

PROJECT PAPER

UNDERSTANDING IMPUNITY: FAILURES AND POSSIBILITIES OF RIGHTS TO TRUTH, JUSTICE AND REPARATION

FOCUSSING ON FOUR REGIONS IN INDIA: GUJARAT, KASHMIR, THE NORTHEAST AND PUNJAB

THE PROBLEM AND THE JUSTIFICATION:

The state of impunity, understood as the freedom to commit violent acts normally subject to penal process, which the State agencies in South Asia routinely enjoy, and the attendant loss of remedies under the law the victims of such violence suffer and their implications for the rule of law concepts have for long been under debate and indignant activism in human rights and civil society circles. The phenomenon of impunity, in all the countries of South Asia, receives legislative sanction to cover the actions of the armed forces that invoke the interests of “sovereignty and integrity” and “security” of the state, “public order” and counter-terrorism.¹ When the state agencies get accused of exceptionally horrific crimes such as custodial torture, rape and murder, beyond the scope of impunity legislation, courts of law are barred from taking cognizance unless the governments explicitly sanction prosecution, which they commonly don't.² The requirement to obtain sanction from the Governor's office to launch investigation and prosecution of officials implicated in human rights crimes, acting as a strong impediment against the principles of accountability, represents a state of regression from the accepted practices of administrative law that had already been forged in the colonial period. In 1932, when South Asia was still a British colony, the Madras High Court had ruled that no sanction for prosecution under section 197 of the Code of Criminal Procedure was

¹ A Notable example of such laws is India's *The Armed Forces (Special Powers) Act of 1958*, and its variations enacted with reference the disturbed areas in other parts of the country. The section 4 of the Act empowers the security forces to enter and search any premises, and to arrest any person without a warrant. It also allows the security forces to destroy any place on the suspicion of being a “terrorist hideout” and to shoot to kill with impunity from prosecution.

² Sections 45 and 197 of the Code of Criminal Procedure, 1973 in India provide comprehensive protection to the members of the armed forces from the normal procedures of arrest for cognizable offences under the law.

necessary when an officer of the State, who had the power to arrest and hold in custody persons suspected of an offence under the law, misuses the power to torture a prisoner to obtain confessions.³ Even when sanctions for prosecution are granted, under the pressure of adverse publicity, international attention or the writ regimes of the higher judiciary, the prosecution agencies are known to botch up the investigations.⁴ They carry out mock arrests of subordinate officials ignoring the imperatives of the command principle and suppressing the evidence necessary to secure convictions of those implicated. The trial courts themselves, under the miasma of the national security discourse, tend to take a lenient view of the criminal abuses of power committed by the officials and either let them off on the benefit of doubt or punish them very indulgently with mild sentences. Impunity is even more robust, pervasive and unchallenged in the case of covert or overt state support for majoritarian sectarian violence, usually called ‘communal riots’, in reality, disguised pogroms. State support for sectarian violence, through acts of commission or omission, take many shapes, enabling violence to continue unchecked, lack of action against those organizations and individuals who propagate hate and violence; their patronage and subversion of the criminal justice system. The principle of compensation to the victims of atrocities and infringement of fundamental rights to life and liberty remains arbitrary and without rational guidelines and even a statutory human rights institution like India’s National Human Rights Commission did not see itself in a position to express “any opinion about the culpability or otherwise of any police officer or officials” and about “the responsibility of any of the officials of the State for infringing the right to life of the deceased by any act of omission or commission” even when systematic atrocities on a mass scale committed by the state forces are clearly

³ *Ganapathy Gounder Vs. Emperor*, AIR 1932 Mad. 214-215: 33 Cri. LJ 557

⁴ The investigation into the abduction and the disappearance of Jaswant Singh Khalra, a human rights defender from Amritsar who first publicized the matter of illegal mass cremations in Punjab, by the Central Bureau of Investigation following a direction by the Supreme Court, and the subsequent trial is one such example of deliberately sloppy investigation to save senior state officials from getting implicated.

established.⁵ The guarantee of non-recurrence eludes meaning when the knowledge of what occurred thus gets suppressed.

It is widely agreed that this situation of impunity in South Asia results in the criminalization of those agencies of the state that carry the obligation to enforce the rule of law. It nullifies the principles of accountability and the rights to truth, justice and reparation which the victims of abuse of power, in every civilized society, supposedly possess. It also stands out as the matter-of-fact negation of people-oriented interpretations of their post-colonial histories. This is especially disconcerting because fundamental human rights and the principles of accountability had become a part of the sub-continental paradigm of governance through the first fervent democratic mobilization against the British rule in 1919, twenty-eight years before the retreat of the empire, which Gandhi had led against the enactment of *the Rowlatt Act* in that year. The British government's reaction is epitomized by the massacre at Jallianwala Bag, a public park two hundred meters across the Golden Temple in Amritsar, carried out on 13 April 1919.

It is regrettable that the South Asian states, in their independent histories, have failed to uphold and improve on the model of democratic accountability, realized by their people in the struggle for *Swaraj* in the heydays of the Northern Empires. As the evidence of available human rights documentation shows, they have, in fact, regressed to practices of unrestrained violence in virtual impunity associated with the savage advent of conquest states in 18th and 19th centuries. The relapse not only illustrates significant failures of the national self-determination processes in modern history but also testifies to the dormant power of the Hobbesian concept of State to rebound and prevail over human rights rhetoric and the deceptive privileging of *jus cogens* norms over sovereign prerogative claims within the legalistic discourse. Clearly, understanding impunity requires a multifaceted approach of inquiry to trace the implacability and the imperturbability of the powers that take on their people for violent reprisal in their organizational and ideological support systems and the semantic matrix of self-defensive rhetoric that are constructed to obtain public endorsement of impunity. As pointed out by

⁵ 9th October 2006 order of the National Human Rights Commission, in Reference Case No. 1/96/NHRC, also known as the matter of illegal mass cremations in Punjab -- <http://nhrc.nic.in/>

several scholars, a state that commands the necessary power and the organizational strength to inflict pervasive violence on its own people may yet fail to effectively do so unless it also commands a bureaucracy that is well versed in the art of denial and the instruments of propaganda that can, in a credible language, misinform the public.⁶ The experience with the relentless state of impunity, which the human rights movement in all the countries of South Asia have made, clearly demonstrates close connections between the perpetration of massive human rights violations by the state agencies, on the one hand, and, on the other, the methodologies of cover up that implicate supposedly independent institutions, the media as well as the professional bodies belonging to the civil society sphere. The orchestration of impunity seems inseparable from the tactics of managing the media in zones of conflict, coopting judicial, scientific and academic communities into State projects of repression and injustice and transfiguration of aggressive campaigns into grand narratives of national defense that defeat the normative notions of remedies against abuse of power in law and accountability.

THE OBJECTIVES:

This project proposal aims to address the interconnected aspects of the state of impunity and the cultural milieu in which it thrives through an interdisciplinary approach of research combining intensive field work, desk studies, data analysis and structured interactions among the victims of impunity, human rights defenders, scholarly experts and the civil society actors. For the purpose of feasibility and thoroughness, the proposal aims to focus on four regions of India for long plagued by violence, state atrocities, human rights activism and failures of accountability. The four regions are: Gujarat; Kashmir; Northeast, including Assam, Manipur and Nagaland; and, Punjab. The objective of the proposal is to develop pluralistic perspectives on the end of impunity and to expand the research and action-oriented discourse on the subject across South Asia on the basis of a more substantial body of factual knowledge and conceptual clarity on the

⁶ Jacques Semelin, "Towards a vocabulary of massacre and genocide", *Journal of Genocide Research*, (2003), 5(2), June, 193-210; Helen Fein, "Genocide: a sociological perspective," *Current Sociology*, Vol. 38, No. 1, 1990, pp. 1-126; Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide*, New Haven: Yale University Press, 1990

complex character of impunity and its political tenacity. The timeframe for completing the project with the publication of a comprehensive volume, inclusive of an advocacy plan and detailed recommendations to end impunity in India, is three years.

WHY THE FOCUS ON INDIA?

Although the problem of impunity is common to all the countries in South Asia, India has for long been globally recognized as a functional democracy with a secular constitution, a system of bicameral parliament, an independent judiciary, a free and vigilant press and inalienable human rights where wide-spread human rights abuses, systematic persecution of disgruntled communities and suppression of political dissent cannot occur. However, the domestic and international human rights organizations that have been monitoring the practices of power and complaints of human rights violations by the state agencies in different parts of the country plagued by conflicts unanimously conclude that abuses occur on a massive scale. According to them, the rule of law and observance of civil liberties and safeguards against abuse of police powers guaranteed in law receive short shrift in crisis situations; illegal detention, custodial torture, sexual violence against women as an instrument of terror and control, and summary executions disguised as armed encounters become routine; the media practitioners tend to fall to the spin and hype of the political establishment and contribute to the legitimization of State violence, suppression of knowledge about the human plight under atrocities; the remedial institutions, including the judiciary, fail to act on the promises of the law when approached by members of victimized groups and that a state of impunity prevails. The government of India and its spokespersons vehemently deny the accusations and a number of human rights defenders and protagonists of accountability have themselves suffered arbitrary arrests and enforced disappearances.⁷ While fervidly denying the

⁷ Jaswant Singh Khaira, a human rights defender from Amritsar who exposed the gruesome habit of the security forces in Punjab of secretly cremating the bodies of those abducted and disappeared, was himself picked up from his residence and disappeared by the officers of the Punjab police on 6 September 1995. Sukhwinder Singh Bhatti, a human rights lawyer from Sangrur district in Punjab, was kidnapped and disappeared on 12 May 1994. Two other lawyers specializing in cases registered under *the Terrorist and Disruptive Activities (Prevention) Act (TADA)*, Ranbit Singh Manshahia from Bhatinda

allegations of systemic abuses, the government also attempts to stymie, often successfully, independent investigations. The hostility between the State protagonists and advocates of accountability and the end of impunity has not only generated somewhat meaningless polemics of denial and defense⁸ but has engendered a fairly sophisticated genre of literature on structural relativism of historical cultures, their autonomous processes and arguments against human rights advocacy based on universal norms that raise a number of challenging issues of research on the politics and the power of narratives and the significance of developing survivors' testimony as the necessary cognitive apparatus to promote an agenda of institutional reforms from the experiential perspectives of victims of state violence.⁹

THE LAW OF COMPENSATION AND THE REPARATION PRINCIPLES:

A strong reason to adopt India for a case study on the failures and possibilities of the rights to truth, justice and reparation is connected with the history of the conflict between the executive and the legislative branches of the State on the one hand and the higher judiciary on the other over the issues of fundamental rights and the limits on the powers of the State to derogate from them in the name of 'public interests' and the obligations of compensation that attend on their denial.¹⁰ Understanding the history of this conflict, which is probably not yet concluded, may be very important for the objectives of evaluating logical possibilities of bringing the principles of reparation, justice and accountability in South Asia in parity with the standards being developed

district and Kulwant Singh from Ropar district were likewise abducted by policemen in plainclothes in 1991.

⁸ *India Today*, 21 September 1998, "Invoking the Past"; *Frontline*, Volume 20, Issue October 22 – November 07, 2003, Praveen Swami, "Inventing genocide"

⁹ *The Hindu*, 19 June 2006, C. Rajkumar, "India and the U. N. Human Rights Council"; Michael Ignatieff, *Human Rights as Politics and Idolatry*, edited and with an introduction by Amy Gutmann, Princeton: Princeton University Press, 2001; Barnet R. Rubin, "The Civil Liberties Movement in India: New Approaches to the State and Social Change", *Asian Survey*, Vol. XXVII, No. 3, March 1987, pp. 371-392; Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights", *American Political Science Review*, 76, (June 1982), pp. 303-316

¹⁰ Lloyd Rudolph and Susanne Hoeber Rudolph, "Judicial Review Versus Parliamentary Sovereignty: The Struggle over Stateness in India", *Journal of Commonwealth and Comparative Politics*, 19, November 1981, pp. 231-256

under international human rights mechanisms.¹¹ The objective of developing a rational and just framework of liability and compensation, based on empirical and rational evidence of harm caused by human rights abuses, including physical and mental injury, emotional and moral harm, livelihood losses, lost opportunities, indemnification for patrimonial and non-patrimonial damages and afflictions and agonies born by social collectives impacted by them may in the end provide a stronger economic incentive for the States to end impunity than purely ethical enunciations on the sanctity of rights have managed to become. The issues of research and analysis unlocked by this approach to study the history of the conflict between different branches of the state on the constitutional commitments of human rights and the obligations of non-derogation provide a creative scope for an interdisciplinary convergence of law and economics, constitutional readings of fundamental rights and the interpretations on the role of directive principles of state policies in moderating their implementation, which may have a great potential to nudge the “judicial game a little closer to the science game”¹²; a game played with a pragmatic empirical investigation of social reality and with the insistence that social thought and action be evaluated as instruments to valued human goals rather than policy ends in themselves. This approach will also contribute to developing a logical and empirical basis for the reassertion of epistemological imperatives of human rights law.

The development of the law to compensate deprivation of property by the State in India, on the fulcrum of fundamental rights jurisprudence, illustrates the reformative potential of this approach of research. The benefits of the law of compensation that became available to the owners of property through its contentious evolution in the sphere of human rights jurisprudence has not yet been transferred to the advantage of the fundamental rights to life and liberty even when State encroaches on them outside the limits of action dictated by the law. The research, analysis and interactions among victim

¹¹ The Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, prepared by Special Rapporteur Theo Van Boven, E/CN. 4/Sub. 2/1996/1

¹² Richard A. Posner, *Overcoming Law*, Harvard University Press, Cambridge, Massachusetts, 1995, pp. viii, 8, 172 & *The Problems of Jurisprudence*, Harvard University Press, Cambridge, 1990, p. 465

families, human rights defenders, academics and experts and other interested actors of the civil society under this project will aim to address the reasons for this failure and the possibilities of their logical rectification through social discourse and the public interest litigation.

THE DOCTRINE OF STRICT LIABILITY AND ITS LIMITATIONS:

An equally challenging area of research overlapping the evolution of human rights jurisprudence under the Indian Supreme Court's review powers and its shortcoming is in the construction of the doctrine of strict liability and the limitations of its enunciation against abuses of power by the State agencies resulting in serious human rights violations. In its original intent, the doctrine was forged to fix liability for damages and to compensate the victims when the intent or even the responsibility for the damaging acts escaped the requirements of proof by normal standards of evidence. Since its origin in 1866 through a judgment delivered by the British House of Lords,¹³ the doctrine has traditionally been used in tort law to compel payments of damages from those who engaged in hazardous or potentially dangerous ventures against their arguments of good faith, absence of intent to cause harm or even having taken all precautions to avert it. The Supreme Court of India invoked the doctrine of strict liability against the Indian State to compel it to monetarily compensate a victim of custodial death for the first time in March 1993 in a case involving 22 year old boy in Orissa, arrested for interrogation, whose dead body was found lying across the railway tracks. Despite the mystery surrounding the death and the claim made by the State of Orissa that the boy had escaped from the police custody, the Supreme Court cited the doctrine of strict liability for "contravention of fundamental rights to which the principle of sovereign immunity does not apply..."¹⁴ While awarding a compensation of Rs. 150,000 to the mother of the deceased, the court explained that under Articles 32 and 142 of the Constitution it had the powers to "forge new tools... for doing complete justice and enforcing fundamental rights" and that the fundamental right to life would remain a mirage if, in the face of its extreme

¹³ *Rylands Vs. Fletcher*, 1866 Law Report 1 Exchequer 265 & *Rylands Vs. Fletcher* 1868 3 House of Lords 330

¹⁴ *Smt. Nilabati Behera Vs. State of Orissa*, 1993 AIR 1960

contravention, the court failed to “grant any relief against the State except by punishment of the wrongdoer... and recovery of damages under private law, by the ordinary process.”¹⁵

In a landmark judgment delivered in December 1996, the Supreme Court used a petition filed on the basis of newspaper reports on the deaths in police custody to examine “the issue in depth” and to develop “custody jurisprudence” and to formulate modalities for awarding compensation to the victims, their families and to “provide for accountability” under the strict liability doctrine.¹⁶ The court explained that “the claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages of tortuous acts of the public servants.”¹⁷

One objective of the research under this project will be to carefully examine how the higher judiciary used the principles of this doctrine, which it evolved, to establish the State’s liability in situations of mass atrocities brought to its attention through petitions for writ under Article 32, a constitutionally guaranteed remedy against human rights abuses. The project will also evaluate, through an analysis of the case law and its appraisal by the victim communities, human rights defenders and experts, the impact the doctrine has had in establishing the standards to determine the existence or the absence of the State’s intent behind the mass atrocities of the kind recorded in Gujarat, Kashmir, Northeast of India and Punjab, the principles of liability including the command responsibility principle and in developing a regime of accountability, end of impunity and reparation on that basis.

THE STATE AND THE NON-STATE ACTORS:

Organized atrocities in Gujarat, Kashmir, Punjab and the Northeast have witnessed variant manifestations of collaboration between the State and the non-State actors that have not been sufficiently researched and debated from the perspectives of

¹⁵ *Smt. Nilabati Behera, Ibid*

¹⁶ *D. K. Basu Vs. State of West Bengal and the State of UP, ...*

¹⁷ *D. K. Basu, Ibid*

accountability and end of impunity. The example of the anti-Sikh pogrom, orchestrated in the wake of Prime Minister Indira Gandhi's assassination on 31st of October 1984, is well known. Murderous gangs led by political leaders, with policemen looking and egging on, had murdered thousands of people with impunity. In fifteen years since the massacre occurred, there have been nine Commissions of inquiry to investigate the Delhi carnage. The 8th Commission, established by the Chief Minister of Delhi in December 1993 under R. S. Nirula, called for action against 72 police officials and 21 others, including the Congress politicians. However, as Amnesty International complained in a memorandum to the government of India, none of the recommendations of these Commissions have been implemented, "nor have any of the accused policemen and politicians been brought to justice." Amnesty International also observed that the Delhi administration's Director of Prosecution wanted the cases against the indicted policemen to be dropped.¹⁸ The Delhi administration argued that there was insufficient evidence to obtain their conviction.

This issue of evidence was taken up by the Additional Sessions Judge of Delhi, S. N. Dhingra, who examined some of the cases pertaining to the November 1984 pogrom. In a 92 pages long judgment, delivered on 28 August 1996, Judge Dhingra accused the police, the administration and the government of deliberately suppressing and destroying the evidence. The judgment categorically said that the government "protected all those connected with the 1984 riots", the actual murderers and their mentors within the police and the political establishment: "The inaction of the police, the inaction of the government and the administration in the riot cases was a well thought of process. It was necessary to save those who were involved in the crime. Perhaps it was considered by the rioters and the rulers alike that the massacre was necessary to teach a lesson and those who engineered the mass murders must be protected." The judgment concluded: "Unless the system rewrites itself and the investigating agencies are liberated from the clutches of

¹⁸ AI Index: ASA 20/20/94 *Memorandum to the Government of India: arising from an Amnesty International visit to India 5-15 January 1994*, <http://www.amnesty.org/ailib/1994/ASA/202094.ASA.txt>

the executive, there is little possibility of faithful and honest investigation by investigating agencies against influential and politically powerful offenders.”¹⁹

In Punjab the collaboration between the State and the non-State actors has been founded on a brazenness of impunity that is unprecedented. In early 2006, the State officials in Punjab admitted that more than 300 “militant collaborators” who had publicly been killed and cremated got rehabilitated under assumed identities. The Chief Minister of Punjab claimed that the rehabilitation was part of the national policy and was being followed in Jammu and Kashmir, the Northeast and other parts of the country.²⁰ Composition of state-sponsored paramilitary groups in Kashmir from surrendered and captured former militants, their strategic and terrorist crimes and the impunity which they enjoy are well documented.²¹ The organization and the State support for such paramilitary forces are reported also in the Northeast.²² The Gujarat carnage, perpetrated by the *Hindutva* organizations with the active and tacit support from important elements of the State apparatus, blurs the distinction between the State and the non-State actors that commonly attaches to discussions on crimes against humanity. A thorough research, documentation and analysis of these connections should be able to provide the factual

¹⁹ *The Hindu*, August 29 1996, “1984 riots: strictures against Govt”

²⁰ “Dead” man worked against Panth for Punjab Police, 19 February 2006, -- ; <http://www.pathic.org/news/125/ARTICLE/2263/2006-02-19.html>; A posting by Khalon, -- http://www.shekharkapur.com/blog/archives/2005/09/the_heart_of_te.htm; *The Hindustan Times*, Chandigarh, 22 February 2006, “PIL seeks names of persons declared dead”; *The Tribune*, “Amarinder’s no to CBI probe into Sukhi case”, 24 February 2006

²¹ *India Today*, 15 March 1996, Harinder Baweja and Ramesh Vinayak, “A dangerous liaison”; *Statesman*, 17 April 1996; *India Today*, 15 December 1995, Harinder Baweja, “Propping up the enemy’s enemy”; *Reuters*, 16 April 1996, “India: Kashmir guerrillas threaten Indian poll officials”; *India’s secret army in Kashmir*, New York: Human Rights Watch, Vol. 8, No. 4, C, May 1996

²² R. Vashum, *Nagas’ Right to Self-determination*, Mittal Publications, N. Delhi, 2000, p. 100; Prakash Singh, *Nagaland*, National Book Trust, New Delhi, Fourth Edition 1995, pp. 180-181; *The Financial Express*, May 24, 1997, Rakesh Singh, “Concerted Plan needed to end Naga imbroglio” –

<http://www.financialexpress.com/ie/daily/19970524/14450343.html>; *The Financial Times*, June 2, 1996, “The unholy nexus that feeds insurgency” – <http://www.hvk.org/hvk/articles/0696/0024.html>; *Rediff.com*, November 12, 2000, Nitin Gogoi, “NE politician-bureaucrat-militant nexus to be probed” – <http://202.54.124.133/news/2000/nov/12ne.htm>; *Rediff.com*, Subir Ghosh, “What Nagaland doesn’t need is a Neroesque politician” – <http://rediff.com/news/1999/sep/09naga.htm>

and conceptual approach to advocacy for legislative and institutional reforms for accountability and end of impunity for crimes against humanity that can coalesce the notions of 'guilty associations', 'command responsibility' and 'joint criminal enterprise' by a clear definition of the scope of the enterprise and the defendant's relationship to it, irrespective of the State or non-State personality of the defendant and without the artificial burden of intent requirement that makes the Genocide Convention practically useless.

The National Human Rights Commission at New Delhi, in *Suo Moto* Case No. 1150/62001-2002, 31 May 2002, raised the question whether the State has discharged its primary and inescapable responsibility to protect the rights to life, liberty, equality and dignity of all who constitute it. Given the history of communal violence in Gujarat, a history vividly recalled in a report dated 28 March 2002 of the State government itself, the Commission raised the question whether the principle of *res ipsa loquitur* (the affair speaking for itself) should not apply in this case for assessing the degree of State responsibility. The Commission observed that the responsibility of the State extended not only to the acts of its own agents, but also to those of non-state players within its jurisdiction and to any action that may cause or facilitate violation of human rights. The Commission added that the burden of proof to rebut the adverse inference arising against it under the circumstances was on the State government.

This is an important addition to our understanding of State responsibility and liability in situations of communal violence. In the context of India, studies carried out by scholars like Paul Brass show that the sectarian violence is rarely spontaneous and that 'riot producing machines' and 'militant *Hindutva* organizations operating with support from partisan State authorities are often culpable. Many militant or counter-insurgency groups (as observed in the Khalistan and Kashmir movements) are Frankenstein's monsters proposed up the State with strategic objectives. In Chatisgarh, an entire militia, including children, has been set up by the State to fight Maoist revolutionaries. Even when not supported by the State, non-State actors need to be liable under the law for acts of violence that impact fundamental human rights of civilian population. In a remarkable moral enterprise spanning over a decade, a "committee of concerned citizens" in Andhra Pradesh have tried to engage both State and non-state actors in dialogue about the

consequences of violence without glossing over the mindlessness of militant attacks on citizens and minor officials.

In terms of legal theory, destruction of enjoyment of human rights by non-state actors can be viewed from two different perspectives. The first, and more conventional, perspective that views State actors and agents of public power as the bearers of human rights obligations would require the governments to protect people from depredations committed by non-state actors by effective exercise of police powers and enforcement of law. From this perspective, the State must account for its failures and if they turn up to be deliberate account for its culpability. Under the second perspective that views human rights as entitlements to be enjoyed by everyone and to be respected by everyone, instead of viewing them as contracts between citizens and the State, the non-state actors, especially if they are organized formations, need to be brought before effective jurisdiction in law that scrutinize their conduct and establish accountability. The second perspective, which acquired force beginning from the Nuremberg Tribunal's decision to hold individuals accountable for war crimes and crimes against humanity, has since acquired firmer foundations in law through the mandate of Article I of the Convention on the Prevention and Punishment of the Crime of Genocide, which defines the crime under international law "whether committed in time of peace or in time of war" and whether committed by "constitutionally responsible rulers, public officials or private individuals." Mandate of common Article 3 of Geneva Conventions and Protocol II also bind the State and non-state actors with the obligations to respect humanitarian law norms in situations of internal armed conflicts. The Trial Chamber of the International Criminal Tribunal for former Yugoslavia, in *Prosecutor v. Tadic* case, referred to the Draft Code of Crimes against the Peace and Security of Mankind, compiled by the International Law Commission in 1991, to clarify that non-state actors are also possible perpetrators of crimes against humanity.²³ Indeed, the realm of theory on the issue of human rights obligations of non-state actors is choke full of subtle and not so subtle differences of

²³ *Prosecutor V. Tadic* Case IT-94-1 AR72 and Case IT-94-1-T, Judgment of 7 May 1997, para 655

opinion reflected in a vast body of specialized literature²⁴ which should not concern us here since the objective is to trace and analyze the empirical evidence on the behavior and the impact of non-state actors on the state of human rights and the nexus between the non-state and State actors, direct and indirect, and their implications on the state of impunity.

SEXUAL VIOLENCE AND REPARATION:

Despite the growing insistence for attention on gender dimensions of the conflict and violence, which comes mostly from feminist lobbies within the human rights community, the egregiousness of sexual violence on women and its differential impact on their rights to life and the implications for human security and the principles of reparation in Gujarat, Kashmir, the Northeast and Punjab are issues that remain almost completely disregarded and sidelined. The absence of attention is particularly striking given the fact that the phenomenon of sexual violence against women, as the birthmark of the South

²⁴ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, New York: OUP, 2006; A. Brysk, *Human rights and private wrongs: Constructing Global Civil Society*, New York and London: Routledge, 2000; A. Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", in G. Teubner(Ed.), *Global Law Without a State*, Aldershot: Dartmouth, 1977, pp. 179-212; A. Clapham, "The question of jurisdiction under international criminal over legal persons: Lessons from the Rome Conference on an International Criminal Court", in M. Kamminga and S. Zia-Zarif (Eds.), *Liability of Multinational Corporations under International Law*, The Hague: Kluwer, 2000, 139-195; L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge: Cambridge University Press, 2002; C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, 2003; Nigel Rodley, "Can Armed Opposition Groups Violate Human Rights?", in K. E. Mahoney and P. Mahoney (Eds.), *Human Rights in the Twenty-first Century*, Dordrecht: Martinus Nijhoff, 1993, pp. 297-318; A. Cassese, "Terrorism as an International Crime", in A. Bianchi (Ed.), *Enforcing International Norms against Terrorism*, Oxford: Hart Publishing, 2004, pp. 213-235; M. McIntosh, M. R. Thomas, D. Leipziger and G. Coleman, *Living Corporate Citizenship: Strategic routes to socially responsible business*, London: Prentice Hall, 2003; D. Weissbrodt, "Non-State Entities and Human Rights within the Context of the Nation-State in the 21st Century", in M. Castermans, F. van Hoof, and J. Smith (Eds.), *The Role of the Nation-State in the 21st Century*, Dordrecht: Kluwer, 1998, pp. 175-195; H. A. Wilson, *International Law and the Use of Force by National Liberation Movements*, Oxford: Oxford University Press, 1988; C. Jochnick, "Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights", 21 *Human Rights Quarterly*, 1999, 56-79

Asian nation-States, has been so ably documented by our feminist scholars and writers.²⁵ This project hopes to address the existing deficiency by capturing women's experiences and narratives of conflict and violence, with regard to their corporeal integrity, sexual security and reproductive rights as well as the mainstream implications of violence against women for reparation and restoration of human security.

Several studies on the conflict in Sri Lanka have focused on the impact of sexual violence and rape of Tamil women committed by the State forces as well as members of the Indian Peace Keeping Force in motivating them to take up arms and join the ranks of the LTTE.²⁶ A number of media reports on the subject of conflict in Punjab very categorically claim that the separatist terrorists lost their support base in the countryside

²⁵ Butalia, Urvashi, *The Other Side of Silence: Voices from the Partition of India*, Durham, NC: Duke University Press, 2000; Butalia, Urvashi, "Community, State and Gender: On Women's Agency during Partition", *Economic and Political Weekly*, 28(7), 24 April 1993; Chatterji, Joya, *Bengal Divided: Hindu Communalism and Partition, 1932-1947*, Cambridge: Cambridge University Press, 1994; Das, Veena, "National Honour and Practical Kinship: Of Unwanted Women and Children", in Veena Das (Ed.), *Critical Events*, Delhi: Oxford University Press, 1995, pp. 53-83; Menon, Ritu and Kamla Bhasin, *Borders and Boundaries: Women in India's Partition*, New Brunswick, NJ: Rutgers University Press, 1998; Suvir Kaul, *The Partitions of Memory: The Afterlife of the Division of India*, Delhi: Permanent Black, 2001; Mattie Katherine Pennebaker, "The Will of Men: Victimization of Women During India's Partition", *Agora No. 1*, Issue 1, Summer 2000; Krishna Sobti, *Zindaginame* (Hindi), Delhi: Rajkamal Prakashan, 1979; Bapsi Sidhwa, *Ice-Candy-Man*, London: Heinemann, 1988; Qurratulain Hyder, *Fireflies in the Mist: A Novel*, New Delhi: Sterling, 1994; Atula Hosain, *Sunlight on a Broken Column*, London: Chatto and Windus, 1961

²⁶ Vidyamali Samarsinghe, "Soldiers, Housewives and Peace Makers: Ethnic Conflict and Gender in Sri Lanka", *Ethnic Studies Report*, 14/2, 1996; Sitralega Maunaguru, "Gendering Tamil Nationalism: The Construction of Women in Projects of Protest and Control", in Pradeep Jeganathan and Qadri Ismail (eds.), *Unmaking the Nation: The Politics of Identity and History in Modern Sri Lanka*, Colombo: Social Scientists' Association, 1995; Sumantra Bose, *States, Nations, Sovereignty: Sri Lanka, India and the Tamil Eelam Movement*, New Delhi: Sage Publications, 1994, pp. 109-111; Peter Schalk, "Women Fighter of the Liberation Tigers in Tamil Ilam: The Martial Feminism of Atel Palacinkam", *South Asia Research*, 14/2, 1994, p. 163; Darini Rajasingham-Senanayake, "Ambivalent Empowerment: The Tragedy of Tamil Women in Conflict", in Rita Manchanda (Ed.), *Women, War and Peace in South Asia: Beyond Victimhood to Agency*, New Delhi: Sage 2001, pp. 106-7; Miranda Alison, "Cogs in the Wheel? Women in the Liberation Tigers of Tamil Eelam", *Civil Wars*, Vol. 6, No. 4, Winter 2003, pp. 37-54

when they began to rape “women in houses where they took shelter.”²⁷ Kamala Visweswaran, the Associate Professor of Anthropology and Asian Studies at the University of Texas, Austin, cites the case of a Sikh woman, “a member of the All India Sikh Student Federation... who was arrested and raped by Indian police” and later, on that ground, “received asylum” in the United States.²⁸ Systematic nature of rape, sexual assault and body mutilation of women in Gujarat have been described and commented on in a number of human rights reports. For example, a December 2003 report by the International Initiative for Justice, compiled by internationally renowned feminist activists, academics and intellectuals, says: “Violence against women was a crucial element of how these massacres were executed. Rape, sexual assault and humiliation were some of the most systematic and consistent mechanisms for violating Muslims and their communities. Women were stripped of their clothes, gang raped, often publicly, and finally, in almost all cases, burnt or hacked to death. Pregnant women were not only not spared the brutality of rape but also had their abdomens slashed open and their fetuses thrown into raging fires. Children as young as 3 years old were sexually assaulted or raped before being burnt to death by the Hindu mobs. According to hospital reports, women and men had OM cut out on other parts of their bodies as well and mutilation of women’s breasts was a common feature of the violence.”²⁹ The rape in Gujarat, as described in the IJJ report, has all the attributes of rape described by Catherine Mackinnon: “It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched

²⁷ *The Times*, 25 January 1993, Christopher Thomas, “Punjab poll cheers India”; *The Gazette* (Montreal, Quebec), 7 March 1994, Rahul Bedi, “Peace rests easy in Punjab: Once tence village savors calm after decade of violence”; *The Guardian*, 3 June 1994, John Rettie, “Peace returns to violated Golden Temple”

²⁸ Kamala Visweswaran, “Gendered States: Rethinking Culture as a site of South Asian Human Rights Work”, *Human Rights Quarterly*, 26, 2004, p. 497

²⁹ *Threatened Existence: A Feminist Analysis of the Genocide in Gujarat*, Report by the International Initiative for Justice (IIJ), December 2003, page 5 of 49

and told to others: rape as a spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.”³⁰

Despite such narratives, which show how women’s bodies are metamorphosed into the embodiments of communal and cultural identities under destruction, there is virtual silence on the issues of gender justice even within the human rights circles involved in the State with the objectives of accountability and reparation. This holds also for the Northeast³¹ where the abduction, suspected rape and the killing of Thanjam Manorama in July 2004 triggered an avid movement led by Manipuri women against the Armed Forces (Special Powers) Act. There is no systematic study and analysis on the nature, the magnitude and the impact of sexual violence on women in the regions of India which have witnessed systematic and pervasive conflict and organized atrocities. The phenomenon of silent acquiescence in sexual violence against women within the victim community for the sake of ‘honor’ and to avoid ‘shame’³² must inevitably have spiraling effects on the existing culture of patriarchy in myriad new forms that enhance male domination, injustice and impunity through coercive marriages, socio-economic impositions and restrictions within the realms of citizenship, community and the nation.³³ In the absence of acknowledgement, accountability, justice and reparation, the victim survivors are condemned to remain a reminder of the aggressors’ power, an epitome of the victim community’s trouncing; damaged property of the male members of the community. The linkages between the sexual violence and the absence of attention on justice and reparation for its victims and their post-conflict rehabilitation as an aspect of reconciliation and peace-building on the one hand and the hierarchical social, political and economic configurations of gender inequality and their mutually reinforcing characteristics is an area of research that would be strengthened through empirical work

³⁰ Katherine A. MacKinnon, “Rape, Genocide, and Women’s Human Rights”, *Harvard Women’s Law Journal* 17 (1994), pp. 8-12

³¹ *India: Campaigns against Rape and Sexual abuse by members of the security forces in Assam and Manipur*, London: Amnesty International, November 1998; Sanjib Baruah, *Postfrontier Blues: Toward a New Policy Framework for Northeast India*, Policy Studies 33, Washington DC: East-West Center Washington, 2007

³² Veena Das, “National Honor and Practical Kinship: Of Unwanted Women and Children”, in Veena Das (Ed.), *Critical Events*, New Delhi: OUP, 1995

³³ Charlotte Bunch, “A feminist human rights lens”, *Peace Review*, 16:1, March 2004, 29-34

in the four regions of study under the project³⁴. The normative quest to guide the empirical investigation, which underlies the 1993 UN Declaration on the Elimination of Violence against Women (DEDAW), has been formulated by Vasuki Nesiah: “If ‘woman’ could become ‘a name for a way of being human’, then the gap between the rights women have as women, and the rights they should have as humans would be eliminated.”³⁵

THE COMPELLING LAW OF CRIMES AGAINST HUMANITY -- ICTY, ICTR AND THE ICC:

Article 5 of the International Criminal Tribunal for the former Yugoslavia (ICTY) defines the crimes against humanity “when committed in armed conflict, whether international or internal in character, and directed against any civilian population” to include: (a) murder, (b) extermination, (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhuman acts.³⁶

The case of *The Prosecutor V. Kunarac, Kovac and Vukovic* before the ICTY, decided on 22 February 2001, establishes the first set of convictions for rape as a crime against humanity affirming the obligations of the justice system under international humanitarian law to act, punish and repair the crime.³⁷ The judgment explains rape as a

³⁴ Cockburn, C., *The Space Between US: Negotiating Gender and National Identities in Conflict*, London and New York: Zed Press, 1998; Claudia Card, “Rape as a Terrorist Institution”, in R. G. Frey and Christopher W. Morris (Eds.), *Violence, Terrorism, and Justice*, Cambridge: Cambridge University press, 1991, p. 303

³⁵ Vasuki Nesiah, “Toward a Feminist Internationality: A Critique of U. S. Feminist Legal Scholarship”, in Ratna Kapur (Ed.), *Feminist Terrains in Legal Domains*, 1996; Julie Peters and Andrea Wolpers (Eds.), *Women’s Rights/ Human Rights: International Feminist Perspectives*, New York: Routledge, 1995; Radhika Coomaraswamy, “Reinventing International Law: Women’s Rights as Human Rights in the International Community”, in Peter van Ness (Ed.), *Debating Human Rights*, London and New York: Routledge, 1999, p. 167

³⁶ Bassiouni, C. M., with Manikas, P., *The Law of the International Tribunal for the Former Yugoslavia*, New York: Transnational, 1996; Kirsten Campbell, “Rape as a crime against humanity: Trauma, law and justice in the ICTY”, *Journal of Human Rights*, Vol. 2, No. 4, December 2003, 508;

³⁷ Buss, D., “Case Note Prosecuting mass rape: *The Prosecutor V. Dragoljib Kunarac, Radomir Kovac and Zoran Vukovic*, *Feminist Legal Studies*, 10, 2002, 91-99

crime against humanity as an instrument of humiliation of a social collective through the violation of the sexual autonomy and sexual self-determination of ‘enemy women’ as well as the crime of genocide.

The International Criminal Tribunal for Rwanda (ICTR), very significantly, convicted Jean-Paul Akayesu, former Mayor of Taba Community, for the crime of genocide which included acts of rape.³⁸

The UN General Assembly’s resolution 59/137 of 10 December 2004 recognized the imperative of reparation to victims of sexual violence in Rwanda and other vulnerable groups like children and orphans. The resolution called on “agencies, funds and programs of the United Nations system to ensure that assistance is provided in the specific areas identified as priorities by the government of Rwanda, notably education for orphans, medical care and treatment for victims of sexual violence... trauma and psychological counseling for genocide survivors and skills training and micro-credit programs aimed at promoting self-sufficiency and alleviating poverty.”³⁹

The ICTY and ICTR retain statutory provisions to delegate national courts and other competent bodies to initiate restitution of losses, compensation and rehabilitation of victims of sexual violence.⁴⁰ The ICTR directly administers a rehabilitation and reparation program, especially directed towards victim-witnesses of sexual violence, which includes general medical services and counseling.⁴¹

³⁸ *The Prosecutor V. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2 September 1998, Count 12

³⁹ UN General Assembly Resolution 59/137 of 10 December 2004 on Assistance to Survivors of the 1994 Genocide in Rwanda, Particularly Orphans, Widows and Victims of Sexual Violence – UN Doc.A/Res/59/137. 17 February 2005.

⁴⁰ S. Malmstroem, “Restitution of Property and Compensation to Victims” in R. May et al (Eds.), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald*, The Hague: Kluwer Law International, 2001, pp. 373-84; P. Chifflet, “The Role and Status of the Victim” in G. Boas and W. Schabas (Eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden: Martinus Nijhoff Publishers, 2003, pp. 75-111; A. M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the practice of the ICTY and the ICTR*, Antwerpen: Intersentia, 2005, pp. 406-9

⁴¹ ICTR Draft Report on Improved Access to Anti-Retroviral Treatment and Psychological Counseling for ICTR Witnesses with HIV/ AIDS, prepared by the tribunal’s gender adviser Elsie Effange-Mbella, 2006, pp. 2-3. The report says: “The ICTR by virtue of its mandate and the provisions of Article 21 of its Statute and Rule 34

The Statute of the International Criminal Court (ICC) gives special attention to crimes of sexual violence defined as crimes against humanity. Enumeration under Articles 7 and 8 includes “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity... or any other form of sexual violence also constituting a grave breach of the Geneva Conventions or (in the context of internal conflicts) constituting a serious violation of Article 3 common to the four Geneva Conventions.” The court has indicted members of armed group in Uganda and the Democratic Republic of Congo with rape and sexual enslavement.⁴²

The ICC has also developed a reparation regime, articulated under Articles 75 and 79 of the statute and also in its Rules of Procedure under Rules 94-99.⁴³ The application form for reparation, in its part F, specifically seeks out information on sexual/reproductive health problems; emotional problems; mental problems; physical reactions and behavioral changes, pain and complaints and concerns related to experiences of sexual violence.⁴⁴ The ICC has established a Trust Fund for Victims.

The United Nations Compensation Commission, constituted in April 1991 to adjudicate all claims of injury, harm and loss arising from Iraq’s invasion of Kuwait and to compensate them, dealt with complaints of rape without following the normal standards of proof and evidence. Recognizing the difficulties of documenting and establishing sexual assault in a situation of military aggression, the Commission accepted

of its Rules of Procedure and Evidence, has a fundamental and unique role to play in achieving peace, justice and national reconciliation in Rwanda, by creating inter alia, conducive conditions for the maintenance of an adequate physical and psychological environment enabling the successful participation of witnesses to the process of testifying before the Tribunal particularly for victims of rape and sexual assault.”

⁴² Pre-Trial Chamber II, *Situation in Uganda: Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005*; Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor V. Thomas Lubanga Duilo*

⁴³ The Statute of the ICC – [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) and Rules of Procedure and Evidence (RPE) – http://www.un.org/law/icc/asp/rstsession/report/english/part_ii_a_e.pdf

⁴⁴ ICC booklet “Victims before the International Criminal Court, a Guide for the Participation of Victims in the Proceedings of the Court”, available at http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf

and approved the complaints on the basis of circumstantial and testimonial evidence alone.⁴⁵

Although these developments in international law and enforcement mechanisms remain symbolic in character, they must serve as precedents to spur efforts for an investigation on the normative framework and institutional remedies for its actualization within the domestic legal environment in India and for alternatives in the absence of its efficacy. The literature on the subject is comprehensive and its systematic survey would be helpful in conceptualizing the methodologies of a remedial campaign against the sexual violence and a system of accountability in South Asia.⁴⁶

The challenges of evidentiary hurdles for possible legal processes to establish accountability and to deliver justice and also of reconstructing the testimony of abuses years or even decades after their occurrence are formidable. It should be possible to draw lessons from the joint efforts of survivors, scholars, feminists and human rights activists made in bringing the issues of criminal liability of Japanese military and political officials and the responsibilities of the Japanese State for rape and sexual slavery practiced in the Asia Pacific regions during World War II to the forefront of international consciousness fifty years after the crimes had taken place.⁴⁷

⁴⁵ United Nations Division for the Advancement of Women, *Women 2000 – Sexual Violence and Armed Conflict: United Nations' Response*, New York: UN, 1998; Judith G. Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law*, The Hague: Kluwer Law International, 2001, p. 239

⁴⁶ Olujic, Marija, "Embodiment of Terror: Gendered Violence in Peacetime and Wartime in Croatia and Bosnia-Herzegovina", *Medical Anthropology Quarterly*, 12(1), 1998, 31-50; Stiglmeier, A., "Mass Rape: The War against Women in Bosnia-Herzegovina" in Stiglmeier, A., (Ed.), *Bosnia-Herzegovina*, Lincoln: University of Nebraska Press, 1994; Allen, Beverly, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia*, Minneapolis: University of Minnesota Press, 1996; Denich, Bette, "Of Arms, Men and Ethnic War in former Yugoslavia", in Constance R. Sutton (Ed.), *Feminism, Nationalism and Militarism*, Washington, DC: American Anthropological Association, 1995, pp. 61-71; MacKinnon, Catherine, "Rape, Genocide, and Women's Human Rights", *Harvard Women's Law Journal*, 17:5, 1994, 5-16; Meznaric, Silva, "Gender as an Ethno-Marker: Rape, War and Identity Politics in the Former Yugoslavia", in V. Moghadam (Ed.), *Identity, Politics and Women*, San Francisco: Westview, 1994;

⁴⁷ Ustinia Dolgopol and Snehal Parajape, *Comfort Women: An Unfinished Ordeal – Report of a Mission*, Geneva: International Commission of Jurists, 1994; Christine M. Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery", *American Journal of International Law*, Vol. 95, No. 2, April 2001, -335-341; Yoshimi

A regime of reparation in the absence of legal accountability will require a clear understanding on distinctive ways in which women experience conflict and the impact of the traumatic events on the community networks and relationships also through losses of homes; transformation in livelihood options; internal displacement; dislocation of preexisting social environment, schooling and health facilities; ghettoization, stigmatization and domestic violence. An evaluation of the existing human security studies focusing on the experiences of women in conflict situations should help establish the methodological criteria for the assessment of the principles and the processes of reparation to victims of sexual violence under the project.⁴⁸ The literature dealing with

Yoshiaki, *Comfort Women: Sexual Slavery in the Japanese Military during World War II*, New York: Columbia University Press, 2000; Alexis Dudden, "We came to tell the Truth: Reflections on the Tokyo Women's Tribunal", *Critical Asian Studies*, 33:4(2001), 591-602; Gay J. McDougall, *Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, Final Report submitted in 1998 by Special Rapporteur to Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1998/13

⁴⁸ Ashford, Mary-Wynne & Yolanda Huet-Vaughn, "The impact of war on women" in Barry Levy and Victor Sidel (Eds.), *War and Public Health*, New York: Oxford University Press, 1977, pp. 186-235; Denov, Myriam and Richard Maclure, "Engaging the voices of girls in the aftermath of Sierra Leone's conflict: Experiences and perspectives in the culture of violence", *Anthropologica*, 48(1), 2006; Gardam, Judith and Hilary Charlesworth, "Protection of Women in Armed Conflict", *Human Rights Quarterly*, 22, 2000, 148-166; Green Jennifer, "Uncovering Collective Rape: A Comparative Study of Political Sexual Violence", *International Journal of Sociology*, 34(1), 2004, 97-116; Mack, Andrew, *Human Security Report 2005: War and Peace in the 21st Century*, Oxford: Oxford University Press, 2005; McKay, Susan, "Reconstructing Fragile Lives: Girls Social Reintegration in Northern Uganda and Sierra Leone", *Gender and Development*, 12(3), 2004, 19-30; Niarchos, Catherine, "Women, war and rape: Challenges facing the international Tribunal for the Former Yugoslavia", *Human Rights Quarterly*, 17, 1995, 649-690; Seifert, Ruth, "The second front: The logic of sexual violence in wars", *Women's Studies International Forum* 19(1/2), 1996, 35:43; *Democratic Republic of Congo: Mass rape – Time for Remedies*, London: Amnesty International, 26 October 2004; *The War within the War: Sexual violence against women and girls in Eastern Congo*, New York: Human Rights Watch, June 2002; *Struggling to survive: Barriers to justice for rape victims in Rwanda*, New York: Human Rights Watch, September 2004; *Sexual violence and its consequences among displaced persons in Darfur and Chad*, New York: Human Rights Watch, April 2005; *Central African Republic: Five months of war against women*, London: Amnesty International, November 2004; *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, the UN Commission on Human Rights, E/CN.4/2005/72, 24 November 2004

experiences of sexual violence, mental health programs and peace building in post-conflict contexts in Latin and South America should be especially helpful.⁴⁹

THE RATIONALE BEHIND THE SELECTION OF CASE STUDIES: GUJARAT, KASHMIR, THE NORTHEAST AND PUNJAB:

In a general sense, the geographies of all the four regions of India represent violently engendered partitions and skewed political mapping without democratic endorsement, which developed in the waning epoch of the British Empire and have since continued to engender new conflicts within and across the international borders in South Asia. This legacy of violently engendered geographies of nation-states has a significant bearing on the environment of virulent disagreements in the discourse about the prerogatives of sovereignty of the States on the one hand and the imperatives of human rights, including the right to self-determination, of the people on the other. Replicated throughout the subcontinent, especially in the peripheral intersections across borders, the situation conveys inflexible political attitudes with little regard for normative standards for human rights. A thorough examination and the analysis of the state of impunity

⁴⁹ Agger, I, *Trauma and Testimony Among Refugee Women: A Psycho-Social Exploration*, London and New Jersey: Zed Books, 1994; Agger, I and S. Jensen, *Trauma and Healing under State Terrorism*, London and New Jersey: Zed Books, 1996; Bunster-Burotto, X., "Surviving beyond fear: Women and Torture in Latin America", in M. Daves (Ed.), *Women and Violence*, London: Zed Books, 1994; Caruth, C., "Trauma and Experience", in C. Caruth (Ed.), *Trauma: Explorations in Memory*, Baltimore: John Hopkins University Press, 1995; El-Bushra, J., and E. Piza Lopez, "Gender-related violence: its scope and relevance", in H. O'Connell (Ed.), *Women and Conflict*, Oxford: Oxfam, 1993; Fisher, J., *Out of the Shadows: Women Resistance and Politics in South America*, London: Latin America Breaux, 1993; Hollander, N., "The gendering of human rights: women and the Latin American terrorist state", *Feminist Studies*, 22(1), 1996, 41-80; Jelin, E., (Ed.), *Women and Social Change in Latin America*, London and New Jersey: Zed Books, 1990; Richters, J., *Women, Culture and Violence: A Development, Health and Human Rights Issue*, Leiden: Women and Autonomy Centre, 1994; Rowlands, J., *Questioning Empowerment: Working with Women in Honduras*, Oxford: Oxfam, 1997; Safa, H., "Women's social movements in Latin America", in C. Bose and E. Acosta-Belen (Eds.), *Women in the Latin American Development Process*, Philadelphia: Temple University Press, 1995; Stephens, L., "Women's rights are human rights: the merging of feminine and feminist interests among El Salvador's mothers of the disappeared (CO-MADRES)", *American Ethnologist*, 22 (4), 1995: 807-27; Zur, J., "The psycho-social effects of 'la violencia'", in H. O'Connell (Ed.), *Women and Conflict*, Oxford: Oxfam, 1993

obtaining in these regions should, therefore, meaningfully contribute to the discourse on the possibilities and the framework of establishing a regional mechanism, which may transcend divisive political passions and prejudices in monitoring and enforcing human rights principles in times of conflicts as well as in supporting and sustaining peace and reconciliation efforts through plural dialogue without abdicating the imperatives of the rights to truth, justice and reparation.

In more specific terms, all the four regions in India have already developed, in sufficiently thorough ways, the basic evidence and the documentation of human rights abuses and the people's efforts to obtain constitutional remedies and their failures. The existence of this documentation makes the prospects of further research and analysis on the interconnected aspects of the state of impunity within the local, national and regional contexts as well as from the international human rights standards very promising. The diversity of issues and experiences connected with the practices of human rights abuses and the challenges of obtaining meaningful remedies that these four regions bring together, despite their dismal character, will significantly augment the prospects of knowledge contribution that this project aims to make. The following is a short description of the specific contexts of the proposed research in the four regions of Gujarat, Kashmir, the Northeast and Punjab.

GUJARAT:

In the last week of February 2002, **Gujarat** witnessed an unprecedented outbreak of murderous mayhem and the religious cleansing of the Muslim community organized by the Hindu fascist organizations acting with impunity in the knowledge that one of their most rabid of protagonists was ruling the state as its chief minister. The intensity of the violence, its political background, systematic orchestration, its relentlessness and the pervasiveness, as also the shipwreck and the trauma of survival against such violence from countless others who remain rootless, displaced without justice and reparation have been widely documented.⁵⁰

⁵⁰ *Gujarat Carnage: A Report*, National Human Rights Commission (NHRC) Report, March 2002; *Gujarat Carnage 2002: A Report to the Nation*, by an Independent Fact Finding Mission including Dr. Kamal Mitra Chenoy, S. P. Shukla, K. S. Subramanian,

Despite wide international condemnation of the government for its failures to prevent genocidal violence against the Muslim religious minority and to meet its legal obligations to ensure justice and to establish accountability,⁵¹ the government of Gujarat under Modi continues to rule the state in impunity and to thwart the processes of establishing the truth, justice and reparation. In September 2004, Human Rights Watch issued a report describing intimidation and harassment of witnesses and human rights activists and lawyers pursuing the issues of accountability in the state; the manners in which the state government has “consistently sought to impede successful prosecution of those allegedly involved in the massacres...” and the instances of malicious prosecution of prominent Muslim involved in providing relief and rehabilitation to hapless victims of violence.⁵² More recently, faked encounters of Muslims including the wife of a person who possessed the knowledge of her husband’s custodial killing disguised as an armed encounter, have received some media attention.⁵³ The activists and the organizations monitoring the progress of nearly 4,252 criminal cases registered by the police in Gujarat in the wake of the pogrom, ostensibly to investigate the issues of culpability and the evidential basis of instituting prosecutions, report that more 2,107 cases were closed before there was even a charge sheet and that the subordinate judiciary itself acquiesced in the state of impunity with more than 200 magisterial and trial courts across 17 districts

Achin Vanaik, April 2002; *Rights and Wrongs: Ordeal by Fire in the Killing Fields of Gujarat*, Editors Guild Fact Finding Mission Report by Aakar Patel, Dileep Padgaonkar, B. G. Verghese, New Delhi, 3 May 2002; *We have No Orders to Save You*, Human Rights Watch Report, May 2002; *Gujarat 2002: An Inquiry into the Carnage in Gujarat*, Concerned Citizens Tribunal, Volume I, II and III; Tanika SArkar, “Semiotics of Terror in India: Muslim Children and Women in Hindu Rashtra”, *Economic and Political Weekly*, Vol. 37, No. 28, July 2002; *Threatened Existence: A Feminist Analysis of the Genocide in Gujarat – Report by the International Initiative for Justice*, December 2003; *Compounding Injustice: The Government’s failure to redress massacres in Gujarat*, Human Rights Watch, July 2003; *Justice, the Victim – Gujarat State fails to protect women from violence*, Amnesty International, January 2005

⁵¹ *The Hindu* 02 March 2005, “Gujarat riots a BJP Conspiracy: K. R. Narayanan”; *Annual Report of the United States Commission on International Religious Freedom*, Washington, DC, May 2002, pp. 37, 47 of 81

⁵² *Discouraging Dissent: Intimidation and Harassment of witnesses, Human Rights Activists, and Lawyers Pursuing Accountability for the 2002 Communal Violence in Gujarat*, Human Rights Watch, September 2004, pp. 2-30

⁵³ *Hindustan Times*, 13 June 2007, Harsh Mander, “Counterfeit encounters and the Nation”

of Gujarat either ordering the police to close the investigations or just dismissing the cases themselves. Harsh Mander, a former officer of the Indian Administrative Service who resigned from his position in the wake of the carnage to devote himself to the issues of justice, observes that these acquittals and closures, which happened within one and half years of their institution, are extraordinary for the reason that the judicial system in our country is infamous for its slow grinding. These closures and acquittals belong to a process of subversion of justice, which in his view, is as organized and systematic as the organization of the massacre itself. Harsh Mander traces the deliberative aspect of the subversion to the first stages of the registration of the First Information Reports (FIRs) when the police officials, ignoring all specific references to the culprits and their crimes by the victims, invariably attribute violence to anonymous mobs. Such omnibus FIRs, or anthologies of multiple crimes involving dozens of incidents and hundreds of victims and witnesses with deliberate omissions of all names of alleged culprits, become the stock-in-trade of blocking all meaningful investigations from the very beginning. Even when victims personally visit police stations for the registration of their specific complaints with all the names and details, the police officials, acting under malicious motives or under political pressure, tag them on to their prefabricated generalized FIRs.⁵⁴ When the evidence is strong and unassailable, the police officials and their stooges are known to intimidate and blackmail the victims to withdraw their complaints or to reach out-of-court settlements with the perpetrators against the letter and the spirit of the law. Some trial judges themselves stand accused of facilitating the subversion of justice by such methods. Harsh Mander now leads a group of para-legal and legal activists in Gujarat working with the victim communities across several districts of Gujarat, in monitoring and assisting the process of investigation and prosecution in cases that remain pending. Lawyers' Collective, an organization established by well known senior Supreme Court advocate Indira Jaising, provides expert assistance. In August 2004, their collaboration resulted in the Supreme Court of India ordering the state of Gujarat to establish a monitoring cell comprising seven range inspector generals with policing responsibilities over 30 districts in the state to carry out "extensive and in-depth investigation into cases, numbering

⁵⁴ Harsh Mander, "Frozen Compassion: Healing, Justice and Reconciliation in Gujarat", full citation ????

2000” , which have been closed on the basis of summary reports. The court’s order also said that the officers who carried out the earlier investigations leading to closure reports are not to be involved with further investigations and that the non-governmental organizations participating in the process of justice are to remain “at liberty to draw the attention of the range inspector general to any particular case... (who) will consider the same before deciding whether further/ fresh investigation or what action, if any, needs to be taken...”⁵⁵

Harsh Mander and his Gujarati associates, drawn mainly from the victim community living in resettlement colonies established by charitable organizations, have since launched a people’s campaign for legal justice, peace and reconciliation, known as *Nyayagraha*, meaning insistence on justice, after the term *Satyagraha* forged by Mahatma Gandhi to convey the spirit of nonviolent resistance for truth and human rights. The campaign has developed a community oriented approach to documenting, petitioning and litigating largely neglected cases of victims of violence mainly in the districts of Anand, Ahmadabad, Kheda and Sabarkantha covering the issues of justice, relief and reparation, monitoring the progress of all cases reopened for investigation under the Supreme Court’s direction and intervening with the officials and the courts, through a team of young lawyers working full time, whenever necessary. The campaign has developed training manuals, prepared by the Lawyers’ Collective, and holds regular workshops to review the progress of their work, including documentation.⁵⁶ Another suit filed by the Lawyers Collective against Chief Minister Narendra Modi, importing the customary international humanitarian/ human rights law and the command responsibility principles into interpretations of the domestic law obligations to initiate prosecution as well as to establish a framework of reparation, is pending.

KASHMIR:

⁵⁵ Supreme Court of India, Record of Proceedings in *Crl. M.P. No. 3740-42/2004 in Writ Petition (Crl.) No. 109/2003 Versus State of Gujarat & Otrs with Applin(s) for directions* date: 17/08/2004, Coram: Hon’ble Mrs. Justice Ruma Pal, Hon’ble Mr. Justice S. B. Sinha, Hon’ble Mr. Justice S. H. Kapadia

⁵⁶ *Walking the Path of Justice: a legal manual for paralegals (Nyaya-Pathiks) in Gujarat*, New Delhi: the Lawyers Collective in association with Aman Biradari, 2006

South Asia Forum for Human Rights (SAFHR), mainly through its Secretary-General Tapan K. Bose, has for long been involved with the issues of justice, human rights accountability, end of impunity, democratic peace and reconciliation in Jammu and Kashmir. A fairly extensive documentation of India's counter-insurgency campaign, involving pervasive human rights atrocities including custodial torture, summary executions, enforced disappearances, the orchestration of vigilante violence, use of surrendered militants to engender terrorist threats for strategic objectives, already exists.⁵⁷

SAFHR has also carried out an exhaustive study on the functioning of the constitutional and legal redress mechanisms for the protection of the rights to life and liberty in Kashmir in the period between 1990 and 2003. The study is based on the record of petitions for the writ of habeas corpus, in all eighty seven, filed by the families of the disappeared before the High Court of Jammu and Kashmir and eleven other cases of disappearances in which the families chose not to file petitions from the fear that the army officials may become antagonized and never release their relatives, if still in custody, alive. Out of the total of 98 cases, selected in this manner, the study team was able to trace and talk to 93 families, in a structured interview process, to understand the ordeals and the woes of their efforts to seek justice and their outcomes. The study has been conducted by Ashok Aggrwaal, a lawyer from Delhi, and Priya Jain, a social worker also from Delhi, in close association with a group of 10 young lawyers from Srinagar known as the Law Ring. It is the first thorough and methodologically rigorous attempt to empirically examine the dynamics of the situation of impunity in the obtaining situation of conflict in the state.

THE NORTHEAST:

⁵⁷ Urvashi Butalia (ed.), *Speaking Peace: Women's Voices from Kashmir*, London and New York: Zed Books, 2002; Rita Manchanda, "Guns and Burqa: Women in the Kashmir Conflict", in Rita Manchanda (ed.), *Women, War and Peace in South Asia*, New Delhi, Thousand Oaks and London: Sage Publications, 2001, pp. 42-101; *Everyone lives in Fear: Patterns of Impunity in Jammu and Kashmir*, New York: Human Rights Watch, September 2006; Kamal Mitra Chenoy, "Human Rights Violations: A Report", in Shri Prakash and Ghulam Mohammad Shah (eds.), *Towards Understanding the Kashmir Crisis*, New Delhi: Gyan Publishing House, 2002; *Kashmir: Violence and Health*, Netherlands: Medicins Sans Frontiers, November 2006; Arundhati Roy (ed.), *13 December: A Reader*, New Delhi: Penguin Books, 2006

The common Indian appreciation of the Northeast, its 'sister states', their people and their struggles and the difficult relations they have had with the institutions of the Indian State is often singularly out of step with the realities. These limitations of appreciation are reflected, probably involuntarily, also in the scant attention India's civil society organizations confer on pervasive human rights abuses and total impunity prevailing mainly in the states of Assam, Arunachal Pradesh, Manipur, Nagaland and Tripura; two other states of the northeast being Meghalaya and Mizoram. This is surprising because India's armed forces have been battling the people of the Northeast for a longtime: the Naga nationalist insurgency, known as "the mother of all insurgencies" and the Mizo uprising, successfully resolved through a peace accord signed between the India Prime Minister Rajiv Gandhi and the Mizo National Front leader Landenga. The entire legal culture of impunity in India first found sap in the northeast with *the Armed Forces (Assam and Manipur) Special Powers Act, 1958 (AFSPA)*; *the Assam Disturbed Areas Act, 1955 (ADAA)*, *the Nagaland Security Regulation, 1962* taking the lead. The section 7 of *AFSPA*, which empowers a person of regular rank in the armed forces to "shoot to kill", to destroy any "position or shelter", to "arrest, without warrant, any person", to "enter and search without warrant any premises", and the provisions of *the Nagaland Security Regulation, 1962*, which allowed the security forces to declare any area as a protected place, to prohibit non-residents from entering or "loitering in the vicinity of any such place", to remove all residents from such an area to "any other area", to restrict their movements and conduct, and to "do any other act involving interference with private rights of property", are the first legislative repudiation of the chapter III of the Indian constitution. The section 7 of *the Armed Forces Special Powers Act*, as also the section 197 and 45 of the Code of Criminal Procedure, protect the army officers and the state officials from prosecution.⁵⁸

⁵⁸ For a comprehensive analysis of the working of the AFSPA, its context and implications for India's nation building projects in the northeast see Sanjib Baruah, "Postfrontier Blues: Towards a New Policy Framework for Northeast India", Policy Studies 33, 2007, Washington D. C: East-West Center, 2007

All attempts to challenge the AFSPA and the ADAA have been defeated with the Union government directly intervening against the judicial initiatives.⁵⁹ The recommendations made by the committee appointed by the government of India under the chairmanship of former Supreme Court judge B. P. Reddy to review the working of the AFSPA, although premised on the primacy of the security of the nation, have been ignored.⁶⁰ Much of the law relating to writ of *habeas corpus* under the Supreme Court, which has developed in the rest of the country, depends almost entirely on 1984 judgment of the Supreme Court in the matter of *Sebastian Hongray Vs. Union of India*, which concerns the enforced disappearances of C. Daniel, the headmaster of a school in a district of Manipur, and C. Paul, a pastor of the local church, which the officers of the 21 Sikh Regiment had carried out in March 1982. Even after coming to the conclusion that murders had been committed and concealed, the court decided not to “impose imprisonment” or to institute criminal proceedings. It merely chose to order the ministries of defense and home affairs to pay 100,000 rupees each to the wives of the disappeared persons as “a measure of exemplary costs”⁶¹ The enforced disappearances of C. Daniel and C. Paul had been carried out through military operations under the AFSPA and ADAA. Yet, the Supreme Court did not make any comment on the provisions of impunity they provide.

A Manipuri woman activist Irom Sharmila has been on a fast unto death to demand the scrapping of the impunity provisions under the AFSPA since 2000. Arrested and force-fed in a hospital, Sharmila has been resuming her fast as soon as the authorities let go of her.⁶² In Assam, the High Court at Gauhati has recently taken up the case of disappeared persons supposed to have been members of the ULFA who had been nabbed by the Bhutanese authorities and handed over to the Indian army in 2003. A two-member

⁵⁹ Civil Writ Petitions Nos. 832-34 of 1980 before the Delhi High Court; *Nungshi Tombi Devi Vs. Rishang Keishang*, 1982 (1) GLR 756; *The Civil Liberties and Human Rights Organizations (CLAHRO) Vs. P. K. Kukrety*, 1988(2) GLR 137; NPMHR ?????

⁶⁰ As Sanjib Baruah’s *Postfrontier Blues* points out, the report has not been officially made public; but *the Hindu* has posted the report on its website -- <http://www.hindu.com/nic/afa/>

⁶¹ *Sebastian Hongray Vs Union of India and others*, AIR 1984 SC 571

⁶² Uma Chakravarti, “The Burdens of Nationalism: Some Thoughts on South Asian Feminists and the Nation State”, ???, pp. 16 and 32 of 38

bench of the court, led by chief justice B. S. Reddy has asked for the list of all the supposed militants who the Bhutanese officials had made over to the Indian army with the defense ministry taking the position that the list is a 'privileged' document that could not be made public against the argument that the suppression of the list will lead to denial of justice.⁶³ An article by Sanjib Baruah, published in *Telegraph*, points out that a Commission of Inquiry appointed by the Assam government to investigate the secret killings which the defense forces orchestrated in the period between 1998 and 2001 by recruiting 'militant collaborators' is at a dead-end because Assam's then inspector general of police, who supervised the operations and is now the director general of police in Tripura, refuses to cooperate. The article points out that "the earlier two commissions" appointed by the state government to investigate the matter folded up without unearthing much and the third commission may go the same way.⁶⁴

A study of the peace process between the government of India and the National Socialist Council of Nagalim (NSCN-IM) following a ceasefire agreement between the two effective from 24 July 1997, which I made on behalf of a civil society initiative convened at Kohima in March 2001, showed that not only were the issues of justice, accountability, end of impunity and reconciliation through reparation completely forgotten but even the ground rules of the ceasefire agreement and the monitoring mechanism, while providing for safeguards for the Indian military and the NSCN cadres, made no provisions for the protection and the enforcement of the human rights of ordinary civilians.⁶⁵ The agreement, which promises unconditional dialogue at the highest political level for a negotiated and peace settlement to the issues behind the six decades long Naga nationalist insurgency, is still in place although the negotiations have been dead-locked for some time. It is possible that the government of India eventually succeeds in persuading the leaders of the NSCN-IM to sign up a peace accord. But the evidence from the past peace agreements between the Naga armed groups and the

⁶³ *Telegraph*, Calcutta, 10 August 2006, Sanjib Baruah, "Torchlight on a blindfolded face"

⁶⁴ *Telegraph*, Calcutta, 10 August 2006, Sanjib Baruah, *Ibid*

⁶⁵ Ram Narayan Kumar and Laxmi Murty, *Four Years of the Ceasefire Agreement between the Government of India and the National Socialist Council of Nagalim: Promises and Pitfalls*, New Delhi: Other Media Communications, 2002, pp. 135-138

government of India suggests that an accord that does not give importance to the substantial issues of rights and reparations may not succeed in ending the cycles of violence. Since the concept of just power is incompatible with impunity, it is necessary to appraise all efforts to end conflict in the region through negotiations by inducting the rights to truth, justice and reparation of wrongs as the essential components. As Sanjib Baruah points out again and again in his writings, the national security-driven agenda of the central state and the lack of people's security, reflected in its counter-insurgency policies, have so far undermined the curative potential of a democratic exchange between the government in New Delhi and the people in the northeast. He points out that "while the elections continue to play an important role, basic democratic values like the rule of law, accountability, and transparency get thrown out of the window."⁶⁶

PUNJAB:

The matter of enforced disappearances leading to mass cremations in Punjab epitomizes a unique combination of the legal process, under the fundamental rights jurisdiction of the Supreme Court, and a rigorous documentation of facts of human rights abuses, which the human rights community involved with the case managed to develop.⁶⁷ Yet, the objectives of truth, justice and reparation remain unrealized. Though the facts of abuses have been established and partially acknowledged, the State agencies have found ways to evade the binding obligations of justice under the law and the imperatives of reform.

The matter has been pending before the NHRC for a decade after the Supreme Court, in December 1996, mandated it to determine and adjudicate all the issues and to award compensation following a report by the CBI, which disclosed "flagrant violations of human rights on a mass scale" and 2097 illegal cremations at three sites in Amritsar district alone.

⁶⁶ Sanjib Baruah, *Durable Disorder: Understanding the Politics of Northeast India*, New Delhi: OUP, 2005, pp. 61, 165

⁶⁷ Ram Narayan Kumar, Amrik Singh, Jaskaran Kaur & Ashok Aggarwal, *Reduced to Ashes: The Insurgency and Human Rights in Punjab*, South Asia Forum for Human Rights, Kathmandu: May 2003

After 10 years of litigation, the NHRC has effectively disposed of the matter with its 10 October 2006 order that awards arbitrary sums of monetary compensation to 1245 victims. The order also appoints K. S. Bhalla, a retired judge of the Punjab and Haryana High Court, to ascertain, over the next eight months, the identities of the remaining persons cremated in the district.⁶⁸ The NHRC also refused to even consider a report by two internationally renowned bodies -- Physicians for Human Rights (PHR) and the Bellevue/ New York University School of Medicine Program for Survivors of Torture – on the physical and psychological impact of human rights violations on families of the victims whose cases were before the commission for adjudication.⁶⁹

Despite this history, the Committee for Information and Initiative on Punjab, the main petitioner body involved with the research, documentation and the litigation of the case from the very beginning, has been appearing before the Bhalla Commission with the objective to assist it with the information and the evidence that it requires to resolve the remaining unidentified cremations listed in the CBI's report. The Committee has made written submissions to point out that the State officials are on the record saying that more than 300 "militant collaborators" who had publicly been killed and cremated got rehabilitated under assumed identities and that they will not reveal further details on how and where these forgeries were actually affected or who were the actual persons killed and burnt in lieu of such "militant collaborators".⁷⁰ The requirements to fix the true identities of remaining anonymous cremations carried out in three crematoria of Amritsar district oblige the Bhalla Commission to call for information on these admitted forgeries and to clearly determine the cremation grounds at which they were actually carried out. The committee has also pointed out that the mandate of completing the identifications of the remaining unidentified cremations requires information on such police abductions and enforced disappearances that occurred outside Amritsar. The committee has been able to clearly demonstrate that the police agencies in Punjab operated without respect for the norms and regulations of their territorial jurisdictions and that persons abducted and

⁶⁸ citation of the order ????

⁶⁹ PHR's letter to the NHRC, 8 December 2006 -- <http://physiciansforhumanrights.org/library/documents/letters/letter-2005-12-08-punjab.pdf>

⁷⁰ *The Tribune*, "Amarinder's no to CBI probe into Sukhi case", 24 February 2006; *The Hindustan Times*, Chandigarh, 22 February 2006, "PIL seeks names of persons declared dead"

disappeared in one district were often confined, interrogated and killed in other districts. Many who belonged to Amritsar were abducted, killed and cremated outside Amritsar. Likewise, many shown to have been cremated as unidentified bodies in the crematoria of Amritsar came from other areas. The task of resolving their true identities requires the Commission to investigate and analyze all reports of police abductions resulting in enforced disappearances throughout Punjab and we will be able to assist the Commission with methodology and the field work if it is able to take on the challenge.

Justice Bhalla Commission will complete its term at the end of June 2007 and it has already rejected the Committee submissions to seek the aforementioned information.

METHODOLOGY:

Understanding impunity and discovering the failures and possibilities of rights to truth, justice and reparation will necessarily require a methodological approach to research that can also simultaneously foster a dynamics of plural dialogue and discursive solidarity linking survivors of atrocities and those elements of the civil society who profess commitment to the rule of law; understand the working of the State institutions; possess the capacity or a potential interest in promoting human rights accountability and yet remain aloof to its challenges. The methodology of investigation that also becomes dialogue is a contrapuntal conception to the ideology of realism founded on the wisdom of “the Melian Dialogue”, which dismisses the rights discourse with the argument that “the strong do what they have the power to do. And, the weak must suffer what they have no power to escape.” Immortalized by Thucydides’ *History of the Peloponnesian War*, this wisdom of ‘Melian dialogue’ which fed twentieth century atrocities and fostered impunity appears to have emerged as a fashionable theory of power relations at the start of the new millennium. Dialogue as a method of research is an alternative to this ideology of power and its working that remain unmediated in the civil society realm largely from the existing disconnection between perceptive standards and experiential perspectives of sufferers and bystanders. Developing a complete design of research, founded on this alternative idea of dialogue, will require all the participants of the project to get together for a structured brainstorming at its very inception to attain conceptual clarity on the objectives, sharing of responsibilities and research tools to ensure dispassionate,

objective and thorough standards of investigation, documentation and analysis while ensuring scope for an empathetic understanding for the urgency of institutional reforms from the survivors perspectives. The brainstorming session will have to evaluate and analyze the experiences and outcomes of organized initiatives for truth, justice, reparation and accountability within India, South Asia and also outside and assess diverging views on the effectiveness of methods. The history of such initiatives is long and complex and a structured discussion will require appraisal and guidance from our experts. The component on sexual violence and reparation principles will also require conceptual and methodological clarity. A two day long inaugural workshop, to be organized within six weeks of initiating the project, will be conducted on the basis of five written papers, dealing with the regional perspectives, international experiences with initiatives on rights to truth, justice and reparation and sexual violence and reparation principles.

The following is a tentative proposal on five phases of administering and completing the project:

The first phase of the project will be devoted to the collection and compilation of the existing data on human rights violations from all the four selected regions in objective and standardized formats, their digitalization and transfer into computer databases. The process will involve close collaboration among those who have carried out the documentation in the four regions, expert consultants, the program administrators and a database designer who will discuss and finalize the principles for the ranking of information and sampling, the fields of analysis and the generation of issue-focused databases covering all aspects of truth, justice, liability and the requirements of reparation from the survivors perspectives. All the databases will then be uploaded to a secure e-platform linked to SAFHR's website, which will become an electronic agora accessible to all the participants of the project enabling them to interact among themselves, from their own locations, with voice and virtual presence, adding their research and data inputs in text, sound, photographs, video clips, maps and graphs for the purposes of developing and administering the project. As a part of its human rights and peace studies program, SAFHR has already successfully experimented with such an e-platform, both as an interactive stage for the distance learning segment of the course and also as a resource site. Given the fact that the participants and the administrators of the project will belong

to far-flung regions of India and outside and will be often on the move for the purposes of further research, an interactive e-platform will ensure that they continue to work together, keeping track of the progress until its conclusion on a common virtual stage.

Administered from SAFHR's Katmandu office, the participants of the project can discuss their data, research and analysis online, in groups or on one to one basis, and save the content of all the interactions for future references. **Implementation of the first phase of the project, within eight months of its initiation**, will be marked by the organization of a two days long symposium at one of the four regional capitals devoted to presentations and discussions of the gathered data and its highlights. Invited participants of the symposium will include around 20 members of victim families from all the four regions under study; approximately 10 representatives of human rights organizations, academics and lawyers from different parts of India; 6 members of the human rights community from other countries of South Asia and 4 representatives of international human rights organizations involved with the issues of justice, accountability and reparation. Local representatives of the civil society, belonging to various professional and community groups, serving and retired officials and judges and media practitioners will also be welcome to attend. The main objective of the symposium will be to place the facts gathered from the compilation of the human rights data, their significance and implications for the rule of law concepts for an open dialogue before the mixed gathering and to elicit varied responses from the perceptions of victims of abuses, non-victims, human rights academics and experts and also members of the civil society who understand or even empathize with the positions of the political establishment pertinent to the purpose of shaping the methodology of further research. The last session of the symposium will be devoted to formulating the guidelines of research, with attention to all the previous discussions, to capture and analyze the perceptions and practices of power; the politics of narratives and knowledge generation; the established habits of legality and the political orientations of those who work the judiciary as members of the bench, the prosecution and the bar, which contribute to the state of impunity, denigration of the abused and the repetition of wrongs. The proceedings of the symposium will be digitally recorded, edited and summarized under the supervision of expert consultants, the program administrators and the donors and uploaded on the e-platform.

The second phase of the project will be devoted to capturing and analyzing, media narratives, parliamentary discussions, scholarly literature and judicial proceedings and policy proclamations dealing with the events of human rights abuses and their contexts, gathered in the first phase of the project mainly from the survivors' testimony. The aim of this exercise will be to acquire a comprehensive parallel understanding of the mainstream perceptions and the terms of discourse which contribute to legitimization of State violence, suppression of knowledge about the plight of those under atrocities and to abuses attendant on denial of effective remedy and redress of wrongs by the institutions and the agencies of the State to the tainted groups. The exercise will involve gleaning of a representative sample of narratives, comments and expositions of all genres from both the national and international sources, directly corresponding to the material of the regional case studies and the time periods they cover, and their evaluation in terms of the standards of objectivity, intellectual independence and balance in the sources of information on which the truth claims they advance are founded. One objective of this part of the project will be to appraise the merits of the proposition that the divergence of perceptions on justice and truth between the victims of impunity and those who are alien to it may be a corollary of the physical and psychological compass of experience that, intentionally and by deliberative connections of social moorings, becomes available or denied. The exercise will establish the importance of the victim testimony and survivors' narratives. **The second phase of the project, to be completed also in eight months,** will be accompanied by the writing of four working papers, juxtaposing and analyzing the narratives of 'truth' and the spectrum of perceptions on the issues of justice, reparation and accountability from all perspectives. The working papers as also the compilation of the research material and sources on which they depend will be loaded on the e-platform and made accessible to all the participants of the first symposium for one month before they are invited again for the second symposium under the project. The two day long second symposium will be held at a regional location other than the first, the basic structure of presentations followed by questions, comments and discussions remaining the same. The last two sessions will aim to develop a framework for a more in depth examination of the points of divergence in the understanding and the interpretations of

facts of human rights abuses, their contexts and the causes in a structured interview process, identifying the individuals and organizations from across the spectrum of perceptions represented in the literature survey; others including local politicians, police officials, civil servants, teachers and members of the business community representing the silent majority as well as the representatives of the victim communities from the four regions to be interviewed. The proceedings of the symposium, as of the first, will be digitally recorded, edited and summarized and uploaded on the e-platform.

The third segment of the project will be divided into two parts of six months each, the first being devoted to in-depth interviews in the field, their translations, transcriptions and editing and the second part devoted to the writing of a comprehensive analysis of the data and the discussions, including the interviews, and the surveyed literature with reference to the framework of law and the institutions of remedy on the rights to truth, justice, reparation from the domestic as well as the international perspectives. The analysis will examine the silences and the shortcomings of the existing laws and the writ remedies, in theory and in the processes of their implementation, and will also take into account the histories of legislative and administrative efforts towards police reforms, independence of the judiciary, the constitution of statutory human rights institutions, their achievements and inadequacies in addressing the issues of impunity, and in preventing and ensuring the non-recurrence of systematic human rights abuses. The work of analysis and writing will progress synchronously with the organization of a series of structured meetings and workshops including the expert consultants and the program administrators on the basis of issue papers drawn from all the previous research. The complete record of these papers and the workshops will be maintained and parts of the discussions and the issue papers will be regularly loaded on to the e-platform. There will be an internal review committee, comprising the expert consultants, the program administrators, and a representative selection from the participants of all the symposiums to read, comment and suggest revisions of the draft manuscripts. The final outcome of the process will be presented at a third three day long symposium organized at an easily accessible location to ensure that a larger number of prominent human rights activists, academics, lawyers, judges and other segments of the civil society, including all

participants of the previous symposiums are able to join. The presentations and the discussions will be recorded, uploaded on to the e-platform.

The entire research and the writing will be reviewed and finalized along with detailed recommendations and an advocacy plan to end impunity in India in the light of the deliberations over the next three months.

The fifth and the final part of the project will revolve around attempts to generate a comprehensive framework of advocacy to end impunity and the survivors' perspectives on their rights to truth, justice and reparation through structured dialogues involving affected communities from all the four regions of India as well from outside, project participants, other experts and civil society segments. The objective of the exercise in the final fifth phase of the project will be twofold: to translate findings of the research as dialogue into actionable programs of justice, sensitive to trans-regional diversities of experience, context and perceptions and yet fostering a sense of togetherness, collective action, a shared language of rights, resistance, objectives and a common pool of empirical and normative understanding to challenge realist assumptions of impunity; secondly to weld together a formal or informal all-India group, led by survivors of abuse of power in association with the project participants and other experts, to independently lead diversified campaigns of public opinion building, lobbying and advocacy for the establishment of legislative and institutional reforms to ensure their actualization. The role played by survivors' led groups involved in campaigning for acknowledgement of wrongs and justice in comparable conditions of impunity, such as Mothers of the Plaza de Mayo in Argentina; the Association of the Families of the Disappeared (AFDD) in Chile; *Nuestras Hijas de Regreso A Casa* in Mexico; SERPAJ in Uruguay; the Assembly of Civil Society (ACS) in Guatemala in rupturing the hegemony of discourse maintained by atrocious regimes is well known. The success of Women's International Tribunal on Japanese Military Sexual Slavery, constituted in December 2000, was entirely due to the efforts that the victims of sexual slavery in South Korea made in arousing international consciousness against the unacknowledged abuses committed by the Japanese military during World War II and the solidarity they were able to forge with the victim survivors, their sympathizers and scholars across the region and outside. Critical social movements across the globe able to effectively challenge the realist paradigm in fostering social

concerns which the State and the market fail to address and in penetrating policy-making arena are all coalitions of grassroots activism and intellectual empathy and support.⁷¹ It is our strong conviction that by redefining the space for advocacy for the end of impunity and institutionalization of rights to truth, justice and reparation by unchaining the reflexive participation of affected communities, the project will end the social isolation and alienation of the survivors of atrocities and introduce new standards of associational accountability within the human rights movement.

As a part of this exercise, the last five months of the project will be devoted to organizing a series of four conferences to be attended by in addition to the participants of the previous symposiums representatives of survivor families who will constitute the core group of an all India forum to be established for the purpose of generating public opinion building campaigns and advocacy. Two conferences in the series will be held at the remaining two regional capitals and the other two in the metropolitan cities of India. The proceedings of these conferences will be recorded and transmitted through the website and their summary will be included in the final draft of the volume for publication, which will be brought out jointly by SAFHR, ICTJ, The Lawyers' Collective, Nyayagraha and Ensaaf.

⁷¹ Akula, Vikram, "Grassroots Environmental Resistance in India" in Bron Raymond Taylor (Ed.), *Ecological Resistance Movements: The Global Emergence of Radical and Popular Environmentalism*, New York: Suny Press, 1995, pp. 127-145; Anaya, James and Theodore Macdonald, "Demarkating Indigenous Territories in Nicaragua", *Cultural Survival Quarterly* 19(3), 1995, 69-73; Broad, Robin and John Cavanagh, *Pondering Paradise: The Struggle for the Environment in the Philippines*, Berkeley, CA: University of California Press, 1993, pp. 150-155; Chatterjee, Pratap and Matthias Finger, *Earth Brokers: Power, Politics and World Development*, New York: Routledge, 1994; Frederick, Howard, *Global Communication and International Relations*, CA: Wadsworth, 1993, pp. 10-15; Hadsell, Heidi, "Profit, parrots, peons: Ethical Perplexities in the Amazon", in Bron Raymond Taylor (Ed.), *Ecological Resistance Movements: The Global Emergence of Radical and Popular Environmentalism*, New York: Suny Press, 1995, pp. 70-86; Rich, Bruce, *Mortgaging the Earth: The World Bank, Environmental Impoverishment and the Crisis of Development*, Boston, MA: Beacon, 1994, pp. 16-20; Walker, R. B. J., *One World, Many Worlds: Struggle for a Just World Peace*, Boulder, CO: Lynne Rienner, 1988; Wapner, Paul, "In Defense of Banner Hangers: The Dark Green Politics of Greenpeace", in Bron Taymond Taylor (Ed.), *Ecological Resistance Movements: The Global Emergence of Radical and Popular Environmentalism*, New York: Sunny Press, 1995, pp. 300-314

TIMETABLE:

The project is conceived in five stages. The first two phases, divided into eight months each, would be completed in sixteen months. The third segment of the project, also divided into two phases, will be implemented in 12 months. The fourth segment of the project, in revising and finalizing the research findings following a three day long symposium to mark the conclusion of the third phase, will be concluded in three months. The final phase of the project, visualized as an attempt to generate a framework and a forum for advocacy led by survivors of atrocities and in close association with the project participants, through four conferences organized in the region, will be completed in five months. The total duration of the project is three years.

INSTITUTIONS AND PERSONNEL:

The project will be housed by **South Asia Forum Human Rights Limited**, registered as a company limited by guarantee and not having a share capital, in Hong Kong and administered, for the sake of convenience of all the participants of the program, from the regional office of **South Asia Forum for Human Rights (SAFHR)** at 3/23, Shree Durbar Tole, Patan Dhoka, GOI Box 12855, Lalitpur, Kathmandu, Nepal. Tapan K. Bose, a renowned documentary film maker, author and human rights and peace activist from the region, is the Secretary-General of SAFHR. He will also be the project's expert consultant on Kashmir. SAFHR will appoint one full time research associate and a desk officer for the administration of the program.

Ram Narayan-Kumar, former director of SAFHR's South Asian Orientation Course in Human Rights and Peace Studies, will be the full time director of the project. Kumar has been involved with human rights and democracy issues in the region since 1975 when he was imprisoned for 19 months for his vocal opposition to Indira Gandhi's Emergency regime that lasted till March 1977. Kumar's work for justice and accountability in Punjab is widely recognized. A founder member of the Committee for Information and Initiative on Punjab, which petitioned the Supreme Court in April 1995 for a comprehensive investigation on the matter of police abductions resulting in the secret cremations in Punjab, Kumar is the lead author of *Reduced to Ashes: The Insurgency and Human Rights in Punjab*, a 2003 publication of South Asia Forum for

Human Rights. Some of his other publications are: *The Sikh Unrest and the Indian State: Politics, personalities and historical retrospective* (Ajanta Publications, New Delhi, 1997); *The Sikh Struggle: Origin, Evolution and Present Phase* (Chanakya Publications, Delhi, 1991); *Confronting the Hindu Sphinx*: Ajanta Publication, New Delhi, 1991; *Four Years of the Ceasefire Agreement between the Government of India and the National Socialist Council of Nagalim: Promises and Pitfalls*, Other Media Communications, New Delhi, 2002; "India's Constitutional Discourse: Some Unanswered Question" and "Rights Guarantees and Judicial Wrongs: Arguments for an Appraisal" in *Recasting Indian Politics*, ed. Paul Flather, Palgrave, London Forthcoming; [June 2007] *Critical Readings in Human Rights and Peace*, Shipra publications, New Delhi, 2006. Former Reuters Foundation Fellow at the University of Oxford, Kumar's forthcoming books include *Terror in Punjab: Narratives, Knowledge and Truth* and *Hegemony and its Nemesis: Perspectives on Resistance to Aggression and Occupation in the Middle East*.

The following organizations and individuals will be the main active partners involved with the development and the implementation of various segments and the phases of the project:

The Lawyers' Collective, an organization of lawyers and law students involved with public interest issues in India, is headed by Indira Jaising who, as a senior Supreme Court advocate in India since 1986, has been focusing on protection of human rights, rights of women and those of the poor working class. Indira Jaising successfully prosecuted K. P. S. Gill, former Director General of Punjab police, on behalf of Rupan Deol Bajaj, an IAS officer who filed a complaint against Gill for outraging her modesty. Indira represented the victims of the Union Carbide's industrial disaster in their claims for compensation against the multinational and has also represented a people's commission in Punjab, comprising three retired high court judges, when the Punjab police moved the high court to ban its investigations into histories of extrajudicial killings, disappearances and mass cremations in the State.

Indira Jaising will be the project's main expert consultant on the issues of domestic law and its working on impunity and the rights to truth, justice and reparation.

Nyaya-agraha: Campaign for Legal Justice and Reconciliation in Gujarat is led by Harsh Mander, former officer of the Indian Administrative Service who quit his position in the wake of the carnage in Gujarat to devote himself to pursue the objectives of justice, reparation and reconciliation. Nyaya-graha is a group, comprising young lawyers and human rights activist, drawn mainly from the victim communities in various districts of the state involved mainly in monitoring and intervening in the cases that have been reopened for investigations following Supreme Court's intervention in August 2004. One senior member of Nyaya-agraha team, appointed by Harsh Mander, will join the project as a research associate in the first phase of the project for the duration of eight months. Harsh Mander will be one of the project's expert consultants.

The International Center for Transitional Justice, with its head office in New York City, has been involved in documenting and campaigning on the issues of justice and accountability, in countries emerging from armed conflicts as well in the countries with a regular rule of law frameworks where systemic abuses of power and impunity remain rampant. Vasuki Nesiah, a senior associate at the center, has been involved with the matter of disappearances resulting in the secret cremations that happened in Punjab and, more recently, organized a strategy meeting in New York attended by the activists and the advocates connected with the matter to develop future strategies to deal with the matter. Vasuki Nesiah will be an expert consultant.

Ensaaf is a registered charitable organization at Portland, the USA, working mainly with the objectives to end impunity in Punjab. Two of the organizations founding directors, Jaskaran Kaur, a law graduate from Harvard and a co-author of *Reduced to Ashes*, and Sukhman Dhami, who earned his J. D., from the Washington College of Law and is a 2006 Echoing Green fellow, have also been involved in the field work in Punjab. In 2001, Jaskaran Kaur had a Harvard Human Rights Program Summer Fellowship to study the judicial attitudes in Punjab reflected in its handling of the petitions from the relatives of the disappeared for the writ of habeas corpus. The study was published in the *Harvard Human Rights Journal*. Ensaaf is in the process establishing a permanent field

presence in Punjab, which will significantly contribute to the implementation of phases I and III of the project in the region. Both Jaskaran and Sukhman will join the project as consultants and research associates.

Satish Kumar Jain is a professor of economics at the Center for Economic Studies and Planning, Jawaharlal Nehru University, specializing in social choice theory, law and economics, and methodology and philosophy of economics. He is the editor of *Contemporary Ideas and Issues in Social Sciences*, an online journal, and has authored a number of papers on the issues relating to theories and practices of democracy, human rights and environment. Satish Kumar Jain will be one of the project's expert consultants.

Sanjib Baruah is a professor of political studies at Bard College, New York, and is also the author of several important studies on the Northeast of India, including *Durable Disorder: Understanding the Politics of Northeast India*, New Delhi: OUP, 2005 and *India Against Itself: Assam and the Politics of Nationality*, University of Pennsylvania Press/ OUP, 1999. He is also a visiting professor at the Centre for Policy Research, New Delhi and the Department of Humanities and Social Science at the Indian Institute of Technology, Gauhati, Assam. Sanjib Baruah will be the project's expert consultant on the northeastern issues and will recommend a research associate to complete the first phase of program for the duration of eight months.

Patrick Hoenig researched the issues of self-determination in Kashmir, published as a book in Germanay, *Der Kashmirkonflikt und das Recht der Voelker auf Selbstbestimmung*, Berlin: Verlag Duncker & Humblot, 2000, and worked for several years for the United Nations in New York and in Africa, serving as the Political Officer in the UN Mission in the Democratic Republic of the Congo from 2004 to 2006. He has remained closely involved with the issues of justice, democracy and human rights in South Asia as a member of the faculty of SAFHR's South Asian Orientation Course on Human Rights and Peace Studies, as a "UN Dialogue with Global South" fellow at Jawaharlal Nehru University, New Delhi in 2005 and currently as a visiting professor at the Academy of Third World Studies, Jamia Millia Islamia, New Delhi.