

# **ACCOUNTABILITY FOR MASS CRIMES AGAINST WOMEN: THE RELEVANCE OF INTERNATIONAL CRIMINAL COURT**

**13 March 2006, New Delhi**

## **REPORT**

The event was organized by ICC-India campaign and Partners for Law in Development, in association with People's Watch – Tamil Nadu. The objectives of the event were to understand the Indian context related to mass crimes against women, examine standards set by the statute creating the International Criminal Court in relation to the same, and an analysis of the provisions of Communal Violence (Prevention, Control & Rehabilitation of Victims) Bill 2005 against this backdrop.

### **Session 1: Mass Crimes Against Women: An Analysis of the Indian Context**

The first session focused on an examination of the Indian context related to justice for mass crimes against women. In this session, Urvashi Bhutalia, a renowned feminist who has researched extensively on violence against women during the Partition, spoke about the gender-based violence against women that was mass in scale but individual in character, and about the history of family violence where families killed women in their own families in the name of family honour. She said that justice for the crimes against women became impossible because many perpetrators were across the border, and in the name of nationalism, justice for women came to be accorded a low priority. Within the framework of the new nation-state, women were not seen as citizens in their own right; the state took the responsibility of “rescuing” abducted women, thereby acting on behalf of the women, without any consideration to the women’s wishes. Mass abortions were conducted under coercive circumstances, on women who were pregnant through men of the “other” community. Despite abortions being illegal at that time in India, such acts were justified on the basis of non-acceptance of children of mixed unions by the society, she said.

The presentation was followed by Uma Chakravarti, a feminist historian teaching at Miranda House, Delhi University. She talked of mass crimes against women committed in the context of the anti-Sikh riots in Delhi in 1984. She outlined the struggle for justice that has extended beyond two decades, and the political ploys that resulted in the setting up of numerous commissions of inquiry, with little justice being meted out. She emphasized that the first commission of inquiry (Justice Ranganath Mishra Commission) was set up only when it was politically expedient to do so. Subsequent commissions and committees failed to prove justice for the victims. She highlighted the fact that sixteen years later, under the BJP rule, Nanavati Commission was appointed, and victims continued to file over 2000 affidavits at this commission, including five affidavits that talk of sexual violence against women. She concluded her presentation by referring to the recent exhortation of Prime Minister Manmohan Singh that we should forget the violations and move on. She emphasized that forgetting the violations implied granting impunity to state officials who perpetrated the violence and that cannot be allowed to happen.

Farah Naqvi, an independent activist who worked with women victims of the Gujarat carnage 2002, began her presentation by contrasting violence against women during Partition and that in the context of the Gujarat carnage. While in the former, the violence was often hushed up and not

made public, in the latter, the objective of gender-based violence was to make them public events in order to send out messages to the minority community about its subservient status. She said that gender-based violence formed the backbone of the Gujarat carnage and was not incidental to it. The Gujarat carnage was frightening for the kind of brutality with which women's bodies were treated, she said. Farah outlined the struggle for justice for victims of gender-based violence. She pointed out that lodging of omnibus FIRs by the police was the first obstacle for pinning down accountability of individual perpetrators. She related the inadequacies in the Indian Penal Code with relation to sexual and gender-based violence, which often made it difficult to apply legal provisions to the violence inflicted upon women's bodies. An absence of law often led to invisibility of the violations, she said. She emphasized that gender-based violence committed within the context of mass crimes required evidentiary requirements and procedures of a different nature, and that their absence had contributed to denial of justice for women. Farah also narrated the process by which silencing of women's experiences had taken place, complimented by a low level of confidence among women in the justice delivery system.

Discussion on the presentations made in the first session ensued around the issue of forced abortions and the ICC, the importance of ensuring that the state documents every unnatural death so that in situations of violence against women by their family members, such deaths would at least get recorded, and the need for changing the basic structure of criminal law and making a disjuncture between the victims and the accused so that the victims are not compelled to stay on with the crime for several years thereafter.

## **Session 2: International Criminal Court & Mass Crimes Against Women**

In the second session, Saumya Uma, Coordinator, ICC-India, outlined the struggle with impunity for mass crimes against women at the international level, the Nuremberg and Japanese military trials, and the phenomenon of "comfort women" that never came to be prosecuted for despite knowledge of the same by the victorious nations. She also highlighted the initial reluctance and difficulties of the ICTY (Yugoslavian tribunal) and ICTR (Rwandan tribunal) in prosecuting for gender-based crimes, and the innovative strategies they had to use to prosecute for gender-based crimes that fell outside the parameters of "rape" as a crime against humanity. The landmark judgment in Akayesu's case, delivered by ICTR, which recognized rape as a means of committing genocide, was highlighted. Saumya said that the advocacy of women's rights activists around the world as well as the jurisprudence of ICTY & ICTR, contributed to the gender-related provisions in the ICC statute in a significant manner. She enumerated the gender crimes recognized in the ICC statute, namely rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization and other grave forms of sexual violence, as well as the crime of persecution on the basis of gender and rape as a tool of genocide. She pointed out the expanded definition of rape under the ICC statute, and how this broader definition could encompass within it the range of gender-based violence in the Gujarat carnage.

In her presentation, Dr. Usha Ramanathan, a law researcher and advisor to ICC-India, stated at the outset that the law and procedures intended for crimes against individuals could not be used for mass crimes, as the contexts in which the crimes were committed varied. For gender-based crimes, the existing criminal law provisions are inadequate even for crimes against individuals, and hence this will definitely be inadequate to deal with mass crimes against women. The ICC was an important framework to examine because it dealt only with mass crimes. However, a drawback with the ICC is that it cannot deviate too much from existing international law and standards. Usha outlined principles enshrined in the ICC statute including individual criminal responsibility, doctrine of command responsibility and superior orders not being allowed as a defence to commission of crimes. She said that presumption of innocence and proof beyond

reasonable doubt formed the basis of criminal law, and the onus was on the state / prosecution to prove the guilt beyond reasonable doubt. The challenge before us is that in situations of mass crimes, there was a need to reformulate such standards without jeopardizing the rights of the accused. Usha also explained the concept of ‘culpable inaction’ where the state is made responsible if it was aware of a possibility or probability of a riot and of risk to persons and property of a certain community, and despite such knowledge, it does not take preventive measures or takes inadequate action. She explained the linkages between the concepts of culpable inaction and command responsibility, and illustrated Indian jurisprudence that indicates the beginning of application of ‘culpable inaction’. Usha observed that the extent of documentary and medical evidence required to sustain an allegation of crime in the context of mass crimes would have to be different and probably lower than under the ordinary context. She also highlighted the witness protection measures and provisions related to victims’ rights, envisaged in the ICC statute.

Discussion that followed focused on the gender neutrality of the definition of rape in the ICC statute and evidence of sexual violence against men in the Gujarat carnage. Since the second and third sessions were inter-linked, by consensus, it was decided to have a joint discussion on the two sessions at the end of Session 3.

### **Session 3: The Communal Violence Bill & Mass Crimes Against Women**

Saumya Uma outlined the chronology of events related to the Communal Violence Bill, highlighting civil society initiatives on drafting versions of the bill, as well as the government’s initiatives in this regard. She also explained salient features of the latest Bill mooted by the government, including purpose of the Bill, definition of communal violence, provisions on sexual violence, declaration of certain areas to be communally disturbed, preventive measures, investigation, punishment, special courts and speedy trials, witness protection, relief and rehabilitation, funds for relief and rehabilitation and special powers of the central government.

Farah Naqvi summarized critiques to the provisions of the Bill, including her own analysis as well as the critiques written by others. These include an absence of any focus on state accountability, the non-mandatory nature of power of state government to declare a place as “communally disturbed”, the basis for such a declaration being very restrictive – limited to death and destruction of property and not taking into account a whole range of discriminatory acts that are meted out including social and economic boycott, the failure to create new offences under the Bill, the repercussions of declaring an area to be a disturbed area on the minorities, the requirement of prior sanction for prosecution of public officials, the presumption that the public officials acted in good faith in the light of their proven complicity in communal violence, the low punishment (maximum of one year) for public officials, and the need for relief and rehabilitation measures that are not arbitrarily decided by the state government. Farah pointed out the experience in Gujarat, where, for death during the communal carnage, Rs. 1 lakh was given as compensation out of which Rs. 60,000/- is in the form of Narmada bonds that can only be encashed after five years. The callous nature with which the provision on sexual offences had been drafted was also emphasized. Farah also highlighted positive aspects of the Bill, such as the acknowledgement of need for witness protection, sexual offences, and the Supreme Court’s power to transfer cases from one court to another.

Usha Ramanathan talked about the application of ICC standards in the light of the Communal Violence Bill. She found the provision in the Communal Violence Bill to declare an area as a communally disturbed area very problematic. She said that the connotation and experiences with a declaration of “disturbed area” was that the state assumed power over the citizens in such an

area, and the next step was often “shoot at sight” orders. While the government assumed that to deal with an extraordinary situation, extraordinary laws giving extraordinary powers to the state were required, the demand of the civil society was that an extraordinary situation warranted extraordinary protection. She pointed out that NGOs have been at the centre of the formulation of the ICC statute and have an important role to play in the functioning of the ICC; in contrast, the Communal Violence Bill excludes completely any role for the civil society that has brought out the culpability of the state time and again. Instead of the good faith clause and requirement of prior sanction for prosecution that amount to shielding public officials from accountability, it was important for the Communal Violence Bill to incorporate the concepts of command responsibility and the exclusion of superior orders as a defence, she said. In comparing the ICC statute and the Communal Violence Bill, Usha said that the former recognizes crimes, spells out what constitutes those crimes as well as prescribes punishment, while the latter fails to do that. In addition, the ICC statute constituted a definition of “crimes against humanity” that takes into account the context in which mass crimes are committed, while the Communal Violence Bill treats such crimes to be a mere law and order issue, and not as a context for commission of mass crimes. The Bill also does not recognize well-established definitions in international law, such as the crimes of genocide and crimes against humanity. In addition, the structure of cooperation between the ICC and the states was also useful to study, as this provided ways in which state officials could be made accountable through a partial surrender of state power. While the ICC statute was an attempt to break impunity, the Communal Violence Bill was all about giving impunity, she said. In short, for the Bill to be successful, it required a paradigm shift from a crime against an individual to an understanding and acknowledgement of mass crimes as its basis.

Discussion that followed concerned itself with the following issues: a) the lack of desirability to lay down hard and fast rules for rehabilitation and yet, the need to ensure a lack of arbitrariness of the government in providing rehabilitation; b) the government’s perception of communal violence was archaic and based on a colonial understanding - that it was an exchange of violence between two group of people of equal power, and that the weak state required powers to step in and control the violence, while the civil society’s analysis was that the state was too strong and complicit in the violence; c) problems in formulating crimes under the IPC as “sociological offences” under special legislations in terms of acknowledgment of gravity of the crimes; d) the pros and cons of fixing criminal responsibility through fines on a community rather than an individual.

The plan for future course of action was discussed, where the participants contemplated on whether to suggest amendments to the existing Bill in relation to gender-based violence, or to propose a new Bill with adequate provisions on gender-based violence. The practicality and advantages of both the approaches were discussed. It was decided by consensus that since the Bill, in its existing form, has such a flawed foundation and framework, incorporating gender-related provisions within this framework would serve little purpose. At the same time, we ought not to duplicate the work of other groups and initiatives that are critiquing the existing Bill and perhaps drafting a new Bill. Hence we need to complement such initiatives by focusing on formulation of provisions related to gender-based violence. As an immediate step, this group would write to the Standing Committee on Home Affairs, which is considering amendments to the present Bill, and express a rejection of this Bill, pointing out its various flaws. As a next step, the participants would identify the contents of provisions on gender-based violence that a law of this kind ought to incorporate, and garner the support of women’s rights and human rights groups for the same.

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