'Riot-Hit to Vote With Cop Cover', *The Times of India*, 3 April 2009

- Non-registration, delayed registration and improper / incomplete registration of FIRs by the police, and the deliberate suppression of material details such as the names of the perpetrators, with the purpose of scuttling processes of justice;
- Shoddy, improper, inefficient and biased investigation, conducted in a *mala fide* manner with the intention of exonerating the accused;
- Non-availability of material evidence in contexts where bodies are burnt or secretly disposed of in order to destroy evidence; the lack of forensic evidence due to delays leading to decomposition of bodies; and lack of corroborative evidence because many victim-survivors and witnesses have fled from Kandhamal;
- Rampant threats to, intimidation and coercion of victim-survivors and witnesses, their family members and relatives, to prevent them from deposing in court, and the absence of a viable victim-witness protection programme that would protect them against the same;
- The passage of orders of acquittal by Fast Track courts in undue haste, without appreciating the available oral and documentary evidence; and without understanding the difficult circumstances in which the evidence has been adduced, or the overall context of communal violence; and
- Lacunae in substantive, evidentiary and procedural law and in legal jurisprudence; their detachment from socio-political reality in contexts of communal violence.

Recognizing Victim's Rights

Justice traditionally has been understood to involve prosecution, conviction and punishment of the guilty in order to restore public order, security and respect for the rule of law. In spelling out the expanded meaning of justice in the present day, Justice Albie Sachs said: "Justice is not only in the end result; it is also in the process."⁵ In one sense, the entire criminal legal system functions primarily and substantially to provide justice to the victim. Giving

5 Justice Albie Sachs is a member of the Supreme Court of South Africa. Statement delivered at the University of Toronto Faculty of Law, October 1999.

the victims and witnesses a voice to testify in court without fear, participate in the court proceedings and have their rights and interests protected is of utmost importance for the legitimacy of the justice delivery system.⁶ The inability of the law to respond to and address violations in contexts of communal violence highlight the clear need for a paradigm shift in criminal law from retributive justice (with a focus on determination of guilt and imposition of punishments) to restorative justice – which entails enhanced visibility of victims in terms of participation and reparation. However this is not to be achieved at the price of diluting the rights of the accused or by compromising on standards of fair trial and legal safeguards accorded to accused persons.

Need for Independence of Prosecution

The complicity of the state through acts of omission and commission, coupled with prosecution of communal crimes by public prosecutors (who represent interests of the state), necessarily make the criminal trial biased. The present system of appointment of prosecutors from the state cadre therefore, needs to be rethought and reworked in prosecutions of crimes of communal violence. Although there have been attempts to address this problem by appointing Special Public Prosecutors (as in cases related to Hashimpura, the Gujarat carnage as well as in Kandhamal), this is an *ad hoc* arrangement, and not a viable long-term solution. The law has to address the need for institutional autonomy and prosecutorial discretion, particularly in contexts of communal violence.

The Potential for Law Reform through the Communal Violence Bill

In its Common Minimum Programme in 2004, the UPA government announced its intention to enact comprehensive legislation on communal violence. This was the first official recognition of the severity and gravity of communal violence, and of the fact that it merits distinct and separate legislation. However, the Communal Violence (Prevention, Control & Rehabilitation of Victims) Bill 2005, introduced in the Rajya Sabha in December 5, 2005, failed to provide

6 Saumya Uma, 'Intimidated Victims and Witnesses: Treated with Hostility', *Combat Law*, Vol. 2, Issue 5, Dec – Jan 2004, pp. 65-71 at p. 66

adequate tools to secure justice for victim-survivors, to make perpetrators including public officials accountable, and to strengthen the struggle against communalism. Due to a criticism of the Bill from various quarters, the Bill was sent to the Parliamentary Standing Committee on Home Affairs for its review and recommendations. However, the Standing Committee suggested no significant changes. In early 2010, the government introduced 59 amendments to the Communal Violence Bill 2009. As this publication goes to print, the Bill is pending before the Rajya Sabha.

The Communal Violence Bill provides a potential opportunity to formulate a law on crimes against collectivities. Such a law ought to effectively respond to and address the specific patterns of events and the facts witnessed during communal violence. It should also recognize the challenges faced by victim-survivors in their efforts to secure justice and citizenship rights. The Bill would be more effective in meeting the stated objectives of protection, control and rehabilitation of victims of communal violence, if it is informed by experiences and efforts at securing justice and accountability in Kandhamal 2007-8 as well as previous contexts of communal violence in India.

Some suggestions for the contents of the Bill are as follows:

- **The objective of the Bill** should be to ensure that the State governments and the Central government take measures to provide for the prevention and control of communal violence, which threatens the physical, social, economic, cultural, political and human security of the citizens.⁷ Such a Bill ought to be directed, not towards empowering the state further, but at a) ensuring effective and prompt response of the government to prevent and control communal violence; b) enhancing the accountability of public authorities for the prevention of such incidents; and the speedy investigation, prosecution and punishment of those engaging in communal crimes; c) ensuring justice and security to victims and survivors and; d) strengthening the rights of victims and survivors to complete and comprehensive reparations.
- **The definition of communal violence** should take into its ambit any

7 Final statement of National Consultation on The Communal Violence (Prevention, Control & Rehabilitation of Victims) 2009, New Delhi, dated 13 February 2010

targeted attack on the persons and properties of individuals or a group of persons on account of their religious identity, which can be inferred directly or from the nature or circumstances of the attack.⁸

- **Exclude concept of 'communally disturbed areas'**: The present government Bill envisages the declaration of certain areas as communally disturbed areas, and thereafter accords excessive powers to the state in these areas. Such provisions run counter to the purpose of the proposed law. The state already has sufficient power vested in it by law to address contexts of communal violence. However, experience indicates that a root cause of communal violence is the non-exercise or non-judicious exercise of this power by state functionaries.⁹ In addition, co-relation between crimes and disturbed area is false, dangerous and untenable, and must not find place in a law on communal violence.¹⁰
- **Include provisions for making public officials accountable** for their actions and inactions in discharging their Constitutionally mandated responsibilities. These include the prevention of hate speech and other expressions of a communal build-up prior to the violence, the protection of victim-survivors and their properties, the registration of FIRs, investigation, prosecution, trial; and the provision of relief and reparations.
- **Exclude provisions that exonerate public officials** who are culpable through their actions and inactions. These provisions include the requirement of prior sanction for prosecution and presumption of actions done in good faith.
- **Define new offences** (such as torture, persecution and sexual violence) **and new rules of procedure and evidence** that take into consideration the socio-political reality of communal violence. This is because situations of communal violence have indicated that the range of crimes committed are not necessarily confined to the definition of offences under present Indian criminal law.

8 Ibid at para 2

9 Press statement subsequent to the National Consultation on The Communal Violence (Prevention, Control & Rehabilitation of Victims) 2009, New Delhi, 13 February 2010, para 4

10 Supra n. 7 at para 3

- **Define and include a wide range of sexual crimes** in this Bill that reflect the reality of women's experiences in contexts of communal violence.¹¹
- **Include concept of command / superior responsibility** which would allow persons in positions of power, including masterminds and architects of communal violence to be held accountable for crimes committed by their subordinates under certain circumstances.
- **Investigation** – the separation of the 'law and order' from the 'investigative' branches of the police is a pre-requisite for conducting investigations in a fair, objective and thorough manner. Additionally, for more egregious incidents a central investigating agency, beyond the reach of powerful suspects, will be required for investigation and prosecution.
- **Punishment** – In keeping with principles of rule of law and natural justice, punishment has to be proportional to the crime. In addition to imprisonment and fine, other forms of punishment such as disqualification from public office or other forms of debarring from professional associations, or running for public office must also be included in the case of culpability of public officials.¹²
- **Courts** – A time-bound disposal of cases should be prescribed without compromising on fair trial standards. In situations where there is an apprehension that fair trial may be compromised at the local court, including through a lack of congenial atmosphere for victims and witnesses to depose freely, the law must provide guidelines for the transfer of such cases.
- **Include the concept of reparations as an inviolable, legally enforceable right of the victim-survivor**, and according to objective norms and scales that are binding on all governments. The law must specify

11 Since sexual violence in situations of communal violence, unlike those in non-communal contexts, is often committed with malicious intent of intimidating, humiliating and degrading the dignity of the victim community using the bodies of women, the National Consultation called for the inclusion of a wide- ranging crimes of sexual violence, in addition to rape. These include a broadened definition of rape, as well as the inclusion of forced pregnancy, enforced sterilization and other forms of sexual violence. Ibid at para 6

12 Ibid at para 4

criteria for identifying who is a victim/survivor and standards which will be applicable to all victims and survivors of communal violence, and not leave it to discretion at the state level. The reparations guidelines must include rescue, relief, compensation, restitution, rehabilitation and guarantees of non-repetition. The rehabilitation measure must include (among other considerations), assistance of soft loans and land allocations to rebuild livelihoods and shelters to levels not less than before the violence and in conformity with the wishes of the affected persons, and the reconstruction of places of worship destroyed in the violence. Any determination of reparation measures must be through mechanisms that include members of the affected community. The compensation scheme under the SC/ST Act should be one of the models for compensation of victims and survivors of communal violence.¹³

- **Recognize comprehensive rights of victim-survivors** including the right to protection in the pre-trial, trial and post-trial phases, right to information of the status of the proceedings, right to participation in all stages of the trial, the right to appoint a lawyer of their own choice at state's costs and the right to appeal in the event that the state fails to do so on their behalf.

The concepts of 'crimes against humanity' and 'genocide' in international law are potentially relevant to Indian efforts at legal recognition of the contexts of communal crimes. For example, the definition of 'crimes against humanity' acknowledges the nature (widespread / systematic); and the context (in pursuance of state or organizational policy) in which a crime is committed. The definition of 'genocide' takes into account those crimes committed with intent to destroy a group in whole or in part, based on religious and other identities.¹⁴ Though the Indian government ratified the Genocide Convention in the 1950s, it has failed to enact domestic legislation on the same, making it virtually impossible to prosecute domestically for crimes of genocide.

Further, the proposed law on communal violence ought to be drafted through an open, transparent and consultative process, with the participation of

13 Ibid at para 10

14 For more details, see sub-head B, Chapter VI of this publication. For a definition of genocide, see n. 9 of Chapter VI of this publication.

members of civil society including eminent jurists, human rights activists, academics and legal experts who have engaged on the ground and in court rooms. Alternative drafts of the law, produced through civil society initiatives, must be considered.¹⁵ Recommendations of various Commissions of Inquiry and emerging international human rights standards must be adhered to. Such a law must not reinforce the impunity enjoyed by communalized state agencies. Most of all, a law on communal violence must base itself on the experiences of victim-survivors of communal violence, must consider the concerns of minority communities and must remedy the obstacles to justice and accountability faced by them.

Though this publication has focused on state accountability vis-à-vis its legal obligations, and on aspects of law and justice in the context of Kandhamal, it is acknowledged that the law, by itself, cannot provide a comprehensive solution to the issue of communal violence. Social, economic and political processes bear significance, in preventing such violence as well as in addressing low level, constant and covert manifestations of communal prejudice that may not reach the threshold of offences under criminal law, but which are nevertheless devastating for communities of victim-survivors and the cause of permanent ruptures in society.

15 Alternative drafts on the communal violence, drafted by members of the civil society and submitted to the government include The Prevention of Genocide and Crimes Against Humanity Act 2004, Communal Crimes Act 2004 and The Communal Crimes Bill 2008.

ANNEXURES

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ANNEXURE I

SUMMARY OF INTERVIEWS WITH
VICTIM-SURVIVORS

A summary of interviews and focused group discussions held with victim-survivors is given below. These were conducted in the months of May-June 2009, in varied places including relief camps, makeshift homes at the outskirts of villages and homes of survivors in their villages. The full names, geographic locations, village of origin and such other details of the victim-survivors, which may reveal their identity, are not being disclosed for fear of reprisals against them.

1. CODE NAME: BD

PROFILE OF THE VICTIM-SURVIVOR: 40 year old married woman, Christian by birth, belongs to SC, worked as coolie, lives with 5 family members

SUMMARY OF INTERVIEW: The attackers were from her village, and she had to silently watch while they destroyed her house and looted her lifelong savings. She and her family members fled to the forest, stayed there for one week before reaching the nearest camp. She is sure that women would have been raped by the mob if they had been caught. She knows the attackers and can identify them. Three persons from her village had forced her to convert. She had complained about this to the authorities but no action was taken. She lodged a complaint with the police about the attack 3 months after the incident. When she tried to lodge the complaint earlier, it was not registered by the police. She does not know the present status of her complaint. She has received no compensation for loss of property. 3 days after she stayed in the camp, she tried to return to her village but her neighbours did not allow her to enter the village. She and her family members were asked to change their religion. Although she has a job card, she has received no employment under

the NREGA. At the time of the interview, she was still living in a relief camp with her family members.

2. CODE NAME: SN

PROFILE OF THE VICTIM-SURVIVOR: 45 year old married man, Christian by birth, belongs to SC, lives with 7 family members, worked as a daily labourer prior to the violence

SUMMARY OF INTERVIEW: He was pressurized by members of Durga Vahini to convert to Hinduism. During the violence, his shop and home were attacked by a mob of 400-600 people armed with weapons, which included local VHP members. They shouted "Burn the sinner", "Kill the bastard Christian". He heard them use abusive language for women. His house was burnt, seeds, personal belongings and life savings had been looted. At the time of the attack, he and his family members fled to the forest, stayed there for 4 days, went to a relief camp. He lodged a complaint with the police nearly 3 months after the attack, as they had refused to register the same earlier. He has received Rs. 15000 compensation till now, although the loss of property is worth at least Rs. 40,000. He now lives with his family in the outskirts of his village in a makeshift home, but is unable to cultivate land and no one gives him work. When he returned to his village, in the name of peace, his head was forcibly shaven, he was given 'gobar water' to drink and informed that if he and his family did not leave their religion, they would not be able to survive for long. Although he has a job card, he received only 3 days of work from 1 April 2008 to 31 March 2009, and has been informed that he will get no further work under NREGA.

3. CODE NAME: PP

PROFILE OF THE VICTIM-SURVIVOR: 47 year old married man, Christian by birth, belongs to ST, lives with 6 family members, worked as a labourer

SUMMARY OF INTERVIEW: His house was attacked by a mob and his life savings were looted. He and his family members fled to the forest and stayed there for 5-7 days. He made a police complaint 2 months after the incident as the police refused to register the complaint earlier. He is aware that his case has not reached the court yet. He has received some amount of compensation. Although his house was fully damaged, the compensation certificate states that it was partially damaged. The approximate monetary value of the losses is Rs. 68,000, and the compensation given was highly inadequate. He has spent the compensation amount on re-building his house. Although he has returned to his village and is staying at his home with his family, he has no land for cultivation and has not been given any work under the NREGA, though he has a job card.

4. CODE NAME: HD

PROFILE OF THE VICTIM-SURVIVOR: 47 year old married man, Christian by birth, belongs to SC, lives with 3 family members, worked as an agricultural labourer

SUMMARY OF INTERVIEW: He said that a large mob of 2000 people attacked his village shouting slogans, he and others like him were asked to abandon their homes or else they would be killed. The mob broke and fully damaged his house as well as the village churches, and blamed the Christians for the killing of Swami Lakshmanananda. He says that his friends in the village have started behaving as strangers, and that he does not have any village, home or land now. He knows some of the attackers and can identify them. He and his family members helplessly ran to the forest and stayed there for 5-7 days. He lodged a complaint with the police about destruction of property 5 months after the violence as the police had refused to register the complaint earlier. He has received some compensation from the government but it is inadequate, as the approximate monetary loss was Rs. 68,000. The compensation certificate states that his house was partially damaged although he says that it was fully damaged. He was residing with his family members at a relief camp at the time of the interview.

5. CODE NAME: GN

PROFILE OF THE VICTIM-SURVIVOR: 45 year old married man, Christian by conversion, lives with 7 family members, worked as a mason

SUMMARY OF INTERVIEW: A mob of about 400 persons, most of whom were outsiders to the village and consisted of VHP members, attacked his village and shouted "Jai Hanuman" and that the Christians should be killed. They were armed. His Hindu neighbour asked his family members to flee from the place as they may get killed by the mob. The mob chased him and his family members till the forest. They stayed in the forest for 5 days as they feared for their lives. During this time, his son died of snake bite in the forest. His house was damaged and their personal belongings and cash looted. One of his Hindu neighbours informed them to return to their homes once the condition became normal, and they returned. He lodged a police complaint for destruction of property 2 months after the attack. He says that for the first month after the incident, the police refused to register any complaint against members of the VHP. He has received Rs. 15000 compensation so far but the monetary value of the loss incurred is Rs. 70,000. He spent the money on re-construction of his house. Though he is not receiving any threats from other villagers, he does not have any land for cultivation and has not been given work under the NREGA.

6. CODE NAME: PN

PROFILE OF THE VICTIM-SURVIVOR: 38 year old married man, Christian by conversion, belongs to SC, lives with 6 family members, owned a tea stall prior to the violence

SUMMARY OF INTERVIEW: He had been threatened by RSS members to change his religion. Attackers included at least 5 VHP members from outside his village. He had a tea stall that was attacked and burnt down by a mob of not less than 400-600 people with weapons, in the presence of police officials who did not act. His house was damaged and his life savings looted. Along with his family members, he fled to the forest, stayed there for 4 days, was helped by the church and finally returned to his village. He made a complaint to the police about destruction of property nearly 3 months after the violence, as the police was reluctant to register the complaint earlier. He is aware that his case has not reached the court yet. He has received a compensation of Rs. 15,000 so far, though the value of damaged property is not less than Rs. 30,000. He has returned to his village and lives with his family in his own home, but does not have land for cultivation and is denied work by the villagers. Although he has a job card, he has not been given any employment under the NREGA and has been informed that he will not get any work under the same.

7. CODE NAME: KN

PROFILE OF THE VICTIM-SURVIVOR: 32 year old married man, Christian by conversion, belongs to SC, lives with 7 family members, owned an STD booth prior to the violence

SUMMARY OF INTERVIEW: He was forced by VHP members to change his religion. He knew the attackers. He and his family members fled to the forest, stayed there for approximately four days, went to a relief camp and then returned to the village. His house had been damaged, his life savings and certificates had been looted. His family received help only from the church. He made a complaint to the police about destruction of property 3 months after the incident, as the police refused to register the complaint earlier. He is aware that his case has not reached the court yet. He has received a compensation of Rs. 15000 from the government although the approximate monetary value of the loss of property is Rs. 40,000. He has returned to his village and lives with his family in his own home, but does not have land for cultivation and has been given no work either by villagers or under the NREGA, although he has a job card.

8. CODE NAME: FGD 1 - PN, KKN, LL, BS

PROFILE OF THE VICTIM-SURVIVOR: 3 men, 1 woman. All are retail sellers

SUMMARY OF INTERVIEW: Some of them had been coerced by RSS members to convert to Hinduism. Prior to the violence, they had observed Christian religious functions and festivals but in a quiet manner. When a mob of 400-600 persons armed with weapons attacked their village, they were shouting slogans such as “burn the inner” and “kill the bastard Christian”. They all fled to the forests with their families. Their houses have been damaged and burnt, personal belongings including cash, utensils, seeds and jewellery looted. Women, if caught by the mob, would have been raped. Children suffered due to a lack of food and other essentials in the forests. They received help from the church to reach the relief camp. Most of them lodged complaints with the police 3 months after the incident, as the police refused to register their complaints earlier. Some of them have received a compensation of Rs. 15000, though their financial loss is Rs. 30,000 – Rs. 1 lac. Although they have returned to their village, they do not have land to cultivate and no job under the NREGA

9. CODE NAME: FGD 2 - PP, PBD, ON, SP, PBS, GP, SP

PROFILE OF THE VICTIM-SURVIVOR: 5 men, 2 women. All worked as labourers before the violence

SUMMARY OF INTERVIEW: Prior to the violence, they had celebrated Christmas in 2007 and 2008 but in a quiet manner, due to Swami Lakshmanananda. When a mob consisting of VHP members attacked their village, their Hindu neighbours asked them to flee to save their lives. The mob shouted “kill the bastard Christians”. Women were threatened with vulgar slang. Their houses were attacked and damaged and moveable properties were looted. They fled to the forests with their families and returned to their village only after 7 days. The local church provided them support initially. For one month, they were unable to register a complaint with the police for destruction of property, against VHP members as the police said that there was no evidence of their involvement. Some have received meager amounts of compensation, less than 1/3 of the approximate monetary loss incurred. They are living in the outskirts of their village, with no land for cultivation. They are using the common land for cultivation and grazing. They have not got work under the NREGA. When they left the camp, they were given some rice and dal, but now those stocks are depleted. Without a livelihood, the children’s education and health needs are suffering and they have received help from nobody.

10. CODE NAME: FGD 3 - SN, DN, SN2, TN, KN, SN3, RD, SD, MN, NB

PROFILE OF THE VICTIM-SURVIVOR: 6 men, 4 women. Most men work as daily labourers & masons; women used to collect leaves from the forest and sell in the market. All are Christians

SUMMARY OF INTERVIEW: They are unable to comprehend why their neighbours, who were very friendly with them earlier, would want to kill them. They had been persuaded by members of Durga Vahini to convert to Hinduism if they wanted to stay prosperous. At the time of the attack, they fled to the forests, where they stayed for 4 days before moving to a relief camp. The mob burnt their houses, looted their belongings and savings, and used abusive language for the women. They say that women could have been raped or subjected to worse treatment than that if caught by the mob. They filed a complaint for destruction of property approximately 3 months after the incident, as the police refused to register the FIR soon after the incident on the pretext that curfew under S. 144 was on. Some of the victims had received Rs. 15,000 compensation which they found to be inadequate. They had used the compensation amount for building a house. The victim-survivors explained in detail the social and economic boycott that had been imposed on them when they tried to return to their villages. They were prevented from collecting water from the village wells; the VHP members have announced a fine of Rs. 1051 to be paid to the Durga Vahini Committee for anyone who speaks to them or helps them. At the time of the interview, they were living in a makeshift home outside the village, with no source of livelihood as no one was willing to give them work.

11. CODE NAME: FGD 4 - MDD, AD, BD, LD, KN, AN, RN, HD

PROFILE OF THE VICTIM-SURVIVOR: 6 men, 2 women. The members of this group did varied work such as labour, coolie, cultivation, retail and service. All are Christians

SUMMARY OF INTERVIEW: They spoke of how they were not allowed to celebrate their festivals openly even before the violence of August 2008. When the mob consisting of VHP members attacked their villages, they shouted “Kill the bastard Christian”. They fled to the forest to save their lives, on the suggestion of Hindu neighbours, and returned to the village only after 7 days. Meanwhile their houses had been burnt down by the mob and their lifetime savings and personal belongings stolen. They were initially helped by the church. All of them attempted to lodge complaints with the police for destruction of property soon after the incident, but the police refused to register FIRs, saying that there was no evidence against the perpetrators accused; instead, they only wrote the complaint in the diary. Although each of them has incurred a loss of not less than Rs. 70,000, no compensation has been paid to them so far. At the time of the interview, this group said “If you can really do something for us, then give us our rights and justice, and help remove the false allegation that we killed the Swamiji”.

12. CODE NAME: FGD 5 - BD, RD, BP, BD

PROFILE OF THE VICTIM-SURVIVOR: 4 women. All Christians, they worked on collection of non-timber forest produce, agricultural labourers and retailers

SUMMARY OF INTERVIEW: The victim-survivors were unable to comprehend the reasons for the attacks and to overcome the pain. A mob consisting of 400-600 persons attacked their village with weapons, shouting instructions to kill all Christians. They were terrified and ran to the forests with their families, leaving behind all their belongings. The women are unanimous in saying that they would probably have been raped if they had been caught by the mob. The mob looted and stole all their personal belongings and life savings. All the victim-survivors knew and would be able to identify the attackers, as the attackers were from their village. All of them stayed in the forest for 4 days, and reached the nearest relief camp with the help of the church. They registered a complaint with the police for destruction of property 3 months after the incident. Their cases have not reached the court. Most of them have received Rs. 15,000 as compensation, which is inadequate to compensate for the monetary losses incurred. The BDO had taken the four families to their village, but the Hindu families vehemently opposed their entry into the village, despite the BDO's attempts to reason out with those families. So the 4 families were taken away, and put under one roof with four bamboo poles. At the time of the interview, they were living in this makeshift home with no source of livelihood.

ANNEXURE II

MAP OF KANDHAMAL MARKING THE ROUTE TAKEN BY THE FUNERAL PROCESSION OF LAKSHMANANANDA SARASWATI



ANNEXURE III

ORISSA GOVERNMENT'S ORDER ON
RELIEF & REHABILITATION

(Order of the Revenue and Disaster Management Department, available at <http://orissa.gov.in/revenue/kandhamal/Kandhamal.htm>, accessed on 17 March 2010)

**Relief and Rehabilitation entitlements for Victims of
Communal / ethnic disturbance in Kandhamal District**

- In December 2007/ January 2008
 1. Ex-gratia to the next of kin of the deceased @ Rs. 1 lakh
 2. Relief camp with food, clothing, tents, lighting etc. arrangements for as many days as required by the victims
 3. Construction assistance for fully damaged dwelling houses @ Rs.50,000/- and for partially damaged dwelling houses @ Rs. 20,000/-
 4. Shops/shops-cum-residence @ Rs.15,000/- to Rs.40,000/- depending upon the damage assessment made by the District Administration.
 5. Assistance for bicycles damaged @ Rs. 2,000/-
 6. Construction assistance for damage of Public Institutions like school, clinic, hostel, hospital etc @ Rs.2 lakh.
- Same Package of entitlements is also applicable for the current phase of disturbances (August/September, 2008) for Sl. Nos. 2 to 6
 1. Ex-gratia to the next of kin of the deceased @ Rs. 2 lakh from the Chief Minister's Relief Fund .
 2. Appointment of Special Administrator.
 3. Deployment of OAS Officers.
 4. Damage to Religious Places.

ANNEXURE IV

REPORT ON THE VISIT OF THE VICE
CHAIRPERSON, NCM TO ORISSA
– 11TH TO 13TH SEPTEMBER, 2008

(reproduced from <http://ncm.nic.in/doc/Tour%20Report%20VC%20Orissa%20Sep.%2008.doc>)

1. Following the outbreak of communal violence in Orissa after the assassination of Swami Laxamananda Saraswati, the National Commission for Minorities (NCM) decided to depute a team to the State to study the situation at first hand. Accordingly, I visited Orissa from 11th to 13th September, 2008, covering in the course of my visit, the blocks of Tikabali, Udaigiri, Raikia etc. I also called on both the Hon'ble Chief Minister of Orissa and the Governor of Orissa to share my experiences with them. Finally, I had in depth discussions with a team of officials from the Government of Orissa headed by the Chief Secretary and including the Director General of Police, Home Secretary and others.
2. In the first nine months of the year 2008, this is the third team from the NCM that has visited Orissa following the outbreak of communal violence in that state. The situation on the ground as I saw it holds out little hope that this will be the last. Orissa has been traumatized by vicious attacks on the Christian community which, in some pockets, continue even today. They are subjected to repeated threats that they will never be safe if they do not convert immediately to Hinduism. Earlier in December, 2007 and January, 2008, the violence was confined to Kandhamal District. On this occasion there were incidents of violence in other districts like Gajapati, Ganjam and even Bargarh. I had the opportunity to interact with three Catholic priests who were badly injured in the riots and had been shifted to a Mumbai hospital for treatment. The testimony of one of them who worked in Bargah district is attached as an **annexure "A"** to this report.

As in the past, the brunt was borne by Kandhamal district in general and the blocks of Tikabali, Udaigiri, Raikia and K Nuagam in particular.

3. On the night of 23rd August, 2008, Swami Laxamananda Saraswati was brutally assassinated in his ashram at Jalespata. The very next afternoon, his body was taken in procession to Chakapad, the place where his first ashram was established. It is reported that at a place called K Nuagam, a large crowd obstructed the procession and insisted that it be diverted to places where his followers were waiting to pay homage to the slain leader. In contravention of the earlier agreement regarding the route the procession was to take, it was now diverted to cover the blocks of Udaigiri and Raigarh. This was an invitation to the mob to take over and soon mindless violence was unleashed. The Christian community fell innocent victims to wide spread acts of arson and destruction. The State Government estimates that 17 people were killed while 2,853 houses and 127 institutions were either destroyed or damaged. Unofficial estimates say that the actual figures are much higher. Since Government estimates are based on confirmed figures alone, the unofficial estimates are probably closer to the truth.
4. In the immediate aftermath of the violence, Christians across the district fled for their lives and took refuge in the forests nearby. Fear of attacks from Hindus in the area made it impossible for them to return to their homes. To cope with this the State Government has so far opened 14 relief camps in the 6 most affected areas of the district and approximately 20,000 people are estimated to be staying in these camps.
5. On my arrival in Phulbani, I visited camps in Tikamballi and its surrounding areas. I then proceeded to Udaygiri where a very large camp is located in a school in the area. The following day, after interacting with members of civil society at Phulbani I visited the huge camp at Raikia. Throughout the journey I was able to visit houses and places of worship that had been destroyed and observe the viciousness with which even everyday items like motorcycles, auto-rickshaws and tractors belonging to the Christian community had been reduced to ashes.
6. There can be no doubt that the entire Christian community has been completely traumatized. Retired officers from the armed forces, retired civil servants who had served the Orissa Government in senior positions

and others who met me had exactly the same story to tell: they had been attacked, their homes destroyed and their family members threatened with every sort of retaliation if they did not forthwith change their religion and embrace Hinduism.

7. As a start, the Government must bring back a sense of normalcy and ensure that Christians are able to pursue their everyday lives without living under constant fear and threat in relief camps. The Government must also strain every nerve to see that those who murdered Swami Laxmananda Sarswari must immediately be brought to book. If outside help in the conduct of investigation is necessary it should be taken but the crime must be solved and those guilty made to pay.
8. Along with this the steps taken by the State Government to maintain law and order following the crime must be put under the spotlight. It was obvious that public reaction to the murder of a prominent religious leader like the Swamiji would be extreme. Yet when options to be followed after the murder were being considered, there is little evidence that high level political and official leadership offered guidance and support to the local district administration. Given the near certainty that a procession of over 170 kms. with the body of the slain leader was bound to arouse huge passions it would have been proper for the senior leadership of the State to try to persuade the Swami's followers to avoid a long procession and bury him in the ashram where he was murdered. Even if his followers had been adamant that he had to be buried at the site of his first ashram in Chakpad, the alternative of airlifting the body should have been examined.
9. It is certainly possible that if the procession had been banned or even delayed there might have been serious trouble at Jalaspeta. This might possibly have spread to other places as well. But a reasoned analysis of the pros and cons does not appear to have taken place. Less than 18 hours after the murder, the funeral procession was taken out and the state still reels under the events that followed it. There is little evidence that anyone at the senior levels of either the political or the official establishment participated in or attempted to influence the decision making process in such a vital matter. This is unfortunate because mature advice could have introduced a measure of sanity into the situation and resulted in a balanced, considered response.

10. In every camp I visited the main feeling was one of despair and hopelessness at the cruel turn of events. Practically everyone complained of the threats they had received that their return to their homes was predicated on their acceptance of the Hindu religion. I was even shown a letter addressed by name to one woman stating that the only way she could return to her home and property again was if she returned to the village as Hindu. (A copy of the letter, written in Oriya, complete with the picture of a blood stained dagger is attached with this report – **Annexure “B”**).
11. Some groups did complain that large scale conversion was at the root of the disturbances and that the Swamiji’s murder was only the trigger that set off the seething unrest that was already brewing in Kandhamal. While exact figures of the number converted are hard to come by, there is no doubt that the Christian population has registered a larger increase than that of the Hindu population. But although the Freedom of Religion Act has been in existence for about 40 years, not a single case has been registered under this Act for forced conversion in Kandhamal. If indeed conversions by force or fraud were responsible for the feelings against Christians, it is absolutely amazing that the provisions of an Act designed precisely to address such conversions have never been invoked. It gives rise to the suspicion that conversion had really very little to do with the problem.
12. Indeed the matter goes deeper than this. I was informed that only 2 applications for permission to convert have been received in the last 10 years in the district but I could not ascertain what action had been taken on those applications. They are probably still pending. This only underlines the fact that not much was expected of the legislation and it was treated more as a political instrument than a means to bring transparency into the conversion process. In fact further probing revealed that rules under the Act were framed only in 1999, more than 30 years after the Act was passed. This underlines, as few other things could, how legislation is sometimes passed in haste not to address a particular problem but to mollify different groups. The State Government must examine this issue in some depth. Merely keeping an Act on the statute book without implementing it or using it for the purpose for which it was intended does not help.
13. Since the Act is now on the statute book, however, its provisions must be used against the pernicious threats to Christians to convert forcibly to

- Hinduism or lose all their property and their right to return to their homes. In camp after camp I was bombarded with complaints of such threats and the fear they inspired. The provisions of an Act that seeks to outlaw and punish conversions made by force and fraud must now be used to achieve that purpose, viz. to take action against those who seek to convert others to Hinduism by using threats and force.
14. During my last visit to Orissa in April 2008, I was told that 127 cases had been registered and 187 people had been arrested. On checking I found that only 14 of these had been charge sheeted, 5 cases closed and about 108 cases were still pending. On this occasion 203 cases have been registered against 223 people who have been arrested. It is impossible to over emphasize the importance of quick investigation and early filing of charge sheets in court. If the impression gains ground that those indulging in rioting, arson and murder will get away with little more than a slap on the wrist in the form of arrest and early release on bail and that investigation will invariably be tardy, it will be an invitation to people to take the law into their own hands. For this purpose the State must depute special investigators to Kandhamal district for as long as it takes them to complete the investigation into all the cases registered in the district. It will be quite impossible for the local administration to cope with this huge task without any outside assistance and if it is not done speedily, it will, as I have pointed out above, be seen as the weakness and ineptitude of the administration.
 15. One particularly heart rending experience in relief camps was the problem faced by those who lost their loved ones to violence but were unable to recover their bodies because these had been burnt or had been destroyed by wild animals. Without the recovery of the body and a post mortem being performed on it, compensation promised to the next of kin of those killed in the riots is not given. The trauma faced by such persons can well be imagined. Not only have they lost their loved one (usually the breadwinner) but insult is added to injury when relief promised to them is denied for reasons beyond their control. While Government procedures do call for the recovery of the body and for the performance of a post mortem, a more flexible approach is needed in times like this. Perhaps Government can rely on the testimony of eye witnesses to the murder and even take an indemnity bond from anyone receiving compensation in respect of a

person whose body has not been found. But human suffering on such a massive scale should not be compounded by insistence on bureaucratic procedures. Since compensation for the next of kin of those killed in such riots is also offered by the Central Government, both the sums received should be pooled and invested in some security that will give a good return to the individual.

16. All the camps that I saw had medical teams in position and I was informed that they were manned by personnel drawn from different parts of the State. I was also informed that some NGOs had offered their services to conduct medical operations. Such offers should be freely accepted even if they come from the so called Christian NGOs. Since inmates of the camps are all from the same religion there is little prospect of controversy arising out of a discriminatory approach to medical services. In the same way there should be no objection to allowing Christian groups to distribute relief in the camps. Since only Christians are housed in the camp there can be no allegations of a sectarian approach to the distribution of relief.
17. Once peace and normalcy are restored, the emphasis must go to rehabilitation. The State's record on this front last time was satisfactory but if the same level of efficiency is to be maintained some more manpower would be needed. There is a strong case for deputing extra officers to work in Kandhamal district for rehabilitation on the same lines as extra officers from the police department assist in the work of investigation. The details should be worked out by the State Government and the district authorities in Kandhamal.
18. In my last report I had covered the need for confidence building measures to build bridges between estranged communities. This is a vital tool in the quest to maintain lasting and durable peace between neighbours. Mohalla Committees have worked wonders in bringing people together in places like Mumbai. But the initiative must be taken when there is peace and people are receptive to such ideas. It is doubtful if the State Government acted on this recommendation in the past. I believe that it is vitally important for them to do so when things settle down in Kandhamal.
19. Although Orissa has a sizeable minority population it is surprising that it does not have a Minority Commission. Such a Commission will not

guarantee that no riot will ever take place but it does provide a useful feedback to Government and, more importantly, a place where people who feel marginalized can let off steam. This recommendation also has been made in the past but has yet to be acted upon.

Conclusions and Recommendations

The agony of Christians in Orissa continues unabated even today in selected pockets of Kandhamal. Full normalcy is yet to be restored and reports of arson, attacks on houses and places of worship and harassment of Christians still come in. Indeed reports that have come in after my return from Orissa show that far from improving things have actually got worse and trouble is spreading to districts which were so far quite peaceful. The communal divide appears to be as strong as before and there has been little success in reining in the extreme fringe that has encouraged and fostered the spread of intolerance.

Christians are still forced to live in an atmosphere of extreme insecurity under threat that if they do not convert to Hinduism their lives would not be safe and their properties would be forfeited. The community has suffered immense damage to their property, their places of worship and above all to their psyche in this macabre drama that has played out twice in the space of less than a year. This reflects very poorly on a secular multi ethnic country like India with a proud tradition of not merely tolerating diverse cultures and beliefs within the body politic but actively encouraging their growth and development. Unless steps are taken immediately to restore normalcy and instill a measure of confidence and security among Christians, we will not only irreparably damage the pluralistic society of which Orissa is so rightly proud but we leave the door open for lumpen, extremist elements to occupy space that should rightly be occupied by the state and civil society groups. The implications of this for a sensitively located state like Orissa are frightening. Steps must be taken immediately to identify those responsible for promoting hatred and the poison of communal unrest. They must not be allowed to roam freely around the area to spread their pernicious doctrines as they now do. If the state is unable to do this the Central Government must consider their own response.

Recommendations

1. Strong steps to restore full normalcy must be taken immediately and a sense of confidence should be built up among Christians. This should be done in a variety of ways but most especially by seeing that firm action is taken against the instigators of violence who spread communal hatred. If the state is unable to do this the Centre should consider an appropriate response in accordance with the provisions of the Constitution
2. The political leadership should consider holding a peace march in the most affected areas along with religious leaders of both sides. The top cadres of the state leadership should also re-examine their response to incidents like the murder of Swami Laxamananda Saraswati and ensure that they play a more effective role in influencing important decisions..
3. The provisions of the Orissa Freedom of Religion Act must be invoked against those using force to convert Christians to Hinduism.
4. Investigations into cases filed must be completed under a time bound programme and charge sheets filed in the court. If the number of cases is sufficiently large, establishment of special court(s) could be considered.
5. Extra manpower at a sufficiently senior level must be deputed to Kandhamal to assist in investigation of cases and in rehabilitation measures. It will be impossible for the district administration to cope with this task by relying only on their limited resources.
6. Christian medical relief teams should be allowed to work in the affected areas. Similarly, Christian groups should be allowed to distribute relief materials in the camps, if necessary, in partnership with the Red Cross.
7. In special cases where the dead body of a victim of the riots cannot be traced for good and sufficient reasons, ex gratia compensation must be given to the heirs of the victim after getting an indemnity bond from them if necessary.
8. Compensation from the Centre and the State must be pooled together and invested in a good security that can bring in a rate of return of about 10 percent.
9. Once peace is restored, confidence building measures between the two communities must be put in place. These can include street plays, poetry competitions dramas and mohalla committees.
10. Orissa must constitute a Minority Commission as soon as possible.
11. Compensation must be given by the Government for reconstructing all religious places destroyed or damaged both in the recent riots and those which took place earlier. Since the rationale for this recommendation has been covered in detail in my last report of April 2008 it will not be repeated here. In fact the last three recommendations have been made in previous reports but because they have not yet been implemented they are reiterated here.

ANNEXURE V

EXTRACTS FROM JUDGMENT OF
DELHI HIGH COURT IN

BHAJAN KAUR
VS.
DELHI ADMINISTRATION
THROUGH THE LT. GOVERNOR

(1996 III AD (Delhi)333: 3 (1996) CLT 337: 1996 (38)
DRJ 203: ILR 1996 Delhi 754)

Note: This case deals with the need to enhance ex gratia compensation paid to the families of the deceased who died in the anti-Sikh violence of 1984.

Communal violence and riots keep on manifesting with alarming frequency. It is the State's obligation to create conditions where rights of individuals or group of persons under Article 21 are not and cannot be violated. It is for the State and its functionaries to evolve methods and strategies to ensure protection of life and liberty of a person or persons which is guaranteed by Article 21. It is obvious that there will be no use of the rights conferred by Article 21 if the State does not exact compliance of the same from its officials and functionaries and private persons. Victims of violence may strike for different reasons but each time it results in negation of Article 21. Life and liberty is being threatened at the hands of anti-national and anti-social elements, caste champions, criminals and rapists, etc. In some parts of the country terrorists and religious zealots are destroying life in the name of religion. The way a person wants to worship his God should not be a matter for hate or contempt of an individual, jeopardizing and threatening his liberty. *(para 6)*

It is the duty and responsibility of the State to secure and safeguard life and liberty of an individual from mob violence. It is not open to the State to say

that the violations are being committed by private persons for which it cannot be held accountable. Riots more often than not take place due to weakness, laxity and indifference of the administration in enforcing law and order. If the authorities act in time and act effectively and efficiently, riots can surely be prevented. Message must go to the mischief mongers that the administration means business and their nefarious designs would be thwarted with an iron hand. *(para 7)*

Personal liberty is fundamental to the functioning of our democracy. The lofty purpose of Article 21 would be defeated if the State does not take adequate measures for securing compliance with the same. The State has to control and curb the malefide (Sec Crimes in India-Ministry of Home Affairs, 1993) page 13 - col. 13 and page 19.) propensities of those who threaten life and liberty of others. It must shape the society so that the life and liberty of an individual is safe and is given supreme importance and value. It is for the State to ensure that persons live and behave like and are treated as human beings. Article 21 is a great landmark of human liberty and it should serve its purpose of ensuring the human dignity, human survival and human development. The State must strive to give a new vision and peaceful future to its people where they can cooperate, coordinate and co-exist with each other so that full protection of Article 21 is ensured and realized. Article 21 is not a mere platitude or dead letter lying dormant, decomposed, dissipated and inert. It is rather a pulsating reality throbbing with life and spirit of liberty, and it must be made to reach out to every individual within the country. It is the duty and obligation of the State to enforce law and order and to maintain public order so that the fruits of democracy can be enjoyed by all sections of the society irrespective of their religion, caste, creed, colour, region and language. Article 21 is an instrument and a device to attain the goal of freedom of an individual from deprivation and oppression and its violation cannot and must not be tolerated or condoned. Preamble to the Constitution clearly indicates that justice, liberty and equality must be secured to all citizens. Besides, it mandates the State to promote fraternity among the people, ensuring the dignity of the individual and the unity and integrity of the nation. Article 38 of the Constitution also requires the State to promote welfare of the people by securing and protecting, as effectively as it may, a social order in which justice - social, economic and political, shall inform all institutions of the national life. These are the goals set by the Constitution, and Article 21 and other fundamental rights are the means by

which those goals are to be attained. Therefore, it becomes the responsibility and avowed duty of the State to adopt means and methods in order to realize the cherished aims. *(para 8)*

Article 21 is the Nation's commitment to bring every individual or group of persons within its protective fold. This Nation belongs to members of all the communities. They are equal members of the Indian society. Equality before law and equal protection of laws is ensured to them by Article 14 of the Constitution to them. None is to be favoured or discredited. The conduct of any person or group of persons has to be controlled by the State for the lofty purpose enshrined in Article 21 of the Constitution. It is the duty of the State to create a climate where the cleavage between members of the society belonging to different faiths, caste and creed are eradicated. The State must act in time so that the precious lives of the people are not destroyed or threatened. Otherwise, Article 21 will remain a paper guarantee. Time is long overdue for adopting measures that have more than a hortatory effect in enforcing Article 21 of the Constitution. The State cannot adopt a "do nothing attitude". Like disease prevention, the State must take every precaution, measure and initiative to prevent *terrorem populi* of the magnitude represented by 1984 riots and in the event of an outbreak of riots it must act swiftly to curb the same and not allow precious time to slip by, as any inaction or passivity on its part can result in loss of precious life and liberty of individuals amounting to violation and negation of Article 21 of the Constitution. The State has to enforce minimum standards of civilized behavior of its citizens so that the life, liberty, dignity and worth of an individual is protected and preserved and is not jeopardized or endangered. If it is not able to do all that then it cannot escape the liability to pay adequate compensation to the family of the person killed during riots as his or her life has been extinguished in clear violation of Article 21 of the Constitution which mandates that life cannot be taken away except according to the procedure established by law. *(para 10)*

Variety of problems like economic inequities, rampant indiscipline, divide on religious basis, degradation of values and morality are afflicting the system. Do not such ailments actually promote, encourage and instigate violation of Article 21? I think they do. It is for the State to consider what corrective measures must be adopted to achieve the full realization of the benefit of Article 21 to the people of this country. *(para 11)*

ANNEXURE VI

EXTRACTS FROM JUDGMENT OF THE
SUPREME COURT IN
NATIONAL HUMAN RIGHTS COMMISSION
VS.
STATE OF ARUNACHAL PRADESH

1996 SCC (1) 742

Note: This case relates to a public interest litigation, filed by way of a writ petition in the Supreme Court, by the National Human Rights Commission, seeking to enforce fundamental rights of about 65,000 Chakma / Hajong tribals settled mainly in the state of Arunachal Pradesh.

"We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty-bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law." *(para 20)*

ANNEXURE VII

EXTRACTS FROM REPORT OF THE U.N.
SPECIAL RAPPORTEUR ON FREEDOM OF
RELIGION OR BELIEF, MS. ASMA JAHANGIR,
ON HER MISSION TO INDIA,
DATED 26 JANUARY 2009

A/HRC/10/8/Add.3

Widespread violence in the Kandhamal district of Orissa in December 2007 primarily targeted Christians in Dalit and tribal communities. The Special Rapporteur received credible reports that members of the Christian community alerted the authorities and politicians in advance of the planned attacks of 24-27 December 2007. The police, too, had warned Christian leaders about anticipated violence. In its report on the events of December 2007, the National Commission for Minorities confirmed that “destruction on such a large scale in places which are difficult to access could not have taken place without advance preparation and planning. (*para 18*)

The situation in Orissa has reportedly deteriorated again after 23 August 2008, when Swami Lakhmananda Saraswati, a local leader of the Vishwa Hindu Parishad (VHP), and four other VHP members were killed. Although a Maoist leader had claimed responsibility and the Christian leadership had condemned the killings, organized mobs subsequently attacked Christians in Dalit and tribal communities. By the end of September 2008, more than 40 people had allegedly been killed in Orissa, over 4,000 Christian homes destroyed and around 50 churches demolished. Around 20,000 people were living in relief camps and more than 40,000 people hiding in forests and others places. The Special Rapporteur was profoundly alarmed by the humanitarian situation in relief camps where access to food, safe drinking water, medical care, proper

sanitary arrangements and adequate clothing were reportedly lacking. (*para 19*)

The Special Rapporteur fully agrees with the analysis by the National Commission for Minorities that communal violence is not merely a “law and order” problem but has a serious socio-economic basis and ramifications. Sectarian riots are most likely to occur when the following elements are present: (i) severe long-standing antagonism on religious lines in particular villages and urban localities; (ii) an emotional response of members of religious communities to a precipitating event; (iii) a feeling in the minds of rioters and the larger religious group to which they belong that sectarian violence is justifiable; and (iv) the assessment by the rioters that the reaction from the police to sectarian violence will be either absent or partisan or ineffective. (*para 31*)

The Special Rapporteur is deeply concerned that laws and bills on religious conversion in several Indian states are being used to vilify Christians and Muslims. The so-called “Freedom of Religion Acts” have been adopted and implemented in the states of Orissa, Madhya Pradesh, Chhattisgarh, Gujarat and Himachal Pradesh. Similar laws have been passed but are yet to be implemented in the states of Arunachal Pradesh and Rajasthan. (*para 47*)

While these laws appear to protect religious adherents only from attempts to induce conversion by improper means, they have been criticized on the ground that the failure to clearly define what makes a conversion improper bestows on the authorities unfettered discretion to accept or reject the legitimacy of religious conversions. All of these laws include in the definition of *use of force* any “threat of divine displeasure or social excommunication”. Moreover, the terms *inducement* or *allurement* are defined to include the offer of any gift or gratification, either in cash or in kind, as well as the grant of any benefit, either pecuniary or otherwise. These broad and vague terms might be interpreted to cover the expression of many religious beliefs. In addition, some provisions are discriminatory in giving preferential treatment to re-conversions, for example by stipulating that returning to the forefathers’ original religion or to one’s own original religion shall not be construed as conversion. (*para 48*)

Furthermore, the requirement of advance notice or prior permission seems to be unduly onerous for the individual who intends to convert. Any state inquiry into the substantive beliefs and motivation for conversion is highly problematic

since it may lead to interference with the internal and private realm of the individual's belief (*forum internum*). This approach is aggravated if such a Freedom of Religion Act awards specific protection to the state government and its officers against prosecution or legal proceedings with regard to "anything done in good faith or intended to be done under the Act or any rule made thereunder". Moreover, it seems unclear who may bring an action for, or lodge an appeal against, decisions with regard to the permissibility of a religious conversion. The Special Rapporteur would like to reiterate that any concern raised with regard to certain conversions or how they might be accomplished should primarily be raised by the alleged victim. *(para 49)*

Even in the Indian states which have adopted laws on religious conversion there seem to be only few – if any – convictions for conversion by the use of force, inducement or fraudulent means. In Orissa, for example, not a single infringement over the past ten years of the Orissa Freedom of Religion Act 1967 could be cited or adduced by district officials and senior officials in the State Secretariat. However, such laws or even draft legislation have had adverse consequences for religious minorities and have reportedly fostered mob violence against them. There is a risk that "Freedom of Religion Acts" may become a tool in the hands of those who wish to use religion for vested interests or to persecute individuals on the ground of their religion or belief. While persecution, violence or discrimination based on religion or belief need to be sanctioned by law, the Special Rapporteur would like to caution against excessive or vague legislation on religious issues which could create tensions and problems instead of solving them. *(para 50)*

The National Commission for Minorities also has expressed its profound concern over the attempt in such state laws on religious conversion to interfere with the basic right to freedom of religion or belief. Provisions relating to notice and selective enquiry will allow state functionaries to interfere in matters of personal life and religious beliefs, thus impinging on freedom of conscience and free profession, practice and propagation of religion guaranteed by Article 25 of the Constitution. The Special Rapporteur would like to add that, according to universally accepted international standards, the right to freedom of religion or belief includes the right to adopt a religion of one's choice, the right to change religion and the right to maintain a religion. She highlights the fact that these aspects of the right to freedom of religion or belief have an absolute character

and are not subject to any limitation whatsoever. Mr. Amor already stressed in an annual report to the Commission on Human Rights (E/CN.4/1997/91, para. 99) that "it is not the business of the State or any other group or community to act as the guardian of people's consciences and encourage, impose or censure any religious belief or conviction". *(para 51)*

The Special Rapporteur would also like to refer to her report to the 60th session of the General Assembly (A/60/399, paras. 40-68), in which she discussed the question of conversion in greater detail. She notes that international human rights law clearly prohibits coercion that would impair the right to have or adopt a religion or belief, including the use or threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Similarly, a general prohibition of conversion by a State necessarily enters into conflict with applicable international standards. *(para 52)*

Organised groups claiming roots in religious ideologies have unleashed an all-pervasive fear of mob violence in many parts of the country. Law enforcement machinery is often reluctant to take any action against individuals or groups that perpetrate violence in the name of religion or belief. This institutionalised impunity for those who exploit religion and impose their religious intolerance on others has made peaceful citizens, particularly the minorities, vulnerable and fearful. *(para 63)*

While inquiries into large-scale communal violence should not be done in indecent haste, they should be accorded the highest priority and urgency by the investigation teams, the judiciary and any commission appointed to study the situation. Furthermore, the State could envisage setting up of truth and reconciliation commissions to create a historical account, contribute to healing and encourage reconciliation in long-standing conflicts, such as the one in Jammu and Kashmir. *(para 68)*

Concerning vote-bank politics and electoral focus on inter-communal conflicts, the Special Rapporteur would like to reiterate her predecessor's suggestion to debar political parties from the post-election use of religion for political ends. In addition, the Representation of the Peoples Act 1951 should be scrupulously implemented, including the provision on disqualification for membership of parliament and state legislatures of persons who promote feelings of enmity or

hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language. (*para 69*)

The laws and bills on religious conversion in several Indian states should be reconsidered since they raise serious human rights concerns, in particular due to the use of discriminatory provisions and vague or overbroad terminology. A public debate on the necessity of such laws, more information on their implementation and safeguards to avoid abuse of these laws seem vital to prevent further vilification of certain religious communities. The Special Rapporteur is concerned that such legislation might be perceived as giving some moral standing to those who wish to stir up mob violence. She would like to emphasize that the right to adopt a religion of one's choice, to change or to maintain a religion is a core element of the right to freedom of religion or belief and may not be limited in any way by the State. She also reiterates that peaceful missionary activities and other forms of propagation of religion are part of the right to manifest one's religion or belief, which may be limited only under restrictive conditions. (*para 70*)

GLOSSARY

A

Ad hoc

Connotes a makeshift solution, inadequate / improper planning, or act of an arbitrary nature

Adivasi

Literally means “original dwellers / inhabitants” and refers to indigenous peoples. Legally, adivasis are counted among the groups collectively named Scheduled Tribes.

Anganwadi

Literally means “court yards”, anganwadi workers are employed by the Department of Social Welfare to distribute nutrition supplements to pregnant women and children, and to provide non-formal education for children upto 6 years of age, under the Integrated Child Development Scheme (ICDS).

Arya Samaj

A Hindu reform movement founded by Swami Dayanand Saraswati inaugurated in the 1870's, and popular with the emergent commercial castes in north India, particularly in Punjab. Dayanand insisted that caste-status depended upon meritorious conduct rather than birth; denounced superstition and idol-worship, and that a proper knowledge of ancient texts was crucial to acquiring merit. The Aryas placed great emphasis upon education, and began an influential Anglo-Vedic pedagogical movement combining western science with Vedic shastras as interpreted by Swami Dayanand. They also believed that the defects in Hindu religious practice were a cause of national weakness, and that doing away with these was the only way to prevent the conversion of the lower castes to Islam and Christianity. In the 1920's they began the activity of re-conversion, known as 'shuddhi' or purification, designed to bring Christian and Muslims back into the Hindu fold.

Ashram

A house of a Hindu spiritual guide

B

Babri Masjid

Historical mosque in North India that was demolished by the Hindu right wing militants on 6 December 1992

Bajrang Bali

Name of a Hindu god, symbolic of courage, strength and devotion

Bajrang Dal

A militant youth organization of the Vishva Hindu Parishad, itself a front organisation of the RSS; it takes its name from the deity Hanuman

Bandh

Literally means 'closed' in Hindi; a form of protest often organized by political parties, where business activities are stopped, and public and private transport cease to operate.

Bharatmata

Mother India

Bona fide

In good faith

Brahmin

The upper most caste in the Hindu caste hierarchy

C

Coolie

Porter / carrier

D

Dal / Daal

Preparation of pulses; is an essential dish for most Indians

Dalit

The term means “oppressed people” and refers to persons belonging to a category at the lower end of the caste system, who are considered “untouchables”. They are discriminated against and treated in an inhumane manner.

District Collector

Administrative head of the district

Division Bench

A panel of two judges of the High Court or the Supreme Court, which hears and adjudicates on a case

Durga Vahini

Women's organization of the RSS

E**Ex gratia**

Literally means 'out of grace or kindness'; in law, an ex gratia payment is one made without recognition of any liability / obligation on the part of the person / institution making the payment

G**Ghar Vaapasi**

Literally means "return home"; it refers to rituals conducted by Hindutva forces in relation to converting or re-converting a person back into the Hindu fold

Gobar Pani

The urine of the cow, considered sacred in the Hindu religion

H**Hari Masjid**

A mosque in Mumbai where Muslims who were offering prayers were fired at and killed by police officials during the communal violence in 1992-93

Hashimpura

A place in Meerut, U.P., from where over 40 Muslim men were abducted and allegedly killed by members of Provincial Armed Constabulary – a type of police

Hindu Rajya / Hindu rashtra

Hindu nation

Hindutva

Ideology and political formation of the Hindu Right

I**In camera**

Closed proceedings in court where spectators are excluded or their entry is restricted

Inquest

A legal investigation into the cause and manner of death, carried out in contexts including murder, death in custody and death in mysterious circumstances; it is conducted by the magistrate in specified situations, and by the police in other situations as prescribed in Section 174 of the Criminal Procedure Code

J**Jai Bajrang Bali**

Victory to Bajrang Bali – used both as a greeting and in slogans by the Hindu Right Wing; see meaning of Bajrang Bali above

Jai Hanuman

Victory to Hanuman (a Hindu god) – used as a greeting but also used in slogans by the Hindu Right Wing

Jai Sriram

Victory to Ram – used as greeting but converted to a slogan by the Hindu Right Wing

Jus Cogens

A peremptory norm – a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is ever permitted

K**Kalashyatra**

Journey carrying the ashes of the body of a deceased person in an earthen pot

Kandhas / Kandhos

One of the oldest tribal communities of Orissa, mostly belong to Scheduled Tribes

L**Lok Sabha**

House of the People; Lower House in the Indian Parliament

M**Mala fide**

In bad faith

Mataji

Mother

Mohapatra Commission

A Commission of Inquiry established by the Orissa state government, headed by Justice Sarat Chandra Mohapatra to inquire into the violence that began in August 2008

O**Odisha Sadbhavana Manch**

An umbrella of civil society organizations that formed a fact-finding team which visited Kandhamal in 12-14 September 2008

P**Panas / Panos**

Community consisting mainly of dalits, many of whom are Christians

Panchayat

Village level elected body

Panchnama

Also called 'spot panchnama', it is a document that lists the evidence and findings that a police official first makes at the scene of the crime. It is signed by the Investigating Officer and two impartial public witnesses.

Panigrahi Commission

A Commission of Inquiry established by the Orissa state government, headed by Justice Basudev Panigrahi to inquire into the violence of December 2007

Post mortem

Also called autopsy, refers to a medical examination of the body of a deceased person, to determine the cause of death

Prima facie

Literally means 'on its first appearance', or 'at first sight'; prima facie case in criminal law refers to one where the facts of the case lead to an inference that the alleged offence has been committed. Prima facie evidence refers to evidence that is sufficient to raise a presumption of fact, unless rebutted.

R**Rajya Sabha**

House of Representatives; Upper House in the Indian Parliament

Ram / Rama

Name of a Hindu god

S**Sadhu**

A mystic, ascetic or wandering monk in Hinduism

Sampradhayik Hinsa Prapidita Sangathana

Association of Victims of Communal Violence in Kandhamal

Sangh Parivar

Refers to the collective Hindu Right Wing organizations – including RSS, VHP, Bajrang Dal and BJP

Shah & Nanavati Commission

A Commission of Inquiry established by the Gujarat state government to inquire into the Gujarat carnage 2002

Shraddhanjali

Literally means 'Offering of faith' – is a Hindu ritual consisting of remembrance prayers offered to dead persons

Shuddhikaran

Literally means "purification" – consists of rituals for conversion or re-conversion to Hinduism

Shuddi movement

A movement for converting and re-converting persons into the Hindu fold

Shudras

The lower most caste in the Hindu caste hierarchy

Srikrishna Commission

A Commission of Inquiry established by the Maharashtra state government, headed by Justice B.N.Srikrishna, to inquire into the communal violence in Mumbai in 1992-93

Status quo

Literally means "the state in which"; connotes the current or existing situation

Status quo ante

Literally means "the way things were before"; in contexts of communal violence, it refers to the situation that existed prior to the violence

Sundhis

A prominent caste of Hindus in states including Orissa

Swami

Religious teacher in Hinduism

T**Tabliq & tanzim movements**

Movements for conversion to Islam

Tahsildar

A gazetted officer of the Government of India, in charge of governance of a district in a state

Tellicherry

A city on the Malabar coast of Kerala, site of Hindu-Muslim violence in 1971

V**Vanvasi Kalyan ashram**

A welfare trust of the Hindu Right Wing for mobilizing tribals

W**Wadhwa Commission**

A Commission of Inquiry established by the Union Government, headed by Justice D.P.Wadhwa, of the Supreme Court, to inquire into the killing of Graham Staines and his two sons by a mob in Manoharpur village in Orissa

MARG is a pioneer in the field of legal empowerment through legal literacy training workshops and development of legal training tools. Since its establishment in 1985, MARG has actively worked towards creating legal awareness, conduct socio-legal research, undertake advocacy initiatives and provide legal aid to disadvantaged and marginalized persons and groups. MARG works both at the mass level and engages with policy makers, using its insight and analysis to inform both. MARG's aim is to empower marginalized communities to enable them to access and secure rights.

MARG has produced innovative legal training materials and advocacy tools. The legal literacy training tools include:

- *Hamaare Kanoon* – a series of 13 legal manuals on rights of working women
- *Hamaare Maulik Adhikar* – a handbook
- *Bol Basanto* – a 10 episode legal literacy film on women's rights
- *Addressing Domestic Violence Through the Law. A Guide To - The Protection of Women From Domestic Violence Act, 2005* (English and Hindi)
- *Posters* on laws relating to violence against women and rights of citizens



205-206, 2nd Floor, Shahpur Jat, New Delhi -110049.
Tel: 91-11-26497483/26496925 Fax: 91-11-26495371
E-mail: marg@ngo-marg.org Website: www.ngo-marg.org



The tragedy of Kandhamal is that the attack on the Christian community was familiar and the subsequent failure of the legal system to accord justice to the victim-survivors predictable.

This book critically examines the patterns of impunity as they unfold in Kandhamal. There is today a vibrant debate seeking legal reform to ensure accountability for mass crimes by extending culpability to those who sponsor and profit from the carnage. Rooted in the firm belief that without justice there can be no peace, this book seeks to contribute to the effort to forge new legal tools to alter patterns of continuing injustice and rampant impunity.