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INDIA



Justice, the victim - Gujarat state fails to protect women from violence

1. Introduction

In February 2002, violence erupted in the state of Gujarat in western India. Some 2000 people, mostly Muslims, were killed and many others were injured and forcibly evicted from their homes and businesses over the course of the following weeks. Violence against women and girls was a key feature of the violence. Scores of Muslim women and girls were sexually violated - raped, gang-raped or mutilated. Many saw their family members killed and their homes and businesses destroyed. After these traumatizing events many women victims were left to care for their family's survival, often in makeshift relief camps with inadequate support, conditions and reparations. Few perpetrators were convicted and victims' attempts to obtain legal redress have been largely frustrated.

The Indian state of Gujarat has a history of communal violence whereby violence was perpetrated by both Hindus and Muslims.¹ While the violence in

2002 followed a fire in a train which killed 59 Hindus, it cannot be likened to earlier patterns of communal violence. The violence that ensued in the period from late February to May 2002 almost exclusively involved Muslims suffering from targeted violence perpetrated by organized right wing Hindu mobs.² The violence was grounded in the widespread ideology of *Hindutva* which sees India as a nation of Hindus. (For details of this ideology see section 4 and 6.)

By looking primarily at the cases of two women victims - Bilqis Yakoob Rasool and Zahira Sheikh, this report demonstrates a range of failures of the

selective violence that was perpetrated was done with remarkable precision, suggesting meticulous planning over a protracted period, rather than the spontaneous mob frenzy characteristic of communal riot." Sahmat, *Ethnic cleansing in Ahmedabad: Preliminary report*, 2002. Similarly a fact finding mission led by Kamal Mitra Chenoy said, "the events in Gujarat do not constitute a communal riot ... the bulk of the violence that followed (the incident at Godhra) was state-backed and one-sided violence against the Muslims tantamount to a deliberate pogrom". Chenoy et al, *Gujarat carnage 2002*, 2002.

² In this report, the phrase 'right wing Hindus' or 'Hindu groups' refers to those that support the ideology of *Hindutva*, a political ideology which sees India as a nation exclusively of Hindus and regards Muslims as a threatening 'enemy'. 'Right wing Hindus' are often members of organizations affiliated with this ideology including the RSS, BJP or Bajrang Dal. For more details on *Hindutva* and organizations adopting this ideology see section 6.

¹ The term "communal violence" in the Indian context refers to violence between religious communities such as between Hindus and Muslims. Observers have pointed out that the term "communal violence" is inappropriate to describe events in Gujarat in 2002. "The events in Ahmedabad do not fit into any conceivable definition of a communal riot. All evidence suggests that what happened there was a completely one-sided and targeted carnage of innocent Muslims, something much closer to a pogrom. Moreover,

state to fulfil the standard of due diligence under national and international obligation to prevent grave human rights abuses perpetrated against women, protect victims and bring the perpetrators of these crimes to justice. Failures are identified at all levels: the police, trial court, high court, the state government and central government.

- Police in Gujarat failed to fulfil their constitutional obligation to prevent violence and protect victims. In many cases, police reportedly participated and connived in the violence. They thwarted victims' legal redress by failing to accurately register and investigate victims' complaints.
- Trial courts in Gujarat failed to ensure justice for victims in a variety of ways, including by their mechanical approach to evidence, failure to use available remedial procedures and failure to ensure a peaceful atmosphere in the court.
- The Gujarat High Court failed to ensure justice for victims, inter alia by failing to use its powers to question the trial courts' passive role in their quest for justice.
- Gujarat government authorities and trial courts failed to provide medical relief and secure medico-legal evidence of victims who had been sexually abused.
- Justice for women victims has also been frustrated because existing laws relating to rape and sexual assault are inadequate.
- The Government of Gujarat not only failed to prevent crimes and ensure that those responsible were brought to justice but it also failed to curb hate speech and inflammatory media and maintain strict neutrality with regard to the violence. The state government also showed reluctance to cooperate with the judiciary, National Human Rights Commission (NHRC), and resisted public scrutiny.
- The Government of Gujarat failed to provide full - or in most instances, any, - reparations to victims and their families, including restitution, rehabilitation,

satisfaction and guarantees of non-repetition.³

- The Government of India failed to ensure that there was effective legislation in place defining adequately all of the abuses (in particular those of sexual violence) and including those amounting to crimes under international law, as crimes under Indian law, providing effective access to courts for victims and their families and requiring those responsible to provide reparations.

There is also evidence to suggest that the State of Gujarat acquiesced in the violence. Meanwhile, the central government of the time, despite having constitutional powers and international obligations to do so, failed to intervene while deliberate and massive violations to human rights were occurring. Since the violence, the Supreme Court of India and National Human Rights Commission (NHRC) have been harshly critical of Gujarat state institutions for their inadequate protection of human rights.

2. Violence against women in Gujarat

Situations of large scale violence, whether grounded in enmity based on religion, race, language or ethnic identity, are not only about men fighting each other. They are not gender-neutral exercises in destruction. In fact, throughout the duration of such violence and thereafter, women suffer in very specific ways determined by their gender. Common to almost all experiences of such violence is the intersection of gender and other identity markers, such as ethnicity, race or religion. Violence against women in such situations is predicated on the sexualization of women and their role as transmitters of culture and symbols of a particular community: women experience situations of large scale violence as sexual objects and as female members of ethnic, racial, religious or national groups. Such situations do not create gender-based discrimination but reflect a pre-existing attitude towards women.

³ For scope of the five forms of reparations see principles 36-50 in United Nations Economic and Social Council Commission on Human Rights, Submission on Prevention of Discrimination and Protection of Minorities Forty-eighth session Item 10 of the provisional agenda. 29 June 1996, E/CN.4Sub2/1996/18.

In none of the earlier incidents of communal violence in Gujarat or other parts of the country had sexual violence against girls and women, committed in public, been such a key feature.⁴

Muslim girls and women in Gujarat suffered abuses similar to Muslim men during the violence experienced by members of the Muslim minority in 2002.⁵ These acts included physical assaults, injuries, extrajudicial killings and forced eviction from or destruction of their homes and businesses. Women were also subjected to deliberate “gendered” forms of violence and persecution, such as rape and other forms of sexual violence. They became victims of grave abuses because their identities as both women and Muslims intersected. For right-wing Hindus attacking the Muslim minority, Muslim women became the hated symbols of the community which they sought to threaten, humiliate, hurt and destroy.

In most cases, these acts were crimes under the laws of the State of Gujarat and India, but, as explained in this paper, these laws were inadequate. In addition, Amnesty International has information that suggests the violence was committed as part of a widespread or systematic attack against civilian Muslim men, women and children pursuant to a state or organizational policy to commit this attack and as such these acts are considered under international law to be crimes against humanity.⁶

During and after the protracted violence, women in Gujarat were also deeply affected in their traditional roles as carers and nurturers of their families. They had to bear sudden and unusual responsibility for families torn apart by the large scale violence and deprived of food and shelter, responsibilities which

were normally borne by male relatives. Women who were themselves deeply traumatized by what they had experienced, including the murders of family members, rape, violent destruction of their home and possessions and by persistent fear of further attacks, had to take care of equally traumatized relatives, including children, whose lives were shattered.

The consequences of having experienced these violations will remain for many years and, for a significant number of women, for the rest of their lives. These consequences may be medical problems or psychological disorders with little assistance or hope for rehabilitation and, in many cases, loss of livelihood.

Important factors in coming to terms with loss and grave crimes, both experienced and witnessed, are the establishment of the truth of the violations, bringing to justice the perpetrators and providing full reparations to victims and their families. The Governments of Gujarat and India are obliged under international law to prevent crimes against humanity and to investigate them, and where there is sufficient admissible evidence, to prosecute those suspected of these crimes.

The gender of the women, on account of which they were attacked, has also hampered their chances of obtaining justice, truth and reparations. The shame surrounding crimes of sexual violence, the victims’ communities’ need for reconciliation and fear of the police have deterred many women from reporting the crimes they suffered. Women in Gujarat who have reported these crimes have consistently been denied justice, truth and reparations: the criminal justice system has at all levels failed them and the Government of Gujarat has actively prevented it wherever possible. Impunity for violence against women is part of the systemic discrimination that women suffered before, during and after widespread violence.

Letting the perpetrators of such serious crimes get away with them sends the message to other Muslims that the state does not take their protection seriously and sends the message to Muslim women that the state is indifferent to their plight. Muslim women, almost three years after the large scale violence in Gujarat, continue to fear for their lives.

Amnesty International believes that impunity for crimes, including crimes of sexual violence, inflicted upon Muslim women and girls of Gujarat must end.

⁴ Cases of sexual violence against Muslim women, who are a minority in India, during communal attacks were reported earlier. During the partition of the Indian subcontinent in 1947, Hindu, Muslim and Sikh mobs reportedly used rape against the other communities. More recently, in December 1992, at least a dozen Muslim women were gang-raped by Hindu mobs in Surat; similarly in January 1993, at least three cases of communally driven rapes of Muslim women were reported in Bombay. See Justice B.N. Krishna Commission of Inquiry; see also the Reddy Commission of Inquiry for the 1969 communal riots in Gujarat.

⁵ In Gujarat, Hindus and Muslims make up 89 and 9 per cent respectively of the population, the rest are Christians, Jains and others. At the national level Hindus constitute 80.5 per cent and Muslims 13.4 per cent of the population. (2001 Census of India).

⁶ See section 4 for discussion on crimes against humanity.

They have a right to justice, to truth and to full reparations.

3. Background to the report

Violence against the Muslim minority erupted in Gujarat after 27 February 2002 when 59 passengers, including many women and children, died in a fire in a compartment of the Sabarmati Express near Godhra station. Officials ascribed the fire to a planned attack by local Muslims on Hindu *kar sevaks* returning by train from Ayodhya.⁷ In the following days and weeks, Hindu mobs targeted members of the Muslim minority in the state. According to official sources 762 people were killed, whereas human rights groups believe that over 2,000 people, mostly Muslims were killed. A large number of the victims were women and children; local investigators have stated that between 250 and 330 women victims were amongst the dead, but exact numbers for all the incidents are not available.

Amnesty International has been unable to directly investigate the violence. The organization's request in 2002 for visas to conduct research in the state was not granted.⁸ The Indian government has often resisted international scrutiny, be it by United Nations (UN) human rights mechanisms or international organizations which clearly state the purpose of their intended visit to the country.⁹

⁷ *Kar sevaks* are Hindu volunteers who offer their services for community activities; they were returning from Ayodhya, a site where Hindu right wing groups aim to build a temple in a place where a Muslim mosque, the Babri mosque, was destroyed by right wing Hindu groups in 1992. They claim that the mosque stood on the birth place of the Hindu god Ram.

⁸ In a statement issued on 22 July 2002, Amnesty International explained that the Government of India had failed to provide a response to Amnesty International's visa applications before the mutually agreed deadline of 12 July 2002 and that as such it saw itself compelled to assume that visas would not be granted. It said, "this refusal damages the image both of the Indian and Gujarat governments before their citizens and the international community. A government which fully accepts its responsibilities in protecting its citizens and uphold their constitutional rights to life and equality does not shy away from international scrutiny." AI Index: ASA 20/15/2002.

⁹ "One reason of this inaction (of relevant UN human rights agencies) is the pressure exercised by the Indian government on the UN mechanisms to not interfere in the 'internal issues' of India. In this regard, the then Chairperson of the

The present report is consequently not based on primary research of sexual violence against girls and women in the country. It does not document the rape, torture and killings perpetrated in Gujarat in 2002 which have meanwhile been investigated by a large number of Indian women activists and human rights organizations.¹⁰ It examines obligations of the State of India and the Government of Gujarat under national and international law to exercise due diligence to ensure human rights to everyone. This entails obligations on the part of the state to prevent human rights abuses, including crimes under international law, and ensure that abuses by state agents and private persons are effectively and independently investigated and perpetrators brought to justice. After examining to what extent police, the

National Human Rights Commission, Justice Verma met the then UN High Commissioner for Human Rights, Ms. Mary Robinson and informed her that it was not necessary for her to visit India in the context of the violence in Gujarat." International Initiative for Justice in Gujarat, *Threatened existence: A feminist analysis of the genocide in Gujarat*, p. 3.

¹⁰ Well over 50 reports on the violence in Gujarat have been made public; those which focus entirely or partly on violence against women in Gujarat include Communalism Combat, *Genocide Gujarat 2002*, 8(77-78), March-April 2002; People's Union for Civil Liberties (PUCL), Vadodara and Vadodara Shanti Abhiyan, *Violence in Vadodara: a report*, May 2002; People's Union for Civil Liberties (PUCL) Vadodara and Vadodara Shanti Abhiyan, *At the receiving end: Women's experiences of violence in Vadodara*, May 2002; Human Rights Watch, *We have no orders to save you*, May 2002; Concerned Citizens Tribunal, *Crime against Humanity: An inquiry into the carnage in Gujarat*, November 2002, three volumes; International Initiative for Justice, *Threatened existence: A feminist analysis of the genocide in Gujarat*, December 2003; Foundation for Civil Liberties, *Untold stories: A case study of judicial redressal*, several volumes, 2002; Women's Panel, sponsored by Citizen's Initiative, *How has the Gujarat massacre affected minority women? The survivors speak*, April 2002; Editors Guild Fact Finding Mission report, *Rights and wrongs: Ordeal by fire in the killing fields of Gujarat*, May 2002; Chenoy et al, *Gujarat carnage 2002: a report to the nation*, April 2002; Disha, *Listening to the speechless, talking to the deaf: Testimonies of some people who suffered during the riots in Gujarat*, September 2002. National institutions which have addressed the violence in Gujarat include the National Human Rights Commission (NHRC), the National Commission on Women (NCW), the Minorities Commission of India and the Election Commission. The Nanavati Shah Commission of inquiry set up by the Gujarat government is to conclude its work in December 2005.

judiciary, medical services and the state and central governments fulfilled these obligations it concludes that there are significant failings in all areas of responsibility. Both the Government of Gujarat and the State of India have failed to prevent crimes against girls and women, including crimes of sexual violence, and to ensure that perpetrators are punished. The state has failed in its national and international obligation to ensure the rights of girls and women in Gujarat.

Unable to speak to victims directly, Amnesty International has relied for this report on court documents (all of which are in the public sphere) and drawn on many reports from witnesses and victims published in the aftermath of the killings. Over 4,000 complaints were registered with police, but many other victims, afraid of police and of retribution by the perpetrators, must be assumed not to have approached police with their complaints. After investigation, about half of the registered complaints were closed by police who claimed that the accused could not be found. Hundreds of cases came to court; of these around 200 ended in acquittal. Complainants in cases relating to five key incidents, supported by non-governmental organisations and the NHRC, approached the Supreme Court to request direction for re-investigation and trial in courts outside Gujarat.¹¹ In many of the pending cases, a whole range of supplementary applications relating to inadequate investigations are pending in courts in Gujarat. The present report does not attempt to examine all of these. Its focus is on the responses of different institutions of the state to the violence against members of the Muslim minority. Many of the observed failings of state institutions affect both male and female victims of the violence but wherever possible failures that particularly affected women are pointed out. One of these areas is the inadequacy of the law relating to rape, which fails to accommodate the range of abuses suffered by women in Gujarat. When looking at the cases investigated and tried, the report, while keeping in mind the wider picture, focuses mainly on two cases in which women who became victims or witnesses of brutal abuse, have, with courage and tenacity, pursued their quest for

justice. The choice of these two cases is linked to the fact that they are both in a more advanced stage of investigation and prosecution respectively than other cases. They are emblematic in that they show the failings of the criminal justice system most clearly. Moreover, in one case, the Best Bakery case, the Supreme Court has given clear directions on how cases of a similar nature ought to be conducted. These directions, if fully implemented by other courts, would prove helpful for victims in other cases.

In the first case, Zahira Sheikh, a 19-year-old woman witnessed the burning down of her family's business, the Best Bakery in Vadodara, by a violent Hindu mob. During the night of 1 March 2002, 14 people, including several women and children, were killed in the incident. Zahira made a complaint to the police. The trial of the Best Bakery case began in February 2003. On 27 June 2003, the trial court acquitted all 21 accused after 37 of the 73 witnesses, including Zahira, had withdrawn their statements in court. Zahira and her mother Sherunissa days later publicly declared that they had "trembled with fear" in court as they had been threatened with harsh consequences by associates of the accused if they did not withdraw their eye-witness accounts. The NHRC petitioned the Supreme Court stating that the circumstances of the acquittal violated the victims' right to a fair trial and sought re-investigation and retrial of the case outside Gujarat. The Gujarat High Court, hearing the appeal of the Gujarat government against the trial court judgment, in December 2003 confirmed the trial court's acquittal. Zahira, in January 2004, filed an appeal against the Gujarat High Court judgment in the Supreme Court. On 12 April 2004, the apex court overruled the High Court judgment and ordered the retrial of the Best Bakery case in Maharashtra. It severely criticized the Gujarat government and the state judiciary for their failings. The retrial began in Mumbai in October 2004. On the day before Zahira Sheikh was to appear in court on 4 November 2004, she publicly withdrew her previous statements, claiming that members of the organisation which had protected her and her family and assisted her in filing her petition in the Supreme Court, had coerced her into accusing people unconnected with the killing of her relatives. The circumstances of this reversal are not at present clear. (For details see the section on witness protection and the appendix.)

Bilqis Yakoob Rasool, five months pregnant and fleeing violence in her home village, was gang-raped

¹¹ These cases relate to the Best Bakery, Godhra, Gulberg Society at Chamanpura, Naroda Patiya and Sardarpura. Petitions relating to all but the Best Bakery case are pending in the Supreme Court which stayed proceedings in these cases in November 2003.

on 3 March 2002 when a Hindu mob caught up with the family near the town Limkheda. She saw at least three other relatives raped and her three-year-old daughter violently thrown on the ground and killed. She reported the rape and killings of 14 relatives to police but in January 2003 police closed the case stating that “the offence is true but undetected”, i.e. that those responsible cannot be found. Acting on Bilqis’ petition, the Supreme Court in December 2003 directed a central police agency, the Central Bureau of Investigation (CBI), to reinvestigate the case. The CBI found evidence of police attempts to cover up the crime and arrested 12 persons accused of rape and murder, six police officers who are alleged to have covered up the crime and two doctors who provided distorted post mortem examinations. The Supreme Court in August 2004 directed that this case be tried in Mumbai as well; it began in late September 2004.

When the violence occurred, the Bharatiya Janata Party (BJP) held power in the union or central government. In May 2004, the ruling National Democratic Alliance, led by the BJP, suffered a surprise defeat in national elections which brought the United Progressive Alliance (UPA) coalition government, led by the Congress Party, to office.

The new UPA government at the centre in its Common Minimum Program of May 2004 made a number of commitments to ensure human rights protection in India. These included the repeal of the Prevention of Terrorism Act (POTA), 2002 and a commitment that it would “enact a model comprehensive law to deal with communal violence and encourage each state to adopt that law to generate faith and confidence in minority communities”. Just after the elections, commentators, when assessing the issues before the new government, have listed Gujarat as one of the key concerns. “The most sensitive issue on which the Centre will be called upon to take a stand is whether those major riot cases in which the trial was stayed last year should be transferred out of Gujarat”, a commentator said.¹²

Several cabinet members have acknowledged the problem of legal redress in Gujarat. Union Law Minister Hansraj Bharadwaj in May 2004 said he would study the Supreme Court orders passed in the key Gujarat cases: “I am vitally interested in the fact

that the rule of law should prevail everywhere, including Gujarat. Citizens there should live without fear and should feel that there is a Government to protect them in case of crisis”.¹³ Union Home Minister Shivraj Patil on 24 May 2004 said the government would do everything to preserve communal harmony in the country. Asked by reporters whether he contemplated a re-investigation of cases of mass violence in Gujarat, he said “We will do everything to preserve communal harmony in the country. ... You know about the general perception and decisions by the courts. This has an impact on our thinking also”.¹⁴ Then prime minister designate Dr Manmohan Singh during a press conference on 20 May admitted, “the functioning of the judicial system in Gujarat ...[and] inordinate delays in court cases, these are all areas of concern”.¹⁵

However, to date, few steps have been taken in this regard. The Government of India on 2 July 2004 removed governors of four states, including the governor of Gujarat, Kailashpati Mishra, all of whom were believed to have sympathies with the *Sangh Parivar*.¹⁶ While the government announced that it was framing a law to combat communal unrest which would target those who instigate, carry out, abet or fund communal violence, no concrete proposals have been made public.¹⁷

¹³ *The Statesman*, 24 May 2004.

¹⁴ *The Statesman*, 24 May 2004.

¹⁵ *Indian Express*, 21 May 2004, *AFP*, 20 May. Tanvir Jafri, the son of former Congress MP Ehsan Jafri who was killed in Ahmedabad on 28 February 2002 said, “unfortunately, such statements have been made before. They don’t help.” *Indian Express*, 21 May 2004.

¹⁶ *Hindustan Times* and *Indian Express* 3 July 2004. Home Minister Shivraj Patil was reported to have cited their “different ideologies” as the reason for their removal. The BJP has challenged this move in the Supreme Court. For more details on the *Sangh Parivar*, see section 6.

¹⁷ To contribute to the debate, a group of eminent citizens, including retired judges, senior advocates and activists, in late August 2004, released a draft Prevention of Genocide and Mass Crimes Bill, 2004 which proposes a central law on genocide and mass crimes and a national authority for preventing crimes which could take cognizance of such crimes, appoint a central investigating agency and constitute a special court in consultation with the relevant judicial authority. It could also devise witness protection schemes. The bill seeks to enshrine the principle of vicarious criminal and administrative liability as well as the doctrine of command responsibility in domestic law. Other drafts are reported to be in preparation by civil rights groups. For

¹² *Indian Express*, 26 May 2004.

In 2004 several developments were reported which bring hope to the victims of the violence in Gujarat. Besides ordering the transfer of the cases of Bilqis Yakoob Rasool and Zahira Sheikh to courts outside the state of Gujarat, the Supreme Court also directed in late August 2004 that over 2,000 complaints which police had closed claiming it could not find the accused, be reviewed and, if appropriate, reopened. The Supreme Court in August 2004 also ordered that some 200 cases which had ended in the acquittal of the accused be reviewed with a view to ascertaining if the state should not appeal against the acquittals. A special police team set up in September 2003 after the Supreme Court had expressed its unhappiness with investigations carried out in the state, investigated several cases and in August 2004 arrested a police officer accused of tampering with the evidence. Applications to transfer several other key cases to courts outside Gujarat are pending in the Supreme Court and decisions are believed to be imminent.

Whatever hope has been generated that justice would be obtained, the truth established and reparations provided after long delays, has resulted from the initiatives of determined victims and witnesses, dedicated Indian human rights organizations and lawyers and an alert national press whose concerns have found resonance and support in a Supreme Court which sees its role as activist in the pursuit of human rights protection. The state of Gujarat meanwhile remains unrepentant for its failings to protect its minority community and to ensure that victims obtain justice, truth, and reparations.

Despite the fact that hope has returned to some victims in Gujarat, for many victims such hope comes too late. Among them are many girls and women: those who were burned to death after gang-rape where no evidence of gang-rape remains; those subjected to sexual assault whose ordeal police

comments see also Asghar Ali Engineer, "Drafting the law to prevent communal violence", *PUCL Bulletin*, November 2004. According to some media reports, the government is preparing a bill which will hold government officials accountable for bias and negligence in the performance of their duties during communal riots. Some suggest that a law passed before February 2005 could be applied to state officials with regard to their failings in Gujarat in 2002 under the "period of limitation" laid down in the IPC, namely that action should be initiated in criminal cases within three years of the event. (Telegraph, 11 November 2004.)

refused to record; those who never reported rape because they were ashamed and feared rejection in their own community and those who withdrew their complaints of abuses in so-called "compromises" so that their families could live without being threatened by the perpetrators. In scores of cases, evidence has been lost, perhaps irretrievably, making reviews difficult if not impossible and justice unattainable.

Amnesty International appeals to the new Central government to live up to the promises it made in its Common Minimum Programme in May 2004 to secure human rights to all citizens and to address the legacy of the 2002 violence in Gujarat with speed and earnest commitment. The organization also urges the government to give particular attention to the forgotten women victims in Gujarat. Specific recommendations to both the Governments of India and of Gujarat are contained in the last chapter of this report.

In keeping with longstanding practice, Amnesty International submitted this report to the Government of India about four weeks before the intended date of publication for comment. The Government of India sought more time and said it would reply by the end of November 2004.

The Central government in its response of 6 December 2004 to Amnesty International's draft report declared that it "wholeheartedly condemned" the violence in Gujarat in 2002. It pointed out that the role of the state police and government during and after the violence was being investigated by the Nanavati Shah Commission and that several cases were pending in the Supreme Court. It concluded that "as such, it would be premature to form an opinion on a matter which is sub judice".

Amnesty International does not wish to pre-empt the findings of the neither Commission nor does its report comment on ongoing criminal proceedings. This report reflects critical comments regarding the composition and terms of reference of the Commission made by Indian activists. It also points to the fact that numerous inquiries on other issues in India have taken years to conclude and that often their findings have been ignored. These considerations and the fact that almost three years after the violence in Gujarat, justice remains elusive for the majority of victims are matters of serious concern to Amnesty International.

The Central government pointed out that the 9th report of the Lok Sabha Committee on Empowerment of Women (2002) had covered problems relating to evidence of violence against women, medical relief and issues of relief and rehabilitation. Amnesty International notes that many of the concerns voiced by the Committee coincide with those expressed by Amnesty International. The 17th report by the same Committee issued in 2003 which the Central government forwarded show that the Committee was dissatisfied with several of the state responses, questioned parts of these and requested further clarification.

The Central government in its response further reiterated the UPA government's human rights commitments, including inter alia its repeal of POTA, the planned adoption of a "model comprehensive law to deal with communal violence" and the intention to improve substantive and procedural provisions in the law on rape. Amnesty International has acknowledged and welcomed these initiatives in this report. The Central government did not in its response specifically mention the need for legislation on witness protection and the organisation hopes that this crucially important element in the pursuit of justice will be given due attention as well.

Commenting on Amnesty International's concern that the criminal justice system in Gujarat failed many victims, the Central government stated that "there exists a sound constitutional and independent and effective judicial system to safeguard the rights of people in the country. The impartiality and effectiveness of the Indian judiciary is well-known and has been appreciated [the] world over. [The] judiciary does not function in [a] vacuum but acts on the basis of evidence and facts [before] it. Therefore the comments on the judiciary are uncalled for". Amnesty International has throughout its report appreciated the active and valuable role of the Supreme Court and statutory bodies like the NHRC in safeguarding human rights in India. Observations about failings of the judiciary in Gujarat cited in the report have been almost exclusively those made by the Supreme Court of India.

Amnesty International has in this report acknowledged the constitutional and legal safeguards against discrimination on grounds of religion and gender. It also pointed to the range of legal provisions which members of the criminal justice system in Gujarat could have but failed to use to ensure justice to victims. Amnesty International therefore calls on the Government of India not only to address identified legal lacunae but also to ensure that the whole rich range of legal provisions are fully applied in the pursuit of justice.

The Government of the state of Gujarat in its response of 10 November 2004 stated that Amnesty International's report appeared "to be based on secondary, unverified sources" and its observations were "one-sided". It denied Amnesty International's allegations that the Government of Gujarat had failed to prevent the violence in the state, that individual state and party members had participated in the violence in pursuance of the ideology of the *Sangh Parivar* and that it had failed to ensure redress. It stated that it had "taken adequate steps to file cases, carry out proper investigations and provide justice to victims". The state government further stated that it was aware of its constitutional obligations and accordingly its actions had been "necessary and appropriate to protect the life, liberty and property of the citizens". It claims to have provided adequate relief and rehabilitation to the victims, had responded fully to national statutory bodies and set up an independent commission of inquiry. Penal and administrative provisions, it said, had been adequate to deal with violence against women.

In response to Amnesty International's specific allegation of the consistent failure of the criminal justice system to record, investigate and try cases of sexual violence against girls and women, the state government stated that six cases of rape of Muslim women had been reported in the violence against Muslims in 2002 which had involved 11 women victims and that all these cases had been properly investigated by a senior woman police officer. A closer examination of the six cases listed in the government's letter showed that one of the cases is that of Bilqis Yakoob Rasool in which the CBI had pointed to serious irregularities in the police investigation.

The state government further stated that a special women's cell had been set up on 15 May 2002. It claimed it had heard 856 women and recorded 1,116 complaints, but "not a single complaint of sexual harassment was received by the cell".¹⁸ Amnesty International believes that in the light of the evidence collated by local human rights groups this claim points to a serious malfunctioning of the cell.

The government further insisted that police investigations and trials had been adequate. However, when pointing to the current reinvestigation of "closed" cases and a review of acquittals it omitted to mention the criticisms of the criminal justice system, in Gujarat, expressed by the Supreme Court on numerous occasions leading to it directing the review of "closed" cases.

In conclusion the state government said that it considered Amnesty International's analysis "inappropriate" and, pointing to the fact that cases were pending in courts and subject to an inquiry, concluded that "Amnesty International should not publish the proposed report, as the cases are sub judice and affect [sic] the judicial proceedings".

Amnesty International considers the state government's response inadequate and evasive. The organisation regrets that the state government has once again failed to acknowledge any of the glaring failings of the state which have been consistently documented by national institutions and local human rights organisations which - unlike Amnesty International - had the opportunity to directly investigate complaints of abuses and subsequent failings of the state to provide justice to victims.

4. State responsibility for abuses by private actors

4.1. State responsibility for failure to exercise due diligence

¹⁸ The special cell was comprised of Ms. Hemangini Zaveri, Secretary, Legislative & Parliamentary Affairs (Retd), Kum. Manorama Bhagat, MD, Gujarat Women's Economic Development Corporation, and Mrs. R.I. Hakim, Deputy Secretary, Gujarat Legislature Secretariat.

The Governments of Gujarat and India are responsible under international human rights law for failing to exercise due diligence to prevent, protect and provide an effective remedy for these abuses. The understanding of state responsibility for human rights violations has significantly widened in recent years to include not only violations of human rights by the state or its agents but also abuses by private actors. The responsibility of states to protect individuals against human rights abuses by private persons is established in core human rights treaties. The International Covenant on Civil and Political Rights (ICCPR) which India ratified in 1979, requires state parties to respect the rights of the Covenant, an obligation which the Human Rights Committee has stated extends to protecting against acts inflicted by non-state actors, those acting in their private capacity.¹⁹ The UN Convention on the Elimination of All Forms of Discrimination against Women (UN Women's Convention) requires in Article 2(e) that states shall "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise". The Committee on the Elimination of Discrimination against Women (CEDAW) which monitors the implementation of the UN Women's Convention has noted that "under general international law and specific human rights covenants, States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and for providing compensation".²⁰ The Declaration on the Elimination of Violence against Women, adopted by the UN General Assembly in 1993 as a "commitment by States in respect of their responsibilities, and a commitment by the international community at large to the elimination of violence against women"²¹, affirms that states must "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons".²² Radhika Coomaraswamy, then UN Special Rapporteur on violence against women in 1995 concluded that "[i]n the context of norms recently established by the international community, a State

¹⁹ The Human Rights Committee is the body of independent experts monitoring state parties' fulfilment of the ICCPR.

²⁰ CEDAW, General Recommendation 19.

²¹ Preamble, Declaration on the Elimination of Violence against Women.

²² Article 4(c).

that does not act against crimes of violence against women is as guilty as the perpetrators. States are under a positive duty to prevent, investigate and punish crimes associated with violence against women".²³

The standard of due diligence was applied by the Inter-American Court of Human Rights in its judgment in 1988 on the Velásquez-Rodríguez case, in which it held a state responsible for human rights abuses even if they were caused by private persons unconnected with the government. The Court stated: "An illegal act which violates human rights and which is initially not directly imputable to the State (for example, because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention". It spelled out what this duty implies: "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim receives adequate compensation. This obligation implies the duty of the State parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights".

The Court also pointed out that a single violation of human rights or one ineffective investigation does not establish a state's lack of due diligence. It is the seriousness with which a state provides and enforces adequate measures that indicates its due diligence in ending abuses. As the UN Special Rapporteur on violence against women has noted, "the due diligence standard is not limited to legislation or criminalization" but encompasses a whole range of approaches including training of state personnel, education, "demystifying domestic violence" and other measures, each of which, if undertaken, will

provide an effective tool for preventing violence against women.²⁴ The UN Declaration on the Elimination of Violence against Women sets out in Article 4 a series of judicial, legislative, administrative, educational and other steps that states should take to meet their obligation to end violence against women. The Declaration also calls on states to adopt national plans of action to promote the protection of women against any form of violence. The Beijing Platform of Action, adopted at the Fourth World Conference on Women in September 1995 sets out further detailed steps for governments to take to eliminate violence against women.²⁵ These include *inter alia* the promotion of an active and visible policy of mainstreaming a gender perspective in all policies and programs related to violence against women, gender awareness raising programs, enactment and enforcement of legislation against perpetrators of practices that violate women's rights and of plans of action to eliminate violence against women. The implementation of such steps is one indicator for measuring the exercise of due diligence.²⁶

State responsibility for abuses of women's rights by private actors also arises from state obligations to ensure non-discrimination and the right to equal protection of law. Under international law, states are under an obligation to ensure protection of human rights to all, without discrimination. States that discriminate in the protection of human rights on a number of specified grounds, including gender, commit a human rights violation. The ICCPR, for example, obligates state parties, in Article 2, to ensure the rights in the Covenant to all in their jurisdiction, without discrimination on various grounds, including sex. Article 3 of the Covenant obligates state parties to ensure the equal rights of men and women in the enjoyment of all the rights set forth in the Covenant. These rights include the right to life (Article 6) and the right not to be subjected to torture or cruel, inhuman or degrading treatment (Article 7). The Human Rights Committee stated in its General Comment 20 on Article 7 that the state's duty

²³ UN Doc. E/CN.4/1995/42, para 72. She added that "this emergence of State responsibility for violence in society plays an absolutely crucial role in efforts to eradicate gender-based violence and is perhaps one of the most important contributions of the women's movement to the issue of human rights.", UN Doc. E/CN.4/1995/42, para 107.

²⁴ UN Doc. E/CN.4/1996/53, para 141.

²⁵ UN Doc. A/CONF.177/20 (1995), paras. 124-130.

²⁶ In her report to the 1999 session of the UN Commission on Human Rights, the UN Special Rapporteur on violence against women listed eight questions she has been posing to states to assess their adherence to the due diligence standard in addressing violence against women by private actors. See UN Doc. E/CN.4/1999/68, para 25.

includes protecting against such acts inflicted by people in their private capacity.

The Covenant also states that "[a]ll persons shall be equal before the courts and tribunals". Women victims of violence have a right to the enforcement and the protection of the law equal to that of any other victim of violence. If states fail to implement these provisions, such discriminatory treatment on grounds of gender violates the right to equal protection of law for the women victims concerned. Some experts, including CEDAW in its General Recommendation 19 adopted in 1992, have noted that violence against women, defined as "violence that is directed against a woman because she is a woman or that affects women disproportionately", is itself a form of discrimination and as such falls under the prohibition of gender discrimination.²⁷

Another human rights treaty relevant to sexual violence against girls and women is the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In Article 1, it establishes state responsibility for acts of torture and ill-treatment by private actors if carried out with the "consent or acquiescence of a public official". International criminal tribunals have affirmed that the pain and suffering caused by rape are in certain circumstances consistent with the definition of torture. In many circumstances under international law, rape has been acknowledged as a form of torture owing to the severe mental and physical pain and suffering inflicted on the victim.²⁸

²⁷ CEDAW, General Recommendation 19, UN Doc. A/47/38, para 31.

²⁸ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Article 1 defines torture to mean "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. ..." Rape has been held in certain circumstances to be a form of torture in the following cases: *Mejia v Peru*, Inter-American Commission; *Prosecutor v Zanjil Delalic et al*, International Criminal Tribunal on former Yugoslavia; *Prosecutor v Jean-Paul Akayesu*, International Tribunal on Rwanda; *Aydin v Turkey*, European Court of Human Rights.

Acts of violence against girls and women constitute torture for which the state is accountable when they are of the nature and severity envisaged by the concept of torture in international standards and the state has failed to fulfil its obligation of effective protection. There would be official responsibility if states tacitly condone rape and other forms of sexual violence by not exercising due diligence and equal protection in preventing and punishing such violence.

Another human rights treaty relevant to violence against girls under the age of 18 is the Convention on the Rights of the Child which has been ratified by every state but two.²⁹ The Convention in Article 19(1) obligates states to protect children from violence, injury or abuse inflicted in the private realm, including by parents, legal guardians or other persons who have the care of a child. It outlines that "State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".

4.2 State responsibility to ensure effective investigation and prosecution of crimes under international law

As discussed above, the governments of Gujarat and India are subject to state responsibility for failure to exercise due diligence to prevent, protect and provide an effective remedy for the crimes, including crimes of sexual violence, as well as other human rights abuses, documented in this report. As explained below, some of these crimes constitute crimes under international law, including crimes against humanity. As such, the governments of Gujarat and India are obliged to investigate them and, where there is sufficient admissible evidence, to prosecute persons suspected of these crimes.

Regrettably, however, India has not defined these crimes as crimes against humanity under its criminal law. Doing so would not only demonstrate the gravity of the crimes and the seriousness of India's commitment to investigate and prosecute them, but would ensure that prosecutions were not subject to

²⁹ The United States and Somalia have not ratified this Convention.

the obstacles that would apply to ordinary crimes under national law, such as official immunities and statutes of limitations. India has also not yet ratified the Rome Statute for the International Criminal Court (Rome Statute), which establishes a permanent international criminal court able to investigate and prosecute crimes against humanity, as well as war crimes and genocide, when states are unable or unwilling to fulfil their responsibility to do so.

As crimes against humanity, these abuses constitute some of the gravest crimes of concern to the international community. Crimes against humanity include acts such as murder, torture, enslavement, rape and other crimes of sexual violence, "disappearance" and other inhumane acts. They are committed as part of a widespread or systematic attack directed against a civilian population pursuant to a state or organizational policy to commit this attack. The individual acts need not have been committed on either a widespread or a systematic basis, but only need to have been committed as part of such an attack. An attack does not necessarily involve military action and could include such conduct as enacting legislation.

As detailed throughout this report, the crimes committed during the Gujarat violence in 2002 included murder, rape, gang rape, other crimes of sexual violence and other inhumane acts perpetrated against a civilian population namely the Muslim minority. The crimes were part of widespread attack on this civilian population as it is believed that over 2,000 people were killed, over 4,000 complaints were registered and presumably other individuals did not report such crimes. Many of these crimes were also committed as part of a systematic attack against Muslim men, women and children. This report focuses on the crimes committed against girls and women.

There is evidence that the crimes were pursuant to policies both of the government of Gujarat and of a number of organizations.³⁰ Section 6 of this report outlines how the crimes were justified by *Hindutva*, the political ideology of an exclusively Hindu state

³⁰ A government or organizational policy "need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not." *Prosecutor v. Tadic*, Judgment, Case No. IT-94-I-T (ICTY Trial Chamber, 7 May 1997), para. 563."

which portrays Muslims and other non-Hindus as hostile to Hindu India, threatening Hindus and eroding their rights. It has been advanced by a group of organizations collectively called the *Sangh Parivar* (the collective Hindu family, which includes the BJP and other political and religious organizations). Proponents of *Hindutva* have consequently not only called for the elimination of Muslims from India but also defined women's bodies as the battleground on which the struggle to establish a Hindu state was to be carried out. Those motivated by *Hindutva* who instigated attacks by Hindu mobs in 2002 on Muslim girls and women did so specifically because women were seen as the biological and cultural reproducers and embodiments of the Muslim community which Hindu right wing activists saw as their duty to defile, violate and destroy.

High-level Gujarat officials allegedly pressured lower-level officials not to make arrests. A senior police official stated in a recent affidavit that he received instructions from senior leaders of the BJP not to act.

Evidence also suggests that the government of Gujarat acquiesced in the violence. For example, in some cases police participated in the crimes, including by providing fuel to perpetrators, beating, threatening and firing at Muslim women. In many cases, the police failed to register and investigate complaints and failed to maintain strict neutrality. Some medical professionals refused to treat injured Muslims. There was inaction on behalf of the government of Gujarat to protect medical professionals who would not treat Muslims because they were threatened by private actions, i.e., members of the *Sangh Parivar*. The trial court failed to ensure a calm and dignified atmosphere in the court and the High Court failed to hold the trial court responsible for inadequacies, such as the trial court's not questioning the withdrawal of a large number of key witnesses. Further evidence of communalization of the state of Gujarat and criminal justice system is described in section 7. From this and other evidence detailed in this report, Amnesty International has concluded that there was a government policy support this attack on Muslim civilians.

The Central government despite its obligations under Article 50 of the ICCPR to prevent abuses, including crimes against humanity, did not interfere.³¹

Amnesty International has reports that the acts were part of a systematic attack on the civilian Muslim population. In 16 of the 24 districts of Gujarat where violence was reported over the days and weeks following the fire in the train, mobs were equally well informed of Muslim residences, enterprises, and properties, with details apparently drawn from electoral rolls, tax lists and other official records and collated well in advance.³² This information suggests possible government acts, as well as policy. Violent acts resembled each other in terms of kind, scale and degree of violence; everywhere the attackers shouted the same slogans and made use of the same Hindu religious symbols.

Crimes against humanity are regarded as crimes under both customary and international treaty law. All states have a duty to investigate and, where there is sufficient admissible evidence, to prosecute crimes against humanity by persons found in their territory, regardless when they were committed or who committed them, to extradite suspects to a state able and willing to do so in fair trials without the death penalty or to surrender them to an international criminal court. Crimes against humanity entail individual criminal responsibility and can occur in armed conflict or times of peace. No official immunities or statute of limitations apply to crimes against humanity and states have the primary responsibility to bring to justice those responsible, to establish the truth about what occurred and to provide reparations to victims and their families.³³ Accordingly, the Governments of Gujarat and India have an internationally recognised obligation to bring to justice the perpetrators of these crimes, to establish the truth and to enable victims and their families to obtain full reparations. However, the Governments

of Gujarat and State of India have failed to meet their obligation under international criminal law to prevent these crimes and to bring to justice the perpetrators. They have also enabled an environment of impunity to exist.

5. Failure of the Indian state to exercise due diligence with regard to sexual violence against girls and women in Gujarat in 2002

The State of India has a duty to guarantee a range of fundamental rights provided for in the constitution and under international treaties it has ratified. Part III of the Constitution of India lists several fundamental rights.

Article 14 provides the right to equality before law: *"The state shall not deny to any person equality before law or the equal protection of the laws within the territory of India"*.

Article 15 contains the prohibition of discrimination on specified grounds: *"The state shall not discriminate against any citizens on grounds only of religion, race, caste, sex, place of birth or any of them"*.

Article 21 says: *"No persons shall be deprived of his life and personal liberty except according to procedure established by law"*.

Article 25 guarantees the right to freedom of religion: *"... all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion"*.

India also has ratified several international human rights commitments. In the ICCPR:

Article 1 provides that *"Each State party to the present Covenant undertakes to respect and to ensure to all individuals ... the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*.

Article 6 says: *"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life"*.

³¹ ICCPR, Article 50 states that "the provisions of the present Covenant shall extend to all parts of federal states without any limitations or exceptions."

³² The use of voters lists, etc is discussed in Asghar Ali Engineer, "Gujarat riots in the light of the history of communal Violence", *Economic and Political Weekly*. 14-20 December 2002.

³³ States are also obliged to exercise universal jurisdiction over crimes against humanity, i.e. to prosecute or extradite perpetrators of such crimes no matter where the crime occurred or nationality and status of the perpetrator.

Article 7 states: *“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ...”*

Article 3 lays down: *“The State parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”*.

Article 3 recognizes the right to legal remedy: *“Each State party ... undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ...; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted”*.

Amnesty International believes that in relation to the violence in Gujarat in 2002, India has not fulfilled its obligations to protect fundamental rights guaranteed in its constitution or in international treaties to which it is a party nor under international criminal law.

Reports received from human rights groups in India indicate that the Government of Gujarat may have been complicit in at least part of the abuses perpetrated in Gujarat in 2002. There is evidence of connivance of authorities in the preparation and execution of some of the attacks and also in the way the right to legal redress of women victims of sexual violence has been frustrated at every level. Furthermore, the state of Gujarat has failed to meet their international obligations to bring to justice perpetrators of crimes against humanity.

Amnesty International believes that the Government of Gujarat has also failed to exercise due diligence with regard to violence, including sexual violence, carried out by private actors. The rights of Muslim girls and women which have been violated by private actors in Gujarat in 2002 include the right to life, the right not to be subjected to torture or to cruel, inhuman and degrading treatment, the right to liberty and security of the person, the right to equal protection under the law, the right to the highest attainable standard of physical and mental health and the right to legal redress for abuses suffered.

The UN Special Rapporteur on violence against women has given substance to the notion of due diligence by saying that any measure which is effective in reducing or preventing violence against women becomes an obligation for the state to adopt under its due diligence mandate. India does not appear to have taken seriously its domestic obligations to ensure gender equality and its international legal obligations to exercise due diligence in preventing, investigating and punishing violations of rights of girls and women. The Governments of India and Gujarat have failed to prevent grave abuses of the human rights of Muslim women in Gujarat and to ensure that legal provisions, law enforcement, judicial structures and rehabilitation measures ensure legal redress for women who have suffered a range of sexual and other abuses of their rights.

6. Sexual violence against girls and women in Gujarat in 2002

While communal violence has a long history in Gujarat, the violence perpetrated against the Muslim community after 27 February 2002 differs significantly from the many instances which occurred in the past, as noted earlier. In 2002, almost everywhere, the violence was inflicted by the majority on the minority community.³⁴

Many observers have pointed to the “overwhelming and sinister similarity” of the attacks which speak for organization and planning and undermine official claims of spontaneous retaliation by an outraged majority community.³⁵ As outlined above, reports

³⁴ In the years 1998-1999 about 200 communal clashes were reported in Gujarat. (Ghyanshyam Shah, *Rediff.com*, 1 May 2002.) Since the wave of violence in 2002 described in this report, clashes of lower intensity have regularly been reported in the press.

³⁵ Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 23; the chapter on “Patterns of violence” contains a list of characteristics shared by most attacks in 2002 in Gujarat. The Concerned Citizen Tribunal headed by former Supreme Court judge, Justice Krishna Iyer, consisted of retired Supreme Court judge Justice P.B. Sawant, retired Bombay High Court judge, Justice Hosbet Suresh, chairman of the People’s Union for Civil Liberties, K.G. Kannabiran, former Director General of Police, K.S. Subramanian, social activist Aruna Roy and academics Ghyanshyam Shah and Tanika Sarkar. Its three volume report *Crime against*

suggest the violence was systematic, widespread and pursuant to an organization policy. Hindus were only rarely attacked, usually by Muslims defending themselves.³⁶ Hindus who were seen to have sided with Muslims, by marrying a Muslim partner, assisting them during the violence, speaking out against it, or helping Muslim victims obtain legal redress were particular targets of the Hindu mobs and treated as traitors to *Hindutva* (see below).

Several hundred Muslim girls and women were reportedly stripped and dragged naked before their own families and thousands of violent Hindu attackers who taunted and insulted them with obscene words and threatened them with rape and murder. They were then raped, often gang-raped, beaten with sticks or *trishuls*³⁷ and swords, had breasts cut off and wombs slashed open by swords and rods violently pushed into their vaginas before a large number of them were cut into pieces or burned to death. The victims included young girls and old women, pregnant women and babies. According to local investigators, there were between 250 and 330 girls and women victims among the dead, the majority of whom had been raped or gang-raped before their deaths.

The International Initiative for Justice in Gujarat³⁸ which visited Gujarat in December 2002 provided a

Humanity is based on 2,094 statements of victims, FIRs, expert accounts and forensic materials.

³⁶ A new feature of the violence in 2002 was a widening of the group of attackers. Unlike in earlier communal violence, tribal people, *dalits* (literally, the “oppressed”, a term to refer to people formerly called “untouchables”) and rural communities participated in the violent attacks against Muslims, a fact which local observers ascribe to their systematic indoctrination by right wing groups who used the economic distress and marginalization of these groups to mobilize opposition to the Muslim minority. According to reports, members of these groups were told that they had been exploited by Muslims and were promised part of the economic spoils of the attacks on the Muslim community. Observers particularly note the Hinduization of *dalit* women on an unprecedented scale: “long standing alliances forged between dalit women and Muslim women based on shared socio-economic concerns, as also neighbourhood spaces, seem to have broken down.” (PUCL Vadodara and Vadodara Shanti Abhiyan, *At the receiving end: Women’s experiences of violence in Vadodara*, May 2002, p.6.)

³⁷ Tridents; emblem of the Hindu god Shiva.

³⁸ The International Initiative for Justice in Gujarat grew out of consultations among over a dozen women’s groups in India which brought together a panel of jurists, activists,

detailed feminist analysis of the ideology that made the sexual humiliation and assault on Muslim girls and women in Gujarat possible, indeed necessary, from the perspective of Hindu right wing groups. It asserts the “centrality of sexual violence as an inherent and intrinsic part of the *Hindutva* project”. *Hindutva* is the political ideology of an exclusively Hindu nation. This ideology has been advanced with increasing vigour over the past two decades by organizations of the *Sangh Parivar* (the collective Hindu family) which includes political parties such as the Bharatiya Janata Party (Indian People’s Party or BJP), the religious organization Vishwa Hindu Parishad (World Hindu Council or VHP) and its youth wing, the Bajrang Dal (an organisation taking its name from the monkey god), the ideological-cultural organization Rashtriya Swayamsevak Sangh (National Volunteer Corps or RSS) and their various affiliates.³⁹

The ideology of *Hindutva* ignores the wide variety of beliefs and practice loosely described as “Hindu religion”. It conflates this reduced perception of otherwise varied and disparate religious practice with an equally simplified notion of “Hindu culture” and uses an emotionally charged and gendered notion of “Mother India” to unite otherwise diverse communities, including several tribal groups. Both as part of their effort to establish and project a singular Hindu national identity and in their effort to mobilize supporters, proponents of the *Hindutva* project have used Muslims as the “other” construed as “the enemy”.⁴⁰ A distorted history presented by proponents of *Hindutva* portrays both “Mother India” and vast numbers of chaste Hindu women as violated by the foreign Muslim invaders of the subcontinent.

lawyers, writers and academics from around the world, about half of them Indian, whose purpose it was to draw to international attention the specific impact of the violence in Gujarat on women’s lives.

³⁹ For a detailed overview of the right wing Hindu organizations see International Initiative for Justice in Gujarat, *Threatened existence: A feminist analysis of the genocide in Gujarat*, Annexure III and their ideology and political growth, Annexure IV.

⁴⁰ “As part of the construction of a *Hindu Rashtra* [Hindu Nation], the Hindu right has consistently sought to portray the Muslim as the other, the enemy within who undermines the security of the nation, poses a threat to the *Hindutva* project of nation building and erodes Hindu rights.” International Initiative for Justice in Gujarat, *Threatened existence: A feminist analysis of the genocide in Gujarat*, p. 21.

Relating to the present, Muslims are cast by proponents of *Hindutva* as deliberately “over breeding” in order to outnumber the majority community.⁴¹ Linked to this are projections of Muslim males as virile, violent, sexually insatiable, a threat to Hindu women and as such to the survival of the Hindu community.⁴² The US-led “war on terror” has further contributed to reinforcing the equation “Muslim-terrorist-enemy” used by Hindu right wing organisations to feed fears of the “Muslim menace”.

The *Hindutva* project does not stop at the projection of this threat but calls for its active elimination. Hatred and fear of Muslim men fuels the aim to kill them or drive them out of Hindu society and indeed Hindustan, the nation of Hindus. This also drives the wish to avenge their supposed defilement of Hindu women by inflicting sexual violence on Muslim girls and women. It follows with frightening logic that in Gujarat in 2002, Muslim “women’s bodies [were] being used as battlegrounds in the struggle over defining India as a Hindu state”.⁴³ Muslim girls and women were targeted in Gujarat in 2002 not only because they were members of the Muslim

community but specifically because they were “the biological and cultural reproducers of the communities and their bodies symbolize the body of the community ... In fact, Hindu men [saw] it as their function and duty to violate the bodies of Muslim women”.⁴⁴ This is also reflected in the fact that Hindu attackers wore their Hindu “uniform” of saffron underwear, headband and khaki shorts indicating that they saw themselves as performing a service to *Hindutva*. Many observers have also pointed to the “festive, carnivalesque aspect of the rampaging crowds”.⁴⁵

Calls to rape Muslim girls and women were contained in pamphlets produced by the VHP and RSS and distributed in Ahmedabad months before the violence started.⁴⁶ A VHP leaflet called *Jihad* (holy war), signed by VHP state general secretary Chinubhai Patel, calls on Hindus: “We will cut them and their blood will flow like rivers. We will kill Muslims the way they destroyed Babri mosque”. It goes on to spell out the sexual nature of their communal hatred:

*“The volcano which was inactive ... has erupted, it has burned the arse of miyas [Muslim men] and made them dance nude. We have untied the penises which were tied till now. We have widened the tight vaginas of the bibis [women]”*⁴⁷

Medico Friends Circle (MFC), a voluntary organization of Indian health professionals, similarly observed, “as pamphlets by the Sangh Parivar indicate, women’s bodies were turned into battlefields in order to perpetrate hate and dishonour and assault the pride, dignity and integrity of the whole community”.⁴⁸

Women have been raped and sexually humiliated the world over in clashes between communities as a mechanism of dishonouring their entire community which becomes impure and polluted by the rape of an

⁴¹ In early September 2004, the BJP again expressed its “serious concern” about alleged “over breeding” of Muslims after the First Report on Religious Data released by the Office of Census Commissioner on 6 September 2004 appeared to suggest that the Muslim population had grown by 36% between 1991 and 2001 (1981-1991 by 32.8%) while the Hindu population had grown by 20.3% (22.8%) respectively. It was subsequently shown that the analysis had failed to take into account data from Jammu and Kashmir and Assam where no census had taken place in 1991 and 1981 respectively. According to adjusted figures, the Muslim community had grown by 32.9% in 1981-1991 and by 29.3% between 1991-2001 with the Hindu community growing by 22.8% and 20% in the same periods. The VHP called the (unadjusted) data “alarming”, claiming that “this community [Muslims] is conspiring to convert ‘Hindu rajya’ into a Muslim country”. (*Times of India*, 8 September 2004.)

⁴² The Gujarati press for months before the attacks in 2002 highlighted reports, mostly false, of rapes of Hindu girls by Muslim men.

⁴³ International Initiative for Justice, *Threatened existence: A feminist analysis of the genocide in Gujarat*, p. 4. “The body of the mother-nation in these stories [in Gujarati newspapers of rape of Hindu women] is conflated with the body of the Hindu woman, and the ‘rape of both’ in such narratives becomes the justification for the retaliatory rape on the bodies of the ‘enemy’ Muslim woman”, International Initiative for Justice, *Threatened existence: A feminist analysis of the genocide in Gujarat*, p. 28.

⁴⁴ International Initiative for Justice, *Threatened existence: A feminist analysis of the genocide in Gujarat*, p. 25.

⁴⁵ Tanika Sarkar, “Semiotics of terror”, *Economic and Political Weekly*, 13 July 2002.

⁴⁶ Eyewitnesses quoted in International Initiative for Justice in Gujarat, *Threatened existence: A feminist analysis of the genocide in Gujarat*, p. 26.

⁴⁷ Communalism Combat, *Genocide Gujarat 2002*, 8(77-78), April 2002 and Tanika Sarkar, “Semiotics of terror”, *Economic and Political Weekly*, 13 July 2002.

⁴⁸ Medico Friends Circle, *Gujarat carnage and the health service: a public health disaster*, May 2002.

outsider. Most observers agree that rape and other forms of sexual humiliation and assault were used in the Gujarat violence as an instrument of systematic “subjugation and humiliation of [the Muslim] community”.⁴⁹ The means and methods of assault bore a deliberate and open Hindu imprint. Women were raped while the rapists chanted Hindu slogans; the weapons with which women’s wombs were cut open were *trishuls* and swords; the bodies of the victims were not left where they fell but burned in the way Hindus cremate their dead. Witnesses reported that in some cases, the syllable “Om” which has religious significance in Hinduism, was cut into the bodies and skulls of victims.

Evidence of the systematic sexual assault on Muslim girls and women is well documented and overwhelming.⁵⁰ Girls’ and women’s bodies were

subjected to “almost inexhaustible violence, with infinitely plural and innovative forms of torture ... their sexual and reproductive organs were attacked with special savagery”.⁵¹ A doctor who examined victims in a local hospital reported injuries inflicted with a brutality he had not seen before. Women working in a relief camp in Ahmedabad reported to the International Initiative for Justice in Gujarat: “There were many women bleeding, injured, naked. Many women had bite marks on their breasts. Three women were raped with wooden rods inserted in their vaginas. They were bleeding. We cleaned these women’s wounds after removing the objects inserted into their bodies”.⁵² Reports on the violence in Gujarat concur on the pattern of violence inflicted on women. It was not only deliberate but designed to inflict maximum suffering. It was long-drawn, intended to kill not outright but, almost identically everywhere, involving a prolonged gradually increasing pain and humiliation.

Muslim girls’ and women’s sense of shame was deliberately outraged by stripping them in front of relatives and the mob. In Fatehpur, young girls were paraded naked and subjected to verbal sexual taunts, humiliation and threats of sexual violence. When an ambulance finally rescued them, they had nothing to cover themselves with. In all the cases in which groups of people were killed, several women underwent this ordeal. In an attack in the Gulberg Society in Ahmedabad on 28 February 2002, at least 10-12 women were raped and over 30 killed.

state government subsequently informed the Committee that the cases were being investigated by state police and that not all of them related to rape.

Again, in the response to the Lok Sabha Committee in its 7th report raising the issue of special courts to try offences against women which many activists favoured, the state government said that “since the offences against women were sporadic and few in number, it was considered that the establishment of special courts ... was not advisable. Further, as the offences against women are sporadic and have occurred at different places, the affected women would not be [sic] benefited ... and they would have to attend the court at far away places and consequently undue inconvenience would have been caused to them.” (Response of 14 May 2003).

⁵¹ Tanika Sarkar, “Semiotics of terror”, *Economic and Political Weekly*, 13 July 2002.

⁵² International Initiative for Justice in Gujarat, *Threatened existence: A feminist analysis of the genocide in Gujarat*, p.100.

⁴⁹ Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 38. The rapists’ purpose was to “possess and dishonour them and their men, ... to taste what is denied to them ... to physically destroy the vagina and the womb and thereby, to symbolically destroy the source of pleasure, reproduction and nurture for Muslim men and children. Then, by beating, to punish the fertile female body. Then, by physically destroying the children, to signify an end to Muslim growth. Then, by cutting up the foetus and burning it, to achieve a symbolic destruction of future generations, of the very future of Muslims themselves.” (Tanika Sarkar, “Semiotics of terror”, *Economic and Political Weekly*, 13 July 2002.) “Upon their bodies women carry the honour of their communities and raping them is one of the surest ways of defiling the entire community.” (Flavia Agnes, “Law, ideology and female sexuality”, *Economic and Political Weekly*, 2 March 2002).

⁵⁰ In responses from the governments of Gujarat and India to this report, Amnesty International learned that the Government of Gujarat has consistently denied that sexual violence including rape was widespread in the 2002 violence. The Lok Sabha Committee on Empowerment of Women said in its 7th report (2002) that it had received a list of 58 Muslim women in Shah Alam camp, Ahmedabad who had alleged sexual violence. In a response sent to the Committee, the state government said that no complaints had been received from the women. A state level Women’s Cell had heard 856 women and recorded 1,116 statements, none of which had contained complaints of sexual harassment. Only six instances of sexual harassment and attack, involving 11 victims were reported during the violence in the state, the state government said. In its 17th report (2003), the Lok Sabha Committee said it was “inclined to conclude that the State level Women Cell failed in their duty to gauge the extent of suffering of the harassed women in the Shah Alam camp” and requested further investigation into the 58 cases brought to its notice. The

While some Muslim survivors reported that rapists had shouted that they intended to impregnate them with “little Hindus”, the target of particular rage were pregnant women. Several eye-witnesses testified before human rights groups that a young woman, Kausar Bano of Naroda Patiya, Ahmedabad, who was nine months pregnant, was gang-raped and had her womb cut open with a sword; her foetus was ripped out, hacked to pieces and flung on the fire. The mother’s body was thrown on the fire as well. Police in Vadodara were reported by several witnesses to have hit the bodies of pregnant women with rifles shouting “kill them before they are born”.

The logic of hatred against Muslims also explained the attacks by Hindu mobs on children, both born and unborn, which added another layer of extreme suffering to their parents. Such attacks would remove the future of the community and was certain to profoundly devastate Muslim women and the entire community. Numerous accounts show that women’s main concern during the attacks was for their children’s lives and safety. There are moving accounts of mothers describing the violation of their young daughters. One woman reported, “I recognized two people from my village ... pulling away my daughter. She screamed telling the men to get off her and leave her alone. ... My mind was seething with fear and fury. I could do nothing to help my daughter from being assaulted sexually and tortured to death. My daughter was like a flower, still to experience life. Why did they do this to her?”⁵³ Children of all ages were deliberately and mercilessly threatened, beaten, cut with swords and killed by Hindu mobs in front of their mother’s and other relatives’ eyes. In Naroda Patiya, a Muslim area of Ahmedabad, new born infants were torn from the arms of their mothers and thrown on the fire. Also in Naroda Patiya, mothers were reported to have pleaded with police to save their children. Some women reportedly laid their babies at their feet begging, in vain, for their protection. Bilqis Yakoob Rasool from Randhikpur village, Dahod district who was five months pregnant when a violent Hindu mob caught up with her and her family was violently gang-raped and made to watch as her three-year old daughter was killed.

Being forced to witness the fear and humiliation, gang-rape, burning to death of mothers, sisters and

other female relatives has left deep scars on hundreds of children who survived the violence. At least 33,000 children, many of them orphans, lived in Gujarat’s relief camps after witnessing some of the most brutal forms of violence on their relatives. The Concerned Citizens Tribunal stated, “They are mute witnesses to gross gender crimes perpetrated on their near and dear ones – sisters, mothers, aunts and even grandmothers – with gory and military precision, evidence of some sick minds and a vicious ideology”.⁵⁴

The intentional sexual humiliation of girls and women is also evident in several reports of police officers exposing themselves to Muslim girls and women and waving their penises at them. A head constable of Gomtipur police station is reported on several occasions to have successfully used this technique to frighten women and cause them to run away. On 2 March 2002, Muslim women in Patel ki chali, a neighbourhood in the Gomtipur area of Ahmedabad, gathered outside the closed main entry gates to their areas to protect the men who had hidden in the houses from both the mobs and police. Two days earlier Muslim neighbourhoods had been burned down. They protested when police entered the area by jumping over the walls. In response, the head constable and his fellow policemen reportedly pulled down their trousers and exposed themselves to the women shouting obscene insults. The mob outside the gate took their cue from the police and did the same. Similar incidents are reported from other areas of Ahmedabad where Hindu men, including police officers, exposed their penises and shouted, “your men are weak, we’re strong, you’re not strong enough to fuck your own women”.⁵⁵

Many women victims of gang rape and other sexual assault were killed, most frequently by burning them, often while still alive. The burning of victims had the effect of depriving victims’ families of the ceremonies surrounding burial and mourning prescribed by Indian Muslim culture. Muslims bury their dead, whereas Hindus cremate them. By burning the dead or dying, the Hindu mobs enforced a cultural form of disposing of the dead that is alien to the victims’ families and deprived the already traumatized

⁵³ Women’s Panel, *The survivors speak – How has the Gujarat massacre affected minority women?* Ahmedabad, Citizens’ Initiative, April 2002.

⁵⁴ Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p.39.

⁵⁵ International Initiative for Justice in Gujarat, *Threatened existence: A feminist analysis of the genocide in Gujarat*, p. 26.

minority community of the important coping mechanism of culturally sanctioned customs of burial and mourning. Hindu mobs were clearly aware of and intended these effects. On 28 February 2002, a Hindu mob of around 25,000 surrounded a Muslim area in Saijpur Patia, Naroda, Ahmedabad, and stormed the lanes and raped girls and women in front of their male relatives. Among the victims were girls as young as 11 who were stripped of their clothes in front of the violent mobs who humiliated and gang-raped them, thrust swords and knives into their vaginas before burning them alive. They then killed Muslim men and women with swords before setting them on fire. They shouted that they would “even spoil their deaths”. Arson and burning of the dead and the dying and living Muslim victims was clearly intended to “obliterate a whole community” by annihilating its culture and beliefs.⁵⁶

The burning of bodies of women victims of sexual assault had the additional effect of destroying all material evidence. In Gujarat, the criminal justice system had been steadily communalized over several years which made it much harder for members of the Muslim minority to obtain justice. In such a context, to deprive victims’ families of the possibility to present material evidence for their complaints in court further diminished the slim chances they had to prove their cases in court.

Surviving girls and women victims of sexual assault have not had any official therapy or trauma counselling to help them cope with their experiences; in fact many had to immediately take on the new responsibilities of caring for other survivors who were equally traumatized and of tending to injured family members.

A unique feature of the sexual violence inflicted in Gujarat in 2002 was the participation of small but significant numbers of Hindu women who approved, instigated and encouraged it. Local human rights monitors have pointed out that “women from all communities were affected by the fear and terror promoted by the state and the police”.⁵⁷ Many Hindu

women were convinced of the likelihood of attacks by Muslim men as this prospect had been systematically spread in local media and numerous pamphlets.⁵⁸ Local observers have been alarmed by the “level of hate” among Hindu women resulting from such indoctrination. Many Hindu women during the violence stayed up at night with their male relatives to guard their homes against presumed assault by Muslims. It is a small step from such vigilante activities to joining men who went on the rampage against Muslims neighbours. Eye-witnesses have named several prominent women who took part in the violence.⁵⁹ Some were also reported to be involved in looting of Muslim properties. But many other Hindu women, resisting enormous pressure and braving personal risks, protected their endangered Muslim neighbours, sheltered and fed them and helped them escape.

7. Failure of the state to prevent abuses and bring perpetrators to justice

The failures of the state with regard to the protection of rights of the Muslim minority, particularly Muslim girls and women, have been comprehensive, involving all organs of state in Gujarat. The police as the institution whose statutory duty it is to protect citizens did not prevent the abuses but on a wide spectrum of culpability, acquiesced, connived or participated in the violence and later refused to perform their duty to assist victims to obtain redress. The state judiciary similarly failed the victims, as did the public health system, and the state government. The then central government, despite constitutional and international obligations to do so, failed to intervene in Gujarat. Lacunae in the law, long recognized but not addressed, further hampered the efforts of victims of sexual assault to obtain justice. The state failed on many accounts to meet their obligations under international criminal and human

⁵⁶ Concerned Citizens Tribunal, *Crimes against Humanity*, vol. II, p.39.

⁵⁷ People’s Union for Civil Liberties (PUCL) Vadodara and Vadodara Shanti Abhiyan, *At the receiving end: Women’s experiences of violence in Vadodara*, May 2002, p. 5; on p.6: “... several majority women are pawns in the hands of fundamentalist Hindutva forces and are as vulnerable as minority women.”

⁵⁸ “PUCL teams have pointed out the manner in which the line between hating Muslims to condoning their killing and encouraging it has been crossed, at least partly on account of the fear psychosis that centres around the notion of the ‘dangerous Other’.” PUCL and Vadodara Shanti Abhiyan, *At the receiving end*, p. 6.

⁵⁹ Several such women are named in the PUCL-Shanti Abhiyan report, p.6.

rights law to provide an effective remedy for the victims of these abuses.

7.1 Failure of police to fulfil their constitutional obligations

There is extensive evidence of the lack of care taken by police to prevent violence against the Muslim minority in Gujarat in 2002 and the connivance, complicity and participation of police officers in the abuses perpetrated against its members. Furthermore, there is evidence of the failure of police to uphold their constitutional obligation to record complaints and investigate crimes as a first step of legal action against the perpetrators.

7.1.a Failure to prevent violence

With regard to the failure of police to prevent the violence in 2002, the NHRC observed that “a serious failure of intelligence and action by the State government marked the events leading up to the Godhra tragedy and the subsequent deaths and destruction that occurred”.⁶⁰ The Gujarat state government admitted in its report which was received by the NHRC on 28 March 2002 that Gujarat had a long history of communal riots, with 443 major communal incidents occurring between 1970 and March 2002 and a climate in which both communities lived in a constant state of apprehension of further violence. It said it was standard practice to alert police stations when a heightening of tension was apprehended.⁶¹ The NHRC observed that in the light of that history, it found it “incomprehensible” that the intelligence services of Gujarat and Uttar Pradesh and the Central Intelligence Bureau had failed to

⁶⁰ NHRC proceedings of 1 April 2002. Having heard extensive evidence, the Concerned Citizens Tribunal concluded, “one may well ask whether this was a case of intelligence failure on the part of the police force, or a deliberate absence of pre-emptive action?” *Crime against Humanity*, vol. II, p.81.

⁶¹ The NHRC issued notice to the government of Gujarat on 1 March 2002 on the measures it had taken to deal with the then ongoing violence in Gujarat; after seeking more time for the report as most of the state machinery was involved in efforts to restore law and order, the Gujarat government submitted a preliminary report on 8 March. The NHRC called it “perfunctory in character”. The NHRC received a more detailed report on 28 March 2002; its proceedings of 1 April take up several of the Gujarat government’s assertions in its report of 28 March.

monitor the sensitive issue of the movement of the *kar sevaks* on their return journey from Ayodhya.⁶²

Already on the Sabarmati Express journey to Ayodhya on 22 February, *kar sevaks* had reportedly provoked Muslims at several stations in Gujarat which should have prompted intelligence agencies and police to take measures to ensure peace during the return journey.⁶³ The NHRC concluded that the fact of continued violence spoke for itself and rejected the state government’s claim that the situation had been brought under control within the first 72 hours as the violence continued for over two months.⁶⁴ The Concerned Citizens Tribunal similarly

⁶² The report of the Gujarat state government received by the NHRC on 28 March stated that while there was intelligence on the journey of *kar sevaks* to Ayodhya in Uttar Pradesh, there was no “specific information” about the return of the *kar sevaks* from Ayodhya. The “only message” it said it received from Uttar Pradesh intelligence was received on 28 February, the day after the Godhra incident. The NHRC said this appeared to constitute “an extraordinary lack of appreciation of the potential dangers of the situation, both by the Central and the State intelligence agencies” (Proceedings of 1 April 2002). The Gujarat government’s lack of concern about *kar sevak* journeys is unmatched anywhere else in India: many states were in a high state of alert following the VHP’s aggressive mobilization for building the temple in Ayodhya. In August 2004, the former head of the intelligence wing of the Gujarat police, Additional Director General of Police (ADGP) (Intelligence), R.B. Sreekumar, testifying before the Nanavati Shah Commission, said that state intelligence had indeed received information from Lucknow police about the imminent return of the *kar sevaks*. Asked whether this information had been passed on to higher officials, Sreekumar said that he could not comment on this as he had only taken up the post in April 2002. Days before Sreekumar’s deposition, former Director General of Police, K. Chakravarthi had categorically denied before the Commission that Lucknow police had informed Gujarat police of the *kar sevaks*’ return on the express.

⁶³ Indeed as the train returned from Ayodhya, provocative slogans were reportedly shouted by *kar sevaks* at every station before it reached Godhra – which should have alerted railway and regular police.

⁶⁴ NHRC proceedings of 31 May 2002, in response to a report by the government of Gujarat in connection with the NHRC’s Preliminary Comments and Recommendations of 1 April 2002. The NHRC also observed that the Gujarat government’s claim that “all possible precautions” had been taken, did not explain the fact that violence was uneven in different areas of Gujarat, pointing to “local factors and players overwhelming the district officers in certain instances, but not in others” which raised the “further

said: "Evidence before the Tribunal establishes the absolute failure of large sections of the police to fulfil their constitutional duty and prevent mass massacres, rape and arson – in short to maintain law and order".⁶⁵ The urgent need for preventive action increased after the Godhra incident but as the Concerned Citizens Tribunal has pointed out, following the VHP call for a *bandh* (strike) on 28 February, which the BJP endorsed, police ignored the probability of state unrest and failed to take appropriate action to prevent violence.⁶⁶

7.1.b Failure to protect victims

A host of investigative reports by local civil rights and women's rights groups demonstrate the indifference and inaction of the Gujarat police force and their connivance, and in some cases participation, in abuses, including against girls and women. Several of them cite a range of testimonies by victims that police stood by watching Muslim women being raped, sexually abused, insulted and humiliated without interceding to protect them. In dozens of cases, calls for help were ignored or frightened members of the minority were told to flee. Police from Vatna police station on 28 February reportedly told Muslims fighting for their lives when their houses had been set on fire to fight for themselves and not expect police help. In Gomtipur, on the same day, members of the Muslim community who were being attacked by a large mob were told by police that if they wanted to stay in Hindustan, they would have to fight for themselves. In Naroda Patiya, frightened Muslims were reportedly told by police, "today there are no orders to save you". State Reserve Police Force personnel reportedly told fleeing Muslims, "we won't let you in [into the police post], today you have to die".⁶⁷ In several places, police reportedly said that they, implying the majority population including the police, would "do the same thing as happened at

Godhra" and that Muslims seeking protection would reap the "rewards for Godhra".⁶⁸

One of the clearest cases of police refusing to play their statutory role of guarding members of the minorities against criminal assault occurred at the Gulberg Society in Ahmedabad, where during nine hours of siege of its Muslim residents, a prominent former Member of Parliament (MP) made some 200 phone calls to state and police officials and others for help which went unheeded, with fatal consequences for the Muslim residents.

Gulberg Society, the home of former Congress MP and trade unionist Ehsan Jafri, was surrounded by a mob of some 20,000 in the centre of Ahmedabad from 7.30am to 4.30pm on 28 February 2002. Many Muslims from surrounding areas had sought refuge there, expecting that an MP would not be exposed to violence. The Concerned Citizens Tribunal cites two eyewitnesses and two others as testifying that Ahmedabad Commissioner of Police, P.C. Pandey, visited Ehsan Jafri at 10.30am and assured him that police reinforcement would be dispatched forthwith and that he would be fully protected.⁶⁹ His widow Zakiya Jafri later testified before the Nanavati Shah Commission, too, that the Police Commissioner had promised help when called.⁷⁰ A few police officers

⁶⁸ For example see: International Initiative for Justice in Gujarat, *Threatened Existence*, p. 150.

⁶⁹ This was also confirmed by other witnesses appearing before the Nanavati Shah Commission in November 2003.

⁷⁰ *Express News Service*, 18 August 2004; Former Police Commissioner for Ahmedabad, P.C. Pandey, subsequently appointed Additional Director of the CBI in February 2004 and testifying before the Nanavati Shah Commission on 17 August 2004 said he had not known Congress MP Ehsan Jafri and did not remember Jafri calling him on the phone: "I do not remember talking to Ehsan Jafri and had never met him." (*Indian Express*, 18 August 2004.) Similarly then Joint Commissioner of Police, Ahmedabad, M.K. Tandon, before the Commission denied having received any phone call from Jafri; he said he had received a message from the police control room saying that Jafri wanted to be shifted to a "safer" place and that he was on his way to another incident and had sent some police reinforcement to the Gulberg Society. The NHRC, in its confidential report on Gujarat, said, "[r]epresentatives of many NGOs and some prominent citizens narrated a number of cases where they contacted the police and requested them to rescue the members of the minority community under attack from the marauding mobs but their pleas evoked no response. Shri Amar Singh Chaudhry, former Chief Minister, Gujarat narrated to the team his futile efforts in seeking police help for Shri Ahsan Jaffery, former MP. He claimed to have

question as to what the factors were and who the players were in the situations that went out of control".

⁶⁵ The Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 81.

⁶⁶ *Bandhs* have in the past been occasions of mob violence and after the incident at Godhra, violence during a *bandh* was predictable.

⁶⁷ Concerned Citizens Tribunal, *Crime against Humanity*, vol. I, p.41.

from the local police post were insufficient to deal with the massive presence of aggressors; according to reports, after feeble attempts to shout at the mob that they constituted an unlawful assembly, they stood by as the brutal violence unfolded.

Around noon, stones, acid and petrol bombs were thrown at the building in which there were then some 80 people. Among the many phone calls reportedly made by Ehsan Jafri were calls to Chief Minister Narendra Modi, then Union Home Minister L.K. Advani, the mayor of Ahmedabad and other party and state officials, asking for protection. Around 2.30pm, the gate was broken open. When it became clear that no help was coming and that he was the specific target, Ehsan Jafri around 2.45pm gave himself up to the mob. In the following 45 minutes he was humiliated, stripped, paraded naked; his fingers, then his hands and feet were chopped off; still alive, he was dragged along the road and thrown into a fire. Mutilations and burning of other Muslims from the building continued as fires were lit on the road outside the building complex. From around 4pm, between 10 and 12 women were raped and gang-raped and cut into pieces before being thrown into the fire; only one woman survived the attack. Police arrived around 4.30pm and after initially being driven away by the mob, started rescuing survivors around 7pm.

The Foundation for Civil Liberties in its extensive documentation of post-Godhra violence said that over 100 people are believed to have been killed in the incident at the Gulberg Society. After interviewing all the available eye-witnesses, it could document only 72 deaths; with regard to the other cases, no complainants or witnesses were available as many families had fled the area. There were 37

personally contacted the Police Commissioner, P.C. Pandey, at 10.30 A.M. on 28 February and apprised him of the imminent danger to the life of Shri Jaffery. The Police Commissioner assured him that police assistance will be dispatched rapidly. He reminded him again after receiving another frantic call from Ahsan Jaffery that no police reinforcement had reached his place and that the few policemen present were ineffective and unwilling to control the violent mob. Shri Chaudhry said that he also spoke to the CM Narendra Modi in the afternoon and found him well informed about the presence of a violent crowd outside Shri Jaffery's house. He also spoke to the Chief Secretary and Home Secretary between 12.30 and 2.00 P.M."

females and 35 males amongst the dead; at least 10 of the dead were children under 10 years.⁷¹

The Concerned Citizens Tribunal commented, "[t]he blatant complicity of the Gujarat state and its police in the Gulberg Society carnage cannot be understated. The CM [Chief Minister], the home minister, the CP [Commissioner of Police], were all called by Jafri himself. ... That such a massacre could take place in broad daylight, and lasting several hours, after innumerable attempts and pleas, desperate pleas, for help had been made, is a pathetic and chilling reflection on the quality of governance in Gujarat under CM Modi. A strong case of personal vendetta by Modi against Jafri was made out by [the] witnesses, while CP Pandey stands individually indicted because he failed to send reinforcements, either of his own choice or on orders from above, although he knew how bad the situation was when he visited Gulberg Society at 10.30 a.m. that day."⁷²

When prominent politicians could not rely on receiving police help, ordinary members of the minority community were exposed to Hindu attacks without protection from police. The ransacking of the Best Bakery in Vadodara where 14 people were killed, followed repeated calls to the local Panigate police station. About one and a half hours after their calls, a police car stopped briefly outside but moved on without any effort to intercede and protect the besieged household. After the police left, the mob began to attack the building. Though the assault lasted some 14 hours, police did not return.

The following narration by Bilqis Yakoob Rasool about her family's attempted flight from Hindu attackers in her village Randhikpur in Dahod district records the repeated refusals by police to protect terrified people from the minority community, including women and children fleeing for their lives, and describes the results of those refusals.

"When Godhra happened my husband Yakub was unemployed. But we lived in a well-kept home and I was happily married. We had a baby named Saleha. She was three years old. I was five months pregnant. On February 27, 2002, the Sabarmati Express was burnt in the morning. The next morning, the sarpanch [head of the village council or panchayat] of our village took out a rally. It turned violent and people started

⁷¹ Foundation for Civil Liberties, *Untold stories: a case study of judicial redress*, several volumes, 2002.

⁷² Concerned Citizens Tribunal, *Crime against Humanity*, vol. I, p. 31.

burning the homes of Muslims in the village. At that point in time we thought of fleeing the village, but our village leaders assured us that nothing would happen, no one would touch us.

But then mobs began pelting stones at our homes. We ran for cover.... We wanted police security, but it was refused. More than 500 Muslim children, women and men were gathered there. We felt unsafe. We wanted to run away but all roads were blocked. At the main exit points they [Hindu villagers] had kept live electric wires. On the 28th [February] midnight they started burning homes systematically. 'We will kill you, chop you off', they were shouting. The men rushed to the police station with the names of 573 people. We needed protection. But the police refused."

Muslim community leaders of Randhikpur at this stage sent a complaint by fax to the Superintendent of Police and the Collector, the senior district civil service officer with administrative, magisterial and judicial responsibilities, naming all the accused. When despite Supreme Court directions to treat such complaints as First Information Reports (FIRs, initial complaint to police which leads to the police inquiry) they were not heeded and no help was forthcoming the Muslim families fled to the hills. As the violence spread, help was more difficult to obtain as people were afraid of repercussions for themselves and their families if they assisted or accommodated fleeing Muslims. One group whose houses were burned down turned to police from two companies who had arrived from Limkheda. They were told to flee if they wanted to stay alive. This group, after hiring a van, fled towards Baria but was stopped on the way by an armed mob that killed one young man and beat his mother breaking her arm. His younger brother was beaten unconscious resulting in his spine being broken. Another group of some 150 women and children fleeing Randhikpur reached a Congress Member of Legislative Assembly (MLA) in Chunadi village who arranged their transport to a relief camp.

Bilqis' family fled on to Kujaval where her cousin delivered a baby:

"Shamim, who had just delivered a baby, was unable to walk. So all of us stayed back ... and most of our men left the place. My mother, my two sisters, my maternal uncle, my two brothers, my father's sister, her husband and her three sisters were among the 17 persons who stayed back. Some tribals helped us. We hid there for two days. They took pity on Shamim, so along with her all of us were given refuge. They fed us and gave us clothes. To hide our identity we wore tribal clothes. We had to leave their home because many inquiries were made if they had kept any Muslims. We left ... at 4am in disguise.

All those days all of us were crying constantly. Fear had captured our hearts and minds. We could not think of much else. The only issue before us was how to save our lives. Out of the 17, four were men, eight were women, and the rest were children. ... We rested for a few minutes at a tribal hamlet. The place was between two hillocks and a narrow road passed by it. When we were passing by that road a man came and hit one of my uncles. He fell down and regained consciousness only an hour later. Soon more people came along. All of them were from Randhikpur, my own village. People from Chaparwad gave them our whereabouts. 'Mussalmans are here, kill them, kill them,' they were shouting. They were able to collect more people from Panivela and Chaparwad. We were too tired and helpless. We didn't have the strength to fight back. Since we were running for cover, we never thought of picking up even a stick. We started running in all directions, but we could not escape. ...

They started molesting the girls and tore off their clothes. Our naked girls were raped in front of the crowd. They killed Shamim's baby who was two days old. They killed my maternal uncle and my father's sister and her husband, too. After raping the women they killed all of them.... They killed my baby too. They threw her in the air and she hit a rock. After raping me, one of the men kept a foot on my neck and hit me. They hit me with sticks and stones, then picked me up and threw me into the bushes. I was unconscious. They thought I was dead. But after a few hours I recovered my senses. Those men were using such foul language, I can't repeat it ever. They were saying, 'Since you have killed our people [in Godbra] we will kill you too. We will not leave any Muslims alive.' In front of me they killed my mother, sister and 12 other relatives. The way we kill animals, they slaughtered us.

*On the 28th [February] morning my husband and other family members had gone to a village meeting held at the home of a BJP worker. There they had pleaded for protection. All those who raped me and my sisters and murdered them were present there. Out of 17 only three of us survived -- two small children and me. I have no idea how they managed to survive. There were no Hindu women in the crowd. All of them were young or middle-aged men. While raping and killing us, they were shouting the choicest sexual abuses. When they were raping me I could not even tell them that I was five months pregnant because all the time their feet were on my mouth and neck. Hindus of all castes were involved. My fellow villagers were part of the crowd that killed my relatives. How can I not identify them? They were all my gaonvale [fellow villagers]."*⁷³

Official explanations about police failure to protect members of the minority stated that "the police tried their best but they couldn't stop the mobs. They were

⁷³ "How can I forgive them?", *Rediff.com*, 26 February 2004.

grossly outnumbered”.⁷⁴ They were contradicted by the evidence of witnesses who state that in some cases, small contingents of police did manage to stop mob attacks and prevent violence.⁷⁵ In the few cases where police actively prevented violence against women, the police officers concerned have apparently been punished by being transferred to less important posts. Police inspector Ajit Srivastava of Khanpur police station, surveillance branch, on 28 February 2002 saved the lives of 35 Muslim girls and women who were trapped inside some hutments while a mob surrounding them surged forward to attack them. Srivastava took 40 minutes to convince the women that they could trust a police officer and that he would not deliver them to the mob. He reportedly jumped into the fire that had already started and succeeded in leading them out while holding back the mob.⁷⁶ Similarly small units of the army are reported in some cases to have saved Muslims from attackers or when they were hiding in forests or fields. In Mora village, Panchmahal, Muslims sought refuge in a local mosque and another building both of which were set on fire. A small unit of the army came and rescued them.

7.1.c Police connivance in the violence

However, police not only withheld assistance. The Concerned Citizens Tribunal observed: “Worse still [than the failure to prevent violence] is the evidence of their [the police force’s] active connivance and brutality, their indulgence in vulgar and obscene conduct against women and children in full public view. It is as if, instead of impartial keepers of the rule of law, they were part of the Hindutva brigade

⁷⁴ Ahmedabad’s Police Commissioner P.C Pandey. Cited in the Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 83.

⁷⁵ Other ways in which police tried to mislead the public was to claim that the situation had been brought under control when this was manifestly not the case. Ahmedabad Commissioner of Police P.C. Pandey said on 2 March 2002 when Muslims were still being abused and killed in large numbers that “the situation is well under control.” “Newshour”, *Star TV News*, 2 March 2002.

⁷⁶ The same police officer rescued 134 Muslims who were surrounded by a mob of 20,000 Hindus on the evening of the same day. For details of named police officers who performed their duty, often at risk to their lives, who were subsequently believed to have been punitively transferred, see Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 90.

targeting helpless Muslims”.⁷⁷ Local inquiry reports list testimonies of police providing diesel from their official vehicles to burn down Muslim homes. Similarly, witnesses told the Nanavati Shah Commission that the Rapid Action Force had supplied petrol from their official vehicles to the mob to set ablaze houses belonging to the minority community. Another witness told the Commission in Ahmedabad that a police inspector encouraged the mob to attack the Muslims in her area: “The inspector directed that petrol be taken from his vehicle and it was used by the mob to set our society on fire”.⁷⁸

On 1 March 2002, in Gupta Nagar, Ahmedabad, police reportedly led a mob of 5,000 people and used tear gas shelling to drive Muslims from their homes, which were then looted and burned. In many reported cases, police beat Muslims, including many women who were trying to flee. A woman, Sabina Sheikh, testified before the Nanavati Shah Commission that on 4 March 2002 in Gomtipur, a police unit had beaten women and children at the Mehboob Chali area. She said that even after they shifted to a relief camp at Gomtipur, the police came to harass them there as well.

In many cases police, rather than protecting Muslims under attack from Hindu crowds, fired at them, particularly if they resisted attacks. This was particularly reported from Naroda Patiya, Ahmedabad. Of altogether 40 people who were known to have died in police firings in Gujarat on 28 February alone, 36 were Muslim.⁷⁹ In some cases police led terrified Muslims not to safety but towards violent Hindu mobs who then attacked them. In several places, police also took part in the attacks on Muslims, looting and burning houses along with the attackers. There are also numerous reports of police participating in sexual threats and innuendo to frighten and humiliate girls and women. The Concerned Citizens Tribunal concluded, “The shocking levels of police complicity in the Gujarat carnage cannot be over-emphasised”.

⁷⁷ The Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p.81.

⁷⁸ *Times of India*, 17 December 2003.

⁷⁹ In some districts, however, police shot at attacking Hindus to prevent further violence; police superintendents in two such districts were subsequently removed from their posts.

Senior police officials tried to explain the widespread involvement of police in the violence against the Muslim minority by saying that police officers were part of and reflected the perceptions of the wider society. Then Ahmedabad Commissioner of Police P.C. Pandey is reported to have said, “police cannot be isolated from the general social milieu ...[when] there’s a change in perception of society, the police are part of it and there’s bound to be some contagion effect”.⁸⁰ Many officers of the Gujarat police force are reportedly members of Hindu right wing organizations and in their actions may have sought to further the objectives of those organizations rather than to impartially carry out their professional duties to protect all people of all communities. When senior police officers point to police staff of lower ranks sharing a communal bias with the majority population, this does not absolve either rank of responsibility for actions resulting from such bias. The partisan conduct of Gujarat police in 2002 points to senior police officials’ failure to take adequate measures to ensure that police are trained in the proper exercise of their constitutional mandate which includes providing protection to all, irrespective of communal or other identity, to using force only when absolutely necessary and without regard to community identity when controlling crowds.⁸¹

Police inaction in preventing abuses and their inaction, connivance and participation in abuses appears to have had official endorsement at the highest level of police and state authorities. Many witnesses reported police saying that they did not have orders to save Muslim victims.⁸² Inspector of police, K.K. Mysorewalla is reported to have told victims seeking protection, “today your time has come. We have been told not to help. These are orders from the top”.⁸³

The Concerned Citizens Tribunal stated that it had heard a confidential testimony “from a highly placed source” who did not want to be named, which claimed that Chief Minister Narendra Modi had told senior state police officers in the evening of 27 February 2002 that a “Hindu reaction” to the Godhra

incident was to be expected on the following day -- on which right wing Hindu activists had called a Gujarat-wide *bandh* -- and instructed them not to do anything to contain this reaction. Director General of Police K. Chakravarthi is said to have protested in vain against such instructions.⁸⁴ Senior ministers of the Modi cabinet later that evening reportedly secretly met in Lunavada village in Sabarkantha district and developed a plan on the method of the violence to be carried out on the following days; this plan was then reportedly sent to 50 top leaders of the BJP, VHP, RSS and Bajrang Dal for implementation.⁸⁵ The delay in the government’s deployment of army troops appears to have served the same purpose: to allow Hindu mobs to operate unimpeded and unchecked for some time.⁸⁶ The presence of two senior cabinet

⁸⁴ “According to the confidential evidence recorded by the Tribunal, these instructions were blatantly disseminated by the government, and in most case, barring a few sterling exceptions, methodically carried out by the police and the IAS [Indian Administrative Service] administration. There is no way that the debased levels of violence that were systematically carried out in Gujarat could have been allowed, had the police and district administration, the IPS [Indian Police Service] and the IAS, stood by [their] constitutional obligation and followed Service Rules to prevent such crimes.” *Crime against Humanity*, vol. II, p.18. *The Times of India* of 29 May 2002 said that if the story was true, “it would mean that the democratically elected head of a state government actually promoted the lawlessness from February 28 by directing his police chief to keep his forces under leash. It would imply that Modi is himself responsible for the chain of events after Godhra...”. The Gujarat government rejected the findings of the report of the Concerned Citizens Tribunal. The VHP threatened, but did not take, legal action against the Tribunal.

⁸⁵ Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p.18.

⁸⁶ Rahul Bedi, “Soldiers ‘held back to allow Hindus revenge’”, *Telegraph*, 4 March 2002. According to this report, the army was sent into Gujarat soon after the Godhra incident but the Gujarat government only deployed these forces on 1 March 2002, after the worst violence had run its course. On Star TV on 3 March 2002, Chief Minister Modi said that the army had been called on the evening of 28 February and joined duty on the morning of 1 March. The Concerned Citizens Tribunal states that 12 columns of the army, numbering some 600 troops reached Ahmedabad and other sensitive areas on 1 March but were kept on standby. It mentions that “military intelligence puts the blame [for the late deployment] on the state government”; *Crime against Humanity*, vol. II, p. 76. *The Times of India* of 11 March ascribed the initial delay to lack of clear instructions from the Gujarat government. The Gujarat government’s failure to provide adequate transportation for troops and

⁸⁰ *The Telegraph*, 2 March 2002.

⁸¹ The high resort to violence by Gujarat police has been noted in the National Crime Records Bureau (NCRB) reports.

⁸² See Human Rights Watch, *We have no orders to save you*, May 2002.

⁸³ Communalism Combat, *Gujarat Genocide 2002*, 2002.

ministers in the police control room in Ahmedabad and the state police control room in Gandhinagar on 28 February, the day of the *bandh* when violence against Muslims peaked, is by most observers believed to have served to influence, if not direct, police action -- or inaction -- on that day.⁸⁷

7.1.d Police failure to register accurate complaints of victims

Police are obliged under the law to truthfully register every individual complaint received in the form of a First Information Report (FIR) after which they are to investigate the complaint and submit a charge sheet or police report to a magistrate who then decides if the case should be brought to court. The registration of specific, correct and detailed FIRs is crucial to the pursuit of effective investigation and trial and the police should take utmost care to fulfil all legal requirements of registering complaints as the prospect of legal redress hinges on it.

Victims' and witnesses' experience of police indifference to or connivance or complicity in violence against members of the minority community contributed to their hesitation to turn to police for help or to report abuses to them. Police, observed to side with the attackers, had become sources of fear, not of constitutional protection and security. Women had been the subject of police sexual innuendo. Police had exposed themselves to frightened Muslim women adding to their fears of rape and had stood by while they, their mothers, sisters and daughters were sexually humiliated, abused and, in some cases, killed. Understandably, many women survivors found it particularly difficult to report rape and other sexual violence to police.

Some victims, men and women, did, however, try to register complaints with police, often without success, as some police appeared to frustrate such efforts through a whole range of acts of commission and omission. In Baranpura, Vadodara, people were prevented from accessing the police station by mobs outside which police did not disperse. In some cases, police refused point blank to register complaints, often claiming that other important work had

precedence. In Vadodara, police in Makarpura Teenlata police station reportedly told people who had come to register their complaints that no complaints from Muslims would be entertained.

When *Sangh Parivar* members, including BJP, VHP and Bajrang Dal members were named as instigators or participants of attacks on the Muslim minority, these names were virtually always kept out of police reports, whether from outright pressure on police or police sympathies with such groups. Numerous cases have been reported in the media and documented by civil rights groups, in which police refused to take down names of perpetrators named by witnesses or of police telling complainants that an FIR would only be lodged if they deleted the names of the suspects. In village Por, where three women and three children were killed, survivors identified and named 95 Hindu attackers but police refused to include this information in the FIR.

In many cases police registered the complaint themselves, identifying the attackers as *tola* (mobs), for instance "a mob of 1-2,000 people" or an anonymous "unruly mob", making effective investigation and trial virtually impossible. When individual witnesses of the violence later approached the police to register their own complaints, police pointed to the existing FIR and refused to take down individual complaints which would have details of victims and accused. In the Gulberg Society, Senior Inspector of Police at the Meghani Nagar police station on the evening of the incident registered an FIR listing 39 dead and naming 10 persons and a mob of 20-25,000 as accused for a range of offences. However, rape was not included amongst the offences listed and it did not mention the visit of Police Commissioner Pandey on the morning of that day, nor that prominent political personalities had been seen in the crowd.⁸⁸

Amnesty International has seen affidavits by key eye-witnesses of the Gulberg Society case according to which some two dozen named accused whom they had identified before police, were not named in the FIR and the subsequent charge sheet. The affidavits also clearly stated the offences which the accused are alleged to have committed, including rape and murder. Several of the eye-witnesses in their affidavits also stated that their statements before police had

information about places where violence was being committed reportedly further hampered the army's effective and early intervention.

⁸⁷ Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 84-85.

⁸⁸ On 2 March and 12 March supplementary FIRs were filed, none of which added the charge of rape.

been manipulated and wrongly recorded. Eleven eye-witnesses in this case submitted their affidavits to the Police Commissioner Ahmedabad and the police inspector of Meghani Nagar police station on 25 November 2002 with the request that their statements be taken into account and to further investigate the case. The affidavits listed a number of discrepancies between their statements including the omission of people identified as perpetrators and the inclusion of people who had not been named in the FIR and the subsequent charge sheet. Police did not respond to this application.

A common feature of inadequately registered FIRs, was the omission of names and numbers of victims. In the Gulberg Society case mentioned above, 39 deaths were recorded while around 100 may have died. In the case of Bilqis Yakooob Rasool, 14 of whose relatives had been killed, police registered only seven as dead on her complaint claiming that the other bodies were not found and were hence “missing”. Observers have told Amnesty International that such omissions may have been intended to keep the total number of deaths in Gujarat low thus reducing the number of offences with which perpetrators could potentially be charged as well as depriving survivors of compensation. Relatives of people killed in violence affected areas have to obtain a death certificate from police in order to claim compensation from the authorities. They cannot obtain this when victims have been declared as “missing” by police. Police do not issue a death certificate without a body.

Police frequently asked complainants for evidence of the killings they wished to report – which was made difficult if not impossible by the fact that many of those killed were burned beyond recognition. Yakubhai of Delol village, Kalol, Panchmahal, reported the killing of 18 family members, including his father, mother, brother, sister, niece and nephew and the rape of several of the women amongst them, to Kalol police station. Police asked him to remove the names of the people whom he had seen commit the crimes and to produce the remains to prove that they had been killed. As the bodies could not be shown, they were listed as “missing”. Only after new police officials were posted to Kalol police station, could his complaint be registered, on 17 December 2003, that is 657 days after the killings.⁸⁹

⁸⁹ *Frontline*, 3 January 2004.

In some cases police also forced families to bury their dead quickly, which prevented them seeking post mortem examinations and thus destroyed proof of the offences committed.⁹⁰ Another way to hide evidence was for police to dispose of bodies they had received within a day, despite the legal obligation to preserve dead bodies for 72 hours to ascertain the cause of death and allow relatives to claim bodies. A police inspector, testifying before the Nanavati Shah Commission in late September 2004 admitted that police had allowed the buildings in the Gulberg Society to burn for a week so that all evidence would be destroyed. He said this was particularly true for the building in which former MP Ehsan Jafri had lived.

Police often did not read out statements to complainants, leading in many cases to complainants being unaware of the incomplete or distorted nature of the FIRs. Moreover, FIRs were usually taken down in Gujarati which complainants may not always have been able to fully understand. A woman deposing before the Nanavati Shah Commission in August 2003 was questioned why she had not reported her allegations of rape and killings in Naroda Patiya to police. She said: “I told them everything. I don’t know what the policemen write because I don’t know Gujarati”.⁹¹

Much detail was also lost when police, despite legal requirements to record an FIR on each individual complaint, filed so-called “omnibus FIRs” or “group FIRs”, merging several complaints. In this way details which the complainant had recorded in the specific complaints, including names of accused, nature of the offences and numbers and identities of victims, were left out. Ten days after the incident Sultana Feroze Sheikh told police who came to the camp where she was staying how on the afternoon of 28 February 2002, 40 Muslims of village Delol, Panchmahal district, tried to escape a violent Hindu mob in her husband’s minibus. “My husband [Feroze] was driving the tempo. Just outside Kalol, a Maruti car was blocking the road. A mob was lying in wait. Feroze had to swerve. The tempo overturned. As we got out they started attacking us. People were running in all directions. Some of us ran to the river. I fell behind as I was carrying my son Faizan. The men caught me from behind and threw me to the ground.

⁹⁰ *Indian Express*, 5 March 2002.

⁹¹ *Indian Express*, 29 August 2003.

Faizan fell from my arm and started crying. My clothes were stripped off and I was left stark naked. One by one they raped me. All the while I could hear my son crying. I lost count after three. They cut my foot with a sharp weapon and left me in that state.”⁹² Sultana Feroze’s husband and 12 others were killed before her eyes. She told police the names of three of the men who had raped her. In November 2002, she received a copy of the “omnibus FIR” in which police had grouped her testimony together with those relating to three other incidents which had taken place on that day within a 25-kilometre radius, diluting her testimony, mentioning only 10 killed and leaving out important details, including that at least one woman had been raped and another woman who was killed may have been raped.⁹³

Similarly after two attacks in Ode village, Anand district on 1 March, when 27 Muslims, including several young girls were burned to death, police merged complaints relating to the separate incidents into one FIR and declared 28 people as “missing”. Amnesty International has seen the statements of 25 survivors who reported that they had witnessed “five relatives dead, not missing”, “father dead, not missing”, etc. but this information was not reflected in the FIR.

Several of those who had named party and government officials to police were later apparently arbitrarily arrested. Twelve witnesses who named a local BJP leader and a VHP office bearer as leading attacks in Naroda Patiya in which some 110 people were killed, were arrested in August 2002 for a murder which had been committed in March 2002. None of their names had been included in the initial FIR of the murder case. The Concerned Citizens Tribunal recorded details of such apparently arbitrary and punitive arrests and estimated that in late 2002, at least 500 innocent Muslims languished in police lock-ups and jails in the state.

The difficulties encountered by people generally when attempting to register complaints about crimes

⁹² Women’s Panel, Citizens Initiative, *How has the Gujarat massacre affected minority women? Survivors speak*, April 2002.

⁹³ *Indian Express*, 6 May 2004. Sultana Feroze Sheikh took her complaint to the NHRC which in turn engaged the Supreme Court. In November 2003, the Supreme Court ordered a re-investigation of the case. A special investigation team in August 2004 arrested the investigating police officer for lapses in the investigation.

committed by the majority community were compounded when Muslim women sought to register complaints of rape, gang rape or other forms of sexual violence. Reporting rape and other forms of sexual violence is difficult for any victim, in any circumstances. A victim’s own sense of shame, of feeling sullied, of shaming her family by making the rape public often overrode women’s desire to report rape. While the Muslim community generally responded to the injury or killing of men with empathy and solidarity, it did not necessarily support and comfort a woman subjected to rape. The perception of it “sully” the whole community, often shared by the victims, stood in the way of victims reporting rape. Some rape victims were also rejected by their husbands and families as “tainted”. Young girls who had been raped were reportedly considered “unclean” and sometimes hurriedly married off to unsuitable old men to cover their “shame”. Persistent patriarchal attitudes in the Muslim community made many women hide the abuses they had suffered. For many, to admit to having been raped would mean that they would have no chance of ever getting married.

The prospect of having to reveal intimate details before an often hostile male police officer posed considerable hurdles for women victims of rape. This was exacerbated if police were known or believed to have participated or connived in abuses or to have shielded perpetrators.

The nature and magnitude of the human rights violations perpetrated in 2002 in Gujarat further added to the difficulty for women victims to obtain legal redress for sexual violence. Since the victims were often burned beyond recognition, there would be no evidence of their having suffered rape or gang rape; in all too many cases, there was no evidence even of their deaths as no identifiable bodies remained. Such victims were simply recorded by the police as “missing”. Observers have said that the majority of women who were killed had been raped before their deaths.

Many women victims also fled to camps or hid for days before finding safety in relief camps or with relatives. For many the necessities of survival, the need to look for missing family members and caring for traumatized dependents outweighed the desire to file a complaint. By the time they then approached police who could have referred them to official medico-legal examinations in government hospitals,

medical evidence of rape was irretrievably lost. Added to these difficulties was the persistent insecurity for Muslims outside the camps and the difficulty for women to move out to approach police stations.

In some cases survivors failed to emphasize in their complaints that female family members were first raped or gang-raped before being killed. Lawyers, too, in some cases encouraged victims to emphasize murder as it is more easily proved than rape, especially if the victim was burned, and carries a higher penalty.⁹⁴ Often, too, rape was not understood by survivors as a separate offence but merely as the context in which the murder occurred. The difficulty to prosecute rape and the requirement to bring medical evidence of rape which courts routinely insist on despite Supreme Court guidelines have also frustrated the prosecution of sexual assault.

When women sought to register FIRs relating to an alleged rape they or family members had suffered, the FIRs often did not reflect their complaints. A woman who had reported rape to police in Panchmahal district told the International Initiative for Justice in Gujarat that she had named five rapists. When she returned on the next day to obtain a copy of the FIR, police refused to acknowledge that she had made a complaint before. When she finally received a copy, she found that it did not contain her charge of rape. Police indifference to crimes perpetrated against women, their general reluctance to register FIRs as required by law and their particular resistance to recording crimes against women led to a considerable under-recording of such offences. In some cases, such FIRs were simply “lost”. Madiben filed an FIR with police who had come to Shah Alam camp, with the help of Nanubhai Maleikh, who had

rescued her from the flames that burned alive five of her family members. The FIR does not appear to exist any more. Nanubhai Maleikh reportedly wrote to the Police Commissioner asking him to ensure that the complaint be filed but to no avail.⁹⁵

Often women victims were sneered at when reporting rape or harassed to the point where they chose not to pursue the complaint. In some cases police made sexually explicit and humiliating remarks about the rape. Victims from Ahmedabad reported that police had threatened to put their police sticks in their vaginas if they insisted on reporting rape.

Bilqis Yakoob Rasool (whose case is described above), deeply traumatized after being subjected to gang rape and witnessing the killing of 14 members of her family, including her small daughter, described in detail what happened to her after the rape and how police refused to register her complaint of rape:

“After two hours [following the gang rape] when I opened my eyes I saw that my world had been destroyed. I could not even stand on my feet. But I was scared that people may see me and come back. A night and a day passed on top of the billock. I was very hungry and thirsty. I could not bear it anymore. I thought I may die of thirst. So I started to come down from the billock. I saw a hand-pump belonging to some tribals. Those tribals also wanted to beat me up because I am a Muslim. I lied to them and told them in their language that I was one of them. They gave me water and clothes. I slept a little. By that time a police van had started combing the area. They had heard about the killings of families from Randhikpur.

⁹⁴ While it varies from case to case, the tendency to treat rape as of lesser significance in cases where the victim was murdered is pervasive. Even the Supreme Court, though an active protector of human rights, has in some cases laid less stress on the offence of rape in such cases. In *Laxman Naik v State of Orissa*, the accused had been convicted of rape and murder of a child under section 376 and 302 respectively but while he was sentenced to death for the latter, no sentence was imposed under the former. The Supreme Court hearing the appeal said: “As regards the punishment under section 376, neither the learned trial Judge nor the High Court have awarded any separate and additional substantive sentence and in view of the fact that the sentence of death awarded to the appellant has been confirmed we also do not deem it necessary to impose any sentence on the appellant under section 376.”

⁹⁵ *Frontline*, 29 August 2003. Other FIRs have “gone missing” as well. The FIR in which Nanubhai Maleikh had alleged that 11 persons including a BJP MLA and a VHP secretary as well as other VHP leaders had instructed a mob in Naroda Gaam, Ahmedabad that went on the rampage, killing 13 people and burning down an entire neighbourhood, is also missing. There is no police record of any kind of his complaint. Despite several attempts to get police and political leaders to take note, his statement has not been re-recorded. In addition, Nanubhai Maleikh was arrested for the murder of a Hindu whose body was found after the unrest. The police case had not named any suspects. Six months after the incident, Nanubhai Maleikh was arrested and detained along with 11 others for four months. He said, “[a]fter my complaint, top leaders were in trouble. That is why police framed me. I have been working in the peace committee for more than 20 years. How could I kill anyone? Our lives were in danger. There was a huge mob out to get us. All we could do was take our families and run for cover.” *Frontline*, 29 August 2003.

They asked me to rest on the back seat of their vehicle. They told me I was very lucky to have survived. I didn't tell them my tale then. They took me to Limkbeda. There they gave me food and heard my complaint. I told them everything that I have told you. But they changed my version. They scared me. They said if you make an allegation about rape, you will have to be taken to hospital for a medical check-up. How can you in such a weak state of health go to hospital? They also frightened me by saying that I could be killed. I was too tired to fight with the police. So I dropped the idea and requested them to take me to Godhra camp. I wanted to meet my relatives.

My mother, two brothers, two sisters and my three-year-old daughter all got killed. But I can identify all the culprits. I have known the men who raped me for many years. We sold them milk. They were our customers. If they had any shame, they would not have done this to me.

Five days after the rape and after taking a bath three times I finally went for a medical check-up. I have the medical certificate that proves rape. ... My father has become deranged after this incident.”⁹⁶

The attitude of police to women reporting rape and other forms of sexual violence is summed up by B.K. Nanavati, Deputy Superintendent of Police in Ahmedabad, where dozens of rapes and gang rapes had occurred: “In my view it is not scientifically and psychologically possible to have a sexual urge when the public is rioting”.⁹⁷ When confronted by journalists who asked him about the recently reported case of Sultana Feroze Sheikh, a 24-year-old woman who had been stripped naked and raped by several men in village Delol, Kalol, he said there may have been “isolated cases” of rape. The official attitude reflected in a senior police officer’s public remark explains why attempts to prosecute for sexual assault have not been successful in Gujarat.

7.1.e Failure to investigate complaints

Police not only failed to record allegations of crimes correctly in FIRs, especially crimes committed against women. They almost invariably failed to adequately carry out investigations of the crimes registered. Some complaints were not investigated at all or in a careless and superficial manner which ignored, whether intentionally or carelessly, important material evidence or even destroyed it. Human rights organizations have described police investigations as

“tardy and loose”.⁹⁸ Police have failed to collect forensic evidence from the scenes of the crime and suspects, including objects looted from Muslim homes or suspects’ weapons. No combing operations in Hindu majority areas were carried out. Police also failed to compile accurate lists of witnesses directly related to different offences, to question witnesses or to record *panchnama* or on-site police reports signed by independent witnesses. Identification parades were not carried out despite the fact that many Muslim complainants knew their Hindu attackers by face but not by name and would have been able to identify them. While the large number of incidents that occurred in a short period of time must have placed an unusual burden on police, their failings – given the gravity of the offences committed – were of a magnitude that must be attributed to a deliberate attempt to conceal the truth.

Deliberate political interference in police investigations at all stages was also reported. The NHRC noted that there were reports of “senior political personalities ... seeking to ‘influence’ the working of police stations by their presence within them” and ensuring that FIRs were distorted in a manner which did not implicate members of right wing political groups.⁹⁹ According to many human rights organizations, police faced considerable pressure from the state not to make arrests and to register lesser charges than those reported to police.¹⁰⁰ Similar pressures led to distortions and delays of the investigations and the formulation of charge sheets, the police reports which summarize the findings of the police investigation and are submitted to the judicial authorities for a decision as to whether the case is to be tried. Many of the charge sheets were found to be faulty. For example, complainants noted that people they had named in their complaints were not mentioned in the charge sheets; this was particularly the case if the accused were VHP, RSS and BJP functionaries.

In several cases the investigation was entrusted by senior police authorities to police officers who were themselves suspected of having abetted or participated in violent crimes or who were known for

⁹⁶ “How can I forgive them?”, *Rediff.com*, 26 February 2004.

⁹⁷ *AFP*, 20 September 2002.

⁹⁸ Concerned Citizens Tribunal, *Crime against Humanity*, Vol. II, p.107

⁹⁹ NHRC proceedings of 1 April 2002.

¹⁰⁰ *Compounding injustice: The Government’s failure to redress massacres in Gujarat*, Human Rights Watch, July 2003, p. 5.

their sympathies for right wing groups and prominent accused. Witnesses have testified that in several cases the names of political leaders, including elected representatives were removed from FIRs and charge sheets by such investigating officers. In the Gulberg Society case, after an initial investigation by local police, a police officer known for his sympathies with the VHP, was appointed investigating officer and also entrusted with the investigation of the Naroda Patiya case. He reportedly reprimanded local police for including the names of local VHP and Bajrang Dal members in the FIR.¹⁰¹ The bias of the investigation is clearly shown in the charge sheet filed in June 2002 in the Gulberg Society case. The charge sheet did not mention that between 10 and 12 women had been raped and portrayed the main target of attacks, Ehsan Jafri, as having instigated the violence. The charge sheet opens by stating, "it was after the firing by Jafri on members of the mob (of 20,000) that the mob got violent and attacked the locality".¹⁰²

Police failure to adequately investigate complaints was coupled with reluctance to pursue the arrest of any of those named, the readiness of the state not to oppose their pre-arrest bail applications and of magistrates to grant bail. As a result, most of the perpetrators, particularly those belonging to Hindu right wing organizations or persons connected to the government, continued to be free during the investigative phase.¹⁰³ Some, though named by victims in the FIRs, were reportedly discharged by the police from the complaints. Others were declared 'absconders' by the police even though complainants and witnesses reported seeing them move around freely. Though police have powers to attach property of absconders to enforce their surrender to police, they were not used. Deputy Superintendent of Police, B.K. Nanavati said when questioned by the press about the lack of arrests of the rapists, "the accused have not been arrested, they are absconding". He claimed that search warrants had been issued and police informants were looking for the accused but

"verification of their identities becomes difficult".¹⁰⁴ Given that many of the accused identified by the victims are locally well known, this explanation clearly seeks to cover up a deliberate police failure to arrest.

Many perpetrators, including those formally accused, reportedly used their freedom to destroy evidence, buy witnesses or to harass or seek to bribe complainants to withdraw their complaints.¹⁰⁵ Rehana Vora, a key witness to violence in Ode village, Anand district, has stuck by her statement despite harassment and attempts to bribe her. Police have only admitted the deaths of six persons in the incident whereas 27 people were burned alive there, including members of Rehana Vora's family. She reported that she had been threatened with "dire consequences" by the accused, all of whom were free on bail. She was offered a bribe of 25 *laks* rupees (one *lakh* = 100,000) by the accused - which only strengthened her resolve to fight on.

Witnesses initially willing to testify also came under pressure to withdraw their statements. This was facilitated by the fact that witness statements were usually unsigned and are therefore not admissible as evidence in court. Police in Gujarat in 2002 did not ensure that victims recorded their statements before magistrates; such statements are signed and can be used as evidence in court and are hence more difficult to withdraw when witnesses come under pressure.

In some cases, families and community elders also put pressure on women complainants to withdraw their complaints in order to facilitate the families' return to their homes. Hindus named in FIRs, often made the dropping of charges or withdrawal of

¹⁰¹ The Gulberg Society case was later entrusted to the Crime Branch.

¹⁰² There are conflicting accounts as to whether Jafri fired shots in self-defence.

¹⁰³ The Concerned Citizens Tribunal's report, *Crime against Humanity*, contains in vol. II on pages 191 to 204 names of police officers, bureaucrats and politicians who were by identified by witnesses for their involvement in the violence against Muslims in 2002.

¹⁰⁴ *AFP*, 20 September 2002.

¹⁰⁵ Political pressure was not only brought on Muslim victims and witnesses of communal violence but also on members of Hindu families who had died in the burning of the Sabarmati Express near Godhra station. Many have publicly complained that the BJP used their plight for its own political ends. Addressing media persons in Mumbai in October 2003, they said that the VHP and BJP had "politicised the Godhra issue over the dead bodies of our loved ones", failed to support the families of victims, and tutored them on what to say before the Nanavati Shah Commission. "We are being told by the VHP leaders on what to say and what not to say in front of Justice Nanavati Commission. This is unacceptable to us. We are therefore demanding that the Godhra inquiry and also other inquiries ... should be conducted outside Gujarat." *Rediff.com*, 5 October 2003.

witness accounts a precondition for allowing the return of families of Muslim complainants to their homes after the violence.¹⁰⁶ The Concerned Citizens Tribunal said it had heard evidence that local officials facilitated such “peace” negotiations.¹⁰⁷ Local observers have reported that there are numerous “compromises” today in villages in Gujarat where Muslim residents have agreed to the demands of the aggressors and withdrawn criminal charges. Often they have also had to accept a whole raft of conditions such as abandoning specific Muslims customs. In some cases such “compromises” are endorsed on official stamp paper, signed in the presence of district administrators. Such compromises may mean for women that in the pursuit of their daily chores, like going to the market, they encounter men who may have raped them or their daughters or sisters and who do not hesitate to remind them of the incident, thus deepening and continuing their humiliation.

If victims and witnesses persisted in seeking justice despite the reported police indifference or connivance with perpetrators of crimes, they were often subjected to further intimidation and harassment. On 8 September 2003, the Supreme Court issued a notice to the Gujarat state to explain why it had closed the case of Bilqis Yakoob Rasool despite the fact that her allegation of rape had been supported by medical evidence. In the following days, local administration started inquiring about her whereabouts through the local police. On 16 September a police officer met Bilqis at Godhra at 10pm and told her to accompany him to the forest where the rape and murders had taken place. When she said that she had nothing more to add to her previous statements and that nothing additional could be found in the forest during the night time, the police officer allegedly exerted pressure on her to accompany him. Bilqis filed an application in the Supreme Court saying that taking her to the forest late at night “could not have served any purpose except harassment The conduct of the officer in insisting upon such a course defies reason and

smacks of a deliberate ploy to terrorise”.¹⁰⁸ Bilqis reportedly continued to be subjected to harassment such as threatening calls from different people demanding that she withdraw her petition in the Supreme Court seeking a CBI probe. As a result of threats and fearing for their lives and safety, Bilqis Yakoob Rasool, her husband and baby left Gujarat with the help of social service organizations. She requested that state police be directed to stay any further investigation in the matter. The Supreme Court observed that “it would be appropriate for the state police to keep off her till the court decides her plea for transfer of the case to CBI”.¹⁰⁹

The inadequacy of police investigations has led Shirin and Shamim Dawood, widows of British nationals of Indian Muslim origin, and Imran Dawood, who survived the attack on the Dawood family in which four men were killed and one seriously injured, to pursue a civil suit for damages against not only the actual attackers but also against the political leadership of the state. They have preferred to pursue a civil suit as it requires a lower level of evidence and the Gujarat police investigation of the case has produced insufficient evidence for a successful criminal prosecution.

The British nationals were on a visit to India and returning from North India to their ancestral home in Lajpur village, Navsari district in Gujarat. On 28 February 2002, after being told by police that the road was safe to travel, their car was stopped at a roadblock set up by a Hindu mob close to a police post on the national highway near Prantij town in Sabarkantha district. Other vehicles were also stopped but those with Hindu passengers were allowed to proceed. Shakeel Dawood (37), his brother Saeed Dawood (42), cousin Imran Dawood (18) and their childhood friend Mohammad Aswat tried to run away from the mob which ignored that they shouted that they were British and set the car on fire. Their driver, Yusuf Palagar as well as Shakeel and Saeed Dawood were killed by the mob whereas Imran, dragging Mohammad Aswat, managed to get away. They were rescued by a local resident. Mohammad Aswat was dead on arrival in a local health care centre. The bodies of Shakeel and Saeed have not been found.

¹⁰⁶ “These women are under a lot of pressure to withdraw their statements. There is a threat to their lives and people from their villages are not allowed to return back to their homes unless they retract their statements”, Navaz Kothwal, Commonwealth Human Rights Initiative, quoted in *AFP*, 20 September 2002.

¹⁰⁷ Concerned Citizens Tribunal, *Crime against Humanity*, Vol. I, p 109-110.

¹⁰⁸ *Indian Express*, 26 September 2003.

¹⁰⁹ *Indian Express*, 26 September 2003.

According to the Dawood family, the authorities in Gujarat failed to adequately investigate the criminal complaint registered after the killings. Other family members who were in India at the time of the incident, visited the crime scene on 8 March with the British Consul General and the Gujarat Director General of Police. They found local people too scared to talk. The records of Prantij police station proved negligently kept and contained discrepancies. Evidence at the place of the incident had not been secured as police had not even cordoned off the area. Relatives found pieces of charred bone which a local doctor identified as human remains but which police had ignored. When police indifference became clear, the widows and the single survivor started an international campaign and pursued legal remedies.

The widows Shirin and Shamim Dawood and Imran Dawood on 30 April 2002 filed three separate but identical civil suits in District Civil and Sessions Court at Himat Nagar, district Sabarkantha, holding Chief Minister Narendra Modi, former Home Minister Gordhan Jhadhafiya, and 12 other senior government and police officials in the command structure responsible through their acts of commission and omission for the murders and more generally the systematic destruction of the Muslim community in Gujarat. They also sued for compensation of 220 million rupees for the loss of lives and the injury to Imran Dawood. The case is pending before the civil court. In the criminal case relating to the killings, police arrested six local men in April 2003 and shortly afterwards released them on bail, suggesting that the evidence against them was weak. A writ petition filed by Imran Dawood seeking a new investigation by a central agency and the transfer of the case to a court outside Gujarat is pending in the Supreme Court.

In dozens of cases police presented so-called “closure reports” at the end of their investigations, claiming that there was insufficient evidence to identify the offenders or that the complainants had contradicted themselves. This happened even in cases where there was clear evidence that an offence had been committed or when several witnesses confirmed details about an incident.

The process which led to such an arbitrary “closure report” is particularly well-documented in the case of Bilqis Yakoob Rasool. She had alleged that she had been gang-raped and that several of her family members had also been raped and 14 family members

been killed. Police at Limkheda police station recorded Bilqis’ first complaint on 4 March 2002. The FIR registered on that day states that a mob of 500 Hindus attacked the family but that while others were raped, Bilqis was spared because she was pregnant. In her second complaint filed at Godhra Town police station on 7 March, after she had reached the relief camp in Godhra, Bilqis stated that a mob of 25-30 people had come in two jeeps and attacked the family. She named three men who had raped her. Bilqis also recorded a statement before an Executive Magistrate on the same day, naming twelve accused and identifying the rapists.

A letter by the Circle Police Inspector, Limkheda of 24 May 2002 to the District Government Pleader requested advice on whether to detain the accused and imputed Bilqis’ implicating the men named in her complaint to external influences. It said that “the complainant is a native of Randhikpur and she recognizes well the renowned doctor, vakil [lawyer] and reputed persons of her village” and that she had given these names on the advice of others in the relief camp. Arguing that her first complaint was correct, the letter said, “If the complainant has seen the details of the crime in her sight, or she would have become victim, she would have narrated the equal and actual facts in her representation up to the end and given the names of the accused”. The Additional Public Prosecutor, Panchmahals, Dahod district answered on 19 June 2002 that it was “not allowed under CrPC [the Code of Criminal Procedure] to make more than one complaint to one crime”, therefore police should proceed on the first FIR in which Bilqis had not named any accused and had not mentioned being raped. He added that there was no “honest and neutral evidence against the accused” to justify arrest. He also said that the location of the crime was such that jeeps could not have reached the spot as alleged in Bilqis’ second complaint, “which also creates doubt”.

The charge sheet of 7 November 2002 stated that a “crowd of 500 Hindu people got together and with common intention beat them and tore the clothes of Halimaben [Bilqis’ mother] and Shaminben [Bilqis’ cousin] and raped them and killed them ... The complainant has named certain persons in her written complaint. However, she had not named any accused persons in the FIR filed by her. Therefore as there is no proof against the accused, a request for granting ‘A summary’ has been made subject to keeping the

case pending investigation". Upon a request by the Circle Police Inspector Limkheda to the Judicial First Class Magistrate on 2 November 2002 to approve "A summary", the latter granted the closure of the case under "A summary" on 25 March 2003.

A direction by the Deputy Superintendent of Police of Limkheda division in November 2002 to more adequately investigate the case was ignored. He had pointed out to the Circle Police Inspector in Limkheda that there were serious "shortcomings" in the investigation: the police record sent to him had been incomplete and while the forensic examination had mentioned the presence of semen on Bilqis' clothes, no medical examination of the suspects had taken place. He directed Limkheda police to conduct a further detailed investigation, but this did not happen. Instead, the Circle Police Inspector Limkheda on 14 January 2003 replied that "in the absence of any evidence and independent proof against the accused named in the complaint, no action has been taken".

The request to close her case was also accompanied by the police claim that Bilqis had contradicted herself in the various statements recorded by police and that she was therefore unreliable. Bilqis subsequently clarified that she had indeed named the three men who had raped her, all of whom were known to her, when she first reported the incident to police on 4 March 2002 but that police had claimed that these were "respectable persons" and refused to name them in the FIR. Hence, she declared, there were no contradictions between her statements before police. Moreover, she said, police in Limkheda police station had told her that she might be poisoned if she approached a hospital for an examination to establish her complaint of rape.

The closure of Bilqis Yakooob Rasool's case is no exception. As of August 2003, of the 4,252 cases filed with regard to the widespread violence in Gujarat, at least 2,032 cases had been closed by police under "A summary" after investigation. In such cases police acknowledge that an offence was committed but that the offenders are unknown or cannot be established. At least 21 cases were closed by police under "B summary", where police found that no offence as alleged by the complainants was committed. In 55 cases, police closed cases under "C summary", in which they stated that there was no case and any complaint should be pursued as a civil matter rather than a criminal complaint. Three cases

were closed on account of the deaths of the accused. The police investigation was then still pending in 39 cases. The high level of "summary closures" indicates the failure of police, either deliberately or negligently, to investigate crimes.¹¹⁰

The communal bias of state police and their inability or unwillingness to fully and adequately investigate complaints has led several complainants and organisations to seek alternative investigative mechanisms in order to ensure justice to the victims. The NHRC in its preliminary comments on 1 April 2002 accused the Gujarat government of failing to take appropriate action on the mass violence in the state and urged it to entrust investigations in "critical cases", including the cases relating to the incidents at Godhra, Chamanpura (Gulberg Society), Naroda Patiya, Best Bakery and Sardarpura to a central agency like the Central Bureau of Investigation (CBI) and to establish special courts to try them.

In response to the NHRC comments, the state government said on 15 April 2002 that investigations by the state police should not be discredited and their fairness questioned on the basis of "hostile propaganda" – the source of which it did not specify. It also argued that it would be incongruous to transfer only some cases to an outside agency while for the remaining cases state institutions were considered adequate and fair; moreover, transfer of critical cases to CBI scrutiny would unduly delay the investigations.

As the state government was unwilling to have the CBI take over investigation of any of the cases before Gujarat police, the central government expressed its inability to transfer the cases to CBI investigation. Disagreeing with both the state and the central governments in this regard, the NHRC in its petition to the Supreme Court pointed out that entrusting investigations of cases of violence against Muslims in Gujarat to state police contravened a central principle of the administration of criminal justice – that investigations of crimes should not be carried out by those allegedly involved in them.

¹¹⁰ The state government in an affidavit presented to the Supreme Court in January 2004 said that of 4,256 cases, 2,108 had been closed including 1,960 under "A summary". A more precise break-up of cases under the different categories of closures is not available to Amnesty International.

Despite these early efforts to involve non-state police in investigations, the only case in which the state government agreed to the CBI taking over investigations, was the case of Bilqis Yakoob Rasool. Acting on Bilqis' petition, the Supreme Court on 16 December 2003 directed the CBI to conduct the probe, after the state government had agreed to this. The CBI began its investigation in January 2004 and submitted a status report in February 2004 indicting Gujarat state police with inaction and lapses in tracing the accused and the bodies of victims. The Supreme Court praised the CBI for its "substantial good work" and granted it three more months to carry out its re-investigations. A status report in March 2004 listed a number of discrepancies between Bilqis' deposition and the Gujarat police record as well as details of a police cover-up during the investigation.

On 19 April 2004 the CBI filed criminal charges in the court of the Chief Judicial Magistrate, Dahod. It indicted six police officers working in or having supervisory responsibilities for Limkheda police station who had "started fabricating false evidence and causing disappearance of evidence immediately after Bilqis lodged an oral complaint giving the names of the assailants and the details of the incident, with the intention of causing disappearance of evidence to screen the offenders".

The CBI charge sheet listed the following police failings. At the time of registration of Bilqis' first complaint on 4 March, the responsible police officer "suppressed the material facts and wrote a distorted and truncated version", leaving out the names given by Bilqis in her complaint of gang rape. He had obtained her thumb impression on an FIR she could not read. Though the investigation and securing of evidence at the place of the crime should have started forthwith, no action was taken in this regard. The inquest was not immediately conducted, the dead bodies were not sent for post mortem and Bilqis was not sent to be medically examined or taken to the place to identify the dead, all of which are requirements under the law.

Gujarat police had apparently destroyed evidence. There was no indication of what had happened to the body of Bilqis' three-year-old daughter Saleha who had been killed before her eyes. On 4 March 2002, Limkheda police had called a photographer who took a photograph of five bodies of Bilqis' relatives which included a photo of Saleha. On 5 March 2002, police had sent another photographer who took photos of

seven bodies, none of which was Saleha's. The CBI which obtained both sets of photos pointed out that Limkheda police could not account for what happened to the child's body.

Although Bilqis was then still at Limkheda police station, she was not taken to the scene of the crime to identify the bodies but the police took another person there instead on 4 March who identified all the seven bodies since they were his relatives. Police incorrectly recorded his evidence, claiming in the inquest report that he had identified only the body of Bilqis' mother Halima and that the other six bodies were unknown to him. The inquest report states that the inquest was undertaken on 5 March, despite the fact that an identification of bodies had already been conducted the day before. Of the three *panch* witnesses who signed or put their thumb impression under the inquest report of 5 March, one was found by the CBI to be fictitious. The inquest report did not mention the number of dead correctly nor any injuries found on the bodies. The CBI concluded, "the inquest panchnama [report] could not have been prepared on 5 March in the manner and at the place mentioned therein". Forensic experts taken to what police had described as the scene of the crime who compared it to the photos of the dead bodies stated that "the place where the dead bodies were found in the photographs could not be the place of occurrence". Falsification of the place of occurrence in police records had already been indicated when during the CBI inquiry, Bilqis had been taken to the alleged place of the incident to reconstruct the events of 3 March 2002. She identified the location of the gang rape some two kilometres from the place identified by police.

The most serious finding of the CBI inquiry was that police had apparently sought to conceal some of the killings. The *panch* witnesses reportedly said that police had directed them to bring 60 kilograms of salt which was then poured on several dead bodies in a shallow mass grave which had been dug by police by the side of a river with the help of four grave diggers. The salt would have hastened the decomposition of the bodies. A large stone was then rolled on top of the grave. In three days of exhumation, the CBI secured the skeletal remains of several bodies, pieces of clothing and other materials which were sent for forensic analysis. The analysis has not been completed. The bodies of several of Bilqis' relatives have not been found yet.

In addition, 14 witnesses, who had been taken to Mumbai for questioning by the CBI as they were too afraid to depose in their own village, revealed that several of the accused had appropriated the possessions of the Muslims who had fled the village.

The CBI also indicted medical staff for covering up the crime. Though a hospital with post mortem examination facilities is available at Limkheda, police requested two doctors to conduct post mortem examinations on 5 March at the place where the seven bodies lay. The post mortem examination was according to the CBI “not conducted in accordance with rules and procedure ... and caused disappearance of evidence with the intention to screen the offenders”. Injuries found on the dead bodies were not mentioned and though the doctors had been informed that there were allegations of rape and murder, vaginal swabs, saliva, blood samples, clothing or other relevant evidence which would have helped to identify the perpetrators were not collected. The post mortem reports stated that the bodies had been decomposed but the CBI found that the photos taken on the same day contradicted this. The dead bodies were then buried in a nearby pit but when the CBI exhumed the bodies, they were found to be headless. The CBI concluded that police had attempted to remove further evidence.

The CBI laid criminal charges against 20 people, including the 12 persons identified by Bilqis including three men who had raped her and the man who had killed her daughter, six police officers for criminal conspiracy and obstructing the course of justice and the two doctors for dereliction of duty and suppression of facts. They are currently in detention.

Beside the CBI, another specially constituted team set up to monitor police investigations, has also brought to light such failures and recently arrested an investigating officer suspected to have tampered with the evidence and colluded with the accused. Apart from the six police officers arrested following the CBI investigation of Bilqis Yakooob Rasool's case, this is, to Amnesty International's knowledge, the only other arrest of a police officer for failing to perform his duties to lawfully investigate complaints.

On direction by the Supreme Court, the state government in September 2003 set up a special investigation team headed by an Indian Police Service (IPS) officer, Neerja Gotru Rao. The team investigated three cases in Panchmahal district; these

included the Ambica Society case in which 13 Muslims were killed, the Eral case in which seven Muslims were killed and the Delol case in which 10 persons were killed. The police sub-inspector who had been in charge of investigation of all three cases had reportedly been suspended earlier for lapses in investigation but been reinstated.

The investigating officer was arrested on 23 August 2004 in connection with the Ambica Society case, while his role in the other cases is still under investigation. In the Ambica Society case four separate cases were merged. The special investigation team found that the investigating officer had failed to record statements of important witnesses, including Sultana Feroze Sheikh who had been gang-raped and injured and lost several relatives. Sultana had named the accused but the investigating officer had not recorded them and merely mentioned that a mob had carried out the attack. After she and other witnesses were questioned by the special investigation team under Neerja Gotru Rao, ten accused were identified, of whom six were arrested but later freed on bail, while four remain at large. In Delol, ten Muslims were killed when they got off a train at the railway station. Some of the victims were burned to death but though the forensic investigation confirmed that charred bone fragments were human remains, the investigating officer now under arrest had ignored this evidence. He had also failed to record the statements of witnesses and submitted a closure report in May 2003, citing lack of evidence. The same investigating officer had also refused to register two FIRs in the case of two separate attacks in Delol where 23 villagers were killed. Neerja Gotru Rao investigated these cases as well and helped victims register two FIRs in December 2003.¹¹¹

In a hearing on 17 August 2004 in response to a submission by Harish Salve, which sought information about the status of these cases and alleged that some 2,000 cases had been arbitrarily closed by police, the Supreme Court directed that the Gujarat government set up a high level police cell to review cases closed under “A summary” with a view to determining if they needed to be investigated

¹¹¹ Neerja Gotru Rao was in early September 2004 asked by police authorities to wind up her probe. The Director General of Police said she had completed her task and “wanted to be relieved from the cases”. He denied that the decision had anything to do with the arrest of the sub-inspector. (*The Hindu*, 13 September 2004.)

anew.¹¹² The seven jurisdictional Inspector Generals of Police were directed to scrutinize the approximately 2,000 closed cases on the basis of reports sent to them by their subordinate investigating officers and decide if another investigation is called for. Their decisions will be vetted by two additional Director Generals and the head of the cell, the Director General of Police, who will report to the Supreme Court every three months. Following this scrutiny if a further investigation is considered to be necessary, it shall be conducted by officers different from those who conducted the first investigation. Activists were called upon to contribute all relevant information to the police cell. If the police cell decides that no further investigation is required, it shall record its reasons and post these on the web to ensure transparency and allow victims to pursue other remedies. The cell is also to examine allegations that FIRs were incomplete and incorrect. The Supreme Court observed that “what has happened in Gujarat was an unprecedented and abnormal situation because of the state’s response to the riot cases”.¹¹³ The counsel for the state of Gujarat reportedly declared, “this is a matter of perception. Our state does not agree with this perception”.¹¹⁴ He said the examination of closed cases had already begun and the state did not oppose the setting up of a special cell.

Commentators have welcomed the Supreme Court directive saying it has “given justice a second chance” and the Modi government a “chance to make amends”.¹¹⁵ It was described as the “most damning indictment yet of the Modi government”.¹¹⁶

Amnesty International welcomes the Supreme Court directive which may provide relief to those whose complaints were closed in an arbitrary and untimely manner. However, the difficulties associated with this measure are considerable. The state police entrusted with the review are the same police who are reported as showing a distinct bias during the violence as well as later when complaints were wrongly recorded and inadequately investigated. Their commitment to objective investigation and assessment of closed cases

may therefore not be taken for granted and may require constant monitoring by an outside agency. Moreover, a mere scrutiny of the records may not be enough to ensure justice to the victims concerned because of the inadequacies of the records. Many details may be irrevocably lost. For instance, Nana Rasool Malik was a witness when 14 people were killed in Naroda Gaon in Ahmedabad. His statement, along with 28 others was part of an FIR filed in Ahmedabad on 18 March 2002 which was merged with another FIR on the Naroda Gaon case in September 2002. The newly combined FIR does not mention Nana Rasool Malik’s statement, nor his name as a witness.¹¹⁷ In other cases, complainants have withdrawn their complaints in so-called “compromises” to enable them to return to their homes and such details may also be lost. To make the measure effective, witness protection programs need to be put in place and support measures for victims, including psychological counselling, to give victims confidence to come forward to record or re-record their complaints.

Gujarat police on 16 November 2004 submitted to the Supreme Court its first tri-monthly report on the cases reviewed up to 31 October. It said that of 724 cases reviewed, it had reopened 286 and that 44 persons had been arrested in this connection. According to the report, police had decided not to reopen 14 cases, all relating to arson; a member of the review committee was reported as saying that these incidents “took place at night and there were no witnesses to the incidents”.¹¹⁸ All information relating to the review is to be posted on a website.¹¹⁹ Director General of Police, A.K. Bhargava said it would be difficult to criminally prosecute police officers responsible for unduly closing cases. “For prosecuting any policemen, we will have to prove the ‘mens rea’ (guilty mind) on his part which will be

¹¹² Harish Salve was appointed by the Supreme Court as *amicus curiae* to monitor cases relating to the violence in 2002 in Gujarat.

¹¹³ *The Times of India*, 18 August 2004.

¹¹⁴ *The Hindu*, 18 August 2004.

¹¹⁵ *Indian Express*, 19 August 2004.

¹¹⁶ *Indian Express*, 19 August 2004.

¹¹⁷ *Times of India*, 19 August 2004.

¹¹⁸ *Indian Express*, 17 November 2004.

¹¹⁹ www.riotcell2002.gujarat.gov.in. Little information is currently available on the nature of the cases reviewed and reopened. One of the reopened cases relates to the burning of Muslim houses in Singhvad area of Limkheda, Dahod district where nobody died. The 15 accused of arson include six persons who are already under arrest in connection with the Bilqis Yakoob Rasool gang rape case; they include the three main accused and a police official arrested for mishandling the investigation of that case.

difficult, so for the moment we are totally concentrating on reviewing the cases only.”¹²⁰

7.2 Failure of the judiciary to ensure reparation and justice to women victims of violence

“Though justice is depicted as blind-folded, as popularly said, it is only a veil not to see who the party before it is ... and not to ignore or turn the mind/attention of the Court away from the truth of the cause or lie before it, in disregard of its duty to prevent miscarriage of justice.” Supreme Court of India judgment on the Best Bakery case, 12 April 2004.

The right to an effective remedy is recognised under international law and is provided for in core human rights treaties as well as Article 8 of the Universal Declaration of Human Rights. This right is enshrined in Article 2 of the ICCPR to which India is a state party. It provides that every person is entitled to an effective remedy, to have the right determined by a competent judicial, administrative or legislative authorities, and that the competent authorities shall enforce such remedies. Moreover, international criminal law obliges states to bring to justice perpetrators of crimes against humanity.

The NHRC has observed that “whenever a criminal goes unpunished, it is the society at large which suffers because the victims become demoralized and criminals encouraged. It therefore becomes the duty of the court to use all its powers to unearth the truth and render justice so the crime is punished”.¹²¹

In Gujarat, the judiciary at all levels appears to have failed to provide justice to Muslim victims of violence in 2002. Already in October 2002, when the Concerned Citizens Tribunal released its report, *Crime against Humanity*, the failure of the criminal justice system had become apparent. The report said, “At such times ... the judiciary is expected to rise to the full capability of its constitutional obligations and duties and take swift and clear *suo moto* action, if necessary, to restore the belief of the disillusioned, marginalized and alienated sections of our population, who have been victims of state sponsored massacres. In not doing so, the courts fail in their primary duty. We state with regret that the casualness with which matters relating to the Gujarat carnage have been handled by the court(s), high and low, is a matter of

serious concern for the rule of law and the survival of constitutional principles in any real sense of the term”.¹²²

When police are unwilling or unable to present thorough and factually correct investigation reports to courts based on strong evidence, witnesses’ testimonies become crucial to the legal process. In many cases in India, witnesses and complainants have been known to withdraw their statements in court after being subjected to pressure from the accused or their associates. This leads to the collapse of criminal cases. In such cases, courts firmly committed to finding the truth must make every effort to protect complainants and witnesses from extraneous influence. As long as effective witness protection programs are not in place, bail should not be granted lightly to prevent the accused from being released on bail as they may exert undue pressure on complainants and victims. Police officers in charge of a police station and courts have powers to release an accused on bail under sections 436, 437 and 438 of the CrPC while the high court has further powers in this regard. While these sections give discretion to the police officer concerned and the courts to grant or withhold bail in accordance with the merits of the case, sub-section (3) of section 437 of the CrPC lays down that in cases of a person being suspected of offences against the state, affecting life or against property, the court “may impose any condition which the court considers necessary -- ... (b) in order to ensure that such a person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or (c) otherwise in the interest of justice...”. Sub-section (2) of section 438 of the CrPC specifies that the high court or sessions court to which the application for pre-arrest bail is made, may impose conditions on the applicant, including “(ii) a condition that the persons shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer; (iii) a condition that the person shall not leave India without the previous permission of the Court...”

In practice, police officers, magistrates, sessions courts and public prosecutors dealing with bail

¹²⁰ *Indian Express*, 17 November 2004.

¹²¹ “NHRC moves the Supreme Court in Best Bakery case”, *NHRC newsletter*, August 2003.

¹²² Concerned Citizens Tribunal, *Crime against humanity*, vol. II, p. 114.

matters appear to have unduly accommodated bail applications and to have failed to make use of their powers to impose any of the conditions cited above thereby ignoring the consequences of the accused being free on bail for witnesses and complainants. Most often, those accused of serious offences found it easy to obtain bail. In some cases those free on bail are reported to have left the country. For instance in the case relating to the burning alive of 27 people, including seven young girls and two elderly women and the rest men who had hidden in a house in Ode village, Anand district, several of the accused were initially arrested but 18 of the accused were released on interim bail for a period of eight days to celebrate a religious festival. Later the majority of the accused were granted regular bail by the sessions court, Anand. One of the main accused is reported to have left for the United States.

The lower judiciary has also failed to question the hundreds of closure applications submitted to it by police. Amnesty International is not aware of any case in which a magistrate turned down a police application to close a case.

The inadequacy of judicial proceedings is very clear in the Best Bakery case. The case is significant in a number of ways. It is the only case so far to have gone through both the trial and the appeal stage so that failings at both stages can be shown. The case is also important in that the Supreme Court in its judgment of 12 April 2004 has reminded the judiciary of the meaning and importance of a fair trial and pointed to the wide powers and obligation of the judiciary to make every effort to find the truth and ensure justice. The case is also significant in that it shows how a woman with courage and determination, supported by civil rights activists, the press and the NHRC could overcome the hurdles posed by an unresponsive state judiciary. Lastly, it shows the pre-eminent role of the Supreme Court which understands itself as activist in the pursuit of justice and which has shown itself as a last resort for those in Gujarat whom the state judicial system has failed.

7.2.a The Best Bakery Case

The trial relating to the destruction of the Best Bakery on 1 March 2002, started in Vadodara in February 2003 and led to the acquittal of all 21 accused on 27 June 2003. An appeal by the state was taken up by the state High Court which on 26 December 2003 rejected the appeal and confirmed

the trial court's acquittal. An appeal to the Supreme Court led to the apex court on 12 April 2004 overturning the High Court judgment and ordering that the Best Bakery case be re-tried in a Maharashtra court. The judgment said: "If one even cursorily glances through the records of the case, one gets a feeling that the justice delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge ... The court appeared to be a silent spectator, mute to the manipulations and preferred to be indifferent to sacrilege being committed to justice". It identified serious failings of the criminal justice system but also indicted the Gujarat government as "modern day Neros" who had ignored the violence and protected the perpetrators.

The Supreme Court judgment was welcomed in the human rights community as a "landmark judgment". "Never in the history of criminal jurisprudence had an order for retrial and reinvestigation been passed when both the trial court and the high court had acquitted the accused in a case. But the Supreme Court has done just that and more: by transferring the case to Maharashtra and pulling up the prosecutor, it has shown a ray of light to the victims who had lost all hope of justice."¹²³

The Supreme Court in the Best Bakery judgment said: "[t]he case on hand is without parallel and comparison ... It stands on its own as an exemplary one, special of its kind, necessary to prevent its recurrence". It, however, noted in the introductory paragraph that some of the features of the appeal "pose very serious questions of far reaching consequences", indicating that its findings related to a wider more systemic problem. Thus Chief Justice V.N. Khare observed while hearing the relevant Special Leave Petition filed by the NHRC that "We are prima facie of the opinion that the criminal justice system is not in sound health". Many observers took this to point beyond the Best Bakery case to the failure of the criminal justice system to deliver justice to victims of other large scale killings.¹²⁴

¹²³ *Outlook*, 19 April 2004.

¹²⁴ "The acknowledgment of systemic culpability is immensely welcome. And it is enormously reassuring that the court has decided to seize this moment to search for a larger response to the erosion of the criminal justice system. Because the Best Bakery case is not merely about assuring justice to the survivors and relatives of those who perished in the inferno near Vadodara in Gujarat 2002. It is not just

The judgment indeed lays bare some of the systemic failures and deficiencies of the original trial of the case and its appeal in the Gujarat High Court. The Supreme Court's observations and recommendations regarding the role of the judiciary, recommendations on how trial courts and the high court should use their specific powers and on the need for witness protection, if followed by other courts, could prevent further miscarriages of justice in other cases.

Failure of the original trial court in the Best Bakery case

Following the burning down of the Best Bakery in Vadodara between 8.30pm of 1 March 2002 and 11am on 2 March 2002, key eye-witness Zahira Sheikh who had lost several of her family members in the fire, filed a complaint with police on the following day. A charge-sheet was filed by police in June 2002 listing 21 accused. Hearings before the Fast Track Court No 1 in Vadodara under Judge H.U. Mahida began on 20 February 2003. Of some 120 named witnesses, 73 were called. Of these, 37 witnesses, including Zahira and her mother, Sherunissa, withdrew in court the statements they had earlier made before police and were declared "hostile" by the court. On 27 June 2003, Judge Mahida acquitted all 21 accused. The judgment said that there was "not an iota of evidence admissible under law produced on record suggesting the guilt of the accused".

Judge Mahida said in the judgment that his court was a "court of evidence not of justice" in its real sense. The Supreme Court of India has identified the key failing of the original trial court to be precisely the mechanical attitude expressed in this statement. The judgment of 12 April 2004 asserts: "If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth,

about making sure that Zahira Sheikh and others like her in Gujarat are not let down by the law and the court. This case is also about the absconding justice in the 1984 Delhi massacre case. In which, 18 years and many commissions after, victims still wait for just resolution and closure. The Best Bakery case is important because it seems to have something to say about those unspectacular cases as well. Which may never make the headlines but in which the miscarriage of justice is just as total, just as inexcusable." *Indian Express*, 11 August 2003.

and administer justice with fairness and impartiality both to the parties and to the community it serves". It reiterated later, "[t]he Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses".

When during the trial four of seven injured witnesses withdrew their statements on 9 May 2003, the court did not take any measures to protect the key witness Zahira Sheikh who was to depose before the court on 17 May. Both she and several other witnesses withdrew their statements during that hearing. Days after the trial court judgment Zahira and Sherunissa stated before the press that they had withdrawn their statements fearing for their lives after receiving threats. This had led to the effective collapse of the prosecution case.

Failure of the trial court to use remedial procedures

Courts, as the Supreme Court pointed out, have a range of procedural remedies to use when witnesses withdraw their statements and decline to give evidence. These include sections 9(6) and 327 of the CrPC permitting trial *in camera* to protect witnesses and victims; section 311 of the CrPC to recall and re-examine a person already examined and section 165 of the Indian Evidence Act 1872 which permits the questioning of any witness and the request for any material needed to ascertain the truth in a given case.

In the Best Bakery case, none of the powers bestowed on courts under these sections of the CrPC and the Evidence Act were invoked. The presiding judge without further questioning accepted the withdrawal of testimonies of a large number of witnesses which should have alerted the court to their being coerced or threatened. He accepted that the public prosecutor did not seek protection for witnesses and complainant. The court also did not take seriously the mandatory nature of its powers under section 311 of the CrPC. While the first part of this section gives wide discretionary powers to the court to examine witnesses, the second contains the obligation of the court to examine a witness if his evidence is "essential" to a just decision. The Supreme Court in its judgment of 12 April 2004 chastised the trial court by adding, "essential" to an active and alert mind and not to one which is bent to abandon and abdicate" its duty.

The trial court also failed to fulfil its mandate of ascertaining the truth in the way it dealt with other witnesses. It did not oppose or question the way in which the public prosecutor presented or failed to present witnesses. It did not examine a number of eye-witnesses without giving reasons for this omission. One injured witness, Rahishkhan Aminkhan Mohamad, who had named five accused persons, had left for his native place in Uttar Pradesh. No efforts were made to trace him and, when he did not respond, summonses were sent with unrealistic short notice.¹²⁵ The presiding judge accepted the public prosecutor's application to drop this witness as well. Several other eye-witnesses were dropped by the public prosecutor because he described them as "of unsound mind". The Supreme Court pointed out in its judgment of 12 April 2004 that the judge did not make any effort to ascertain if that was indeed the case by having them examined by appropriate medical staff. One of them, Sahejadjkhan Hasan Khan, was unconscious from 2 to 6 March 2002 but on regaining consciousness had his statement recorded in which he identified four of the accused. Neither a doctor examining him nor the police recording his statement on 6 March had mentioned that he had any mental impairment.¹²⁶ Similarly, Shailun Hasankhan Pathan, who had identified three accused, was treated as of "unsound mind" without any further inquiry.

In contrast, the original trial court judge examined prosecution witness Lal Mohamad Sheikh on 27 May 2003, days before the originally stipulated date of 6 June 2003, without giving any explanation for this change. This witness supported the accused, describing them in court as "saviours" of several Muslims of the area, yet was treated as a witness for the prosecution. Again, the relatives of the accused were examined by the court as witnesses for the prosecution without the judge questioning this procedure.¹²⁷

¹²⁵ His first summons were issued to him on 27 April 2003 to appear in court on 9 May 2003; when it could not be served as he had left, new summons were issued on 9 June 2003 to record his evidence on the next day, 10 June 2003. When that could not be served, a summons was issued on 13 June to appear in court on 16 June 2003.

¹²⁶ The Supreme Court also mentioned in its judgment that Sahejadjkhan Hasan Khan had filed an affidavit in the Supreme Court narrating the matter and so could not be said to be of unsound mind "as was manipulated by the prosecution to drop him".

¹²⁷ See below.

Failure to ensure a peaceful atmosphere in court

The trial court also failed to ensure a peaceful atmosphere in court as pointed out by the affidavits of four witnesses presented to the Supreme Court. As in many other trials of cases relating to post-Godhra violence against Muslims, particularly Muslim women, the atmosphere was vitiated by unruly behaviour of those present in court. The Supreme Court in its judgment of 12 April 2004 quoted a 1979 judgment of the Supreme Court relating to the "alleged absence of congenial atmosphere for a fair and impartial trial". The court had said: "It is becoming a frequent phenomenon in our country that court proceedings are disturbed by rude hoodlums and unruly crowds, jostling, jeering or cheering and disrupting the judicial hearing with menaces, noises and worse. This tendency of toughs and street roughs to violate the serenity of court is obstructive of the course of justice and must surely be stamped out. Likewise, the safety of the person of an accused or complainant is an essential condition for participation of a trial and where that is put in peril by ... tumult or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. ... Indeed it is the duty of the court to assure propitious conditions which conduce to comparative tranquillity of the trial".¹²⁸

7.2.b Failure of the Gujarat High Court

The Supreme Court pointed to a wide range of failings of the Gujarat High Court in the Best Bakery case; they are manifold and evident. It dismissed the appeal against the acquittal of the 21 accused saying that there was no evidence on the record to warrant their conviction. It failed to use its powers to question the failings of the public prosecutor and the trial court and in fact at every stage defended its performance. Indeed, in its judgment of 31 December 2003 (with detailed reasons being issued on 12 January 2004), the High Court went further to assert that the trial court could not but come to the judgment it did. Beyond the issue before it, the High Court also gratuitously commented on what it considered the "anti-state" activities of human rights defenders. The main failings of the High Court, as pointed out in the Supreme Court judgment are listed below.

¹²⁸ *Mrs. Maneka Sanjay Gandhi and Anr. v Ms. Rani Jethmalani*, 1979 (4) SCC 167.

Failure to hold the trial court responsible for questioning the withdrawal of a large number of key witnesses

The Supreme Court criticised the High Court's inaction in failing to challenge the trial court's shortcomings, particularly the trial court's refusal to apply its powers to question the withdrawal of so many witnesses. It had endorsed a passive attitude of the trial court which did not take seriously its duty to reach the truth and ensure justice.

The High Court fully exonerated the trial court of any failings with regard to the withdrawal of statements by witnesses. Such occurrences, it said, were frequent and could be motivated in a number of ways. Ignoring the nature of the threats that the witnesses might have been assumed to be under, the High Court said that the 37 witnesses, seven of whom were victims of the attack, would not have stopped giving evidence in court. It argued that "it was the best opportunity for them to depose against the accused; if at all they had seen the respondent accused taking part in the incident ... they would have definitely identified the accused persons, who were very much present in the court, and deposed against them because in the court there was no threat or coercion". Similarly, the High Court held that the trial court could not have been expected to seek protection for Zahira and other witnesses as they had made no complaint in court about being coerced or threatened. It stated that "if they were really threatened by any one prior to the recording of their evidence, then they would have definitely complained about it at least to someone, but that is not the case".¹²⁹ The trial judge and the public prosecutor, the High Court argued, could not have put further questions to the witnesses who withdrew their statements as neither "can put leading questions to the witnesses. Neither the [public] prosecutor nor the learned judge can cross the limits and become prosecutors". It also argued that since none of the "so-called" statements had been signed by the witnesses, they were not statements in the

strict legal sense and hence the question of withdrawing statements did not arise.¹³⁰ The court also held that as there was no indication of any threat to witnesses and the prosecutor and the judge were unaware of any previous "so-called" statements being withdrawn by the witnesses in court, the judge could not be blamed for not having held the trial *in camera*, postponed or adjourned the hearings or provided witness protection. Trials in Fast Track courts, it argued, were to be conducted expeditiously and should not be postponed without adequate reason; no such reason, it said, had been known to exist in this case. Similarly, the High Court said that there had been no need for the trial judge to recall and re-examine witnesses under section 311 of the CrPC or to ask further questions of witnesses under section 165 of the Evidence Act as the evidence of the witnesses who had turned hostile was not considered essential by the trial judge for arriving at a just decision and there was nothing on record to necessitate further questioning.

Failure to censure the trial court for not bringing all witnesses before the court

The Supreme Court also pointed out that the High Court had failed to rebuke the trial court for failing to bring witnesses before the court to ensure that all possible evidence was recorded to ensure a fair trial.

With regard to the public prosecutor not bringing injured witness Rahishkhan Aminkhan Mohmad before the court, the High Court said in the judgment of December 2003, "[it] may be the case that in the instant case, the Public Prosecutor may not have conducted the case in the more skilful way, but it cannot be said even for a moment that the Public Prosecutor [has] not properly conducted the case.... the question is, how long one may wait for a witness ...when the matter is placed before the Fast Track Court and there was always a demand to expedite the trial..." With regard to Shajadkhan Hasankhan, the public prosecutor had obtained a

¹²⁹ The High Court further observed in its judgment that between the hearing on 17 May 2003 at which Zahira withdrew her statement and the announcement of the judgment on 27 June 2003, she could have revealed any threats she may have been under. The fact that she did so to the press after the judgment of the trial court is by the High Court construed as an indication that Zahira, "who is hardly 19 years old" was "misused", having "fallen pray to ... the dirty hands of antisocial and anti-national elements".

¹³⁰ The High Court said: "There is nothing to show that these witnesses had ever made their so-called statements before the police and possibility of this case cannot be ruled out. If they had not made any statement before the police, then there was no question of resiling from their so-called statements either under threat or coercion." With regard to 20 *panch* witnesses (authorized witnesses appointed by police) who also withdrew their statements, the High Court commented, "it is known to everyone that in most of the cases in our country *panchas* turned hostile".

statement from his brother that he was mentally unfit to depose before the court. Shailun Hasankhan Pathan had been injured in the attack and gone to his native village. In both cases, the High Court found the trial court fully justified in dropping them as witnesses.

Failure to challenge the trial court's reliance on a witness examined earlier than agreed

The High Court did not take note of or challenge the fact that a witness was examined by the court earlier than the date fixed for the hearing and that the veracity of his testimony was doubtful on account of contradictions between his earlier statements. The Supreme Court observed that "this unusual conduct of the prosecutor should have been seriously taken note of by the trial court and also by the High Court". Lal Mohamad, a neighbour of the Best Bakery, was hurriedly examined on 27 May 2003 instead of on the day fixed for his hearing on 6 June 2003. There were inconsistencies between his statements. In his statement before police on 9 March 2002 he had named some accused but in a statement before police on 16 March he said that he and his family had been sheltered by some of the accused. In court, Lal Mohamad claimed that the accused persons had in fact saved the lives of 65 Muslims of the area – which contradicted the statement of several other eye-witnesses as well as his own initial statement. It has been reported that his conduct appeared to suggest that he had been won over by the accused or someone associated with them and had therefore been hurriedly brought before the court by the public prosecutor and examined by the judge. The High Court held that though he did not support the prosecution case, he could not be declared a witness "hostile" to the prosecution simply because he had not initially mentioned to police that the accused had actually helped Muslims. The High Court also rejected the argument that relatives of the accused whose testimonies supported the accused cannot be examined in court: "it is nowhere stated that the persons who are relatives of the accused, cannot be examined as witnesses". The Supreme Court, without going into the substance of this argumentation of the High Court, observed that the statements given by these witnesses were "immaterial" and "could have been carefully avoided at least in order to observe and maintain the judicial calm and detachment required of the learned Judges of the High Court". It said: "it is not known as to

what extent these irrelevant materials have influenced the ultimate judgment of the High Court, in coming to such a strong and special plea in favour of a prosecuting agency which has miserably failed to demonstrate any credibility by its course of action. The entire approach of the High Court suffers from serious infirmities, its conclusions [are] lopsided and lacks proper or judicious application of mind".

The High Court went to unusual lengths to show that the accused could not in fact have committed the offences with which they were charged. It claimed that the accused would have known that three of the victims were Hindus working in the Best Bakery and hence would have spared them. Moreover, the judges considered that four of the seven eye-witnesses who had been tied up to be burned, would not have escaped unhurt if the accused had been the real culprits. Some 65 to 70 Muslim neighbours also escaped unhurt. The High Court judgment said: "[i]f the accused participated in causing extensive damage to the properties during the incident, then they would not have spared those other 65 or 75 Muslims in their locality. The very fact that those other 65 to 75 Muslims survived unhurt ... shows that they were saved and protected by the accused and other neighbours of the locality".

Failure of the High Court to use its special powers to ensure justice

The appeal against the trial court judgment of 27 June 2003 requested that new evidence contained in affidavits filed by four witnesses who had under threat to their lives withdrawn their statements in the trial court, be permitted to be adduced under section 391 of the CrPC read with section 311 of the CrPC and that a retrial be permitted.¹³¹ It also requested that the witnesses whose affidavits were submitted, be examined so that the truth could be brought out. The High Court rejected all these requests. It concluded that the "learned [trial] judge has rightly

¹³¹ Section 391 reads: "Appellate Court may take further evidence or direct it to be taken: (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate. (2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such court shall thereupon proceed to dispose of the appeal ..."

come to the conclusion that the prosecution has miserably failed to prove its case against the respondents-accused, and the police investigation in this case is absolutely faulty. It is clear from the evidence on record that the Police ... [were] not able to reach the real culprits, then they decided to involve innocent neighbours who have in fact saved the lives of about 65 to 70 Muslims of that area, as accused persons by preparing false documents and statements of the witnesses". It said that the original trial was without "any manifest illegalities committed by the learned Trial Judge" and as such no retrial was indicated. Showing extraordinary compassion for the accused, the High Court judgment strongly opposed a retrial of the case, as this "may seriously prejudice the interest of the accused, whose personal liberty is at stake". Since the High Court rejected a re-trial out of hand, the question of a re-trial outside the state did not arise.

Agreeing with the counsel for the accused, the High Court said that under section 386 of the CrPC, it could only peruse the record of the case brought before it under section 385(2) of the CrPC and that no other record or evidence could be taken into consideration in deciding the appeal.¹³² It did not give any reasons for refusing to take the four affidavits on record. The Supreme Court criticized the High Court which, "while belittling and glossing over the serious infirmities and pitfalls in the investigation as well as trial", had opted for a narrow interpretation of its own powers which would "render section 391(CrPC) and other allied powers conferred upon Courts to render justice completely nugatory" or an "exercise in

futility".¹³³ The High Court's acknowledgment that the original investigation had been faulty should have in itself justified a direction to re-try the case. Moreover, if the High Court had critically and without bias examined the evidence before the court instead of declaring that the newly adduced affidavits contradicted the witnesses' previous statements and were therefore to be rejected, it would have exercised powers under section 391 of the CrPC to garner further insights into the truth of the case.¹³⁴ Like the trial court, the High Court had also not taken seriously its duties under section 311 of the CrPC.

The Supreme Court said that the High Court, like the original trial court before it, had not taken its duty to find the truth seriously. It added that its duty, like that of the trial court, was greater "in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice system itself" and concluded that "[a]fter having clearly concluded that the investigation was faulty ... it would have been proper for the High Court to accept the prayer made for additional evidence and/or re-trial".

Section 391 of the CrPC is a discretionary provision to enable the appellate court to consider additional evidence in order to try and arrive at the truth and the court has to record the reasons when taking recourse to it. The Supreme Court called section 391 of the CrPC a "salutary provision" providing additional powers beyond those given by section 386 of the CrPC. It said: "Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to the elucidation of truth, the exercise of power under Section 391 is desirable". It concluded that for the High Court dealing with the appeal in the Best Bakery case, "the proper course would be to direct acceptance of additional evidence and in the fitness of things also order for a retrial on the basis of additional evidence".¹³⁵

¹³² Section 385(2) reads: "The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties: Provided that if the appeal is only to the extent of the legality of the sentence, the Court may dispose of the appeal without sending for the record."

Section 386 reads: "Powers of the Appellate Court: After issuing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may – (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence according to law ...".

¹³³ The Supreme Court also noted the internal inconsistency in the High Court rejecting the four affidavits and at the same time declaring the contents of the affidavits to be untruthful.

¹³⁴ The Supreme Court said, "As the provisions under section 391 of the Code are by way of an exception, the Court has to carefully consider the need for and desirability to accept additional evidence".

¹³⁵ The Supreme Court added that not every witness who after the trial changes his or her statement is entitled to a

The Supreme Court concluded that the High Court had failed in its duty to ascertain the truth by not actively searching for the truth and making use of the powers it holds in this regard. In view of the disturbed atmosphere in the trial court and the continuing lack of a conducive atmosphere in the state, it directed that a retrial be conducted outside the state of Gujarat under section 406 of the CrPC.

Gratuitous and inappropriate condemnation of human rights defenders by the High Court

The High Court in an uncalled for and agitated manner criticized the role of human rights defenders in Gujarat. In several remarks scattered throughout its judgment, the High Court alleged that the print media and several named human rights activists had manipulated Zahira and others to induce them to make public statements about why they had withdrawn their statements in the trial court and to petition the Supreme Court. The fact that Zahira did not report to the court the threats that she had been subjected to but had gone public after the judgment, was seen by the High Court as a clear indication of a “definite design” and “ulterior motive”, in fact a “deep-rooted conspiracy” of “antisocial and anti-national elements” who misled and misused young and poor people like Zahira.

A few pages later, the judgment said, “... it appears that an attempt is made by the journalists/human rights activists and advocate Teesta Setalvad and Mihir Desai, respectively, of CJP to have parallel investigating agency, whereas the statutory authority to investigate any case is Police, CBI or any other agency established under the Statute. We do not know how far it is proper. But we can certainly state that it is not permissible under the law”. Several pages later, the judgment dedicates two full pages to venting its anger at the unscrupulous anti-national elements -- who are here not named but only implied -- who, it said, had continually sought to undermine Gujarat’s prosperity and peace. They approached the Supreme Court in the Narmada Dam case and though unsuccessful, “they were successful in causing huge loss, running into thousands of crores of rupees to the state because of the delay in construction of the dam. Ultimately, such huge loss had to be suffered by the people of the state for no fault of their[s]. Gujarat is very much part and parcel of our Nation and any

retrial but that the court has to assess if he or she had a fair opportunity to depose in the trial.

loss to the State means loss to the Nation.” The court further stated that “anti-national elements” had sought to disturb and undermine the “peace prevailing in the State ... the communal harmony between the two communities and ... a congenial atmosphere” in Gujarat. The judgment concluded its tirade: “It is most unfortunate that only few handful of people are indulging in dirty tactics and wrongly defaming the State and its people for ulterior motives and reasons. Much could have been said about such elements but it would have been once again used as publicity, therefore the best thing is to simply ignore them”. The judgment also mentions comments made by the counsel for the accused on the NHRC having directly approached the Supreme Court with its Special Leave Petition (SLP) and bypassed the High Court. It said that the issue was pending before the Supreme Court and as such it could not respond to it.

The Supreme Court commented on the High Court’s inappropriate statements about various personalities and organisations: “The High Court appears to have miserably failed to maintain the required judicial balance and sobriety in making unwarranted references to personalities and their legitimate moves before the competent courts – the highest court of the nation, despite knowing fully well that it could not deal with such aspects or matters. Irresponsible allegations, suggestions and challenges may be made by parties, though not permissible or pursued defiantly during course of arguments ... with blessing or veiled support by the Presiding Officers of Court.” It noted that the High Court had made remarks about the NHRC which had not been represented in court and ordered that such remarks be expunged. Responding to an application by Teesta Setalvad and others it subsequently said that it had been inappropriate for the High Court to have commented on persons who were not parties to the case and that the comments had no relevance to the subject matter of dispute before the court.¹³⁶ It added, “Courts are not expected to play to the gallery or for any applause from anyone or even to take cudgels as well against anyone, either to please their own or any one’s fantasies”. The Supreme Court directed that the observations be expunged from the judgment.

7.2.c Other cases

Many cases currently pending in courts in Gujarat or closed following acquittals (see below) share some or

¹³⁶ Criminal appeal Nos. 443-445/2004.

all of the failings shown to have characterized the proceedings of the Best Bakery case. Several lawyers have reported a threatening atmosphere in court with the accused, their friends and supporters shouting insults and intimidating slogans during proceedings, frequently ignored by public prosecutors and the presiding judges. A lawyer practicing in Ahmedabad said that the threatening atmosphere and misconduct of the courts at all levels had become “institutionalized” and that judicial personnel, from court clerks to judges, were suggesting to complainants and witnesses to accept “compromises” with the accused and withdraw their complaints and statements. In several cases reported to Amnesty International, witnesses were heckled and openly threatened; in some cases, witnesses when accompanied to court by human rights activists were surrounded and threatened by sympathizers of the accused and told to withdraw their accounts. Several witnesses in the Gulberg Society case have alleged that the atmosphere in the court was threatening and that they had received threats to drop their statements.

The atmosphere in court has made it particularly difficult for women victims of sexual violence to make their statements. There are very few cases which only deal with complaints of rape or sexual violence; the majority of cases relate to cases of murder with rape or gang rape antecedent to the killings. Provisions in the CrPC to hear cases of rape *in camera* and extensive Supreme Court directions on how courts should deal with cases of sexual assault were ignored as the main focus of the cases was on murder. Neither public prosecutors nor judges are reported to have made any effort to separate out elements of the case relating to sexual violence and to apply suitable procedures and follow extensive Supreme Court directions in this regard.

Hearings in which witnesses testify about sexual violence were frequently disturbed by sexual innuendo and abuse shouted by the accused and their supporters. A woman pursuing the case of her daughter who was raped and killed said, “I told the court what had happened to my daughter and my mother-in-law and my father-in-law, how they were beaten by the mob. But the people in the court, they laughed at me, and they kept on laughing while I testified. The case is still on. They offered us money to retract our statements. They said they could pay us off. Even my husband was persuaded to withdraw his

statement but I don’t want to do that. I want justice”.¹³⁷

In some cases, too, the presiding judges of Fast Track courts have imposed conditions that make it difficult for the case to proceed. In the trial relating to a case instituted in Kalol, Panchmahal district, the judge refused to proceed unless all the 32 witnesses were present in the court at the same time.

At present, hundreds of cases are pending in courts in Gujarat. Petitions relating to 13 cases which seek direction for their trial outside the state are pending in the Supreme Court. These cases relate to the incidents at Godhra; Chamanpura (Gulberg Society, Ahmedabad); Naroda Patiya and Naroda Gam, Ahmedabad; Sardarpura, Mehsana district; and Ode, Anand district.¹³⁸ The Supreme Court assumed a monitoring role with regard to these and stayed proceedings in all but the first of these cases in November 2003. A further petition for trial outside

¹³⁷

http://www.channel14.com/news/2003/10/week_2/06_guj.ht
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¹³⁸ The NHRC on 31 July 2003 when filing a special leave petition in the Supreme Court requesting it to direct the re-trial of the Best Bakery case outside Gujarat, had in separate petitions also sought direction for transfer to courts outside of Gujarat of the cases relating to Godhra, Chamanpura, Naroda Patiya and Naroda Gaon and Sardarpura. The case relating to the incident at Godhra where 59 passengers had died, was the only one in which the Prevention of Terrorism Act (POTA) was applied. Initially the authorities detained those accused of involvement in the Godhra deaths under POTA. After an outcry about the bias in detaining people accused of involvement in deaths in Godhra under POTA and those involved in subsequent attacks on Muslims under regular criminal law, charges under POTA were withdrawn in the second week of March 2002. However, POTA was reapplied to those accused of the deaths at Godhra in February 2003; according to state authorities this was done after the confession of an accused who had pointed to the involvement of Maulana Hassan Umarji, a local cleric who, it was alleged, had planned the attack. On 28 August 2003, this accused reportedly retracted his confessions, claiming that it had been “forced”. (*Times of India*, 30 August 2003.) Amnesty International has consistently opposed POTA, expressing concerns that several of its provisions violate international human rights standards. (See: *India: Briefing on the Prevention of Terrorism Ordinance*, AI Index: ASA 20/049/2001). Civil rights groups, the media and Amnesty International have also opposed the discriminatory application of POTA to Muslim suspects in Gujarat. (See: *India: Abuse of the law in Gujarat: Muslims detained illegally in Ahmedabad*, AI Index: ASA 20/129/2003).

the state relating to the Dawood case is also pending in the Supreme Court. At the time of finalizing this report, a Supreme Court decision with regard to these cases was widely believed to be imminent.

The first – and so far only -- reported conviction by a Fast Track court is reported from Anand district.¹³⁹ On 24 November 2003, a sessions court in Nadiad *taluka* (subdivision) found 15 of 63 accused guilty of the killings of 14 Muslims on 3 March 2002 in Ghodasar area on the outskirts of Nadiad, Anand district. On 1 March 2002, Hindu mobs had attacked Muslim homes and set fire to at least 80 shops owned by Muslims. Two days later, they returned and attacked over 100 Muslim homes and ransacked the only mosque before killing 14 Muslims, including 12 women in an open field as they were trying to flee their attackers. Houses of Muslims in the surrounding villages were also set on fire. The court acquitted 48 accused and found 15 men guilty. On 25 November 2003, twelve of the convicted men found guilty of murder were sentenced to life imprisonment and three others, found guilty of injuring victims under section 324 of the Indian Penal Code, 1860 (IPC), were given two years' rigorous imprisonment. Sessions Judge C.K. Rane granted bail to the three persons awarded rigorous imprisonment. Forty-six witnesses had presented their evidence before the court and the local public prosecutor, albeit an RSS member, took the depositions seriously. There was no intimidation of witnesses. The principal witness, Jive Mian Belim, whose father and brother had been killed in the incident, stood his ground and identified at least six of the accused.

Obtaining justice, however, has not brought these victims and witnesses unalloyed contentment. According to reports from Ghodasar, Muslims in the village did not dare celebrate the Id festival shortly after the court decision, as they apprehended a backlash against the convictions.¹⁴⁰

There have been over 200 acquittals in cases relating to the violence against Muslims in 2002 so far. A large number of these have been reported from Panchmahal district where some of the worst violence was reported in 2002, with some 200 people, including many women and children killed. In Pandharvada village, some 70 Muslims were killed on

1 March 2002 in several incidents. In some of the reported cases, local Hindu farmers are alleged to have lured frightened Muslims, particularly women and children, into their houses or compounds, then barred the gates and attacked, along with other right wing Hindus, the trapped people. Many bodies were burned beyond recognition and were recorded as "missing". In one of the cases registered in Pandharvada, relating to the killing of 21 people in the village, all 15 accused were acquitted for lack of evidence as most of the witnesses were not examined.

A court also acquitted in late 2002 all the accused in a case in which some 70 people from Kidiad, Sabarkantha district, died. On 28 February and 1 March, news of violence in neighbouring villages spread and upon requests for protection to police from Malpur police station only one policeman was sent to Kidiad village, where a small Muslim minority lived. On 2 March police told the frightened Muslims that they should flee to save their lives as police would be unable to protect them. Two vans full of over a hundred Muslims then set off on the same day. All except six of those in the first van escaped their pursuers. The second van containing a large number of women and 32 children escaped pursuers for some time but was then stopped. Only 16 people, mostly men, escaped while the women and children were either burned to death in the van or hunted down and killed while trying to escape. Witnesses testified that 67 people were killed in the incident. The driver of the second van filed a complaint with police in Khanpur, Panchmahal but police only recorded the death of eight persons, did not record any further evidence nor the names of the accused and made no effort to identify the missing from the bone fragments of those burned to death. During court proceedings, witnesses identified the perpetrators who had not been named in the FIR and charge sheet. The presiding judge who had remarked that police had not conducted a proper inquiry, did not use his powers to direct further investigation upon receiving this information. All the accused were acquitted.

Lawyers practicing in Gujarat have told Amnesty International that the high acquittal rate points to the dire situation in which most complainants and victim-witnesses find themselves. If they have lost loved ones before their eyes, often killed in a brutal fashion, seen all their property destroyed and are without hope for a worthwhile future, they may accept a financial compromise from the accused and withdraw

¹³⁹ Fast track courts, called Lok Adalats in some parts of India, are used to expedite judicial processes.

¹⁴⁰ *Times of India*, 26 November 2003.

their statements rather than face a prolonged trial with uncertain outcome. Threats, bribes and sheer weariness of victims must be counted as causes of the large number of acquittals. A Superintendent of Police, Panchmahal district was quoted as saying, "It is very difficult to prove riot cases. Witnesses turn hostile. They have to live in their villages. Even people who lodge FIRs have gone back on their initial statements".¹⁴¹ While acknowledging that victims having lived through weeks or months of fear and violence may lack the will to pursue a long legal battle, Amnesty International believes that the high acquittal rate is another indication of the failure of the state of Gujarat to exercise due diligence. It has failed to provide adequate compensation and full psychological, medical and economic rehabilitation to complainants and victim-witnesses and effective protection against threats and harassment to enable them to pursue their complaints in safety and obtain justice.

In November 2003, through its secretary Teesta Setalvad, CJP filed Special Leave Petitions in the Supreme Court challenging the acquittals in Kidiad and Pandharvada. The Supreme Court subsequently directed the state to file appeals. Amnesty International has been told that the state has now filed 'memos to appeal' in this context, but that the appeals have not been admitted by the state High Court as yet.

On 17 August 2004, in response to an application by *amicus curiae* Harish Salve, the Supreme Court directed that the Gujarat Advocate General explain the failure of the state government to appeal against acquittals by trial courts in the state. The Supreme Court said, "what has happened in the state is an unprecedented and abnormal situation because of the State's response to the riot cases".¹⁴² During the hearing on 23 August 2004, the Advocate General said before the Supreme Court that of 217 cases in which the accused had been acquitted by the trial courts, the state Law Department had decided that appeals be preferred in 45 cases, while 16 were being considered and 156 cases were pending consideration. The Supreme Court directed that instead of the normal procedure whereby the state public prosecutor reports acquittals to the state Law Department and recommends whether or not an appeal should be

filed in the state High Court, the Advocate General scrutinize, together with the Law Department, all orders of acquittal and suggest whether or not an appeal should be filed. The Supreme Court gave the Advocate General four months to provide a status report on these cases. It also directed that in future the Law Department take the Advocate General's view into consideration before deciding whether or not to go into appeal against acquittal.

Amnesty International welcomes this decision of the Supreme Court which may lead to appeals to the state High Court. However, as in the Best Bakery case, a mere mechanical consideration of the evidence on which the trial court acquittals were based may not ensure justice to the victims. To achieve this objective, new evidence may have to be considered and the High Court will need to assume a more searching attitude than the one it displayed when hearing the appeal in the Best Bakery case.

Observers have repeatedly pointed out that sections of the judicial personnel in Gujarat are sympathetic to or affiliated with right wing Hindu organisations. (See page 94.) Lawyers have told Amnesty International that a large section of judicial officers in Gujarat belong to high Hindu castes and support the ideology of *Hindutva*. Many Muslim victims of the violence in 2002 found it difficult to find lawyers to take up their cases and had to hire lawyers from outside the state. This has in many cases added to the hurdles faced by victims. For instance in the Sardarpura case, where 33 Muslims, mostly women and children, were electrocuted by a Hindu mob on 1 March, the complaint was filed with the help of a member of the *dalit* community who was also a member of the Congress party. He was subsequently attacked by unknown assailants. The police investigation, conducted by a police officer with alleged links to the BJP was inadequate and no local Hindu lawyer was willing to take up the case of the Muslim victims, compelling them to seek a Muslim lawyer from another state at a higher cost. That lawyer reportedly received little help from local police in marshalling evidence for the trial.

The Concerned Citizens Tribunal was told by a senior solicitor that a bar association of a rural district court had passed an oral resolution that no advocate would take a brief from a Muslim client. This bias is also reflected in the stance recently taken by the state legal community. On 15 April 2004, the Gujarat High Court Bar Association passed a resolution with 106

¹⁴¹ *Frontline*, 28 August 2004.

¹⁴² *The Times of India*, 18 August 2004.

votes in favour and only six against, which endorsed a similar resolution of the Bar Council of Gujarat on 14 April. They objected to the transfer of the Best Bakery case to a court outside Gujarat, arguing: "In Bihar and Jammu and Kashmir, murders of innocent people and other offences have become the order of the day. Yet the cases are tried by the courts in the States concerned. The situation is not grave in Gujarat".¹⁴³ The High Court Bar Association resolution stated that the order of the Supreme Court adversely affected the morale of the legal profession and the judicial administration of the state. Those who opposed the resolution mostly did so on the technical ground that it would be improper to adopt a resolution against a judgment of the Supreme Court. The resolution authorized the president and secretary of the Association to approach the Supreme Court to seek a review or modification of the order.

7.2.d The Supreme Court as guarantor of a fair trial

The Supreme Court in the Best Bakery judgment at length emphasized the importance of a fair trial and the need for an active searching judiciary.¹⁴⁴ While the protection of the rights of the accused to a fair trial often takes precedence in human rights discourse, the Supreme Court, acknowledging the many problems faced by victims in the judicial process, emphasized that a fair trial must balance the needs of the accused, the victims and society at large. It said that "the interests of the accused and the public and to a great extent that of the victim have to be weighed, not losing sight of the public interest involved in the prosecution of person who commit offences".¹⁴⁵ It said that in a heterogeneous society

like India discrimination had to be stopped and society be assured that justice would be done and seen to be done. The twin decisions of the Supreme court in late August 2004 to direct review of some 2,000 cases closed by police under "A summary" and of 217 cases which ended in acquittals have also sent a strong signal to the criminal justice system in Gujarat to provide justice to victims in the state.

On 1 May 2004, the Chief Justice of India, V.N. Khare, said that he was both anguished and pained by the trials of the post-Godhra cases in which he detected "complete collusion" between the accused and the prosecution in Gujarat. He said: "There was no prosecution in the riot cases at all. Therefore the Supreme Court stepped in to break the collusion between the prosecution and the accused". He expressed concern for the victims and witnesses in such a setting: "What will happen to the victims and witnesses if the prosecution and the accused collude throwing the rule of law to the wind?"

He said that the Supreme Court had assumed a new role in seeking to save the criminal justice system: "I gave a new dimension to criminal jurisprudence as on the one hand one bench of the Supreme Court monitored the progress of prosecution in riot cases while another bench decided on the judicial side the correctness of the high court order [in acquitting the accused in the Best Bakery case]" in hearing the appeal. He also expressed his exasperation with the lack of power of the Supreme Court to exercise superintendence over the country's high courts to deal with undisciplined or corrupt judges. "By two or three decisions, the apex court has taken some powers of superintendence but that is more like a moral authority. The framers of the constitution did not know that after 50 years things will collapse. Now time has come that the Chief Justice of India should be given power of superintendence over the high courts by amending the constitution".¹⁴⁶ The new Chief Justice of India, R.C. Lahoti, sworn in on 3 June 2004, said on the next day in an interview that the Supreme Court had risen to the occasion and that "[j]udicial activism is a misnomer. The judiciary is

¹⁴³ *The Hindu*, 16 April 2004.

¹⁴⁴ "The import of the historic Supreme Court directive on the Best Bakery case will be felt long after this particular case runs its course. ... (T)he apex court has provided a new model for the delivery of justice in a situation where the criminal justice system has failed at the local level. This hold up hope that no killer-rioter, no perpetrator of mass hate crimes, will escape unpunished in the future." (*Indian Express*, 14 April 2004.) "The history of riots in this country has been a history of the miscarriage of justice. ... Through its latest order the apex court has signalled its determination to ensure that this will not happen, not now and not in the future." (*Indian Express*, 14 April 2004).

¹⁴⁵ International criminal law has also recently acknowledged the need for greater victim protection. The statute of the International Criminal Court includes provisions which seek to balance the rights of the accused

and the victims and allows for the legal representation and participation in proceedings by the victim.

¹⁴⁶ *Indian Express*, 6 May 2004, referring to the Chief Justice's interview with *Press Trust of India*, PTI, on 1 May.

supposed to be active under the Constitution; the day it is not active, it ceases to be judiciary".¹⁴⁷

7.3 Failure to provide medical relief and medico-legal evidence of abuse to victims of sexual abuse

Injured victims of the large scale violence in 2002 could not count on receiving medical assistance. Hospitals, nursing homes and doctors' practices and ambulances taking the injured to hospital frequently came under attack by Hindu mobs or medical practitioners themselves were unwilling to provide assistance. Several doctors who have close links with Hindu right wing organisations were observed participating in violence. Medico-legal documentation, particularly of sexual abuse, was frequently inadequate.

Several independent inquiries have shown that the medical profession in many cases in Gujarat did not live up to the Hippocratic oath to save life and to reduce suffering. Instead professionals refused to render medical assistance to injured Muslims, either of their own volition or under pressure from rightwing Hindu groups. Severely traumatized and injured survivors of the Gulberg Society killings were told by Ahmedabad's VS Hospital staff they could only be treated if they obtained a police statement referring them to hospital first. In other hospitals, BJP members were reportedly telling doctors whom to admit and whom to turn away, with Muslim victims almost invariably being refused admission. Heavily armed youths of the Bajrang Dal and VHP were reported to have patrolled hospital wards and corridors which prompted some victims and doctors to petition the NHRC for Special Reserve Police protection within hospitals. The state did not take any measures to protect medical staff, patients and their relatives and to ensure access to patients without threat or intimidation. The Concerned Citizens Tribunal was told by retired Justice A.P. Ravani that he personally knew several Hindu doctors who had been threatened and told by the VHP not to treat injured Muslims.¹⁴⁸

Many injured Muslims sought help in private Muslim-run hospitals and nursing homes, many of which,

however, were in the course of the violence burned down or vandalized by Hindu mobs. In the face of such intimidation and threats, Muslim survivors also found it difficult to claim the bodies of their relatives who had died in hospitals. The presence of VHP and Bajrang Dal activists also in some cases prevented police recording dying declarations of victims, particularly women victims of sexual assault. The Concerned Citizens Tribunal concluded: "It [the Gujarat government] is also guilty of failure to provide medical aid and relief to victim-survivors in life-threatening circumstances".¹⁴⁹

The Medico Friends Circle (MFC), a voluntary organization of health professionals, examining the performance of medical staff in the crisis of 2002 observed that while health professionals in the hospitals by and large worked neutrally, some medical professionals were "involved in propagating an ideology of hatred. As members of the BJP and the VHP these professionals have also been responsible directly or indirectly in perpetrating grave injury to Muslims in Gujarat. They have played a role that contradicts their professional calling as providers of care. ...The medical associations, which represent the medical profession, have been clearly partisan. They have made no attempts to mobilise any relief" nor did they censure medical professionals who participated in or instigated the violence.¹⁵⁰

¹⁴⁹ Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 121.

¹⁵⁰ MFC, *Carnage in Gujarat: A public health crisis*, May 2002. It said, "Pravin Togadia (Vishwa Hindu Parishad, International General Secretary) Jaideep Patel (Vishwa Hindu Parishad, Joint Secretary), and Maya Kodnani (M.L.A, Naroda) are three medical professionals who were reported as being directly involved in the carnage. Apart from making incendiary statements and provoking violence, at least two of these have been reportedly named in police complaints as assailants in different incidents in Naroda and Gomtipura in Amdavad. Although such reports referred only to certain members of the profession, no cognisance has been taken of their actions; nor have any of the medical associations taken action against them. Professional bodies, both statutory and voluntary, play an important role in safeguarding the integrity of their members. Their failure to even comment on the behaviour of members of their own fraternity is inexcusable." The Concerned Citizens Tribunal, *Crime against Humanity* in its chapter, "Communalizing of Public Space – Hospitals", similarly observed: "One of the most disturbing and sinister truths about some prominent masterminds behind the Gujarat carnage was the fact that many of them hailed from the medical profession and,

¹⁴⁷ *The Hindu*, 5 June 2004.

¹⁴⁸ Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 118.

Police who refused to take down complaints of rape and other forms of sexual violence accordingly did not facilitate medical examinations of girls and women which could have established sexual assault, including rape and gang rape. The indifference of police towards women victims of sexual assault was frequently matched by the indifference of doctors. The MFC team found evidence of “large scale and systematic sexual assault. There have ... been many reports of women coming to hospitals in conditions (where) doctors would certainly suspect sexual assault. Yet doctors in hospitals visited by the team stated that no cases of sexual assault had been filed – in other words, obvious signs of sexual assault had been disregarded. As a consequence, there is no medical evidence of sexual assault, on which basis women could seek justice. ... There is ... no official admission, either by police or by the health care machinery of the fact that sexual abuse was perpetrated at such a large scale. Nowhere do medical records of the dead or injured women mention sexual abuse.” The team also noted that “evidence of sexual assault was also destroyed in other ways. In some camps, volunteers reported receiving unidentified bodies without any medical records or post-mortem reports. They were forced to bury them as soon as possible”.¹⁵¹

Though many victims with burn, stab or gunshot wounds died in hospitals, dying declarations were rarely recorded as neither the police nor hospital authorities pursued this.¹⁵² Amnesty International has seen a list of 10 injured persons, half of them women, who were admitted in V.S. Hospital and Civil Hospital in Ahmedabad and died between half a day and 11 days after admission. Though possible, dying declarations were taken from none of the victims.

There are also reports of cases where medical reports were deliberately destroyed. A human rights activist told the International Initiative for Justice in Gujarat that a body of a woman who had been gang-raped and burned was taken to a health centre where the medical examination report about her death stated

despite their professional allegiance to the Hippocratic oath, violated it to lead mobs to rape, pillage, maim and kill and that, too, in the most barbaric ways.” The chapter goes on to name several of the doctors identified by witnesses.

¹⁵¹ MFC, *Carnage in Gujarat: a public health crisis*, May 2002.

¹⁵² In Ahmedabad corporation hospitals 70 deaths were reported by 25 April 2002.

that there was evidence of gang rape. VHP members, according to the activist, later came and tore up the post mortem report threatening the doctor to keep quiet about it.¹⁵³

The MFC was also told by a senior administrator in the municipal corporation in Ahmedabad that whenever there was a wave of casualties, no post mortem examinations were undertaken at all but mere identification of bodies. When post mortem examinations were performed, the guidelines for conducting them laid down by the NHRC appear to have been widely ignored. The Concerned Citizens Tribunal noted that post mortem reports of victims of the post-Godhra violence provided by government and municipal hospitals showed “shocking lapses when detailing causes of injury in the case of police firing”.¹⁵⁴ Such reports stated for instance that people killed in the firing had died of injury and shock.¹⁵⁵ Formal requirements relating to post mortem reports of persons killed after sexual violence appear to have been inadequate. The forms for post mortem reports which hospitals are required to fill in such cases contain questions about injuries to external genitalia and to internal sexual organs. With its undue emphasis on injury, such columns may not be sufficiently precise to encompass all forms of sexual violence perpetrated in 2002. Moreover, the columns were not always truthfully filled in. The International Initiative for Justice reported being informed of a woman who told her father before her death that she had been raped. The post mortem report, however, stated that there was no injury to external genitalia and “nad”, meaning “nothing abnormal detected” with regard to internal organs. The MCF concluded that “doctors may have been under pressure to ‘modify’ post-mortem reports” and that it found “indifference and neglect among doctors in conducting post mortems, [and] documentations of the causes of death and injury”.

The CBI which had been directed by the Supreme Court to investigate the allegations of gang rape and

¹⁵³ International Initiative for Justice in Gujarat, *Threatened existence: A feminist analysis of the genocide in Gujarat*, p.77.

¹⁵⁴ Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 113.

¹⁵⁵ The report adds, “These lapses, we hope, were not deliberate, as otherwise it would legitimately invite criticism that hospitals in Gujarat are not different from other public institutions, which have been communalized”, op cit, p.133

murder made by Bilqis Yakooob Rasool found that there was evidence of medical neglect as the post mortem reports appeared to have been “prepared in a haphazard and vague manner and (did) not indicate details of injuries” on the bodies. Though the doctors appear to have been informed that this was a case of gang rape and murder, they failed to collect vaginal swabs, saliva samples, blood samples, nail filings or victims’ clothes.

The MFC has pointed to the serious consequences of inadequate medical documentation for the pursuit of legal redress by victims. “It remains to be seen whether these inadequacies were deliberate because such lapses in documentation are common in normal times as well. However, ... these lapses have serious consequences for survivors in their attempts to get compensation and punish those who inflicted violence on them”. The MFC regretted that “[t]he medical profession has also not made any attempts to contribute to the process of securing justice for the survivors by documenting medical evidence or highlighting the problems that victims have faced. ... By not documenting medical evidence [doctors] have hindered the process of securing justice to survivors”. It recommended that in the absence of medical examinations of victims of sexual assault, “[t]he testimony of relatives or eyewitnesses (if the victim was burnt to death) or the testimony of the survivors (where there was a delay in reporting forced by circumstances) should be given paramount importance in judging the case, keeping in view the context”. The Supreme Court has on several other occasions pointed out that in rape trials medical evidence is crucial and disapproved of a government hospital refusing to undertake a medical examination without a police referral.¹⁵⁶

Amnesty International believes that all details of sexual assault as of all other injuries and causes of death must be fully and honestly recorded by medical professionals and any lapses investigated.

7.4 Deficiency of the law on rape and sexual assault

Women and girls seeking legal redress after being subjected to sexual violence in Gujarat in 2002 have also been hampered by the inadequacy of relevant legal provisions in the IPC. There are several

proposals for reform of these provisions but they have not been implemented as yet. In the absence of gender sensitive procedural guidelines in the CrPC, judgments of the Supreme Court containing such guidelines can be drawn on but there is an urgent need for these to be codified to guide courts when dealing with cases of sexual violence.

7.4.a The substantive law relating to sexual violence

Relevant provisions of the IPC are:

Section 375: “A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: First.- Against her will; Second.- Without her consent. ... Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape”.¹⁵⁷

Section 376 lays down in subsection (1) that the punishment for rape is imprisonment for not less than seven years but which may extend to life imprisonment. Subsection (2) says that whoever “(e) commits rape on a woman knowing her to be pregnant; or (f) commits rape on a woman when she is under twelve years of age; or (g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine...”

Explanation 1 to section 376 says: “Where a woman is raped by one or more in a group of persons, acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section”. According to this explanation, once it is established that the accused persons acted in concert, even if only one of the accused persons carried out the rape, all accused would be guilty of gang rape. Thus it is not necessary that the prosecution should adduce definite proof of the completed act of rape by each of the accused on the victim or on each of the victims where there are more than one, in order to find the

¹⁵⁶ *State of Karnataka v Manjanna*, 2000 (6) SCC 188.

¹⁵⁷ The section on rape also lists four situations in which consent for sexual intercourse is fraudulently obtained and excludes marital rape. As not relevant for the present context they are ignored here.

accused guilty of gang rape and convict them of gang rape under section 376.¹⁵⁸

Section 377 states that “whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine”.

Assaults on women which do not amount to rape are dealt with under Section 354: “Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both”.

The notion of “modesty” is not defined in the IPC but the Supreme Court of India has sought to give it substance.¹⁵⁹ It said that the ultimate test of ascertaining whether “modesty” has been outraged is if the action of the offender is such as could be perceived as one which is capable of shocking the decency of a woman.¹⁶⁰ This definition may be seen to be circular and hinging on the subjective perception of “decency” of a woman which may be open to challenge. Section 509 of the IPC which makes the intention to insult the modesty of women the essential ingredient of the offence, says: “Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or such gesture or object seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both”.

The victims of sexual violence during the 2002 large scale violence in Gujarat included the very old, the very young and the pregnant, and assaults included, besides vaginal penetration, penetration of other

orifices and by different objects, sexually explicit insults and innuendo, sexual touching, tearing of clothes and parading girls and women naked before family members and hostile Hindu mobs. Given the variety of abuses of a sexual nature suffered by girls and women in Gujarat the relevant sections of the IPC are clearly inadequate to encompass the offences committed.¹⁶¹

7.4.b Discussions and reforms of the laws relating to rape

Indian feminists academic writers have commented that the “understanding of crimes of sexual nature as ‘outraging of modesty’ is archaic”.¹⁶² Moreover, attempts to subsume a range of sexual assaults, including violent non-penile penetration, under the category “insulting modesty” has led to courts going “to absurd lengths to determine whether a six-month old baby who had been sexually assaulted by an adult male, was possessed of ‘modesty’ capable of being violated and whether all females were ‘born with a sense of modesty’ and carry it with them at all times – whether asleep or awake, in their conscious selves as well as in the recesses of their subconscious beings, from birth to death – just so that sexual offenders could be brought to book relying upon outdated Victorian tenets of ‘female modesty’”.¹⁶³ There is recognition in recent times that crimes of sexual nature are crimes because they are “invasive violations of a woman’s person and bodily integrity and not because they morally outrage women’s modesty”.¹⁶⁴ Many women’s groups have therefore suggested that section 354 and 509 of the IPC be repealed and incorporated in a comprehensive law on sexual assault.

Section 375 of the IPC limits rape to vaginal penetration by a penis and ignores other forms of

¹⁵⁸ *Pramod Mahto v. State of Bihar*, Criminal Appeal Nos. 295-296, dated 21 April 1989 (SC).

¹⁵⁹ *Girdhar Gopal*, (1953) CrLJ 964 held that only women possess modesty which can be outraged. This implies that men are not the repositories of socially recognized attributes whose violation can shame them or society. The same judgment also holds that both men and women can outrage a woman’s modesty.

¹⁶⁰ *Rupan Deol Bajaj v Kanwar Pal Singh*, (1995) 6 SCC 194.

¹⁶¹ Other situations of sexual assault may equally require a rethinking of legal provisions but are not the focus of this paper. Many women’s groups in India aim at a comprehensive legal reform which would encompass sexual abuses in domestic, including marital situations, of minors in fiduciary situations, in employment situations as well as against girls and women in conflict situations.

¹⁶² Flavia Agnes, “Law, ideology and female sexuality”, *Economic and Political Weekly*, 37(9), 2 March 2002.

¹⁶³ *Ibid.*

¹⁶⁴ International Initiative for Justice, *Threatened existence: A feminist analysis of the genocide in Gujarat*, p. 76; see also Pratiksha Baxi, “Sexual harassment”, *Seminar*, September 2001.

sexual abuse that may constitute rape. Section 377 of the IPC can be applied to other forms of penetration but such interpretation depends on a court's willingness to use it creatively and not being currently recognized as rape, such offences carry a lesser punishment.¹⁶⁵

The Law Commission of India has proposed various changes to the substantial and procedural law relating to sexual violence. The 42nd Law Commission report on the IPC in June 1971 suggested amendments to section 375 and 376 expanding the definition of rape and an increase of punishment and also suggested incorporating other offences relating to sexual offences in the IPC. In its 69th report on the Indian Evidence Act, 1872, the Law Commission recommended a reform of the law, however, for some time no action was taken. The 84th Law Commission Report in 1980 said: "It is often stated that a woman who is raped undergoes two crises – the rape and the subsequent trial. While the first seriously wounds her dignity, ... destroys her sense of security and may often ruin her physically, the second is no less potent of mischief, inasmuch as it not only forces her to relive through the traumatic experience, but also does so in the glare of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focussed

upon her. ... Rape is the 'ultimate violation of the self'. It is a humiliating event in a woman's life which leads to fear for existence and a sense of powerlessness. The victim needs empathy and safety and a sense of reassurance. In the absence of public sensitivity to these needs, the experience of figuring in a report of the offence may itself become another assault. Forcible rape is unique among crimes, in the manner in which its victims are dealt with by the criminal justice system. Raped women have to undergo certain tribulations. These begin with their treatment by the police and continue through the male-dominated criminal justice system. Acquittal of many de facto guilty rapists adds to the sense of injustice. In effect the focus of the law upon corroboration, consent and character of the prosecutrix and a standard of proof of guilt beyond reasonable doubt have resulted in an increasing alienation of the general public from the legal system, who find the law and legal language difficult to understand and who think that the courts are not run so well as one would expect." Accordingly the report recommended comprehensive changes of the law on rape and allied offences, amendments to the procedural and evidence law and submitted these to the central government in April 1980.

Three years later, the Criminal Laws (Amendment) Act 1983 introduced several changes. The Statement of Objects and Reasons stated that the changes introduced in the Bill had been formulated principally on the basis of the following considerations: "(1) the law should be made more stringent without jeopardising considerations of fair trial; (2) the definition of rape should be amended to remove certain loopholes and inadequacies and to ensure that consent should be vitiated unless it is real and given of free choice; (3) minimum punishment for rape should be prescribed; (4) the prosecutrix should be protected from the glare of embarrassing publicity during the investigatory as well as the trial stage and any information leading to identification of the victim should not be disclosed; (5) in the case of rape by a police officer or by a group of persons or by a person having custodial control by virtue of his special position over the victim, once it is proved that sexual intercourse has taken place, the onus should be on the accused to prove that the sexual intercourse was with consent of the woman."

The Criminal Law (Amendment) Act, 1983 amended sections 375 and 376 of the IPC by increasing the

¹⁶⁵ In the absence of a comprehensive law on sexual assault which encompasses non-penile sexual abuse, section 377 has frequently been used to address adult sexual abuse of children, including male children, as the current law on rape is inapplicable to such cases. However, the New Delhi High Court in dealing with a finger penetration of a six-year old child in 1996 barred the creative interpretation of section 377 to include non-penile abuse of children and said it amounted to an offence under section 354, 'violations of modesty'. It said: "Penal statutes must be construed strictly. The court must ensure that the thing charged is an offence within the plain meaning of the words used and must not strain words." Only parliament could expand penal provisions, it held. (*S.J. v K.C.J and others*, 62 (1996) *Delhi Law Times* 563. The long due reform of the substantive laws on sexual assault (see in the following text) would dispense with the need to resort to section 377 in such cases or to an unsatisfactory characterisation of the sexual abuse of children as amounting to a "violation of modesty". Human rights groups opposing sexual discrimination, including Indian gay and lesbian groups, believe that section 377 should be abolished. After the above New Delhi High Court judgment, the group *Sakshi* sought the direction of the Supreme Court to the Law Commission to frame a law on sexual assault. This led to the 172nd Law Commission report in the year 2000.

punishment to a minimum of seven years and adding penal provisions for custodians molesting women in their custody. It made significant changes related to the procedural law by adding section 114A to the Indian Evidence Act which allows drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape involving custodians. Most significantly, it added sub-sections 2 and 3 to section 327 of the CrPC on trial of rape cases *in camera*. However, it did not broaden the concept of rape.

The Law Commission of India suggested in its 172nd report in 2000 that the offence of rape under section 375 and other offences under sections 376, 376-A and 376-D of the IPC be replaced with a new offence of graded sexual assault which would include a range of forms of penetration besides penile penetration, including by parts of the body other than the penis and other objects.¹⁶⁶ It also proposed that sexual assault be defined in a gender neutral way, with regard to both, offender and victim.¹⁶⁷

The Malimath Committee on Reforms of the Criminal Justice System, which submitted its report to the Ministry of Home Affairs in April 2003, differed in its proposals from those of the Law Commission in that it suggested that different forms of penetration be made separate offences similar to section 375 of the IPC.¹⁶⁸

¹⁶⁶ Section 377 was to be deleted except with regard to sexual intercourse with animals. It also argued that criminalizing marital rape would “amount to excessive interference with marital relationship” and therefore did not introduce any change in this area despite women’s group’s demands.

¹⁶⁷ A national meeting of 30 women’s groups in December 2001 opposed the notion of complete gender neutrality as it did not reflect the reality of sexual assault perpetrated exclusively by men. “The concern of women’s groups today is to widen the definition of rape and to take the offence beyond the patriarchal parameters of peno-vaginal assaults, which can be brought about without invoking the principle of gender neutrality.” Flavia Agnes, “Law, ideology and female sexuality”, *Economic and Political Weekly*, 37(9), 2 March 2002.

¹⁶⁸ “As instances of non-penal penetration are on the increase and they do not fall in the definition of rape under section 375 of the IPC, the Committee feels that such non-penal penetration should be made an offence prescribing a heavier punishment.” It recommended that “forcible penetration, penile/oral, penile/anal, object or finger/vaginal and object or finger/anal should be made a separate offence under the IPC prescribing appropriate punishments on the

Both proposals for reform, however, limit sexual assault to a form of penetration even if not confined to penile-vaginal penetration, while ignoring other forms of sexual violence. To overcome this limitation, the Law Commission in its 2000 report also recommended the introduction of a new offence of “unlawful sexual contact” which would cover a wide range of offences including sexual harassment at the work place and sexual perversion.

The 1993 Sexual Violence against Women and Children Bill prepared by women’s groups and submitted to the National Commission for Women proposed deleting sections 354, 375, 376 and 377 of the IPC and subsuming these offences under a new and comprehensive definition of “sexual assault” as “introduction (to any extent) by a man of his penis into the vagina, the external genitalia, anus or mouth of another person” and also penalizes the “insertions of any object or any part of the body into the vagina or anus of another person”. In its statement of objects and reasons the draft bill said that existing definitions of rape and molestation did not correspond to the range of violations nor sufficiently recognized the gender-specific nature of these offences. The bill has not been adopted.

When the Lok Sabha passed the Indian Evidence (Amendment) Bill, 2002 in December 2002 barring the cross examination of rape victims on their characters, the then law minister announced that the government intended to introduce a comprehensive law on rape soon. No further steps to bring about changes in the law relating to sexual assault are known to have been taken in this regard since then. A report presented to the government in August 2004 by the Centre for Social Research (CSR) also emphasized the need to reform the law on rape, especially in view of the failure to recognize marital rape, to address the issue of the death penalty for rapists and to introduce gender sensitization training to all government personnel.

An attempt to define sexual assault which would include acts of sexual intercourse without the consent of the woman, unwanted touching, and other non-consensual sexually explicit behaviour and any conduct of a sexual nature that violate the dignity of

lines of Section 376 of the IP Code.” See also: *India: Report of the Malimath Committee on Reforms of the Criminal Justice System: Some observations*, AI Index: ASA 20/025/2003.

women could draw on Article 7(9) of the Rome Statute of the International Criminal Court. This Article includes rape, sexual slavery, enforced prostitution and enforced sterilization in the definition of sexual violence. The Declaration on the Elimination of Violence against Women defines violence against women in Article 1 to include all threats or acts of gender-based violence which result in physical, sexual or psychological harm to a woman. A judgment of the International Criminal Tribunal for Rwanda states that “sexual violence, including rape, is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact”.¹⁶⁹ Such definitions of sexual assault which move away from forms of non-consensual penetration and take into account other forms of sexual violence would also lessens the burden of proof on women who in many cases find it difficult to establish forced intercourse in the absence of visible marks of physical injury.

The need for reform of the legal framework governing the sexual assault of women has been widely recognized by Indian women’s and human rights groups, especially in view of the increasing number of reported rapes.¹⁷⁰ Their recommendations go well beyond those discussed here which are relevant to abuses reported from Gujarat in 2002 and also relate to rape in custodial contexts, marital rape and other forms of sexual violence; they can be found in the relevant literature.¹⁷¹ There does not currently appear to be a consensus among Indian rights groups as to whether there should be a comprehensive law

on sexual assault or separate laws addressing specific sexual offences.¹⁷²

7.4.c Need for further procedural changes with regard to sexual violence

Besides changes in substantive law relating to rape, major changes in procedural law are also desirable. The Malimath Committee recommends changes in criminal proceedings including that “suitable provisions be made requiring the investigating officer to complete investigation of cases of rape and other sexual offences on priority basis and requiring the court to dispose of such cases expeditiously within a period of four months. Specialized training should be imparted to the Magistrates in regard of trial of cases of rape and other sexual offences to instil in them sensitivity to, amongst other things, the feelings, image, dignity and reputation of the victim. Provisions should be made in the Code permitting filing of FIRs in respect of offences under Section

¹⁶⁹ *Prosecutor v. Akuesu* (Judgment), ICTR-96-4-T, T CH I (2 September 1998).

¹⁷⁰ The National Crime Records Bureau in its 2001 annual report, “Crime in India” reported 16,496 cases of rape, an increase of 6.6% over the previous year. A field study of the Institute of Development and Communication in Chandigarh found that for every reported rape, as many as 68 rapes go unreported.

¹⁷¹ For instance Nidhi Tandon and Nisha Oberoi, “Marital rape – a question of redefinition”, *From the Lawyers Collective*, March 2000, who point to judicial ‘cross purposes’ in that the Supreme Court has described rape a crime against basic human rights and a violation of the victims’ right to life under Article 21 of the Constitution while marital rape has not been included in the legal definition of rape. Also see Flavia Agnes, “Law, ideology and female sexuality”, *Economic and Political Weekly*, 37(9), 2 March 2002.

¹⁷² There have also been calls to introduce the death penalty for rape. Then Deputy Prime Minister L.K. Advani in November 2002 reiterated his earlier call to introduce the death penalty for rape. The Malimath Committee in its recommendations did not favour the imposition of the death penalty of rape. In the Committee’s opinion, “the rapist may kill the victim. Instead, the Committee recommends sentence of imprisonment for life without commutation or remission”. The National Commission for Woman opposed the death penalty for rape. Its April 2000 report “Rape: A legal study” suggested the speeding up of rape trials by reducing delays through the establishment of special courts and trials on a day-to day or time bound basis. It also added that the introduction of harsher punishments would reduce the punishment rate for rape which is currently only less than four per cent. The death penalty for rape would also increase the pressure on victims to withdraw complaints. “Certainty and speed of punishment would act as greater deterrent”, NCW member Poornima Advani said. (*Times of India*, 3 April 2000.) Many women’s groups also suspect that “this call for capital punishment for rapists is just another way of avoiding a thorough reform of the system to ensure that it delivers real justice to women. (*Indian Express*, 28 November 2002.) The case of Dhananjay Chatterjee has given a new impetus to the debate. He was sentenced to death in August 1991 for the rape and murder of a schoolgirl in March 1990. All of his appeals were turned down. On 4 August 2004 President A.P.J. Kalam rejected his mercy petition and he was executed on 14 August 2004. For details see: AI Index ASA 20/008/2004. Some people have argued that in this “rarest of rare cases”, the death penalty is appropriate and some women’s groups appear to have agreed with this view.

376, 376A, 376B, 376C, 376D and 377 of the IP Code within a reasonable time”.

There have also been various initiatives to change the nature of the courts dealing with sexual offences. A draft bill, the Sexual Offences (Special Courts) Bill, 2003 was announced in January 2003 but did not appear to have gone beyond the draft stage. It is not known if any new drafts are being prepared under the new government. Several proposals including those contained in the 172nd Law Commission report recommend special courts with specially trained personnel to try rape and the induction of more female judges on the assumption that they would be more sensitive to gender issues; none have so far been adopted.

The most significant recent procedural change was the amendment of section 327 of the CrPC in Criminal Law (Amendment) Act, 1983 which added sub-sections 2 and 3. Section 327 of the CrPC deals with the right of the accused to an open trial but taking into account problems faced by rape victims in open court, the new sub-sections were inserted. After renumbering the old section as sub-section (1). Sub-section 2 now reads: “(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted *in camera*; Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or to remain in, the room or building used by the court; (3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court.”

The Supreme Court has noted on several occasions that these two provisions are frequently not adhered to: “In spite of the amendment, ... it is seen that the trial courts either are not conscious of the amendment or do not realise its importance for hardly does one come across a case where the inquiry and trial of a rape case has been conducted by the court *in camera*. The expression that the inquiry into and trial of rape ‘shall be conducted *in camera*’ as occurring in sub-section (2) of Section 327 of the CrPC is not only significant but very important. It casts a *duty* on the court to conduct the trial of rape cases and those of similar offences invariably ‘*in*

camera’. The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327(2) and (3) of the CrPC and hold the trial of rape case *in camera*. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar surroundings. Trial *in camera* would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an *open court*, under the gaze of the public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. The High Courts would therefore be well-advised to draw the attention of the trial courts to the amended provisions of Section 327 of the CrPC and to impress upon the Presiding Officers to invariably hold the trial of rape cases *in camera* ... Wherever possible it may also be worth considering whether it would not be more desirable that the cases of sexual assault on the females are tried by lady judges, whenever available, so that the prosecutrix can make her statement with greater ease and assist the courts to properly perform their duties...”¹⁷³

Priyadarshini Narayanan has pointed out that even in *in camera* proceedings, the accused and the lawyers of both parties remain present. Such situations can subject the victims of sexual assault to a hostile, threatening or humiliating environment making special protection necessary.¹⁷⁴ Such protection measures may include physically shielding the victim or using electronic communication media such as video-conferencing. Judge of the Supreme Court, Justice S. Rajendra Babu, in the course of a workshop on “Creating awareness among women about women-friendly laws” organized by the Karnataka Legal Aid Authority in January 2004 also suggested changes in the Evidence Act such that victims do not have to depose before police, before the medical examiner and again during cross examination in court where they would have to face the accused. Instead

¹⁷³ *State of Punjab v Gurmit Singh and others*, 1996 (2) SCC 384.

¹⁷⁴ Priyadarshini Narayanan, “Towards sexual assault law”, *From the Lawyers Collective*, March 2004.

the statement made by the victim immediately after the incident before police should suffice.¹⁷⁵

The serious shortcomings of the law relating to rape and problems faced by women seeking legal redress in normal circumstances are exacerbated in situations of mass violence when sexual violence is targeted, many gang rapes occur, many of the victims are burned leaving no physical evidence of sexual assault, many women rape survivors flee their homes and are hence unable to adduce timely medical evidence of rape and many hesitate to record complaints in a continuing atmosphere of fear.

The Supreme Court of India has recognized the stress and trauma experienced by women victims seeking redress for sexual offences and has in a number of judgments set down guidelines for courts dealing with rape and other sexual offences many of which are highly relevant to the situation of women victims of sexual assault in Gujarat in 2002.¹⁷⁶ In 1995, the Supreme Court laid down that the complainant in sexual assault cases should be provided with legal counsel who is to explain the nature of proceedings to the victim, prepare her for the trial and assist her in the police station and the court and help her in securing assistance from other agencies, such as the area of trauma counselling. During the trial, anonymity of the victim should be maintained as far as necessary; compensation should be awarded by the court on conviction of the offenders and by the Criminal Injuries Compensation Board whether or not a conviction has taken place taking into account the pain, suffering, shock and loss of earnings in case of pregnancy and child birth as a result of rape.¹⁷⁷ In 1996, the Supreme Court reiterated that the holding of trials of rape *in camera* is mandatory and that it was desirable for women judges to hear such cases. It further encourages judges in trials of rape not to be silent spectators when rape victims are cross-examined by the defence but to effectively control proceedings to avoid victims being further humiliated, harassed or traumatized.¹⁷⁸ The Supreme Court in

another case encouraged the courts “to show great responsibility while trying an accused on charges of rape. ... The Courts should examine the broader probabilities of a case and not be swayed by minor contradictions or insignificant discrepancies in the statements of the witnesses which are not of a fatal nature to throw out allegations of rape. ... The Courts must deal with rape cases ... with utmost sensitivity and appreciate the evidence in the totality of the background of the entire case and not in isolation”.¹⁷⁹ Delays in filing FIRs are frequently used by the accused to weaken the case of victim. The Supreme Court has held in this regard that victims of rape and their families frequently take time to decide whether to take the matter to court on account of the impact it might have on the family. Such considerations may delay action and should not vitiate the victim’s case.¹⁸⁰

With regard to the appreciation of evidence for rape, which is usually perpetrated with no eye-witnesses present, the Supreme Court has given a liberal interpretation which takes into account both the trauma a raped woman may have suffered and that a woman, given the way reporting rape may impact on her reputation, would not report rape if she had not actually undergone it. The Supreme Court held that inadequate recall of rape or minor contradictions in the reporting of rape do not vitiate the case as they can be explained in terms of both the frightening nature of the incident as the intimidating situation in the court room.¹⁸¹

The Supreme Court has on a number of occasions stated that corroboration of the victim’s statement is not essential for a conviction, in some cases it has indeed spoken of the “obsolescent demand for substantial corroboration”.¹⁸² “There is no legal compulsion to look for corroboration of evidence of the prosecutrix before recording of an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires

¹⁷⁵ *The Hindu*, 5 January 2004.

¹⁷⁶ For a selection of Supreme Court judgments on rape see Aparna Bhat, *Supreme Court on rape trials; a manual of best practice of the Supreme Court*, New Delhi 2003.

¹⁷⁷ *Delhi Working Women’s Forum v Union of India and others*, 1990 (1) SCC 249.

¹⁷⁸ *State of Punjab v Gurmit Singh*, 1996 (2) SCC 384. It was in this case that the court held that “a murderer destroys

the physical body of his victim, a rapist degrades the very soul of the helpless female”.

¹⁷⁹ *State of Andhra Pradesh v Gangula Satya Murthy*, JT 1996 (10) SC 550.

¹⁸⁰ *Harpal Singh and another v State of Himachal Pradesh*, 1981 (1) SCC 560.

¹⁸¹ *Bharwada Bhoginbhai Hirjibhai v State of Gujarat*, 1983 (3) SCC 217.

¹⁸² *Krishan Lal v State of Haryana*, 1980 (3) SCC 159,

confidence and there is absence of circumstances which militate against her veracity.”¹⁸³ In another case, the Supreme Court said: “A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act does not state that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 [Evidence Act] and her evidence must receive the same weight as is attached to an injured in cases of physical violence. ... If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. ... We think it proper ... to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim to the lust of another with an accomplice to the crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless corroborated in material particulars as in the case of an accomplice in a crime. ... Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity.”¹⁸⁴

¹⁸³ *State of Himachal Pradesh v Raghubir Singh*, 1993 (2) SCC 622.; similarly the Supreme court said in *State of Punjab v Gurmit Singh and others*, 1996 (2) SCC 384, “If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend *assurance* to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be live to its responsibility and be sensitive while dealing with cases involving sexual molestation.” This view was also upheld in *State of Sikkim v Padam Lall Pradhan*, 2000 (10) SCC 112 and *State of Rajasthan v N.K.*, 2000 (5) SCC 30.

¹⁸⁴ *State of Maharashtra v Chandraprakash Kewalchand Jain*, 1990 (1) SCC 550; it also said, “an Indian woman attaches maximum importance to her chastity and would not easily be a party to any move which would jeopardise her reputation and lower her in the esteem of others...”

The Supreme Court has also held that faulty police investigations, refusal to register a complaint or incorrect recordings of the complaint must not frustrate the victim’s right to justice. In a case of a woman raped by a local influential person, police had refused to register the victim’s complaint. Unaware of the importance of preserving the evidence she had washed herself and her clothes after the assault. Being a married woman with children who had been forced not to resist the rapist, there was no physical evidence of the rape and there was no immediate medical examination. The Supreme Court held that the victim could not be expected to know that she should have immediately seen a doctor for an examination and so “the non-production of a medical report would not be of much consequence if the other evidence on record is believable”. Regarding the police denial that they had refused to register the complaint, the Supreme Court said, “How many police officers who have in fact not performed their duty would come before court as witness and admit that they had failed to discharge their duty? The court may safely presume that notwithstanding the allegation of the complainant being true, she would not have been able to secure the evidence of such a negligent police official”.¹⁸⁵ In the same case the Supreme Court also held that the statement made by the victim to her family member, in this case her husband, was admissible under section 157 of the Indian Evidence Act as having corroborative value. The Supreme Court has also held that statements to close relatives such as mother or father after the rape are admissible as corroborating the victim’s statement.¹⁸⁶ Again, in a case where the FIR was not recorded properly, the Supreme Court held that the more detailed later statement could be accepted and treated as the FIR.¹⁸⁷ The Supreme Court also held that “for the offence of rape, it is not necessary that there should be actual use of force. The threat of use of force is sufficient”.¹⁸⁸

Sentences for rape are in many cases observed to be lower than prescribed in law. The Supreme Court has

¹⁸⁵ *Sheikh Zakir v State of Bihar*, 1983 (4) SCC 10

¹⁸⁶ For example, in *Krishan Lal v State of Haryana*, 1980 (3) SCC 159 and *State of Rajasthan v N.K.*, 2000 (5) SCC 30

¹⁸⁷ *State of Maharashtra v Chandraprakash Kewalchand Jain*, 1990 (1) SCC 550.

¹⁸⁸ *State of Maharashtra v Prakash*, 1993 Sup. (1) SCC 653. This is a reversal of the finding of *Tukaram v State of Maharashtra*, AIR 1978 SC, according to which the absence of injuries implied consent.

held on a number of occasions that the sentence in a rape case must be adequate to reflect the grave nature of the offence; as a matter of practice the sentence should not be lower than that prescribed in the penal code and that if lower sentences are given, reasons should be recorded. "In recent years, we have noticed that crimes against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to society's cry for justice against such criminals. ... The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."¹⁸⁹

Amnesty International believes that the substantive and procedural laws relating to sexual violence against girls and women should be urgently reviewed to ensure that victims' search for redress is not frustrated by the inadequacy of the law.

7.5 Failure of the government of Gujarat to prevent violence against the Muslim minority and assure justice

The Government of Gujarat, led by the BJP since 1995, has failed to prevent the human rights abuses perpetrated and instigated by right wing Hindu groups in 2002. This includes the failure to curb hate speech and inflammatory media reports as well as failure to maintain neutrality at key moments in the build-up to and during the violence. The state government has shown reluctance in cooperating with the judiciary and resistance to public scrutiny. The state government has consistently attempted to prevent victims obtaining legal redress. Further, many local human rights groups have presented evidence that the state actively connived in much of the violence against Muslims in Gujarat. Many of the lists reported to have been carried by Hindu attackers during the violence identifying Muslim households in mixed housing societies or enterprises with Hindu sounding names but with invisible Muslim participation or capital, could not have been compiled

¹⁸⁹ *State of A.P. v Bodem Sundara Rao*, 1995 (6) SCC 230.

without meticulous planning and access to government records such as those held in tax offices, land registries or voters lists.¹⁹⁰ Other shortcomings of the state government include failure to cooperate with the NHRC, appoint independent public prosecutors, protect human rights defenders and witnesses, and provide adequate relief, compensation and rehabilitation. Despite rebukes by the NHRC, the Supreme Court, the media and human rights activists, the state government has not acknowledged any failings, expressed any regret or asked the victims for forgiveness.

7.5.a Failure of the state to curb hate speech and writing as well as inflammatory media reports before and during the violence

Police failure to register and investigate criminal charges against people spreading hate speech and writings against Muslims, and against militant Hindu groups training young men in the use of lethal weapons including *trishuls* and swords, appears to have been sanctioned by the state leadership. It was apparently facilitated by the state policy to have right wing Hindu officers in executive positions of the police and to systematically exclude Muslim and non-partisan Hindu officers from these levels of the police force.¹⁹¹

Partisan, often distorted reports in Gujarati media which clearly incited violence against the minority were ignored by the authorities, pointing towards an official policy of acquiescence. Alleged supporters of the BJP launched a direct provocative advertising campaign in leading newspapers in Gujarat, attacking the Election Commission, the NHRC, the National

¹⁹⁰ VHP President K.K. Shastri's statement in an interview with Sheela Bhatt posted on the *Rediff.com* portal revealed some of the pre-planning though most observers agree that the certainty with which Muslim homes and businesses were singled out by Hindu mobs indicates longer preplanning. Shastri said the lists of Muslim owned shops had been put together on the morning of 28 February because, "we were terribly angry over Godhra ... Hindutva was attacked..." He also admitted, "[t]he VHP has formed a panel of 50 lawyers to help release the arrested people accused of rioting and looting. None of these lawyers will charge any fees because they believe in the RSS ideology." Quoted in Editors Guild, *Rights and wrongs: ordeal by fire in the killing fields of Gujarat, Editors Guild Fact Finding Mission*, 2002, p.5.

¹⁹¹ According to Tanika Sarkar, Gujarat police in 2002 had only 65 senior Muslim police officers, none in active field service. Tanika Sarkar, "Semiotics of terror", *Economic and Political Weekly*, 13 July 2002.

Commission for Minorities, and specific named politicians. In a question and answer style, these organizations and individuals were depicted as exclusively supporting the minorities while the BJP stood for “you”, the general (Hindu) reader. Despite opposition parties’ objections, no action was taken against this campaign.¹⁹²

Among the Gujarati media, particularly *Sandesh* and *Gujarat Samachar* reportedly carried inflammatory articles on the unrest in February and March 2002. The Editors Guild Fact Finding Mission in 2002 said “the national media and sections of Gujarati media, barring some notable offenders, played an exemplary role in their coverage of Gujarat, despite certain lapses ... However, the role of sections of the Gujarati media, especially the Gujarat Samachar and more notably Sandesh, was provocative, irresponsible and blatantly violative of all accepted norms of media ethics”.¹⁹³ For instance, they had distorted the events in Godhra to the extent of inventing the rape, sexual mutilation and murder of 80 Hindu women on the Sabarmati Express; although this was denied by state police. The press corrected the story only on inside pages which may have escaped many readers who were affected by the headlines, misleading them and perhaps contributing to similar brutality actually committed against Muslim women.¹⁹⁴ The Women’s Panel fact finding report called *Sandesh* “a weapon of war”.¹⁹⁵ In July 2003, the Press Council of India censored these two papers for publishing “scurrilous” and misleading articles that could incite further violence, after an inquiry committee had examined

eight complaints against the papers.¹⁹⁶ Despite this and other independent assessments pointing out similar failings, and despite the fact that police have powers under section 153 or 153A and 153B of the IPC to take penal action in such cases, none of the perpetrators of hate speech have to Amnesty International’s knowledge been criminally prosecuted.¹⁹⁷ The government did not take any

¹⁹⁶ Rediff.com, 1 July 2003

¹⁹⁷ Section 153 of the IPC: “Wantonly giving provocation with intent to cause riot – if rioting be committed; if not committed: – Whoever maliciously, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Section 153A of the IPC: “Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony: whoever (a) by words either spoken or written, or by signs or by visible representation or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religions, racial, language or regional groups or castes or communities, or (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, or (c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community, shall be punished with imprisonment which may extend to three years, or with fine or with both.”

Section 153B of the IPC: “Imputations, assertions prejudicial to national integrity: (1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise, (a) makes or publishes any

¹⁹² Rediff.com, 20 August 2002.

¹⁹³ Editors Guild, *Rights and wrongs: ordeal by fire in the killing fields of Gujarat*, Editors Guild Fact Finding Mission, 2002, p. 1. The Editors Guild fact finding team itself was challenged during its visit to Ahmedabad by VHP vigilantes on 1 April 2002.

¹⁹⁴ See Tanika Sarkar, “Semiotics of terror”, *Economic and Political Weekly*, 13 July 2002. The Editors Guild team when interviewing the de facto Editor-in-chief of *Sandesh* was told, “Hindu protection is my duty”. Asked about *Sandesh* banner headlines about breasts of two Hindu women cut off by a Muslim mob at Godhra, he said the information had come from police in Panchmahal but was contradicted by *Gujarat Samachar*. *Sandesh*’s own policy, he said, was “not to carry corrections and clarifications”. Editors Guild, *Rights and wrongs: ordeal by fire in the killing fields of Gujarat*, Editors Guild Fact Finding Mission, 2002, p. 8.

¹⁹⁵ Women’s Panel, *How has the Gujarat massacre affected minority women*, April 2002.

action to ensure that the reports were publicly corrected and the relevant papers held to account. Asked by the Editors Guild fact finding mission in April 2002 why no action had been taken against newspapers who published sensational stories which were factually incorrect, Chief Minister Modi said, "We prefer to move on".¹⁹⁸

Similarly no legal action was taken against groups and parties that openly advocated hatred and violence, including sexual violence, against the minority community, even when the violence had begun. This may have directly contributed to further abuses. VHP and Bajrang Dal leaders made highly provocative speeches before the killings, inciting Hindus to rape and commit sexual abuse of Muslim women and humiliating and killing of Muslims generally and later justifying such abuses. They were neither banned nor censored, nor held under criminal provisions relating to the incitement of communal hatred. The Concerned Citizens Tribunal cites an anonymous pamphlet circulating in Gujarat calling for "filthy conduct against Muslims, especially women" which may well have had an impact on the "bestiality of the violence" that followed. Despite widely shared insight that hate speech had contributed to violence in the past, police did nothing to stop it and hold the perpetrators to account.¹⁹⁹

imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India, or (b) asserts, counsels, advises, propagates or published that any class or persons shall, by reason of their being members of any religious, racial, language or regional groups or caste or community, be denied or deprived of their rights as citizens of India, or (c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feeling of enmity or hatred or ill-will between such members and other persons, shall be punished with imprisonment which may extend to three years, or with fine, or with both."

¹⁹⁸ Editors Guild, *Rights and wrongs: ordeal by fire in the killing fields of Gujarat, Editors Guild Fact Finding Mission*, 2002, p. 11. Chief Minister Modi also denied during the meeting that he had said that the firing by former MP Ehsan Jafri had enraged the mob. He said he had been misquoted.

¹⁹⁹ Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 82.

Many of the national media conscientiously covered the incidents in Gujarat and pointed to those responsible for it. In February 2004, the International Press Institute (IPI) India Award for Outstanding Work in Journalism was given to the *Indian Express* for its "fearless and comprehensive" reporting of the Gujarat riots and their aftermaths. Its coverage was described as "the best example of furtherance of public interest by a newspaper".

The VHP have repeatedly accused national media of providing a one-sided picture of the Gujarat situation. Its Senior Vice President A.G. Kishore responded to the Editors' Guild of India findings that Gujarati papers had played a "mischievous role" in fomenting trouble in the state by saying that "[i]t is a baseless charge. The local media can feel and understand the pulse of the people much better."²⁰⁰ Chief Minister Modi said, "it is unfortunate that along with the communal violence that is dangerous for any country, a non-violent secular violence also gets unleashed in the country at the same time by the media".²⁰¹ The view that national media misled the public by their reporting on the events in Gujarat, is also echoed in the Gujarat High Court judgment on the appeal in the Best Bakery case, which speaks of the "media hype" around the case.

Bias against some forms of media reporting on Gujarat was shared by other states of India. Several documentaries on the violence in Gujarat have not been permitted to be publicly shown in India. For instance, national television Doordarshan refused to show Anand Patwardhan's National Award winning *Father, Son and Holy War* which explores the psychology of violence. The Central Board of Film Certification (CBFC) refused to grant a licence for the screening of *Akrush*, a film by Ramesh Pimple on the Gujarat violence saying it was biased against a particular community. Pimple has stated that during the riots only a particular community was targeted and his film showed this fact. In March 2004, the Mumbai High Court directed Doordarshan to telecast the former film and asked the CBFC to grant a licence to show the latter.²⁰²

²⁰⁰ Rediff.com, 13 May 2002.

²⁰¹ Press conference, 5 March 2002.

²⁰² Rediff.com, 4 March 2004.

7.5.b Failure of the state government to maintain strict neutrality with regard to the Godhra incident and subsequent violence

Before any investigation could be conducted to establish the cause of the fire in the Sabarmati Express, Gujarat government officials prejudged it, claiming that the fire in the train compartment had resulted from a pre-planned attack of some 2,000 Muslims throwing inflammable substances and fire balls into the compartment.²⁰³ Chief Minister Modi, hours after the incident in a public broadcast said he saw the “ISI (Inter Services Intelligence, Pakistan’s intelligence service) hand behind the Godhra incident” and directed that the charred bodies of the victims be taken in a long motor cavalcade from Godhra to Ahmedabad. Along the way, Hindu right wing party leaders vocally incited the mob to seek revenge.²⁰⁴ State government officials have also on other occasions prejudged events before inquiries or court proceedings could establish the truth. Chief Minister Modi was quoted as saying about the killing of Congress MP Ehsan Jafri on 28 February that “investigations have revealed that the firing (shooting) by the Congressman played a pivotal role in inciting the mob”. When asked why Jafri may have fired,

²⁰³ This is contradicted by officials and institutions in Gujarat. The Inspector General of Police, Railways, P.P. Agja, said that there was no evidence of a pre-planned attack. (*Times of India*, 29 March 2002.) Similarly the Godhra district collector, Jayanthi Ravi on 27 February 2002 repeatedly said on national radio and television that the incident was not pre-planned but an accident. The cause of the fire remains unclear. The Gujarat Forensic Science Laboratory after extensive tests trying to reconstruct the incident of the fire on the train coach came to the conclusion that it was not possible to throw any inflammable liquid from outside the coach to start a fire within in a way that was consistent with the evidence of the fire of 27 February 2002. A judicial inquiry was set up on 2 September 2004 to ascertain the causes of the fire in the express train.

²⁰⁴ Deposing before the Nanavati Shah Commission in August 2004, then Additional Chief Secretary Ashok Narayan stated that Chief Minister Modi had himself taken the decision to take the charred bodies to Ahmedabad. Former head of the intelligence wing of Gujarat police, Additional Director General of Police (Intelligence), R.B. Sreekumar submitted, also in August 2004 before the Commission that he had warned against taking the bodies to Ahmedabad as this was likely to trigger violence. Similarly former Commissioner of Police, P.C. Pandey said that he had disagreed with taking the dead bodies to Ahmedabad but that his advice had been overruled. (*Times of India*, 15 March 2004)

Modi reportedly said, it was “probably in his nature” to do so.²⁰⁵

On the evening of the Godhra incident the VHP and Bajrang Dal issued a call for a *bandh* for the next day, which Chief Minister Modi on the same evening publicly confirmed.²⁰⁶ Justice Ravani, a retired Chief Justice of the Rajasthan High Court has observed that this was highly unusual. If the government had not given or supported the *bandh*, the situation might not have become so grave. Given the history of communal violence in the state, a record of violence during *bandhs* and that the incident at Godhra had occurred the day before, it appeared to imply government sanction of what was to follow.

Gujarat government officials invariably described the violence directed against Muslim men, women and children in the post-Godhra period as a “natural reaction of Hindus” against an “act of terrorism” thereby implicitly justifying the violence.²⁰⁷ Senior BJP leader J.P. Mathur said that the ongoing violence in Gujarat was the reaction of “patriots” to the Godhra violence: “I do not know why the people and the media has [sic] been calling the violence in Gujarat ‘riots’. These are not riots, but the reaction of nationalist forces to the Godhra carnage”.²⁰⁸ Chief Minister Modi on several occasions, quoting Newton’s law, stated that “every action has an equal and opposite reaction” to justify the violence against Muslims after the assumed targeted killing of Hindus by Muslims at Godhra.²⁰⁹ When the violence had begun on 28 February, he said, “with the entire population of Gujarat angry at what happened in Godhra, much worse was expected”²¹⁰ Gujarat state Information Department press releases similarly used inflammatory and biased language, speaking of “inhuman genocide”, “carnage” or “massacre” when

²⁰⁵ *Hindustan Times*, 2 March 2002. This was echoed in the charge sheet submitted by police months later.

²⁰⁶ In his address on Doordarshan on 28 February, Chief Minister Modi, referring to Godhra, said, “Gujarat will not tolerate such incident. The culprits will get full punishment for their sins. Not only this, we will set an example that nobody, not even in his dreams thinks of committing a heinous crime like this”. (Quoted in Editors Guild, *Rights and wrongs: ordeal by fire in the killing fields of Gujarat, Editors Guild Fact Finding Mission*, 2002, p. 10.)

²⁰⁷ For instance RRS spokesperson M.G. Vaidya in the *Times of India*, 16 March 2002.

²⁰⁸ *Rediff.com*, 3 May 2002

²⁰⁹ *Times of India*, 3 March 2002.

²¹⁰ Press conference, 28 February 2002.

referring to Godhra and describing the subsequent large scale killings as “disturbances” or occasionally as “violent disturbances/incidents”.²¹¹

A disturbing acceptance of and justification for the violence against Muslims was also apparent in the attitude of some elected parliamentarians. For instance, BJP Member of Legislative Assembly (MLA), Maya Kodnani, when interviewed by members of the Women’s Panel, mostly senior women’s rights activists, showed no remorse that the state had abdicated its responsibility in Naroda Patiya, her constituency. She was named in an FIR for having participated in the violence which cost over a hundred lives and during which many girls and women had been raped. She had not visited Muslim victims from her constituency in relief camps, denied knowing where they had gone and said she was not aware of rapes in Naroda Patiya. She reportedly calmly accepted that there was a “natural Gujarati inclination towards communal violence” which as such could not be stopped.²¹²

In the weeks after the Godhra incident, state officials consistently downplayed the violence, claiming that the situation was fast returning to normal when in fact, killings and sexual assaults were still being committed. The Chief Election Commission concluded after an extensive visit to towns and villages in Gujarat in August 2002 to assess if state assembly elections could be held, that district authorities had untruthfully stated that normalcy had returned in the state. The continuing large scale displacement of sections of the population, the slow progress of relief and rehabilitation work, the delay in bringing perpetrators of violence to justice and the general lack of confidence in the state machinery, including police, made the holding of elections inadvisable. Election campaigning evoking passions could all too easily shatter the fragile peace, it said.²¹³

²¹¹ Editors Guild, *Rights and wrongs: ordeal by fire in the killing fields of Gujarat*, Editors Guild Fact Finding Mission, 2002, p.13.

²¹² Women’s Panel, *How has the Gujarat massacre affected minority women: the survivors speak*, April 2002.

²¹³ Election Commission of India press release on 16 August 2002, also *Rediff.com*, 10 August 2002. In November 2002, one month before the state elections, Chief Election Commissioner J. M. Lyngdoh again expressed his concern about the climate in the state saying that provocative speeches were being made and that water supply had been disconnected in some relief camps. (*Indian Express*, 13

Observers believe that officials deliberately projected a false picture of peace in the state to mislead the rest of the country and prevent central intervention.²¹⁴ Some analysts have linked it to the state government’s intention to call early state elections in order to enable it to use the violence in the state to shore up the declining popularity of the BJP government in Gujarat. In 2000 the Congress party had won district and *taluk panchayat* (sub district council) elections and by-elections. “Given the continuous downslide of the BJP in the state since ’98, the question has been raised by many as to whether there were any electoral political calculations and machinations behind what subsequently happened in the state from February 28 onwards. While this remains in the realm of speculation, the fact is that the Modi government prematurely dissolved the state assembly and pushed very hard for early elections even though the situation in the state was far from normal. For this he was widely criticised and the BJP was charged for trying to cash in on the carnage.”²¹⁵

The fact that the VHP called Chief Minister Modi a “hero of Hindutva” and declared that Gujarat had been a “successful experiment” which should be repeated all over India lends additional weight to many observers’ conviction that the state of Gujarat acquiesced in the violence against the Muslim minority in the state.²¹⁶

November 2002) The BJP reportedly subsequently said the Chief Election Commissioner was biased and pointed to his membership of a minority community.

²¹⁴ Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 76.

²¹⁵ Concerned Citizens Tribunal, *Crime against Humanity*, ibid. BJP used it (the Godhra massacre) to engineer a communal pogrom across the State. The places where the Congress(I) would have won, such as Mehsana, Banaskantha, Dahod, Godhra, Kheda, Anand and Chhotaudaipur, were precisely the places that were targeted during the communal clashes. Ahmedabad and Vadodara, the only other places affected by riots are BJP bastions. The hysteria and terror generated helped the BJP stem the tide of anti-incumbency.” *Frontline*, 22 May 2004.

²¹⁶ *Rediff.com*, 20 June 2002: VHP President Ashok Singhal on 3 September 2002 said that its success lay in the fact that entire villages had been “purged” of Islam and Muslims. (Quoted in Concerned Citizens Tribunal, *Crime against Humanity*, vol.II, p. 79.) He reportedly also said, “Godhra happened on 27 February and the next day, 50 lakh Hindus were in the streets. We were successful in our experiment of raising Hindu consciousness, which will be repeated all over the country now.” (*Indian Express*, 4 September 2002.)

Domestic and international human rights groups as well as academic researchers have stated that the violence against Muslims, including Muslim girls and women, was planned and instigated by state and party officials well before the post-Godhra violence began, that police inaction when confronted with Muslim victims and Hindu perpetrators was decreed at the highest level and that some of the violence was carried out under the supervision and direction of state officials.²¹⁷

Recent depositions of senior police and state officials before the Nanavati Shah Commission have shed further light on the state's conduct during the months of violence in 2002. On 31 August 2004, former head of the intelligence wing of Gujarat police, Additional Director General of Police (Intelligence) R.B. Sreekumar in a 172-page affidavit reportedly

While human rights activists point to the many failings of the state of Gujarat measured against its obligations under national and international law, some analysts have suggested that claims about the apparent success of *Hindutva* objectives in Gujarat, when seen from the perspective of its proponents, may well be true. "The Modi government as well as the Sangh as a whole, have been spectacularly successful in their agenda. What is happening in Gujarat is not a mark of weakness or inadequacy but a sign of the strength of the Sangh Parivar, its firmness of resolve, its ideological consistency." (Tanika Sarkar, "Semiotics of terror", *Economic and Political Weekly*, 13 July 2002.) Sarkar also points out that state and non-state institutions at all levels, from police to hospitals, the legal profession, education and media have been successfully penetrated by the *Sangh Parivar* with their executive level occupied by its members. Despite Bajrang Dal and VHP office bearers, municipal officers and MLAs as well as BJP ministers having been explicitly implicated in killings and other violence, none of them have been arrested. For a list of implicated party and state officials see for instance Concerned Citizens Tribunal, *Crime against humanity*, vol. II, p.191-204 and other human rights activists' reports.

²¹⁷ See for instance the chapter on "State complicity" in Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 75 to 80 and the list of state officials accused of violence in 2002, vol. II, p.191-204. It identifies the Chief Minister as the "chief author and architect of all that happened in Gujarat" after the Godhra fire and states unequivocally, that "what began in Godhra, could have, given the political will, been controlled promptly at Godhra itself". (p. 79.) K.P.S. Gill, appointed as security advisor to Chief Minister Modi in May 2002 was quoted as saying, "riots would not take place if the government did not want them ... no riots could take place if the political establishment was impartial". (*The Times of India* and *The Hindu*, 14 November 2002.)

documented instances of complicity of police and politicians in the violence, anti-minority bias of police, subversion of riot control rules and manipulation of investigations to benefit perpetrators. *The Times of India*, which obtained a copy of the affidavit from the Commission quoted Sreekumar as saying that police "officers at the decisive rung on the hierarchical ladder were ignoring specific instructions from the official hierarchy, on account of their getting direct verbal instructions from the senior leaders of the ruling party".²¹⁸ During an earlier deposition he had said: "Such officers have become quite adept in doing the art of deceptive law enforcement for the benefit of their political friends, who ensure their placement and continuance in their choicest executive posts, at the cost of the spirit and letter of the laws of the land".²¹⁹ He said that several "lower rung officers had named the political leaders who were pressurizing them to go soft on investigation of cases in which VHP and Bajrang Dal leaders were mentioned in FIRs".²²⁰ He also said that the violence had begun to be brought under control when K.P.S. Gill who had been appointed security adviser to the Chief Minister had transferred several senior police officers. A police inspector, K.K. Mysorewalla who had been in charge of Naroda police station in 2002, in whose jurisdiction about 100 Muslims were killed in 2002, stated before the Commission in August 2004 that on 28 February he had received instructions from the police control room not to send messages to the city police control room over the wireless sets as frequencies would be jammed which may have led to senior police officials not being adequately informed of events as they unfolded. Mysorewalla also admitted that many names of VHP leaders and BJP members of the Gujarat Assembly mentioned in FIRs later "disappeared", but he had not explanation for this fact. Deputy Superintendent of Police, Rahul Sharma in late October 2004 told the Nanavati Shah Commission that the then state home minister, Gordhan Jhadafiya had phoned at the height of the violence to say that "the ratio of death figures in police firing is not good" after five Hindus and one Muslim had been killed in a police firing incident. Sharma reported that he had been removed from his post at Bhavnagar when he did not agree with Gujarat Director General of Police K. Chakravarthy's request to release 21 Hindus who had been arrested

²¹⁸ *Times of India*, 1 September 2004.

²¹⁹ *Times of India*, 18 August 2004.

²²⁰ *Times of India*, 1 September 2004.

in the violence. Sharma also presented a compact disc to the Commission which contained a list of cell phone calls made by politicians to police officers during the violence. The police inspector in charge of the Meghaninagar police station, K.G. Erda, in whose jurisdiction the Gulberg Society is located, stated before the Commission that the Society had been left to burn for a week after the attack and that joint chief Commissioner M.K. Tandon, not Commissioner of Police, P.C. Pandey, had visited the place in the morning while the crowd was laying siege to Ehsan Jafri's residence.

The depositions of some other high police officials before the Commission were less illuminating. Then Commissioner of Police, P.C. Pandey, told the Commission that he could not remember much of the events in 2002. He said he recalled that in the meeting of state and police officials on the evening of 27 February 2002, the political implications of the fire on the train at Godhra had not been discussed. He said before the Commission that he was informed of violence at Naroda Patiya only at 9.30pm on 28 February 2002, when, he said, he "received information that some persons had been killed there". Journalists analyzing the records of Pandey's cell phone record, however, indicate that he was in regular touch throughout the afternoon with two police officers in charge of Naroda Patiya and Gulberg Society where the two main incidents of violence occurred on that day in Ahmedabad.²²¹

7.5.c Reluctance of the state government to cooperate with the judiciary to ensure legal redress

The state's apparent acquiescence in the violence against Muslims found its natural extension in the state's apparent efforts to thwart legal redress. Police resistance to filing truthful FIRs and to investigate abuses, often by appointing biased investigating officers, has been described above.

Failure to disobey any direction of law, such as when police failed to protect Muslims being attacked by

²²¹ For details see *Indian Express*, 24 November 2004. In mid-December 2004, the Government of Gujarat requested the Nanavati Shah Commission to refrain from releasing compact discs containing cell phone records arguing that such data could be abused and that the privacy of innocent persons could be violated. (*Indian Express*, 15 December 2004.)

Hindu mobs, is an offence under section 166 of the IPC.²²² Failure to accurately record offences committed during the attacks is a crime under section 167 of the IPC.²²³ The All India Service Rules similarly provide for punishment for errant police and administrative officers, as do the All India Service (Discipline and Appeals) Rules, 1969, Part III, Penalties and Disciplinary Authorities. In several cases, firing by police on Muslims during riots may have been extrajudicial executions which are strictly prohibited in domestic and international law. The Government of Gujarat is obligated to investigate such allegations and to bring those responsible to justice. Though national human rights organizations have provided ample evidence for failings in all of these areas, the Government of Gujarat has taken no action to investigate such violations and to bring the perpetrators to justice.

The state government has also sought to prevent, hamper or delay the judicial process which should ensure legal redress to the victims by appointing public prosecutors who are affiliated to right wing groups and have allowed their bias to affect their professional functioning, and by reluctantly and slowly responding to Supreme Court notices.

As a result, of over 4,000 FIRs filed after the violence in 2002, two and a half years after the violence in 2002, only just over 200 cases have been concluded, with 217 acquittals and one conviction and hundreds of cases pending in various stages of proceedings. Pointing directly to the lack of political will as the biggest hindrance to ensuring justice to victims, NHRC Chairman Justice A.S. Anand said: "If the

²²² Section 166: "Public servant disobeying law, with intent to cause injury to any person: - Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

²²³ Section 167: "Public servant framing an incorrect document with intent to cause injury: - Whoever, being a public servant, and being, as such public servant, charged with the preparation or translation of any document, frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause or knowing it to be likely to cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

state government wants it, then justice can always be done".²²⁴ Many social activists and human rights groups have pointed to the negative effect of the delay and denial of justice on the rehabilitation of victims and restoration of communal harmony in Gujarat. Teesta Setalvad, Secretary of the non-governmental organization CJP, addressing the social and psychological impact delayed justice on Muslim victims in Gujarat said, "[i]f there is a failure of justice for the riot victims, then there will be bitterness among people. This is not good and healthy for society in the long run. ... There is a growing perception among Muslims that they are being deliberately kept out of the system. ... But the tragedy of Gujarat is that rapists and killers are roaming freely. This is like rubbing salt in your wounds all the time for the Muslim community".²²⁵

Many observers have commented on the long delays in bringing cases to court and on delays in court, often occasioned by the state not responding to notices in a timely manner. The state government has defended the state record in this regard on a number of occasions. In an affidavit submitted to the Supreme Court on 28 January 2004 in which it opposed the transfer of cases, including the Best Bakery case, to courts outside the state, it denied that there was "any attempt, planned, systematic or otherwise ... to deny justice to the victims of the widespread communal riots that engulfed the State in the aftermath of the Godhra incident". After stating that of the total of 4,256 registered cases, 2,108 cases had been summarily closed after investigation, it said that "conviction or acquittal depends on the nature of the evidence furnished by the prosecution and defence witnesses, and a low conviction rate per se cannot lead to an inference of faulty investigation and/or weak prosecution, and certainly cannot be the basis for transferring the riot cases outside the State of Gujarat." The affidavit also dismissed allegations that witnesses had been intimidated or enticed to change their stance as such occurrences were not "on record" and hence not worthy of investigation. The affidavit further states that a reason why few cases of conspiracy to riot under section 120B of the IPC had been registered and investigated was that such a conspiracy to riot could not be established because the "communal backlash was marked by spontaneity in response to the gruesome incident of the

Sabarmati Express at Godhra". Again, with regard to the absence of cases involving members and leaders of the BJP and the Bajrang Dal, the affidavit pointed to a lack of "independent and sufficient evidence" to implicate them. It also argued that a transfer of cases to courts outside Gujarat would not be judicious in view of the number of cases that might be sought to be transferred, the poor financial standing of the accused, the adverse "social implications" of such a decision and the "prejudice likely to be caused to the accused in their defence".

The attitude of the state government can be seen very clearly in its responses in the Best Bakery case. Following the original trial court judgment on 27 June 2003 in which all 21 accused were acquitted, the state filed an appeal on 7 August 2003, a day before the Supreme Court was to hear a Special Leave Petition which the NHRC had filed on 31 July 2003 requesting that the Supreme Court set aside the trial court judgment and direct re-investigation and re-trial of the case outside the state of Gujarat. The state appeal sought re-trial of the case but did not call for further investigation. Given the poor quality of the evidence which had already contributed to the collapse of the prosecution case in the trial court, a re-trial on the basis of existing evidence could not have reversed the order of acquittal. The state appeal also states that "the trial court ignored the settled legal position" when it discarded the evidence of witnesses who had taken back the statements they had earlier given to police. Such statements can still be relied on in court to corroborate circumstantial evidence of a substantive nature. The state appeal, however, did not make a link to such evidence and so its reference to "settled legal position" did not have any meaning for the appeal.

During a Supreme Court hearing of the NHRC petition on 12 September 2003, Chief Justice V.N. Khare called the state government appeal a "complete eyewash" which betrayed a lack of seriousness in pursuing the appeal.²²⁶ The Chief

²²⁴ Rediff.com, 2 July 2003.

²²⁵ Rediff.com, 15 April 2004.

²²⁶ The Supreme Court judgment of 12 April calls the Gujarat appeal "not up to the mark and neither in conformity with the required case ... The role of the government also leaves much to be desired. One gets the feeling that there was really no seriousness in the State's approach to assailing the Trial Court's judgment. This was apparent in the way the appeal was presented." BJP MLA Madhu Srivastava who had allegedly threatened Zahira Sheikh and caused her to withdraw her evidence in court, commented on the Supreme

Justice reportedly suggested that the state government resign if it could not enforce the rule of law. "I have no faith left in the prosecution and the state government. I am not saying Article 356 [of the constitution should be imposed].²²⁷ You have to protect the people and punish the guilty. What else is Raj Dharma (government duty)? You quit if you cannot prosecute the guilty. Democracy does not mean you will not prosecute anyone".²²⁸ The state then submitted an amended appeal in the state High Court on 29 September seeking permission for the prosecution to present as evidence affidavits filed by four eye-witnesses before the Supreme Court in the Special Leave Petition and seeking re-trial on the basis of the new evidence.

In the Supreme Court judgment of 12 April 2004, which overturned the Gujarat High Court judgment and ordered a retrial of the case in Maharashtra, its criticism of the state's role was devastating. It expressed its shock at the manner in which the state government had come to the aid of the accused: "Those who are responsible for protecting life and properties and ensuring that investigation is fair and proper seem to have shown no real anxiety. Large number of people had lost their lives. Whether the accused persons were really assailants or not could have been established by a fair and impartial investigation. The modern-day Neros were looking elsewhere when Best Bakery and innocent children and helpless women were burning, and were probably deliberating how the perpetrators of the crime can be saved or protected".

The state of Gujarat subsequently challenged sections of the Supreme Court judgment when it argued in a petition filed in April 2004 that "no material had been placed before the court justifying this transfer outside the state" which would have a "demoralizing effect".²²⁹ Accordingly it asked the Supreme Court to

modify its order and direct retrial in Gujarat. It also requested that the remark that state authorities had acted like "modern-day Neros" be expunged. On 7 May 2004, the Supreme Court dismissed the application saying that direction given by the Supreme Court on 12 April had been in exercise of its unlimited powers to do justice while dealing with an appeal under Article 136 of the Constitution. It also said that "[w]e fail to understand how the observation made in any way can have demoralizing effect on the highest court of the State, or create negative impact upon the State judiciary in discharging its functions".

When the re-trial was to begin on 7 June in Mumbai a controversy over which state government was to appoint the public prosecutor delayed its start. Both the states of Gujarat and Maharashtra claimed that right and appointed public prosecutors. When the advice of the presiding judge, Additional Sessions Judge Thipsay on 5 July that the two states resolve the issue amicably between them failed to yield a solution, Zahira Sheikh approached the Supreme Court for direction. While hearing her petition on 9 August 2004, the Supreme Court expressed its displeasure with the public prosecutor appointed by Gujarat who had opposed the issuing of non-bailable arrest warrants by the Mumbai trial court for the remaining accused whom Gujarat police had failed to arrest.²³⁰ The court said, "What type of prosecutor is he who opposes issuance of arrest warrants against the accused? You are showing your true colours right from the first day".²³¹ It noted that the Gujarat government had not followed the direction of the Supreme Court in its judgment of 12 April to take the victims into confidence when appointing a public prosecutor for the re-trial of the case. It admonished the Gujarat government to shed its "ego problem" on the question of appointment of a public prosecutor

Court criticism of the Gujarat state prosecution of 12 September 2003: "If one court of the country has no respect for another court, people will soon start losing faith in the judiciary". (*Indian Express*, 13 September 2003.)

²²⁷ Under Article 356, the President of India can take a range of measures if he is satisfied that the constitutional machinery of the state has failed; these include the imposition of President's rule in a state.

²²⁸ *Indian Express*, 13 September 2003, *AFP*, 12 September 2003.

²²⁹ Zahira Sheikh had specifically stated in her Special Leave Petition of January 2004 that "for the fair and transparent trial to take place and for meeting the ends of

justice, it is essential that the trial of the Best Bakery case be shifted outside Gujarat". Accordingly the Supreme Court judgment of 12 April had said: "Keeping in view the peculiar circumstances of the case, and the ample evidence on record, glaringly demonstrating subversion of justice delivery system with no congenial and conducive atmosphere still prevailing, we direct that the re-trial shall be done by a court under the jurisdiction of Bombay High Court."

²³⁰ In June when the trial was about to begin, 11 of the accused were in judicial custody, one of whom was granted bail.

²³¹ *Indian Express*, *the Hindu*, *Times of India*, 10 August 2004.

and directed it to agree to one of the lawyers suggested by the victims as already directed in the 12 April judgment. On 16 August 2004, the Supreme Court replaced the Gujarat appointed public prosecutor with P.R. Vakil as Special Public Prosecutor to avoid further delay in the trial.

7.5.d Resistance of the state government to public scrutiny

Many inquiry commissions in India have in the past been grossly delayed and their recommendations ignored. The setting up of such inquiries is often seen as a cynical attempt by the authorities to avoid action while giving the impression of responding to the need to find the truth and hold those responsible to account.

An official inquiry set up by the Government of Gujarat with a limited brief and under an official whom state human rights activists did not consider fully impartial, appeared to follow this pattern especially when viewed in the context of the state's hostility to investigations by human rights activists and even statutory bodies like the NHRC.

On 6 March 2002, the Gujarat government appointed a judicial inquiry under a retired judge, Justice K.G. Shah to inquire into "facts, circumstances and the course of events that led to the setting on fire of the Sabarmati Express train" and subsequent incidents of violence in the state. **In view of the continued threats against judges and lawyers by right wing groups and the partisan attitude of sections of the state judiciary, activists urged that such inquiry be entrusted to a senior judge from outside the state.**²³² The state government on 21 May issued a

further notification which appointed a former Supreme Court judge, Justice G.T. Nanavati to head the panel and gave it three months to conclude the inquiry. This period was extended on 3 June 2002 to nine months, ending on 5 December 2002. In the same notification, the period under scrutiny was changed from the vaguely worded, "incidents of violence" to include incidents "that took place on or from 27 February, 2002 to 30 March 2002". The government subsequently included former Supreme Court judge, Justice G.T. Nanavati on the panel. The terms of reference of the inquiry commission were also controversial as they did not include an investigation of the causes of the violence, the persons or organizations instigating it or the role of the state and administration in controlling it and providing relief.

In May 2003, when the commission had yet to hear witnesses in Vadodara and Ahmedabad from where high levels of violence had been reported, Justice G.T. Nanavati publicly said that there was no evidence of party or state officials' involvement in the violence: "Yes, there have been instances where people have said the Bajrang Dal and the VHP workers at the local level instigated people to riot. But the complaints are primarily of a very general nature. There is no real evidence that has been brought to name individual Bajrang Dal or VHP leaders. Evidence recorded so far ... [does] not show any serious lapse on the part of police and civil administration".²³³

At least some witnesses appearing before the Nanavati Shah Commission were alleged to have been tutored without the Commission investigating such allegations and taking suitable counter-measures. Prior to Commission hearings in Vadodara in July 2003, newspapers reported that police had called potential witnesses to their headquarters for the purpose of influencing what they would say. Of 204 witnesses examined from urban and rural Vadodara, 201 spoke in favour of police. Police and government officials attended the meeting in large numbers. The Nanavati Shah Commission did not question any of the police officers and did not take any measures to make the hearings less intimidating for deponents.

²³² Members of the legal community pointed out that Justice Shah, when presiding over a TADA court, had sentenced a Muslim accused to death in a judgment which was subsequently overturned by the Supreme Court. (*Communalism Combat*, 77-78 (2000) 110). Another analyst said that Justice Shah was "well known for his Hindutva leanings and his anti-Muslim judgments during TADA trials". (Tanika Sarkar, "Semiotics of terror, *Economic and Political Weekly*, 13 July 2002.)

²³³ *Times of India*, 19 May 2003, *Rediff.com* and television channel NDTV 24x7, 20 May 2003. The Commission had by then recorded evidence in all areas except in Ahmedabad, Vadodara, Bharuch and Narmada districts.

Justice Shah was quoted as saying that he had not heard about police tutoring witnesses. Commentators were highly critical. The owner of *Newsplus* channel is reported to have said: "Almost all the witnesses were brought by the police. It was stage managed. People from the worst riot-hit areas spoke as if nothing happened there. Then how did more than 100 people die? Did they commit suicide?"²³⁴ Vadodara Police Commissioner Sudhir denied any allegation of tutoring witnesses. He suggested that "witnesses may have changed their stand because they have reached some settlement with the accused. Those who want to testify against the accused may be waiting for the criminal trial. They may not want to jeopardize their case by testifying before the commission, since contradictions could arise in their statements". The Police Commissioner did not think witnesses testified in favour of police out of fear because "whatever deficiencies [there] may have been in the police handling of the riots, victims are more interested in putting the real accused behind bars than blaming the police". He also saw nothing wrong in police asking witnesses to give a positive account: "Police personnel also have the rights of citizens. If an individual police officer has approached some witness to highlight some good work done by him, it may not amount to misconduct. But I have not heard of any such incident".²³⁵ A spokesperson of the People's Union of Civil Liberties (PUCI) said about the relation of victims and police: "Riot victims have great fear of the police. When police officials knock on people's doors asking them to testify before the Commission, it is like a rapist asking his victims to defend him".²³⁶ The Gujarat government reportedly ordered an inquiry into these allegations but Amnesty International is not aware of its outcome.

The PUCI together with Vadodara Shanti Abhiyan (VSA), organizations active in providing relief and rehabilitation and working for communal harmony in the state, withdrew from the proceedings of the Commission in June 2003 alleging a number of failings. They claimed that the Commission had made no provisions to protect Muslims wishing to depose before it, resulting in many witnesses and victims staying away from it. This was reinforced by the fact that many human rights defenders, social activists and lawyers of the minority had been threatened and

harassed. Its procedure of allowing deponents only singly before it was frightening to many individuals from the disempowered minority community and betrayed insensitivity to their needs. The organizations also stated that the Commission had committed a serious breach of judicial propriety when in May it appeared to publicly prejudge the outcome when hearings had not been completed. This had sown doubts about the Commission's impartiality and sincerity among an already demoralized minority, they said.²³⁷

In mid-2004, after the general elections in May had brought about a change in the central government, the Gujarat government further extended the brief of the Nanavati Shah Commission. Following Railway Minister Lalu Prasad Yadav's announcement on 14 July 2004 of a further probe of the incident at Godhra from the perspective of the railways and Congress MPs' discussion about a new commission to investigate the violence against the state's Muslim population, the Gujarat government on 20 July widened the scope of the Nanavati Shah Commission. The Commission would also inquire into the "role and conduct" of the "chief minister, ministers, officers of the government, other individuals and organisations" in the Sabarmati Express killings and the violence that followed.²³⁸ The Commission will now probe events up to 31 May 2002, instead of 30 April 2002, and submit its report by 5 December 2005 instead of 5 December 2004 as laid down in a notification of 28 May 2004.²³⁹ The move was widely seen as an effort to pre-empt the setting up of an impartial inquiry by the Centre. The state subsequently filed an application seeking

²³⁷ PUCI Press release, Gujarat, 16 June 2003.

²³⁸ BJP members fiercely criticized this decision in sessions of both Houses of Parliament in July; BJP leader V.K. Malhotra said the railway minister "was shielding those people ... who are Pakistani ISI agents". (*NDTV*, 15 July 2004)

²³⁹ A Gujarat legal department notification of 20 July 2004, announced on the following day, claimed that the scope of the inquiry had been extended after the state government had received a large number of representations questioning the administration's role in the incidents. "The government decided to come up with it as there was some confusion about the scope to be covered by the commission. If the commission desires, it can summon the CM, ministers, police and government officers, leaders of political parties, non-governmental organisations, anyone", Gujarat Chief Secretary P.K. Laheri was quoted as saying. (*Times of India*, 22 July 2004.)

²³⁴ *Frontline*, 18 July 2003.

²³⁵ *Frontline*, 18 July 2003.

²³⁶ *Frontline*, 18 July 2003.

postponement of depositions and cross examination of police officials, arguing that the terms of reference of the inquiry had recently been expanded. On 27 July 2004 the Commission rejected this plea, saying that the scheduled examination of police officers and collection of affidavits of victims would continue simultaneously.

Following on from the Railway Minister's announcement, the Central Government on 2 September 2004 set up a judicial inquiry under retired Supreme Court judge Justice U.C. Banerjee to investigate the fire on the Sabarmati Express. It is to examine the antecedents and causes of the fire and assess if preventive, emergency, rescue and relief regulations had been followed. It has been requested to report within three months but can extend its term. The BJP criticised the move saying that it was an anomaly to have two judicial inquiries of the same event.

7.5.e Failure to fully co-operate with the NHRC

The NHRC whose statutory function it is under the Protection of Human Right Act of 1993 to "inquire ... into complaint of violations[s] of human rights or abetment thereof or ... negligence in the prevention of such violations by a public servant, [and to]... intervene in any proceedings involving any allegation of violation of human rights pending before a court with the approval of such court..." has on several occasions had reason to criticise the state government for failing to respond to its directives in a timely, comprehensive and honest manner. Below only the initial exchanges between the NHRC and the government of Gujarat will be described to indicate the nature of the state government's response.

The NHRC on 1 March 2002 asked the state government to reply within three days on the measures it had taken to stop the violence in the state and prevent further violence. The state government on 4 March asked for a 15-day extension "as most of the State machinery is busy with the law and order situation". The Commission in its proceedings of 6 March observed that it expected at least a preliminary report from the state. On 11 March, the NHRC received a preliminary response from the Gujarat government. The NHRC called it "rather perfunctory" and silent on many vital aspects. In view of the ongoing violence in the state, an NHRC team visited Ahmedabad, Vadodara and Godhra from 19 to 22 March 2002. During meetings in the state,

NHRC officials found presentations by government officials unspecific, lacking a community-wise break-ups e.g. regarding arrests or casualties and restricted to few areas, e.g. ignoring incidents in rural areas.²⁴⁰

On 28 March 2002, the NHRC received the state government's *Report on the incidents in Gujarat after the burning of the Sabarmati Express on 27th February 2002* with three annexures relating to law and order measures, rescue, relief and rehabilitation measures and press clippings. In its Proceedings of 1 April 2002, the NHRC set out its Preliminary Comments and Recommendations on the situation in Gujarat on which it requested the state government's and the Central Government's response within two weeks. It also responded to assertions made in the state report many of which it found unsatisfactory. In its Proceedings of 1 May 2002, the NHRC noted that a further reply from the state government dated 12 April 2002 did not respond to the issues raised in the NHRC's confidential report on its March visit to the state despite a request for such a reply and despite a further extension of two weeks having been granted for the state and central governments to respond. The central government replied saying that the concerns in the confidential report pertained to Gujarat and the state government was requested to respond directly to the NHRC.

No response was received from the state government before the next meeting of the NHRC on 31 May, despite repeated oral reminders by the Commission and assurances by the state government that a response would be forthcoming soon. On 31 May, the NHRC decided to offer additional comments on the state government's response of 12 April 2002 to the NHRC's Preliminary Comments of 1 April 2002. It also decided to make the confidential report public in its totality. In its Proceedings of 31 May, the NHRC commented in detail on a vast range of state failures which the state response had failed to adequately convey. It concluded: "There is no doubt in the opinion of this Commission, that there was a comprehensive failure on the part of the State Government to control the persistent violation of the rights to life, liberty, equality and dignity of the people of the State. It is of course, essential to heal the wounds and look to a future of peace and harmony. But the pursuit of these high objectives

²⁴⁰ For details see NHRC *Report on the visit of NHRC team headed by Chairperson, NHRC to Ahmedabad, Vadodara and Godhra from 19-22 March 2002*, dated 31 March 2002.

must be based on justice and the upholding of the values of the Constitution of the Republic and the laws of the land...”

The reply to the confidential report of the NHRC issued by the Gujarat state on 30 May 2002 and received by the NHRC after its 31 May meeting, rejected most of the observations made by the Commission relating to its visit to the state. It said in the introduction, “As far as specific incidents are concerned, in most cases FIRs have been lodged or statements have been recorded during investigations and the correct factual position can be known only after the investigation is over. As far as general complaints, representations and opinion expressed are concerned, it should not be construed that anything contained in the confidential Report of the Commission is admitted by the State government unless so stated specifically in this report”.

When the NHRC in July 2003 took the initiative to file a Special Leave Petition in the Supreme Court in the Best Bakery case after the trial court had acquitted all the accused and Zahira Sheikh had revealed how threats from a BJP MLA and others had made her withdraw her statement in court, the state government and party officials openly challenged the impartiality and intentions of the NHRC. BJP spokesman Mukhtar Abbas Naqvi said: “[i]t was wrong on the part of any organization to take such a step ... We will not allow anyone to disturb the communal peace and harmony prevailing in Gujarat and the state government should take steps in this regard”²⁴¹ The BJP Gujarat state president was quoted as saying: “We fail to understand whether the NHRC is only for Gujarat or for the entire country? Why is it not looking at Kashmir? Or the killing of Sikhs in 1984? The move is an insult to the judicial system”.²⁴²

In August 2003, the BJP in Gujarat organized *dharna* (sit-ins) at all the district headquarters to protest against the NHRC initiative to approach the Supreme Court. The RSS warned the NHRC “not to cross its mandate” and charged it with indifference to continued violence in other parts of the country. Spokesman Ram Madhav said, “[w]hat is happening in West Bengal and northeast is much more serious. However, the total indifference of the NHRC to all these incidents and its over-enthusiasm in setting a

wrong precedent in the case of Gujarat is quite conspicuous”.²⁴³

The state government in September 2003 also criticised the NHRC when responding to the notice issued by the Supreme Court on the NHRC petition. It said that it was not maintainable as the NHRC “appears to have been carried away by the campaign orchestrated by a section of the media casting aspersions on the functionaries of [the] administration of justice”. Moreover, the NHRC should not have directly approached the Supreme Court to seek relief as this procedure sidestepped the state High Court; such an approach, it said was “extremely exceptional”. It also warned that if the NHRC petition was entertained by the Supreme Court this would set a “bad precedent having wider repercussions in the criminal cases pending throughout the state of Gujarat and in the country”.²⁴⁴

In an unprecedented move, Gujarat Chief Minister Narendra Modi on 5 August 2003 approached the President of India with his complaint about the NHRC. In a letter to President A.P.J. Abdul Kalam which was widely reported in Indian media, Modi requested him to direct all the states of the Indian Union to compile details of major incidents of communal violence, the charge sheets filed in these cases, the withdrawal of cases even after filing charge sheets and the acquittal rate in such cases after trial by the courts.²⁴⁵ Such compilation, he wrote, would show how widespread such clashes are. “When group clashes had attained alarming proportions in other States, why have the champions of human rights not been so active?” He stated that a compilation would allow people to judge for themselves “who is right. Facts on record will unveil the truth, thereby exposing the vested interests that have targeted not only Gujarat but have tried to weaken the democratic fabric and reputed institutions of the country”. In a clear reference to the NHRC, he wrote, “[i]t is more disturbing that some national level institutions are also carried away by propaganda. This needs serious attention because Gujarat being a border state has a strategic importance for the nation’s security”. Modi

²⁴¹ *AFP*, 7 August 2003.

²⁴² *Outlook*, 11 August 2003.

²⁴³ *Rediff.com*, 31 July, 2003

²⁴⁴ *The Indian Express*, 5 September 2003; *The Hindu*, 4 September 2003.

²⁴⁵ Observers called it “perhaps the first attempt by any chief minister to involve the President of India in the bitter controversy”. *The Times of India*, 6 August 2003.

asserted that “some external forces and non-governmental organizations have been trying to raise issues with [sic] the pretext of expressing their concerns about some stray incidents in Gujarat at international forums thereby tarnishing the image of the country and questioning its democratic strength”. He added that “the same vested interests had earlier opposed the construction of the Narmada dam ... and were trying to obstruct the progress achieved by Gujarat. They are identifying stray incidents and exaggerating them with the sole objective of slowing down the pace of development”. Beside the “self appointed and so-called champions of human rights” who even attacked the judiciary, “a section of the media”, too, was intent on undermining Gujarat, he asserted. “Such activities raise serious doubts about the intentions of such groups which cannot accept a constitutionally elected democratic government.”²⁴⁶

7.5.f Failure to ensure the independence of public prosecutors

A crucial way in which the government of Gujarat has influenced the conduct of trials in the state is by its choice of public prosecutors. As part of its attempt to introduce proponents of *Hindutva* at all levels of the administration, the BJP government in Gujarat in January 2000 lifted the ban on government officials joining the RSS. This measure was subsequently revoked after public resistance to it. Informally, however, the penetration by Hindu right wing organisations of all levels of the administration has continued. The Gujarat state government has appointed many public prosecutors who are members, sometimes leaders, of Hindu right wing organizations.²⁴⁷ Several of the public prosecutors appointed by the government of Gujarat have allowed their ideology and political affiliations to vitiate their professional performance.²⁴⁸

²⁴⁶ *The Hindu*, 5 August 2003, *Times of India*, 6 August 2003, *Indian Express*, 7 August 2003.

²⁴⁷ Police and other administrative officers have in the past years been transferred in a systematic manner to ensure that decision making levels were occupied by people with right wing leanings. (For details see International Initiative for Justice, *Threatened existence: A feminist analysis of the genocide in Gujarat*, p. 22.) Similarly moves were made by the government to ensure control by right wing groups over educational institutions, syllabus formulation and the popular media.

²⁴⁸ *The Indian Express* has consistently monitored the political affiliation of public prosecutors conducting post-

Public prosecutors are judicial officers who under section 24 of the CrPC are appointed to conduct proceedings in courts of session or High Courts on behalf of the government. Persons who have practiced as advocates for at least seven years are eligible for such appointment. District magistrates in consultation with sessions judges prepare lists of suitable appointees to the office of public prosecutor; the state government appoints public prosecutors for each district from this list.²⁴⁹ For each state high court, the central government or the state government in consultation with the high court appoints a public prosecutor for conducting high court proceedings.²⁵⁰ Chapter XVIII of the CrPC lays down how trials in courts of session are to be conducted. Under section 226 of the CrPC, the public prosecutor opens the case when the accused appears in the court by describing the charge brought against him and stating by what evidence he proposes to prove the guilt of the accused. Public prosecutors play a crucial role in supporting the court in its mission to establish the truth and are expected to steer the defence and the court towards justice. The function of the public prosecutor relates to a public purpose in so far as the office of the public prosecutor is entrusted with the responsibility of acting only in the interest of the administration of justice. The public prosecutor must be impartial; he is not the protagonist of any party but represents the state in whose name all prosecutions are conducted.

Numerous comments have been published on the deteriorating status and performance of the public prosecutor in India in general and in Gujarat in particular. “The reasons for such deterioration are manifold. ... Deep rooted corruption, nepotism, inefficiency, caste prejudices, political influence, influence of the home department of the state and that at the centre are to name a few”.²⁵¹ “Prosecutors are playing the role of the defence. One fell asleep during the second half of a trial. There is no decorum in the court. People jeer while witnesses relate

Godhra criminal cases in different courts in Gujarat; for details see their website.

²⁴⁹ Section 24(4) CrPC and Section 24(3) CrPC respectively.

²⁵⁰ Section 24(1) CrPC; the Central Government may also under section 24(2) CrPC appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district or local area.

²⁵¹ *Krodhi Praja Nyanadhisha*, the bi-monthly newsletter on the Rule of Law, initiated by the Asian Human Rights Commission, Vol. 1. No. 2, 16 February 2004.

incidents of rape or murder. The accused keep shouting that they will be freed”, another observer said.²⁵²

The reported bias of public prosecutors appears to have been particularly evident when bail applications were to be considered. In Gujarat bail has been routinely refused to Muslim defendants, including those accused in the Godhra case, and granted to Hindus, particularly those accused who belong to the same organizations as the public prosecutors.

For instance, the public prosecutor in sessions court Mehsana, Dilip Trivedi, who is also the Secretary General of the VHP for Mehsana district, did not object to the 46 accused in the Sardarpura case being released on bail. In Sardarpura village, 33 persons, mostly women and children had been electrocuted when members of a violent Hindu mob pushed an iron rod attached to a live cable into a room in which the victims had earlier taken shelter on 1 March 2002.²⁵³ Trivedi did not take any interest in an application filed by the survivors of the Sardarpura killings against the granting of bail despite the fact that several of the accused had reportedly attacked a mosque on the day after their release on bail. Public prosecutor Trivedi also did not oppose bail applications of the accused of the hacking to death on 28 February 2002 of 11 people in Dipda Darwaja area of Visnagar. Of the 45 accused, 38 were freed on bail. When the complainants in May 2003 filed a petition in the Gujarat High Court objecting to Trivedi acting as public prosecutor, additional public prosecutor S.J. Dave urged that the state government consider the appointment of a special public prosecutor. Eventually Trivedi was removed from the Dipda Darwaja case and another VHP lawyer, Rajendra Darji, was appointed; the request for a special public prosecutor for both cases was ignored. Dilip Trivedi was quoted as saying, “It is a controversy created by the English media. What is wrong with my appointment as public prosecutor? You see a controversy in everything”.²⁵⁴

The Gujarat government, right wing organizations and the public prosecutors themselves have asserted on several occasions that such leanings or affiliations

do not affect the performance of public prosecutors. Piyush Gandhi, President of the Panchmahal district VHP unit and public prosecutor in several cases relating to violence in this district where 121 FIRs were reportedly registered, stated: “The state government appoints as public prosecutors who it feels are honest and experienced. No political or organizational affiliations work in this. I am associated with the RSS since 1964. In 1982, I joined the Ram Mandir movement and since 1985 I am president of the VHP Panchmahal district unit. The VHP is not a political organization so I don’t consider mine as a political appointment”.²⁵⁵ Other public prosecutors with political affiliations see their appointments as political. Public prosecutor for Anand district, P.S. Dhora, a known RSS sympathizer, admitted, “What is new in public prosecutors being political appointees? It has always happened like this. I have been district government pleader for this district since last five years”.²⁵⁶

On 9 October 2003, the Supreme Court intervened in the Gujarat state’s handling of the post- Godhra cases following criticism of the slow rate of progress in prosecuting perpetrators. It said that Gujarat would have to obtain federal clearance for special public prosecutors to be appointed by the Gujarat government to try those charged with attacking Muslims. The court also appointed former Solicitor General Harish Salve, who, as *amicus curiae* monitors the cases and ensures impartiality.

The Supreme Court when examining the trial of the Best Bakery case and its appeal in the Gujarat High Court, in its judgment of 12 April 2004 clearly indicted the public prosecutor for “not acting in a manner befitting the position held by him”. It said that both the public prosecutor and the presiding judge “failed to discharge their duties” and were “not acting in a manner befitting the position held by him” during the trial. It also said, “[t]he prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system” and warned judges not to “play into the hands of such prosecuting agency [by] showing indifference or adopting an attitude of total aloofness”.

Among the many failings listed in the judgment of 12 April 2004, the Supreme Court pointed to the prosecution’s failure to protect key witnesses once

²⁵² Navaz Kothwal, Commonwealth Human Rights Initiative, quoted in *Frontline*, 18 July 2003.

²⁵³ For details see Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 110.

²⁵⁴ *Indian Express*, 19 September 2003.

²⁵⁵ *Indian Express*, 19 September 2003.

²⁵⁶ *Indian Express*, 19 September 2003.

several other witnesses had withdrawn their statements in court. Under pressure, they, too, withdrew their statements. In order to protect witnesses and prevent their turning hostile, the public prosecutor could for instance have requested that the trial be conducted *in camera*, that witnesses withdrawing their statements in court be re-examined or that hearings be postponed or adjourned to gather additional evidence. Public prosecutors also failed to ensure that “full and material facts [were] brought on record so that there might not be miscarriage of justice” and to make every effort to ensure that all key witnesses, including those who were injured or who had moved elsewhere, were brought before the court to be examined. The Supreme Court noted that while several crucial witnesses had been ignored by police and the public prosecutor, six relatives of the accused persons were examined in the trial court as prosecution witnesses. As was to be expected, they portrayed the accused as “saviours”. The counsel for the state of Gujarat said this had been done to show the manner in which the incident had happened. The Supreme Court observed, “[t]his is a strange answer. Witnesses are examined by the prosecution to show primarily who the accused is. In this case it was nobody’s stance that the incident had not taken place. That the conduct of the investigating agency and the prosecutor was not *bona fide*, is apparent and patent”. It said, the “public prosecutor appears to have acted more as a defence counsel than one whose duty it was to present the truth before the Court”.

Reprimanding the prosecution for the perfunctory manner in which it had conducted the case, the Supreme Court said: “... the reluctance and the hesitation of witnesses to depose against people of muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interest[s] of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies”. It concluded: “When the investigating agency helps the accused, the witnesses are threatened to depose falsely and [the] prosecutor acts in a manner as if he was defending the accused, and the Court was merely acting as an onlooker and there is no fair trial at all, justice becomes the victim”.

When directing that the case be re-investigated and re-tried in Maharashtra, the Supreme Court directed “the State Government to appoint another public

prosecutor and [that] it shall be open to the affected persons to suggest any name which may also be taken into account in the decision to so appoint. Though the witnesses or the victims do not have any choice in the normal course to have a say in the matter of appointment of a Public Prosecutor, in view of the unusual factors noticed in this case, to accord such liberties to the complainant party, would be appropriate”. This direction was ignored by the state of Gujarat when appointing a new public prosecutor for the retrial of the case.

The Malimath Committee has commented on public prosecutors that “[t]his important institution of the Criminal Justice System has been weak and somewhat neglected. Its recruitment, training and professionalism need special attention so as to make it synergetic with other institutions and effective in delivering good results”. It recommended that the public prosecutors be brought under a Director of Prosecution, a post to be created and filled “from among suitable police officers of the rank of Director General of Police”. The Director of Prosecution is to “facilitate effective coordination between the investigating and prosecuting officers”.

The Supreme Court of India by contrast has on several occasions insisted on a complete separation of the prosecution from the investigation agency. In 1994, the Supreme Court categorically stated that the public prosecutor is not a part of the investigating agency but an independent statutory authority.²⁵⁷ A year later, the Supreme Court ordered that the prosecution agency should be autonomous, having a regular cadre of prosecution officers.²⁵⁸ The Supreme Court had earlier noted that the duty of a public prosecutor is to represent not the police, but the State.²⁵⁹ The Supreme Court in its judgment on the Best Bakery case after noting the deficiencies of the public prosecution of the case at the trial level urged reforms of the office of the public prosecutor without, however, suggesting concrete steps.²⁶⁰

²⁵⁷ *Hitendra Vishnu Thakur v State of Maharashtra*, 1994 SCC (Cri.) 1087 (1114).

²⁵⁸ *SB Sahane v State of Maharashtra*, AIR 1995 SC 1628.

²⁵⁹ *Ram Ranjan Ray*, (1914) 42 Cal 422, 428.

²⁶⁰ Referring to its earlier judgment *Vineet Narain v Union of India*, (1998 (1) SCC 226 in which it had “directed that steps be taken immediately for the constitution of (an) able and impartial agency comprising persons of unimpeachable integrity to perform functions akin to those of the Director General of Prosecution in England”, the Supreme Court

Amnesty International believes that bringing the prosecution service under the control of a police officer as suggested by the Malimath Committee would be a retrogressive step, irreconcilable with Supreme Court directions. While the Committee in principle agreed that the prosecution should be independent of police interference, it was of the opinion that this independence would not be jeopardized by it being headed by a police officer. This opinion is contradicted by the evidence of police abuse of power, political interference in police work and the view held by many police officers themselves that the current police system invites abuse.

While mechanisms to allow for better coordination between the work of the prosecution and the police are welcome, Amnesty International believes that the full and visible demarcation between the police and the prosecution should be maintained to ensure the independence of the prosecution which is essential to ensure that a trial is free of bias and truly fair. Amnesty International recommends a thorough and independent review of the prosecution service prior to any reforms being implemented following the Malimath Committee report and urges that any reforms be made in line with the UN Guidelines on the Role of Prosecutors.²⁶¹

The bias against Muslims shown by public prosecutors in Gujarat would not be overcome by the creation of a Directorate of Prosecution headed by a senior police officer as large sections of the police force share the same bias. Amnesty International believes that those public prosecutors who are affiliated in some form with Hindu rights wing organizations, whether political in the strict sense of the term or cultural or religious, should be transferred to posts where their ideology will not vitiate their work. All public prosecutors should be trained in the need for strict impartiality in the interest of ensuring a fair trial to all. Amnesty International reiterates its earlier calls to the government of India to undertake a comprehensive reform of the criminal justice system, including the role of the public prosecution, in line with international human rights standards.

clearly favoured a independent prosecution agency. The Director of Prosecution in England is appointed from amongst the members of the bar and functions under the supervision of the Attorney General.

²⁶¹ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

7.5.g Failure to adequately protect human rights defenders

In situations in which institutions whose duty it is to ensure the enjoyment of fundamental rights, including police, the judiciary, the state and national governments, as well as medical professionals side with the perpetrators of abuses, human rights defenders have special importance. Often it is they alone who, at considerable risk to themselves, stand up for the victims and assist them in their quest for justice. In Gujarat, human rights defenders who have defended minority community members who became victims of attacks, have been subjected to threats, intimidation and abuse by state and party functionaries. Abuses by private actors against human rights defenders have been ignored by the state which has failed to prevent and prosecute abuses of human rights defenders. This constitutes another element in the failure of the state to exercise due diligence in Gujarat.

The UN Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders), adopted by the General Assembly on 8 March 1999, lays down the obligations of the state and society at large to promote and protect all human rights and to allow human rights defenders to work freely without interference, intimidation or harassment.²⁶²

²⁶² UN Doc: A/RES/53/144. The Declaration, while not a legally binding instrument, was adopted by consensus of the General Assembly and therefore represents a strong commitment of states to its implementation. Under Article 1 of the Declaration on Human Rights Defenders, "[e]veryone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international level". Article 9 of the Declaration states in subsection 3 that human rights defenders who assist victims of human rights violations in seeking redress have the right "to complain about the policies and actions of individual officials and government bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities ... which should render their decisions without undue delay ... to attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international standards and commitments and to

Many people of both communities spontaneously became human rights defenders during months of violence, protecting fleeing victims, nursing them, looking after children who had lost their relatives, provided them with food, clothes, finding transport for them to less affected areas and helping them register complaints with police, often at great risk to themselves.

Women in many areas took on responsibilities to maintain or restore peace when police failed in this task. In Taiwada, Vadodara, women formed *Shanti Abhiyan*, peace committees, soon after the Godhra incident to mediate whenever tension arose, protect potential victims and prevent violence. Some women said about their role, “the whole area was under curfew and it was these women who are more alert in preventing untoward incidents [than] the police”. Women kept vigil on terraces and balconies to prevent trouble for the entire community. “We had to keep the men inside because they get beaten more easily. If we women do not do it, who will?”²⁶³ In Sabarkantha and Banaskantha districts, members of the majority community reportedly came together in efforts to isolate those who had instigated violence in order to prevent further violence against members of the minorities. An area where local people decided to protect the entire - mixed - community is Tandalja on the outskirts of Vadodara. This village with a Muslim majority had been vilified in VHP propaganda as a “mini Pakistan” and a “hotbed of terrorists”. Local community peace committees often held vigils around the clock and informed members of both communities if rumours of violence were received and so diffused potential crises and protected potential targets of violence.

Individuals who had fought for their own redress also sometimes understood themselves as taking on a

offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.” Article 12 of the Declaration states that human rights defenders have a right to effective protection under national law in reacting against or opposing, through peaceful means, acts or omissions attributable to the State that result in violations of human rights. The Special representative on human rights defenders has in her report for 2002 to the Human Rights Commission pointed to the specific role of women human rights defenders in highlighting abuses of women and the risk they bear in this work. See UN Doc: E/CN.4/2002/106.

²⁶³ Concerned Citizens Tribunal, *Crime against Humanity*, vol. I. p.147.

wider role. Bilqis Yakoob Rasool, who had received threats to her life ever since she had decided to press for a re-investigation of her case and who had had to change houses over a dozen times, said at a press conference in Ahmedabad on 8 August 2004: “It is not my fight alone, but numerous other Muslim women who also had to suffer the same fate during the communal riots in 2002, will get the courage to speak up after my case was transferred outside the state ...I know I am not the only one ...”

Hindu human rights activists in Gujarat have particularly been at risk of abuse. Many Hindu families who sheltered Muslim neighbours at risk have been harassed or threatened by their right wing neighbours. When some 20 Hindus on 28 February 2002 attacked the house of Prof. J.S. Bandukwala, a Muslim and active PUCL member who had openly opposed all forms of religious fanaticism, he and his daughter found shelter with Hindu neighbours. On the next day a larger crowd returned and set his house on fire. The fire brigade was prevented by the mob from reaching the house. The family escaped unharmed but the Hindu neighbours who had sheltered them went into hiding for a few days for fear of reprisal. On their return they were “interrogated” by members of local right wing groups on why they had helped Muslims and received a warning not to do so in future.

Senior jurist, Girishbhai Patel, a Hindu, was reportedly threatened in his home by young VHP and BJP leaders for defending minority rights. Police did not intercede to protect him but a senior RSS member, Arun Oza, who is also state public prosecutor, intervened to protect him. Similarly an elderly member of the *dalit* community, Someshwar Pandya, a member of the Congress party and resident of Sardarpura, Mehsana district, had witnessed a large Hindu mob surrounding the Muslim area of Sardarpura on 1 March 2002 and setting it on fire, killing 38 people. He reportedly helped Muslim neighbours affected by the violence file their complaints. Pandya was attacked in the market by local right wing Hindus who had apparently been instigated by people close to the accused. He sustained more than 10 fractures and lost an eye.²⁶⁴

In some cases known to Amnesty International police stood by when human rights defenders were threatened by mobs while doing their protection

²⁶⁴ Rediff.com, 6 August 2003.

work or even led them into danger. A human rights defender (name, location and date withheld) told Amnesty International that his group was called one evening to a village, where in previous days houses belonging to Muslims had been destroyed in several waves of attacks. *"We received a phone call at 9.30pm that their houses were being attacked and they needed immediate help. We made a call to the police ... but given that we had found in the recent past that police were taking their side, we decided to go ourselves ... We took a car to the village. When we reached the area we saw the police who tried to direct us down the wrong street. They said we should go to a particular street but when we got there we saw a large mob of Hindus standing there with stones in their hands. The police told them that these are the human rights people. In a desperate attempt to try and save our lives, we started asking where the houses of the Muslims were as though we were on the offensive and on the side of the Hindus. When we rushed to the houses of the Muslims, we found police inside the houses beating men and women and swearing at them. When the police saw us they said we were 'troublemakers' and pointed a gun at me. One police officer said, 'you do your business and we will do our business'. We tried to call the Collector [the district administrator] on our mobiles. We were not sure our lives would be saved. ... After an hour we got the message that three houses had been set on fire. We went outside to see but people were standing outside ready to attack us with fire. Since the terrace of the house [in which we were] had tiles, we started collecting them in case we needed to defend ourselves. Some people with guns started shooting at the property. Finally someone spoke to the Collector on the phone and said that he would be accountable to ... [our organization] and the whole of the human rights community if anything happened to us. One activist was able to go to the Collector's house and forced him to come with him. He came at 1.30am (having made our initial call at 9.30pm) When the Collector arrived, the same police who were standing on the side of the Hindus were now transporting us to safety. When we came out of the house, [name] was beaten in front of us. He was crying because he had been beaten so badly. The [named] police officer kept taunting him saying that 'you called these people'."*

Statements by Chief Minister Narendra Modi have further compounded the sense of insecurity experienced by human rights defenders in the state. In August 2003, Chief Minister Narendra Modi at a function, that the "five star activists ... have always been busy maligning Gujarat for the sake of their vested interests but now they have become active to attack India's democratic system and constitutional machinery".²⁶⁵ Unwarranted verbal attacks on human rights defenders by the state High Court have been described above.

²⁶⁵ *Indian Express*, 11 August 2003.

Many human rights defenders have not come forward to seek protection as they fear further violence in retaliation. Amnesty International has been informed by several human rights defenders that they have received threatening phone calls demanding that they stop their work and accusing them of calling unwanted international attention to Gujarat.

The BJP government's rhetoric of national security overtly linked with loyalty to the "Hindu nation" has contributed to considering human rights defenders as "anti-Hindu" and "anti-national". Amnesty International believes that the branding of human rights activists as "anti-national" by the Government of Gujarat paved the way and threatened to legitimize the further harassment of activists. By vilifying human rights defenders and their legitimate activities in protecting and promoting human rights, the state signals to others that attacks on or harassment of human rights defenders can be carried out with impunity.

Individuals and organizations who have been pivotal in working to correct the failures of the criminal justice system and to bring those responsible to justice have been particular targets of continued and widespread threats, intimidation and other harassment by both state and non-state actors. Amnesty International in 2003 publicly expressed its concerns for the safety of several activists working for the organization CJP (CJP). Those threatened included Teesta Setalvad, its Secretary, Suhel Tirmizi, a lawyer on a number of cases including the Best Bakery case, and Rais Khan Azeekhan Pathan, coordinator of the CJP. Teesta Setalvad and Rais Khan Azeekhan Pathan personally provided protection to key witnesses in the Best Bakery case. Both activists received threatening phone calls in connection with their work. On 25 April 2003 Suhel Tirmizi and Rais Khan filed a formal application for police protection and another more urgent application on 20 August 2003. On 29 August 2003, Rais Khan was surrounded and physically threatened by about 100 VHP and Bajrang Dal members who threatened him as he was escorting witnesses to court. Some protection was granted in September 2003. In November 2003, two human rights defenders associated with the CJP again received threatening phone calls, details of which were sent to the Director General of Police. In the same month, Amnesty International issued an appeal expressing concern about Rais Khan Azeekhan Pathan's safety

when he continued to receive threats despite being provided police protection. In February 2004, the CPJ submitted an application to the Additional Solicitor General to direct that Rais Khan Azeekhan Pathan be given 24 hour protection and armed guard when travelling for the CJP. The letter also noted that the state Intelligence Bureau staff had begun following him thus jeopardizing the work of the organization and the safety of contacts. An application was also filed in the Supreme Court on the same matter.

Despite receiving protection by Gujarat state police since mid-2003, whenever visiting Gujarat, Teesta Setalvad has been repeatedly threatened and abused by Hindu nationalist individuals. For instance, on 12 April 2004, while she was addressing a meeting of the voluntary organization *Prashant* at the Centre for Dialogue and Reconciliation in Ahmedabad, television channels flashed the news of the Supreme Court judgment in the Best Bakery case ordering a retrial of the case outside Gujarat. The visit of Teesta Setalvad whose organization had petitioned the Supreme Court on behalf of the victims of the Best Bakery incident, had, according to Teesta Setalvad, been planned much earlier and so was co-incidental with the Supreme Court judgment. While she was still addressing the meeting, two men approached the Director of *Prashant*, Father Cedric Prakash around noon and demanded to see her to “teach her a lesson for her anti-Hindu canard and defaming Gujarat outside the state”. As they were making calls on their mobile phones apparently to mobilize supporters and about a dozen youths started arriving at the Centre, Father Prakash turned to call the police. The two men then went outside shouting slogans against Teesta Setalvad. When Father Prakash fetched his camera to photograph the men, they covered their faces and fled on a motorbike. Police arrived in large numbers to guard the building. The two men identified themselves as Dr. Atul Vaidya and Bharat Teli, activists of the VHP who are accused in the Gulberg Society case. Father Prakash filed a complaint against the two men at Ghatlodia police station alleging criminal intimidation. The two men were reportedly arrested but let off shortly afterwards with a warning. Police protection was provided to *Prashant* but then withdrawn after a few days without explanation.

Father Cedric Prakash himself has also repeatedly been harassed and his actions been called “anti-

national”. On 11 June 2004, the Gujarat Criminal Investigation Department (CID) questioned activist Father Prakash about his visit to the prison where detainees held under POTA for alleged crimes committed in Godhra were held. Father Prakash said that he had visited the jail with official permission and as part of his social and educational work and that he has been involved in jail reform efforts for some 20 years. The Police Inspector also questioned him about his visit to London in December 2003 where he was alleged to have made “inflammatory” speeches relating to the Gujarat violence in 2002. Father Prakash had been questioned earlier by the CID on 26 April and 8 June 2004. The questioning was apparently triggered by an email message from a RSS activist alleging that Father Prakash was involved in “anti-national” activities. Though the state has brought no formal charges against him, police have threatened with recommending to the Central Government that his passport be impounded. The Director General of Police of Gujarat said the CID routinely questioned people suspected of trying to create disharmony in society.²⁶⁶ Subtle forms of harassment are reported to continue, including frequent questioning by tax officials and the Charity Commission, particularly after some 20 domestic civil rights groups on 1 June 2004 addressed a charter of demands to the new government which included demands that people at all levels of responsibility for the violence be brought to justice.

In other cases the state has sought to discredit the status of human rights defenders in order to invalidate their findings. The report issued on 21 November 2002 by the Concerned Citizens Tribunal, *Crime against Humanity – An Inquiry into the Carnage in Gujarat* as well as the Tribunal itself which consisted of eminent retired judges, lawyers and activists which had held Chief Minister Modi, his cabinet colleagues and organizations including the BJP, RSS, VHP and the Bajrang Dal “directly responsible for the post Godhra carnage” was rejected out of hand by the Gujarat government. Noting that the tribunal had no statutory authority to conduct an inquiry, the state government said the tribunal’s findings were “one-sided and not based on facts established in accordance with constitutionally sanctioned legal process” and warned people not to be “misled by self-appointed agencies”. The Gujarat government further challenged the status and motivation of its

²⁶⁶ *Indian Express*, 12 June 2004.

members, insinuating that the “self-styled tribunal seems to have been motivated by partisan, ideological and other considerations”.²⁶⁷ The VHP attacked the tribunal as being assisted by “jihadi-fundamentalist and pseudo-secularists” and threatened to sue it for slander.

Concerns for the safety of individuals working to protect minority members from abuses and assisting them in seeking justice were further heightened when in February 2004 the press reported that P.G.J. Nampoothiri, Special Rapporteur of the NHRC based in Gujarat, had written a letter to the NHRC stating that members of a government appointed team working under guidelines of the Gujarat Home Department had themselves been threatened. Nampoothiri cited the case of Neerja Gothru, head of a special team appointed by the Gujarat government to investigate police lapses in registering and investigating cases of violent attacks in Panchmahal district. The Rapporteur stated that he feared “legal action and/or physical assault” against members of the team and pointed out that “influential leaders of Panchmahal apprehending arrests and prosecution of their henchmen, have made representations to the government seeking action against those who had helped Ms. Neerja’s team in identifying victims/witnesses”. The Rapporteur sent the NHRC a copy of a letter received from Mukhtar Mohammad of Kalol, a prominent activist of the special team who had been named witness in several cases registered by Gujarat police and who alleged that he was being threatened by “influential, dominant and powerful people including politicians and ministers”.

Journalists and documentarists who have tried to rectify the biased reporting of local media by their work on the violence in Gujarat have been labelled ‘anti-national’ and been targeted for harassment as well. The Editors Guild Fact Finding mission report cites examples of interference in TV channels and cable networks, some of which were temporarily closed when they attempted to show live footage of the violence against Muslims. It also lists numerous instances when secular journalists who were harassed and attacked by Hindu right wing activists.²⁶⁸ In October 2003, the VHP forced a Delhi-based

documentary maker to apologize for screening a documentary containing footage of the Godhra train burning and the later violence against Muslims on the grounds that it would disturb the peace in Gujarat. The documentary contains explanations for the burning of the train from a diverse set of individuals some of whom comment on a forensic report that the fire started inside the train. Also in October 2003, allegations of anti-national activities were brought against classical dancer and social activist Mallika Sarabhai; she was charged with trafficking people into the USA. A local court imposed restrictions on her movements outside the state of Gujarat. Reports in a local paper labelled her as a *desh drohi* (traitress against the nation) claiming that her alleged activities could affect the legal entry of thousands of Gujaratis into the USA. Amnesty International believes that the case was maliciously brought to harass her after she had filed a petition in the Supreme Court calling for full and proper compensation to the victims of violent attacks in Gujarat. The Supreme Court subsequently ordered the Gujarat government to lift all restrictions on Mallika Sarabhai’s movements.

7.5.h Failure to adequately protect witnesses

“The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those who [have] political patronage and could wield muscle and money power, to avert [the] trial getting tainted and derailed and truth becoming a casualty. As the protector of its citizens, it has to ensure that during a trial in court, the witness could safely depose [the] truth without fear of being haunted by those against whom he has deposed.” Supreme Court in the judgment on the Best Bakery case, 12 April 2004.

As a result of police failure to adequately register and investigate complaints of girls and women victims of sexual assault, partisan magistrates’ acceptance of closure reports submitted by police and biased public prosecutors’ and judicial officers’ failure to ensure that accused persons were under arrest, the vast majority of the suspects have remained free. They have used that freedom to put pressure on, threaten, harass and bribe victim survivors who have filed complaints and witnesses of the abuses to withdraw their complaints or change their statements.²⁶⁹ The

²⁶⁷ BBC and *rediff.com*, 22 November 2002.

²⁶⁸ Editors Guild, *Rights and wrongs: ordeal by fire in the killing fields of Gujarat*, Editors Guild Fact Finding Mission, 2002, p.23-24.

²⁶⁹ “Witnesses in serious criminal trials regularly turn hostile because there is no witness protection programme, because the police seldom record their depositions before a magistrate and because they almost never prosecute

number of prosecution witnesses who have turned “hostile” to the prosecution under threat to their lives, “sets a new dismal record for the Indian judicial system”²⁷⁰

Effective witness protection is a key measure to ensure justice to the victims in Gujarat. It would contribute to more perpetrators being convicted and punished and to thereby restore a sense of security amongst members of the Muslim minority. The state’s failure to provide timely and comprehensive witness protection is one more facet in its failure to exercise due diligence with regard to ensuring the right to redress of Muslim victims of the violence.

In the case relating to the Best Bakery, the threats exerted on witnesses led to 37 of 73 witnesses deposing before the court turning “hostile” to the prosecution. One of the first available indications in this case that witnesses were being put under pressure to change their statements was provided by Lal Mohamad, who lived in the neighbourhood of the Best Bakery. When police first recorded his statement on 9 March 2002, Lal Mohammad implicated the accused. In a supplementary statement made by him on 16 June 2002, Lal Mohammad said that when his premises were attacked by a mob, he and members of his family were given shelter and protected by some of the persons he had earlier accused. The NHRC in its Special Leave Petition before the Supreme Court said that “this dramatic *volte face* by Lal Mohammad ought to have put the investigating agency on caution that external pressure was being already brought on the witnesses of the crime”. Not only did the police not pay heed to the reasons why he had turned hostile, it made no effort to instil confidence in him to help him abide by the truth. Instead the prosecution presented him as a witness for the prosecution although his supplementary statement had made it evident that he was now supporting the accused. No steps were taken to ensure that other witnesses felt secure to depose before the court once the first witnesses had withdrawn their statements. As a result, thirty-seven witnesses withdrew their statements as they feared for their lives, leading to the acquittal of all the accused.

The NHRC in its Special Leave Petition on 31 July 2003 asked the Supreme Court to lay down guidelines

witnesses who turn hostile for perjury.” *Outlook*, 11 August 2003.

²⁷⁰ *Outlook*, 11 August 2003.

for the protection of witnesses and victims of crime to be adhered to by law enforcement and prosecuting agencies. The Supreme Court on 8 August 2003 directed the state government to provide witnesses with full and complete protection. It again reiterated this direction in September.

Shortly afterwards Vadodara police began to provide protection to several key witnesses but said that some witnesses had not approached them for protection or refused it. Several of the witnesses in need of protection reported to the media that they had been tricked by police into signing documents stating that they did not need protection. Police reportedly took signatures from them on blank forms marked with ‘yes’ and ‘no’ boxes already ticked which the witnesses did not understand but were pressured to sign. They only learned later that the forms were applications for police protection.²⁷¹

In the Best Bakery case, too, such claims were made by state authorities when they said that no witness “had complained to police or the state government about threat or coercion extended to them”.²⁷² Zahira Sheikh and several members of her family in early July 2003 moved to Mumbai where the NGO CJP whom Zahira Sheikh had approached for protection, looked after their financial and security needs. In late November 2003, Zahira Sheikh and several members of her family moved to Mira Road Bhayander, a town close to Mumbai; Zahira stated before local police that she did not request police protection as she lived in close proximity with her family and police presence would make her more conspicuous. Among those who stayed behind in Gujarat, Sahera Shaikh, the elder sister of Zahira, and her family initially refused protection but in mid-September 2003 accepted round the clock police protection. Zahira’s other sister Saira and her husband on the other hand refused protection stating that the presence of the police guards would only draw attention to them and increase their risk.²⁷³

Several of those witnesses who were given protection by Gujarat police reported that such protection was only partial, inadequate and a burden on those meant to be protected. Some of those under police protection also reported that police protection officers had demanded that they be supplied with

²⁷¹ *AFP*, 15 September 2003.

²⁷² *The Indian Express*, 5 September 2003.

²⁷³ *AFP*, 16 September 2003.

food, drink and snacks. In many cases, police instead of being present round the clock to provide effective protection, reportedly only appeared for a few hours a day.

Amnesty International has seen lists of witnesses who were given protection which the witnesses themselves, however, considered inadequate. For instance, of the key witnesses in the Gulberg Society case, 30 stated that their protection was inadequate, at least three had not been given any protection at all and only one had Central Reserve Police protection. Similarly in the Sardapura, Mehsana district case, none of the witnesses, including nine key witnesses, were given any state police protection; there was reportedly a special reserve police tent for "general protection" some distance away from their residences indicated for their use. The witnesses in these cases had applied for protection by a central agency rather than state police protection.

The Gujarat government said on 4 September 2003 before the Supreme Court that it was "rather impossible to comply fully" with the Supreme Court direction of 8 August 2003 to provide full and complete protection to witnesses of the post-Godhra violence. It said there were over 1,400 witnesses and therefore the request was not realistic. The state counsel said that Gujarat state had complied with the court direction and offered protection to 1,187 witnesses in the nine post-Godhra cases short-listed by the NHRC but claimed that most of them had declined such protection or asked that they be provided protection at some later stage. Moreover, the state government said, its police forces were already stretched as "a large number of villages, towns and cities are communally sensitive and as it is, adequate forces are required to be deployed on a permanent basis in such sensitive areas for the maintenance of peace, tranquillity and communal harmony".²⁷⁴ It therefore asked the Supreme Court to modify its order regarding witness protection.

On 27 February 2004, the Supreme Court issued a notice to the central government on a petition filed by CJP seeking protection for witnesses and victims by central agencies such as the Central Reserve Police Force (CRPF). The court argued that in case of federal offences and those relating to the violation of fundamental rights, the federal government should

come forward and provide protection to the witnesses.²⁷⁵

The Supreme Court asked *amicus curiae*, Harish Salve, on 15 March 2004 to identify witnesses in the key cases who were in need of protection by a central security force such as the CRPF. The Solicitor General submitted during the same hearing that there were 1,499 witnesses in the nine key cases and that it would be impossible to provide protection to them all but that the Centre was not averse to providing security through central forces to key witnesses. The Gujarat Additional Solicitor General said that security had been provided by state police to most witnesses. Harish Salve was then asked to identify them; the court also said certain activists like Teesta Setalvad also needed protection and asked central forces to provide it. In the following days Citizen for Justice and Peace submitted a list of some 190 witnesses to the *amicus curiae*.²⁷⁶

On 28 April 2004, a team of 20 officials from the Central Industrial Security Force (CISF), a security force under the Home Ministry that guards public sector areas, the CRPF, and Intelligence Bureau accordingly began a visit to Gujarat to assess the security needs of witnesses. Many of the witnesses told the team that they lived in constant fear as threatening phone calls continued to harass them. They said the CISF presence had worked as a morale booster. One of the eye-witnesses who had lost 10 members of his family on 28 February 2002 told the CISF that state police could not be relied on to protect them "because it was the same people who just kept looking on when our people were brutally murdered".²⁷⁷ CISF officials said that their presence was a confidence building exercise and that once they had understood the apprehensions of the witnesses, a comprehensive witness protection scheme would be put in place. A senior CISF official said: "We are trying to identify the exact reasons behind their fear. We will plan accordingly and in the near future put in

²⁷⁴ *The Indian Express*, 5 September 2003.

²⁷⁵ *AFP*, 27 February 2004.

²⁷⁶ Citizens for Justice and Peace also expressed its "pain, shock and disappointment" at the attitude of counsels for both the state of Gujarat and the Central Government; it said the request for witness protection had never been for all the witnesses but only for key witnesses who numbered around 200.

²⁷⁷ *Indian Express*, 27 May 2004.

place a security system with foolproof strategy to provide the eye-witnesses total safety”²⁷⁸

On 5 May 2004 during a hearing of the NHRC petition on witness protection needs, Solicitor General, Kirit Raval, said the Home Ministry was examining the report of the team’s visit but indicated that deployment of central forces would be limited. He said: “We are inclined to provide protection in one or two clusters like Naroda Patiya but not in all the clusters as suggested by the *amicus curiae*. Where State protection is inadequate, the Centre would step in. But where State protection is adequate, the Centre is not in favour of replacing the State’s security forces. Further, the Central security forces were already overburdened due to election duty”.²⁷⁹ In late May 2004, a 100 man contingent of CISF was deployed in Gujarat, to patrol and protect witnesses in Dahod, Himmatnagar, Vadodara, Godhra and Ahmedabad. A victim of the riots whose wife and daughters were burned alive is reported as having welcomed the move: “We never trusted the local police as they always worked in collusion with Hindus who participated in the riots. We now feel, justice is not far away”.²⁸⁰

Activists working in the state of Gujarat reported to Amnesty International in mid-2004 that all key witnesses in the state in need of protection had finally received adequate protection. Acknowledging the country-wide problem relating to witness protection and responding in particular to the Supreme Court’s observation in the Best Bakery case calling for legislative measure in this regard ²⁸¹, the Law Commission of India in August 2004 presented a Consultation Paper on Witness Identity Protection and Witness Protection Programmes.²⁸² Amnesty International submitted its recommendations to the Law Commission of India in November 2004.

The crucial issue of witness protection came once again to the fore when on 3 November 2004, key

witness and original complainant in the Best Bakery case, Zahira Sheikh, in a press conference in Vadodara retracted her previous statements. She claimed that the organisation which had supported her all along and helped her petition the Supreme Court, the CJP and its secretary Teesta Setalvad and her colleague Rais Khan had had her kidnapped by local residents, wrongfully confined her in Mumbai and forced her to lie “in the interest of the Muslim community”. They had “tutored” her, she said, to implicate the 21 accused in the Best Bakery case after the acquittal by the trial court. In fact, these 21 people were innocent, she said.²⁸³ She also claimed that Teesta Setalvad had made her sign legal documents in English which she did not understand and took the issue to the Supreme Court against her wishes. Zahira also stated that she had filed an affidavit before the Vadodara Commissioner of Police and the Vadodara Collector stating her allegations and seeking Gujarat police protection. Zahira Sheikh also petitioned the National Commission for Minorities for protection against the CJP, pleading helplessness on account of her minority status. She also met the Chairperson of the National Commission for Women who said that the matter was *sub judice* and the Commission therefore had no jurisdiction over it.

Zahira Sheikh, her mother and two brothers were at the time under the protection of Gujarat police and, out of reach of the media, moved from one undisclosed location to another in different cities of Gujarat. Nafitullah Sheikh, Zahira’s elder brother had earlier told the court that the organisation Janadhikar Samiti, a Vadodara anization with links to the *Sangh Parivar*, had organised and financed Zahira’s press conference on 3 November. This was confirmed when Tushar Vyas, an advocate from Vadodara, stated that Zahira had approached the organisation for help. Vyas and Ajay Joshi, the Vadodara VHP President, had set up the organisation after the Godhra incident; it reportedly took formal shape after the Supreme Court judgment in the Best Bakery case.

²⁷⁸ *Indian Express*, 27 May 2004.

²⁷⁹ *The Hindu*, 6 May 2004.

²⁸⁰ *Reuters*, 26 May 2004.

²⁸¹ “Legislative measure to emphasise probation against tampering with witnesses, victims or informants, have become the imminent and inevitable need of the day.” The Supreme Court has since sought responses from various states on the question of witness protection.

²⁸² The Paper running into over 300 pages is available on the website of the Law Commission of India, www.lawcommissionofindia.nic.in

²⁸³ The written statement which Zahira Sheikh read out in Vadodara said, “[w]hat I have said before the Baroda [fast track] court was the right statement. The Best Bakery judgment of Baroda was right.”

At earlier stages of the retrial in Mumbai, four witnesses identified several of the persons accused in the original trial. In November and December 2004, Zahira Sheikh, her brothers Nasibullah and Nafitullah, her mother Sehrunissa and her sister Saira stated in court that they did not know any of the accused, did not know how their own relatives had died as thick smoke had enveloped the bakery during the incident and that they could not recall their own earlier statements. They were declared hostile to the prosecution. On 22 December 2004, the weekly magazine *Tehelka* released secretly filmed material which purports to show Zahira and her family negotiated payment of a large amount of money obtained from a relative of BJP MLA Madhu Srivastava in return for withdrawing earlier statements implicating the accused. Chandrakant Srivastava and Madhu Srivastava have denied the allegations. The veracity of the *Tehelka* materials has not so far been scrutinized and established.

Teesta Setalvad on 6 November filed a petition in the Supreme Court requesting that it order a CBI inquiry into the allegations made by Zahira Sheikh against herself and her colleagues in the CJP. She requested that the inquiry is requested to examine the circumstances which led Zahira Sheikh to make her statement on 3 November before the press in Vadodara, the persons who assisted her in the process and the role of the Vadodara police who were present at the press conference. The petitioner stated that Zahira Sheikh's "unfortunate and utterly mala fide allegations" were baseless and that all affidavits written in English were translated into Hindi before Zahira signed them. Moreover, the history of Zahira's statements, many of them sworn affidavits, showed that she had named the accused well before meeting members of the CJP.²⁸⁴ By the end of the year, the Supreme Court had not decided the petition.

²⁸⁴ Zahira first named the accused before police on 2 March 2002, immediately after the events in the Best Bakery; she repeated the same statement before the Concerned Citizens Tribunal on 11 March 2002, the chairperson of the NHRC when he visited Gujarat in late March 2002 and again before the Nanavati Shah Commission on 20 May 2002. After having declared that she had withdrawn her statement in court out of fear, Zahira Sheikh made several statements on oath in which she named the accused, including before the full bench of the NHRC on 11 July 2003 and in the

As there were indications that Zahira Sheikh might bring criminal charges against Teesta Setalvad and Rais Khan for illegal confinement and criminal intimidations, these two persons sought pre-arrest bail. On 9 November the Mumbai High Court ordered police in Maharashtra and Gujarat not to arrest either petitioner until further notice. On 10 November, the Mumbai High Court directed the Gujarat government to declare its stand on 23 November. On that day, the Gujarat government declared that no FIR had been filed against Teesta Setalvad or Rais Khan. The Mumbai High Court then disposed of the anticipatory bail applications and directed the Gujarat and Maharashtra governments to give 72 hour notice in case criminal charges against either of the petitioners were registered.

Responses to this latest reversal by Zahira Sheikh have been divided. Prime Minister Dr Manmohan Singh stated that this was a matter "which we should ponder and reflect" on. Chief Minister Modi said the issue raised some "serious questions" about the working of non-governmental organizations. He said, "the country, its citizens and constitutional bodies now need to look into the role of NGOs." Muslim victims in Gujarat have expressed their sense of "betrayal"; her former Muslim neighbours have been reported to accuse Zahira of "colluding with the state government". Professor J.S. Bandukwala of Vadodara University said, "[w]e feel embarrassed and saddened by this" and Mukhtar Mohammad, a human rights activist from Vadodara said the Muslim community was "confused" by the latest development. "Since she has changed her statements so many times, it looks like she is doing it under pressure from someone."²⁸⁵

Teesta Setalvad, at a meeting on 9 November with human rights activists in Mumbai insisted that Zahira was "not a culprit. She was a victim at the start of the trial, she is still a victim." Local media meanwhile reported that judge Thipsay presiding in the court retrying the Best Bakery case had received some 100 hate letters since the beginning of the trial. They contained threats against him and his family as well as against Teesta Setalvad. They were given police protection.

affidavits accompanying the PIL filed in August 2003 in the Supreme Court.

²⁸⁵ Both quotes in *Indian Express*, 4 November 2004.

Zahira Sheikh's case focused attention on the problems faced by victims who without adequate counselling for the trauma suffered, without long lasting support and perspective for the future, adequate compensation for losses suffered and comprehensive protection from external pressures remain vulnerable and may forsake their quest for justice.

Not only witnesses, victims and complainants in the court cases but also those deposing before the Nanavati Shah Commission reported that they had had received threats and intimidation causing several others not to appear before the Commission for fear of retribution. Among witnesses who have come under threat was Zakia Jafri, the widow of Ehsan Jafri who had been brutally hacked to pieces in the Gulberg Society, Chamanpura, incident. Ehsan Jafri's son, Tanvir Jafri reported, "[w]hen the press were interviewing her [after the hearing by the Commission], Bajrang Dal people ambushed us and started abusing us. The police did not do anything. We had to run".²⁸⁶

In mid-September 2003, a group of 16 non-governmental organizations submitted an application to the Nanavati Shah Commission to bring to its notice the alleged intimidation of survivor victims coming to testify before it and to seek a safer environment for them. It said the presence of a large number of police officials from the respective police stations made it difficult for victims to speak out as they felt intimidated and afraid to testify in their presence and hence asked for the removal of all police during hearings by the Commission. Moreover the state government had made public statements in verbal or written form commenting on witnesses and their counsels which unduly exposed them to the public. It also asked for victims to be examined on a stipulated date without the presence of local police officials. The application said that many victims from Naroda area could not appear before the Commission on 27 and 28 August because of threats and intimidation by their local opponents.

The Commission on 16 September 2003 passed an order restricting witnesses and lawyers from giving interviews on the Commission premises or criticising anyone's statements made before it. It also directed the state counsel to limit the number of police

officers present during witnesses' depositions to a minimum. It agreed that only three police officers should be present when witnesses gave their account, namely one from the concerned police station who knows about the incident, one to produce the relevant record and a senior officer responsible for co-ordinating the presentation of records. In December 2003, the Commission directed that police, members of the VHP, BJP and other organizations stay away from victims appearing before it, stating that "any attempt made by the agencies, VHP or BJP to contact or pressurise the witnesses directly or indirectly will be taken very seriously and orders will be passed for initiating action against them".²⁸⁷ No action was, however, initiated against those who had earlier harassed or pressured witnesses. Several hearings of the Nanavati Shah Commission were subsequently reported to be held *in camera*.

7.6 Failure of the government of Gujarat to provide adequate reparation including relief, compensation and rehabilitation

"Public authorities in Gujarat not only refused to extend relief, or rehabilitate those destroyed by waves of mass violence ... but systematically created roadblocks for other agencies which attempted to substitute for the State and forced the closure of relief camps after paying people a pittance ... The denial of relief and rehabilitation by the government of Gujarat is a harrowing and disgraceful tale of a premeditated, unrepentant, merciless and perverse exercise of public authority." Former civil servant and social activist Harsh Mander²⁸⁸

Observers agree as to the failure of the state to provide reparation including relief, compensation and rehabilitation to the Muslim victims of the violence in 2002. This is aptly summarized by the International Initiative for Justice in Gujarat as "the complete indifference of ... state institutions in providing humanitarian and medical support, or compensation to the violence affected".²⁸⁹ Similarly the Concerned Citizens Tribunal holds Chief Minister Modi "accountable for criminal negligence of duty in failing to provide any relief and rehabilitation to the victims

²⁸⁶ *Frontline*, 2 December 2003.

²⁸⁷ *Indian Express*, 12 December 2003.

²⁸⁸ *Frontline*, 19(19), 14-27 September 2002.

²⁸⁹ International Initiative for Justice: *Threatened existence: A feminist analysis of violence against women in Gujarat*, p.2.

of the carnage in Gujarat”.²⁹⁰ The Medico Friends Circle similarly in its 2003 annual meeting announcement said, “in a situation when the entire state machinery stands implicated, timely, appropriate and non-discriminatory medical care assumes critical importance, and it is the response of the health services which determines the fate of the affected people. ... The response from health groups for relief work and medical assistance for the riot victims has been poor, to say the least”. Many have pointed to the contrast between the situation in 2002 and the comprehensive relief, compensation and rehabilitation packages put in place a year earlier after the earthquake in Gujarat.

It is a fundamental principle of international law that victims of human rights abuses receive reparation and have access to an effective remedy, specifically the procedural means by which forms of reparation can be obtained. This right is enshrined in the Universal Declaration of Human Rights and embodied in core human rights treaties including the ICCPR. It is also considered a principle of customary law, binding on all states. Accordingly, the Government of India is obligated to provide all victims of human rights abuses with appropriate forms of reparation and to enforce this right.

While the obligation of the Indian state to provide reparation is not contained in any specific domestic statutory law, this principle is not under serious challenge. It may also be seen to derive from several articles of the constitution. The Constitution of India guarantees the right to life in Article 21 which has been interpreted to mean to include the right to livelihood and a life with human dignity. Article 39 lays down among the directive principles of state policy that the state direct its policy to ensuring adequate means of livelihood, adequate health and the healthy development of children. Article 41 states that the “state shall, within the limits of its economic capacity and development, make effective provisions for securing the right to ... public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want”. Several judgments of the higher judiciary have recognised the state’s obligation to provide compensation.²⁹¹

²⁹⁰ Concerned Citizens Tribunal, *Crime against humanity*, vol. II, p. 79.

²⁹¹ See for instance the decision of the Madras High Court with regard to the Coimbatore riots where it recognized the

Amnesty International believes that the Government of Gujarat and the Central Government have failed to fulfil their obligations under international and national law to provide appropriate reparation to the victims of the violence against Muslims in 2002. While the state may seek the assistance of non-governmental bodies in this regard, it may never abandon its central responsibility for providing food, shelter, physical, psychological and economic rehabilitation including compensation to victims of natural or man-made disasters.

The failure to provide effective forms of reparation to victim survivors was particularly pronounced with regard to the most vulnerable section of victims, women and children. Having been subjected to or having witnessed sexual assault, having lost family members including their husbands, having lost homes and possessions, women were often left in charge of children and elderly parents without the wherewithal to sustain themselves and their dependents.

7.6.a Failure to provide adequate relief

While the NHRC noted that efforts had been made by many Collectors and other district officers to provide interim relief to victims, often acting on their own initiative, the state government did not provide a single camp or welfare centre for those affected by the violence.²⁹² According to reports, official recognition of the rapidly filling privately run relief camps began on 6 March 2002 but it took several days for the administration to complete relevant administrative tasks. District administrations then began providing uncooked food rations and water in bulk. In a few cases sanitation and some medical care through occasional visits by medical teams to camps were provided. A grant of five rupees per family for various expenses began to be distributed about 10 days after camps had opened. Government contributions were in some camps augmented by international organisations, such as UNICEF, or the Indian Red Cross. In response to a petition filed by

duty of the state of Tamil Nadu to provide compensation. *R. Gandhi and others v Union of India and others*, AIR, 1989 Mad 205.

²⁹² “The State took absolutely no responsibility to provide any safe locations for members of the Muslim community who were fleeing from mobs and attackers”, the International Initiative for Justice in Gujarat concluded after its investigation. *Threatened existence: A feminist analysis of violence against women in Gujarat*, p.41.

six relief camps, supported by the non-governmental organisation CJP, the Gujarat government gave assurances before the High Court in April 2002 that it would assume its constitutional duties to provide adequate relief to the camps, including food, water, sanitation, medical aid and tents for the inhabitants. However, reports continued to be received that none of these provisions were adequate. Medical assistance remained poor, restricted to a few hours' visits and lacking any kind of privacy in which victims could confidentially report their complaints to doctors.

Relief and shelter were provided by the Muslim community itself; it was carried out by its organizations and many individuals, who had themselves been affected by the violence.²⁹³ They set up and ran relief camps in schools, graveyards, mosques, shrines and open spaces in Muslim dominated areas in both urban and rural areas. They mobilized food, medicines and shelter for those displaced during the violence. No accurate figures of persons sheltering in camps are available; camps in Ahmedabad alone by 5 March 2002 accommodated according to official estimates 66,000 people while independent assessments speak of 98,000 people. Unofficial estimates and official figures speak of another 76,000 and 25,000 persons respectively displaced outside Ahmedabad, many in remote and insecure locations and deplorable conditions. While most estimates are of 100,000 people in camps in Gujarat, taking into account those displaced who moved in with families and friends, the total number of internally displaced people is estimated at not less than 250,000 persons.²⁹⁴

In the initial stages of the flight of terrified Muslims from mob violence, many non-Muslim individuals, including from the tribal and Hindu community supported them, providing food and shelter, often at great risk to themselves. Many civil liberties groups from other parts of India also came forward to provide support, collect and distribute food, clothes and medicines or offered their services in attending to the injured or helping victims file complaints and

claims for compensation or retrieving property records.

Activists have noted with regret that political parties, while critical of the state BJP government, were not effective in providing a critical analyses or exerting pressure on the central and state governments to stop the violence and provide redress. National newspapers which in times of crisis regularly set up relief funds, did not do so in 2002. International responses including from the UN system and other international aid agencies were weak and did not put sufficient pressure on the state to provide relief to thousands of internally displaced victims, many of whom were women and children, nor provided adequate assistance themselves. Governments around the world by and large ignored the humanitarian crisis in Gujarat, providing no relief to the thousands of displaced persons in the state.

While non-governmental initiatives were crucial to the survivors, they were far from sufficient, given the enormity of the needs. The lack of appropriate support measures was particularly dire in view of the comprehensive economic losses suffered by the displaced Muslim population, many of whom had lost all their possessions. Sanitation and clean drinking water in the camps remained a problem which the government refused to address, making the displaced prone to disease. The lack of cover was particularly serious during the monsoon as many camps had been set up in low lying areas, exposing them to rain and water-borne diseases.²⁹⁵

Government responses to the relief camps were consistently slow and negative.²⁹⁶ The NHRC also noted that when its Chairman visited the biggest camp, Shah Alam in Ahmedabad, on 20 March 2002, no higher state officials had deemed it necessary by then to visit the camp to express their support for the victims. On 6 March 2002, when the violence in the state was still ongoing, the State Minister for Food and Civil Supplies publicly said that Hindus in his constituency felt insecure due to the presence of a relief camp nearby which should therefore be closed down. Chief Minister Narendra Modi on 9 September 2002 in Mehsana district where a high level of

²⁹³ There were also a few relief camps for Hindus who feared attacks from neighbours in Muslim dominated areas. They were similarly run by Hindu organisations and benefited from more state support. Medico Friends Circle, *Carnage in Gujarat: a public health crisis*, May 2002.

²⁹⁴ Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 122.

²⁹⁵ The intervention of activists and organizations enabled displaced people in some camps to construct rain shelters immediately before the outbreak of the rains.

²⁹⁶ The Election Commission report of 16 August 2002 emphasized the slow progress of relief and rehabilitation.

violence had occurred, publicly said during a rally: "Relief camps are actually child-making factories. Those who keep on multiplying in population should be taught a lesson".²⁹⁷ He also said: "What should we do, run relief camps for them? Do we want to open baby producing centres?"²⁹⁸

Not only did the state not assist communally run relief efforts and denied prompt and adequate relief assistance; state agents, including police were also reported to have hampered trucks carrying privately mobilized relief materials from reaching the camps. Police harassment of camp residents and arbitrary raids was also reported.

In the beginning of March 2002, while the violence was still ongoing, the Gujarat government took steps to close the camps as quickly as possible to create the impression that normalcy had returned in the state, in an apparent effort to deflect international attention and to prepare for elections which were brought forward to December 2002. However, this was done without providing rehabilitation to people in camps or their relocation to other secure locations. The NHRC in its proceedings of 31 May 2002 noted the state government's assurances given on 12 April that people in camps would not be asked to leave the camps until appropriate relief and rehabilitation measures were in place and they felt secure to leave the camps. It also recorded its concern that many had left the camps because of pressures being exerted on them or because of intolerable living conditions in camps. It recommended that a committee consisting of the Collector, an NGO representative and an NHRC member be set up and consulted on every decision regarding the camps. This recommendation was not implemented.

As threats of closure persisted, CJP on 31 May 2002 filed an application in the Gujarat High Court to obtain an assurance that relief camps would not be forcibly closed and received oral assurances from the government counsel that the camps would remain open until 30 June. However, forcible closure of camps in rural areas had begun in May and camp administrators continued to be harassed and coerced to shut down the camps. Often water supply was stopped or rations reduced to make it impossible for the camp administration to provide food and water to

people in the camps. The petitioners submitted a state-wide survey of displaced persons to the court asking the state to set up a monitoring committee to facilitate rehabilitation. The state claimed in court that there were 13,482 displaced person in the state for whom it supplied food grains.

In August 2002, Shah Alam camp, the largest camp in Ahmedabad, was shut down leaving people helpless about where to go.²⁹⁹ UN High Commissioner for Human Rights Mary Robinson in September 2002 called on the Government of India to ensure that internally displaced people were not cut off from relief as a result of the closure of yet more camps. At the time, almost all of the 121 official camps were rapidly closing and people moved to unofficial camps, to live with friends and neighbours, or were destitute and lived in the open. The High Commissioner emphasized the responsibility of the state to ensure conditions which made it possible for people to return to their homes voluntarily and with dignity.³⁰⁰

Amidst allegations of serious financial irregularities by the state bureaucracy, the state government in October 2002 announced that all camps must be closed by the end of the month. One of the last to close was the Haji House in Ahmedabad. Almost one hundred of the last people staying there had pleaded that they had nowhere to go.³⁰¹ Rehabilitation of many people in camps had remained incomplete and many found it impossible to return to areas and villages which right wing Hindu inhabitants had declared "Muslim-free".

Responding to concerns expressed in the 7th report of the Lok Sabha Committee on Empowerment of Women (2002) that camps were being closed down despite protests and the unwillingness of inmates to leave, the state government denied that it had closed down any camps and reported that due to its "confidence building measures like providing additional security, involving the village elders and local leaders in the peace process, convening Peace Committees meetings arranging shelters in pucca

²⁹⁷ *The Hindu*, 10 September 2002.

²⁹⁸ Quoted in Concerned Citizens Tribunal, *Crime against Humanity*, vol. II, p. 124.

²⁹⁹ *Indian Express*, 26 August 2002.

³⁰⁰ UN press release of 4 September 2002.

³⁰¹ Ayub Khan, organizer of the Haji House Camp said at that time that about 100 people in the camp from Saraspur and Vatva had not received any compensation at all. The Gujarat state Chief Coordinator for Relief said, "We have given them cheques to repair their homes and also sufficient time to construct their homes". *Milli Gazette*, 5 November 2002.

buildings during monsoon" etc, normalcy had been restored and inmates had left the camps.

7.6.b Failure to provide adequate compensation

"If a person who has lost human beings, his house, his business, his homeland, if after losing all this, the compensation given to him is Rs.5,000, can he rebuild his life?" A survivor before the Concerned Citizens Tribunal.

The NHRC recommended that "adequate compensation be provided for those who have suffered. This will require an augmentation of the funds allocated thus far, through cooperative arrangements involving both the State and Central Governments".³⁰² It also recommended involving other domestic and international agencies and programs as well as private sector participation in relief and rehabilitation. Further, the NHRC said: "The role of NGOs should be encouraged and be an intrinsic part of the overall effort to restore normalcy, as was the case in the coordinated effort after the earthquake. The Gujarat Disaster Management Authority, which was deeply engaged in the post-earthquake measures, should be requested to assist in the present circumstances as well".

Under pressure from civil rights groups, individuals and media, the state government announced some "aid, assistance and relief" measures. However, as the International Initiative for Justice in Gujarat has pointed out, the state used the terms "assistance" rather than "compensation" indicating that the state considered these payments not as a right or entitlement of the victims but as charitable measures.³⁰³ The state reportedly explicitly refused foreign aid to supplement state funding for relief and rehabilitation.

³⁰² NHRC Newsletter, April 2002, expanded recommendations in the NHRC proceedings of 31 May 2002.

³⁰³ The Gujarat state Chief Coordinator for Relief said, "[w]hat we are giving is assistance, not compensation. Aid is given as per the government engineers' estimates." The Ahmedabad District Collector said, "[w]e verified records before giving compensation. The scope for mistakes is very small." *Milli Gazette*, 5 November 2002.

On 4 April 2002, then Prime Minister A.B. Vajpayee announced during his visit to Gujarat the allocation of 150 *crores* of rupees (US \$32.6million) for the rehabilitation of victims but no official accounts are available on how the money was spent or how many people received assistance.³⁰⁴ Supplementary measures were to be taken by state financial and development corporations. The Chief Minister announced that Rs two *lakhs* (about US \$4,350) would be paid in assistance to relatives of those killed in the Godhra incident and Rs 1 *lakh* (US \$ 2,175) to relatives of those killed in the later violence.

The NHRC in its preliminary comments and recommendations of 1 April 2002 noted that the state government had decided on 9 March 2002 to pay the same amount to both groups of relatives of victims only after the Chief Minister had received a letter "on behalf of the *kar sevaks* [saying] that they would welcome financial help of Rs 1 *lakh* instead of Rs. 2 *lakhs* to the bereaved families of [the] Godhra massacre". The NHRC added that this decision ought to have been taken by the government itself in view of the fact that a discriminatory allocation of compensation "impinges seriously on the provisions of the constitution contained in Articles 14 and 15, dealing respectively with equality before law and equal protection of the laws within the territory of India, and the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth". Subsequently, 150,000 rupees were disbursed for the death of a relative, with 50,000 rupees contributed from the Prime Minister's relief fund added to the state compensation of Rs 1 *lakh* provided by the state.

A government notification said that disbursement of assistance would follow the norms fixed for the victims of the earthquake in 2001. Building "assistance" of up to 50,000 rupees given for destroyed houses; cash "assistance" for loss of household effects up to 3,000 rupees; "aid" for disability as a result of the violence between 2,000 and 10,000 rupees.

While compensation can never fully make up for loss of life, dignity, livelihood, sense of security and property of the victims, the state of Gujarat has made no effort to set up a mechanism whereby losses can be objectively assessed as a first step to providing

³⁰⁴ One *lakh* is equal to 100,000, one *crore* is equal to 10 million.

adequate compensation. To avoid arbitrary assessments of property loss, the NHRC urged that the state government set up “credible mechanisms for assessing damages done to homes and items of property” to ensure just and speedy compensation disbursement and also suggested that national finance institutions be involved to facilitate special loans to the needy.³⁰⁵

In practice, compensation payments were grossly inadequate and arbitrary and bore no relation to actual losses or damage and left many displaced persons in acute destitution; nor were independent assessments undertaken. Though 50,000 rupees were to be given for the loss of homes, in practice this has not been done. According to the report of a non-governmental organisation, *Disha* of Wadali Camp in Dahod, most people received house compensation of only 200 to 500 rupees. At least 25 per cent of victims have received no compensation, and less than 10 per cent have received compensation of more than 30,000 rupees for the loss of their homes. Many people deposing before the Nanavati Shah Commission complained about the inadequate amounts of compensation received by them. Mehrunissa Sheikh from Madhavpura, showed the Commission a cheque of 100 rupees which she had received for her house which was destroyed in the violence and which a government officer had assessed as worth 300,000 rupees. Justice Shah said, “It should shame both those who receive and those who award such compensation”.³⁰⁶ The amounts of compensation did not enable the recipients to rebuild their homes. “In many cases one cannot even buy a

door for the house from the compensation amount paid”, concluded a civil liberties group.³⁰⁷

The process of claiming compensation was not adjusted to the particular situation of the victims, making compensation or “assistance”, while theoretically available, slow, insufficient and difficult to obtain for victim survivors. Many victims were too traumatized to fulfil the legal requirements in relevant forms and claims or lacked the will and ability to document and pursue their claims. Many ownership records were not clear, had been left behind, were destroyed or had not been adequately recorded in the first place, making claims impossible to substantiate. Much of the agricultural property was undocumented and made compensation claims for loss or damage virtually impossible. According to reports victims in some cases had to bribe officials to take note of their claims.³⁰⁸

As noted above, many deaths were not recorded by police who had simply declared such persons “missing” instead; the authorities refused to provide death certificates if a body was not found. This ignored the reality that many bodies were burned beyond recognition and relatives, though they may have witnessed the deaths could not prove them. Legally such deaths were treated as “missing” for which relatives are not entitled to compensation. Gujarat Government resolution No RHL 102002-681-S-4 of 6 April 2002 stated that if a dead body is not found and a person is declared missing, compensation is given to the heirs only after scrutiny. The NHRC recommended in its proceedings of 31 May 2002 that “procedures should be simplified for obtaining death certificates and ownership certificates, in order to expedite the giving of compensation”. Others have suggested that new mechanisms be developed to establish deaths including a specified number of affidavits by eye-witnesses and/or recourse to documents including census records, voters’ lists, ration cards or birth certificates. So far, none of these recommendations have been implemented, with the result that few people have been able to claim compensation for the death of family members declared “missing”. In Panchmahal district, where at least 193 people were reportedly killed, compensation has only been paid for 75 deaths

³⁰⁵ Petitions pending in the Supreme Court included inter alia requests to the court to direct the determination of the liability of the state of Gujarat as well as Hindu organizations. In particular, to direct them to pay compensation (in *Dr. Mallika Sarabhai and others v. Union of India and others*), to request that the government not close camps and to re-open relief camps, declare existing relief schemes inadequate and fix reasonable amounts of compensation (in *Mahashweta Devi and others v. Union of India and others*). These petitions were linked to the NHRC petition relations to the Best Bakery case and more generally witness protection issues in various cases connected to the violence in Gujarat. In its latest hearing of 17 August 2004, the Supreme Court disposed of those sections of the petitions relation to compensation saying the petitioners could approach the state High Court where a number of similar petitions have been pending.

³⁰⁶ *Press Trust of India*, 23 August 2003.

³⁰⁷ Foundation for Civil Liberties, *Untold stories*, several volumes on major incidents, 2002.

³⁰⁸ International Initiative for Justice in Gujarat, *Threatened existence*, p. 43.

as relatives had been unable to prove the other deaths. A civil liberties organisation concluded with regard to the whole of Gujarat, “[m]ore than 50% of deaths have not been recorded by the police, instead they are reported missing. Therefore no compensation for them”.³⁰⁹ There is also no provision for compensation for death caused by police firing.

The NHRC recommendations paid special attention to the needs of women affected by the violence. It said, “[s]pecial efforts will need to be made to identify and assist destitute women and orphans, and those subjected to rape. The Women and Child Development Department, Government of India, and concerned international agencies/programmes should be requested to help. Particular care will need to be taken to mobilize psychiatric and counselling services to help traumatized victims. Special efforts will need to be made to identify and depute competent personnel for that purpose”.³¹⁰

While state compensation or “assistance” were generally inadequate and hard to obtain, the specific needs of women victims, traumatized and with dependent, severely traumatized children, should indeed have been a special focus of state attention and compensation. Similarly orphans’ needs were particularly pressing. In reality, both groups were totally ignored; where compensation was paid at all, relatives of widows and orphans often took it with little benefit to their lawful recipients.

Contrary to official statements that “assistance” would follow the norms fixed for the victims of the 2001 earthquake, this was not true in all respects. Whereas the earthquake relief had recognized a category of “injury” for which compensation and reimbursement for medical treatment was paid, in 2002 no relief was provided for injury. Gujarat Government resolution No. RHL 232002-513(2),

³⁰⁹ Foundation for Civil Liberties, *Untold stories: case studies of judicial redressal*, several volumes. 2002.

³¹⁰ *NHRC Newsletter*, April 2002. The NHRC proceedings of 31 May 2002 spelled out these recommendations in greater detail, e.g. “The plight of women and children, particularly widows, victims of rape and orphans remains of particular concern to the Commission. It is essential that their names and other details be recorded with care and individual solutions be pursued for each of them, whether this be for financial assistance, shelter, medical or psychiatric care, placement in homes or in respect of recording of FIRs and the prosecution of those responsible for their suffering...”

dated 30 April 2002 restricts assistance for medical aid to cases where there is temporary or permanent disability. Consequently there is no entitlement to compensation or reimbursement of medical assistance available for serious burn injuries, cuts and bruises and internal injuries sustained in sexual assault which did not lead to disability. “The financial assistance offered by the government is not only a mockery of the term compensation, but is also a failure to grant gender-based violence the status of ‘injury’ even on paper.”³¹¹

Widows were in a particularly vulnerable situation as they were often overwhelmed by the responsibilities they had to shoulder and often were bereft of all means of livelihood. The International Initiative for Justice in Gujarat reported that in one locality they came across a dozen widows whose houses, possessions and crops had been destroyed and whose applications for a widow’s pensions (500 rupees a month; US \$11) had not been answered. Compensation for the deaths of their husbands, if paid at all, had often been received by male relatives and did not benefit the widows.

The PUCL Vadodara reported that for women in the relief camps the issue of compensation had become a source of particular indignation and anger. Many reported suffering losses of several hundreds of thousands of rupees and being offered cheques of 10,000 rupees which they had refused on principle. Other women had accepted this as they were too desperate to refuse.

7.6.c Failure to provide adequate rehabilitation

While adequate compensation and detailed rehabilitation packages enabled victims of the earthquake in 2001 to rebuild their lives themselves, no such comprehensive measures were taken in 2002. The government rejected responsibility for rehabilitation of the victims outright. During a meeting with a large delegation of representatives of the Muslim community, the Chief Minister rejected the demands of violence affected victims for resettlement in alternate resettlement sites and refused funds for rebuilding ransacked shrines despite clear NHRC recommendations in this regard.³¹²

³¹¹ International Initiative for Justice in Gujarat, *Threatened existence*, p.45

³¹² *The Times of India*, 8 June 2002. The NHRC recommended that all places of worship that were destroyed in the violence

Consequently, no survey of needs was conducted. After privately run relief camps were closed, no alternative housing was provided forcing those once again displaced to seek refuge with relatives or move into rented accommodation, provided they could pay for it. No physical and psychological rehabilitation was provided by the state.

The BJP-VHP call for a boycott of Muslims further aggravated this situation. Leaflets circulated even before, but especially after, February 2002 called for a systematic economic boycott of Muslims, urging Hindus not to buy from Muslims or to sell to them, not to use their services of any kind, not to employ them or be employed by them, with the clearly expressed objective to drive them from the state. It has been strictly enforced, with people who ignore the boycott call being threatened by right wing groups. Without work, many Muslim families have sunk into penury. Then Attorney General, Soli Sorabjee, while criticising the Modi government's reluctance to take necessary steps to restore confidence of the minority, reportedly particularly criticised its support for the social and economic boycott of minorities.³¹³

Neither the physical, psychological or economic rehabilitation needs of women survivors have been addressed by the state of Gujarat. Women's physical health needs, including the restoration of their reproductive and sexual health after being subjected to sexual abuse, were ignored. No attention has been paid to sexually transmitted diseases, injuries suffered in gang rapes, pregnancies and abortion. In relief camps, lack of privacy and medical care led many women to initially ignore such needs. MFC found many of the physical effects of the violence suffered by women victims of violence, including disrupted menstrual cycles, pain and vaginal infections apparently caused by the stress and trauma experienced which may have been aggravated by remaining untreated.³¹⁴

Many women suffered the trauma of sexual assault or witnessing family members injured or killed; many also felt deeply disturbed by their experience of neighbours suddenly and violently turning on them.

be repaired expeditiously with assistance by the state. NHRC Newsletter, April 2002.

³¹³ *The Asian Age*, 4 September 2003.

³¹⁴ MFC, *Gujarat carnage and the health service: A public health disaster*, May 2002.

Women also felt overwhelmed by unaccustomed responsibilities of fending for their families alone in the absence of male relatives either dead or in hiding. They were consistently dismayed by the effect the violence had had on their children. Many children had witnessed their parents and other relatives humiliated, injured, raped and burned alive; some had been injured themselves without their parents having been able to protect them. Fear of Hindu attacks also stopped many parents from sending their children, particularly their daughters, to school.

Local observers have pointed out that "overarching fear has become part and parcel of life for women" for which no counselling was available.³¹⁵ This fear relates to fear of the future, for themselves, their families and community and includes the fear of sexual assault, sometimes further sexual assault, and abuse as well as fear for the safety of family members, including children. The government rehabilitation policy, in itself grossly inadequate, had no specific provisions for women victims of sexual violence such as safe spaces to which women could withdraw and recover. Women who were able to remain in their homes or to return to villages after agreeing to "compromises" may also daily face humiliation when they meet men in public who had forced them or their relatives to walk naked or who had raped them.

Doctors who had volunteered to work with victims in the relief camps told an MFC team in April 2002 that post traumatic stress disorder, depression, anxiety, and other mental health problems were widespread, leading to withdrawal, sleep disturbances, nightmares and somatic complaints and would require long-term counselling and support. A study conducted by two doctors of B.J. Medical College Ahmedabad, found that 113 of 300 women who had been exposed to the violence had symptoms of disorder.³¹⁶

The vast majority of women victims with mental problems caused by the violence did not receive adequate and systematic counselling. The MFC in its May 2002 report stated that "there is no acknowledgment of the need to provide treatment for post traumatic stress disorder ... the only emotional support is provided by camp volunteers with no training or support for this work. ... Medical

³¹⁵ People's Union for Civil Liberties, Vadodara and Vadodara Shanti Abhiyan, *At the receiving end: Women's experience of violence in Vadodara*, May 2002, p.13.

³¹⁶ *Islamic Voice*, January 2003.

professional and camp volunteers had strikingly different attitudes to people's mental health needs. The MOs [medical officers] providing medical care at camps consistently undermined the importance of dealing with psychological trauma. Any sign that people were returning to a routine was taken as proof that they were not traumatized." In fact, the MFC found not only indifference but open disdain for displaced people amongst public health officers. The report quoted a senior government health administrator as saying, "camp inmates do not have the brains to understand that they are suffering from stress and mental trauma".

The Government of Gujarat claimed that 40 counselors had visited the camps regularly and worked with 3,824 children, 3,107 adolescents, 4,305 adult women and 4,635 aged persons. It stated that "a total of 17,285 persons were covered in trauma counselling and treatment."³¹⁷

Women's sense of vulnerability has been enhanced by their loss of livelihood which was exacerbated by the economic boycott. Widows were often not trained or accustomed to work outside their homes and earn a living. Most women who had worked before the violence found it impossible to continue or resume work. Many women had to give up home industries because they were injured or had to leave the locations in which their wares had earlier been sold or were afraid to leave the camps. Women daily wage earners were dismissed either because their employers supported the economic boycott of Muslims or because they feared repercussions if they ignored it. No retraining facilities or financial support were provided for women who had lost their work in the caring professions such as nurses, teachers and domestic workers. Most could not leave the camps or homes on account of safety concerns or lost their work due to the economic boycott.

Lack of earnings has meant inability to buy basic necessities leading to hunger and malnourishment. But even those who had the means to go out and buy daily necessities often risked their life in doing so in a hostile environment. Curfew was sometimes lifted for women but no security was provided to make it safe for them to leave camps or homes. Though relief

rations cards were issued by the state government to victims, rations were grossly inadequate and moreover rations had to be collected from the original rations shops in the very areas which they had fled and dared not return to. Economic hardships for many families have meant that women victims would cut back on their own food intake to assure their children's nutrition, with serious implications for their own health.

The trauma experienced by children who had been exposed to or witnessed violence was not addressed except in some cases by NGOs offering group counselling.³¹⁸ School attendance fell because of its cost, the bias of school staff and students and fear of parents for children's safety and the need for many children to take up work to support families and children's traumas. Muslim students were attacked both at school and in Hindu neighbourhoods they have to pass through. Girls who were subjected to sexual assault feared to go out or if they did attend school has to face contempt or ridicule for having been "shamed".

The PUCL team monitoring Vadodara concluded, "At the present moment, women feel secure only in the midst of their own community. There is fear that this would lead to ghettoization of the community".³¹⁹ Two years after the violence in Gujarat, many victim survivors driven out by intense violence, have not returned to their original places of residence with many resettled by Muslim organizations amongst other Muslim communities inside or outside the state.

Amnesty International urges the government to draw up clear and concrete statutory provisions for the setting up and running of relief camps including strict guidelines that such camps may not be closed unless

³¹⁸ The findings of a UNICEF study conducted in the camps that 239 of 723 children were in need of counselling have been questioned by the MFC: "These findings seem to underestimate the extent of trauma. There was no information about whether the symptoms recorded in the protocol were probed or only recorded if reported spontaneously. Also, there were no details about which children were screened." The Independent Citizens Team has collected testimonies of traumatized children and urged trauma counselling and special programs for orphans. See: Independent Citizens Team, *The next generation: In the wake of the genocide*, 2002.

³¹⁹ People's Union for Civil Liberties, Vadodara, and Vadodara Shanti Abhiyan, *At the receiving end: Women's experience of violence in Vadodara*, May 2002, p.16.

³¹⁷ In response to the Lok Sabha Committee on Empowerment of Women, 14 May 2003.

peace is fully restored in the affected areas, and relief and rehabilitation measures are fully implemented enabling the displaced to return to secure and dignified lives. Nobody should be expelled against their will. Until the voluntary closure of camps, all the food, clothing, health and security needs of the people in the camps should be fully met by the state. The Government of India should ensure that it respects its obligations under international law to provide appropriate and adequate reparation to all victims of human rights abuses and their families. This should include the provision of rehabilitation services to victims and their families. Compensation and rehabilitation for victims of the 2002 violence, where incomplete or inadequate, should be urgently dealt with to enable these victims to rebuild their lives.

7.7 Failure of the central government to intervene in Gujarat

The Government of India is bound by the Constitution and international treaties to ensure fundamental rights to everyone. Article 356 of the Constitution provides wide ranging powers to the President in cases where “a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.” It follows that the deliberate and massive violation of fundamental rights which occurred in Gujarat in 2002 should not have been ignored by the central government in accordance with these obligations.

In response to Amnesty International's draft report, the Central government in December 2004 sent the organisation a one and a quarter page note (undated, without indication of source, but apparently formulated by the BJP-led government in 2003) on the steps it had taken to prevent the killing of members of minorities in Gujarat. After outlining general measures taken to prevent communal violence the note states that “in the context of last year's communal violence in Gujarat, it has to be appreciated that Gujarat is a border State and has to accommodate a neighbour [Pakistan] having an avowed objective of fomenting communal trouble in the state and the country and [that] this has been causing apprehensions in the minds of the population. Besides, the Union [i.e. central] government has to keep in view the overall security scenario in the State.” It stated that “a steady stream of advisories were [sic] sent to the State Government clearly

advising them to specifically instruct the district law enforcing authorities that they would be personally responsible for the maintenance of communal harmony within the areas of their jurisdiction and that complaints received from the members of the minority communities should be attended to promptly and action taken against the culprits expeditiously. Special Reports are also being called for from the State government in case of need [sic].”

It added that the central government had in December 2002 sent a letter to all state governments to ensure that “communal cleavage” would not occur. The note concludes by stating that the “communal situation in Gujarat is under control and no large scale violence against minorities has come to the notice so far”. A further annexure to the central government's response to Amnesty International lists constitutional and legal provisions and institutional mechanisms to protect minorities and the administrative and promotional efforts undertaken by the central government to maintain communal harmony. There are no indications in this annexure of specific measures taken by the central government to prevent an end the large scale violence in Gujarat in 2002.

The BJP-led National Democratic Alliance (NDA) government, in office up to May 2004, did not distance itself from the Gujarat BJP government, nor did it hold it to account for its consistent failure to exercise due diligence with respect to the violence against Muslims, including Muslim girls and women in Gujarat which engulfed the state for several months.³²⁰

In April 2002, when Muslims women were still being raped and killed in Gujarat, the then Prime Minister,

³²⁰ Asghar Ali Engineer, “It would be wrong to say that only Narendra Modi was guilty of the Gujarat carnage in Gujarat in 2002; the BJP-led NDA at the Centre was equally responsible for it. Despite hue and cry from all over the country, the central leadership of the BJP and NDA not only kept quiet but extended full support to Narendra Modi in his fascist-like pogrom of Muslims in Gujarat. ... When the BJP won Gujarat elections after the carnage with two-third majority, all BJP leaders not only praised Narendra Modi but maintained that we should repeat the Gujarat model throughout the country by organizing blood bath of innocent members of minorities.” *Secular Perspective*, 16-31 May 2004.

A.B. Vajpayee, said at a BJP meeting in Goa: “Wherever there are Muslims, they do not want to live with others. Instead of living peacefully, they want to preach and propagate their religion by creating fear and terror in the minds of others”.³²¹ He later changed his stance and admitted in November 2003, “There is no doubt that those perpetrating such violence should be punished. Our public, media and judiciary are following it closely. Justice will not only [be] seen to be done, it will be done.... The violence in Gujarat was a tragic aberration and we have condemned it unequivocally. It is important to remember that these tragic incidents remain localized – the secular fabric of India remains intact”.³²²

The state government’s lack of concern for girls and women who became victims of brutal sexual assault has already been noted. At least some central government ministers shared this disregard for girls and women’s lives. On 30 April 2002, at a time when the rapes and burnings were still going on in Gujarat, the then Defence Minister, George Fernandes, publicly trivialized before the Lok Sabha the violence suffered by women victims when he said: “There is nothing new in the mayhem let loose in Gujarat ... A pregnant women’s stomach being slit, a daughter being raped in front of a mother aren’t a new thing”.³²³

The central government did not censure the state government for failing to ensure legal redress to victims of violence in the state and even the Supreme Court’s harsh indictment of the “modern-day Neros” in Gujarat did not affect the support of the central government for the Modi government. Similarly the BJP did not at the national level see any need to censure the state government. “There is no need for Modi to resign ... The Gujarat government would take note of the observations made by the apex court and act accordingly. ... There is no embarrassment at all. The Supreme Court has made some observations and we will have to examine it [sic]”, BJP President Vankaiah Naidu was reported to have said.³²⁴

In October 2003, then Deputy Prime Minister L.K. Advani admitted in a television interview that “what

happened in Gujarat could disturb anyone. When one finds that the offenders are not brought to book, it certainly created a strong reaction”. He disagreed with remarks that the failure was due to a systematic attempt to subvert justice in Gujarat, stating it should be seen in the light of the wider criminal justice system. “I have seen [it happen in] so many cases. I have seen cases collapsed totally simply because the system is such.”³²⁵ L.K. Advani has on a number of occasions been quoted as denying any collusion between the government in Gujarat and the attackers and subsequent steps to shield them, citing as proof the December 2002 Gujarat elections in which the BJP won a majority.

Before general elections in May 2004, members of the BJP noticeably changed their stance by presenting an agenda of inclusiveness. Despite this, in a speech in Goa the then Prime Minister A.B. Vajpayee described Muslims as threatening the majority community, he calling on Muslims to shed their “fear psychosis”: “Get out of the fear that is dividing the nation and vote for a Government that would not allow any community to live in fear”.³²⁶ However, in April 2004 in Kishanganj, Bihar, the only Muslim majority constituency outside Kashmir, he deplored the violence in Gujarat: “What happened in Gujarat should not have happened. Let us resolve not to allow another Gujarat to happen anywhere else. The Hindus and Muslims should not see each other with distrust”.³²⁷ Similarly then Deputy Prime Minister L.K. Advani in March 2004 called the post-Godhra riots “unfortunate” and an “aberration”, “unfortunate events in an otherwise clean record of the NDA government”. He repeated the *Sangh Parivar* line that, “[h]ad Godhra not happened, the subsequent riots would not have taken place”.³²⁸ He added that “the developments were unfortunate and all necessary steps were taken to rectify the situation”.³²⁹ VHP International General Secretary Pravin Togadia objected to such wooing of Muslim voters saying that “[t]here is a fashion in India to blame Hindus, who are the victims for everything and not to mention even the names of jihadis who are the

³²¹ *Indian Express*, 13 April 2002

³²² In an interview with *The Financial Times*, London, reported by *AFP* and *rediff.com*, 7 November 2003.

³²³ *The Hindu*, *Indian Express*, *Deccan Herald*, *The Times of India*, 1 May 2002.

³²⁴ *AFP*, 12 September 2003.

³²⁵ *The Hindu*, 10 October 2003; *AFP*, 9 October 2003; Hard Talk, *BBC World*, 10 October.

³²⁶ *Indian Express*, 26 February 2004

³²⁷ Press Trust of India, 22 April 2004.

³²⁸ L.K. Advani during a rally in Ghaziabad, UP on 8 March, *AFP*, 8 March 2004.

³²⁹ *The Indian Express*, 9 March 2004.

aggressors...”.³³⁰ Observers have, however, noted that coming on the eve of elections, expressions of regret by some BJP leaders smacked of political expediency and would have been more meaningful had they come at the time of the Gujarat violence when the BJP unreservedly supported Chief Minister Modi’s handling of the riots.³³¹ Moreover, even half-hearted criticism of the Modi government by central ministers was not followed by any action and so had no impact on the situation for victims in the state of Gujarat.

After the elections in which the BJP lost its mandate, the BJP discussed whether “Gujarat” had caused its defeat without, however, expressing any regret for the events there. Former Prime Minister A.B. Vajpayee vacillated, sparking off a dispute in the BJP when he said riots had contributed to their defeat and later denied it, while L.K. Advani cited “over-confidence” and “complacency”, not the violence in Gujarat as the cause.³³² For a period after the elections in which the Gujarat BJP lost seven seats to Congress, reducing its seats from Gujarat from 21 to 14, Chief Minister Modi appeared embattled. Some 62 of the 127 BJP MLAs in Gujarat demanded his removal but in late May 2004, BJP president M. Venkaiah Naidu said that there was “no proposal or decision” to remove the Chief Minister and warned dissidents against airing their criticism of the Modi government before the media. Despite this internal debate, media report a decision by the BJP at the national level to return to its *Hindutva* ideology.

³³⁰ *Indian Express*, 9 March 2004.

³³¹ “Advani’s rethink gives added weight to the initial expression of shame and concern on the part of Prime Minister Atal Behari Vajpayee. It is unfortunate that the two senior-most leaders of the BJP did not have the political courage and wisdom to join forces and seek the removal of the Narendra Modi government and the imposition of a spell of President’s Rule in Gujarat. Instead, Advani and his supporters in the BJP defended Modi’s handling of the law and order situation at the time and some BJP leaders went to the extent of defying Vajpayee to defend Modi. This will remain a shameful chapter in the recent history of the ruling party.” *The Indian Express*, 10 March 2004.

³³² Former Prime Minister A.B. Vajpayee said, [h]ad not the train bogie been burnt in which many people, including kar sevaks, died, my rivals would not have got a political weapon against us.” *The Telegraph*, 5 July 2004.

8. Amnesty International’s recommendations

One of the fundamental duties of governments is to maintain law and order in society. In Gujarat in 2002, the governments of Gujarat and India failed to fulfil this fundamental duty by permitting the worst possible crimes, including murderers and rapes, some amounting to crimes against humanity, to be committed against the Muslim civilian population, in particular, against girls and women. Sadly, the government of Gujarat continues to fail to take effective action to investigate and prosecute these serious crimes or to prevent them in the future. Meanwhile, despite various promises the State of India has taken few concrete steps in this regard.

Amnesty International calls on the Governments of India and Gujarat to take seriously their obligation to exercise due diligence in ensuring fundamental rights including but not restricted to the rights to life, the right not to be subjected to torture or to cruel, inhuman and degrading treatment, the right to liberty and security of the person, the right to equal protection under the law, the right to the highest attainable standard of physical and mental health and the right to justice, truth and reparations for crimes committed against them. From information received by Amnesty International there is evidence of connivance of the Gujarat authorities in abuses of several of these rights and of failure to protect girls and women from abuses of these rights by private actors in Gujarat. In particular, both the governments of India and Gujarat have an obligation under international law to bring to justice those responsible for the crimes, including crimes of sexual violence, documented in this paper that amount to crimes against humanity.

As a first step, Amnesty International calls on the Governments of India and Gujarat to condemn clearly and publicly all crimes of violence, including crimes of sexual violence, committed against by girls and women in Gujarat whether committed by law enforcement personnel or private individuals. Since all the sexual violence experienced girls and women in Gujarat in 2002 and elsewhere, is decisively influenced by the perception of the victims’ gender and discrimination against women at all levels of society, the issue of gender based discrimination urgently needs to be addressed. In this, Amnesty International believes, everyone has a role to play –

the government, political parties, religious groups, all elements of civil society and individuals. Everyone has a responsibility to commit themselves to the equality of all human beings, irrespective of gender, age, social status, racial, national or ethnic origin or sexual orientation.

Crimes of violence, including crimes of sexual violence, committed against girls and women in Gujarat appear to have been part of a widespread attack on the civilian Muslim population pursuant to government and organizational policies to commit this attack. These crimes also appear to have been committed as part of a systematic attack pursuant to government and organizational policies to commit this attack. On both grounds, these crimes constitute crimes against humanity under international law. The Indian Government and Gujarat authorities have a responsibility under international law to protect against such crimes and to bring the perpetrators to justice.

The prospect for girls and women victims of crimes, including crimes of sexual violence, in Gujarat obtaining justice, establishing the truth and receiving full reparations has been significantly hindered because sections of the police force and the judiciary have been appointed despite their commitment to an ideology which affected the impartial exercise of their professional duties. Amnesty International calls on the Government of Gujarat to cease this practice, to establish an effective screening system for recruitment and to appoint only persons who are known for their commitment to non-discrimination and neutrality. An effective vetting procedure should be set up to identify police or judicial officers already in place who have shown a bias against people on grounds of political ideology, religion or gender. As a first step, they should be transferred to posts where such bias does not affect the conduct of their professional duties. However, all members of the police and judiciary should receive continuing professional training in applicable law, including human rights law, and standards, as well as gender sensitivity training (see Section 8.3 below). In developing recruitment screening procedures, vetting procedures for current staff and continuing professional training, the authorities should build upon the extensive experience of the United Nations civilian police (CIVPOL) peacekeeping operations, the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal

for Rwanda, Special Court for Sierra Leone and International Criminal Court, as well as upon provisions concerning gender issues in international legal instruments establishing international criminal courts. For example, these include Articles 36 (8) (b) (noting the need to include judges with legal expertise in issues concerning violence against women), 42 (9) (requiring the Prosecutor to appoint advisers with legal expertise in sexual and gender violence), 43 (6) (requiring the Registrar to set up a Victims and Witnesses Unit), and 68 (setting forth a broad range of requirements for protection of victims and witnesses and guaranteeing participation at all stages of the proceedings) of the Rome Statute. Any training programs should be consistent with the Amnesty International guidelines, *A 12-Point Guide for Good Practice in the Training and Education for Human Rights of Government Officials*, AI Index: ACT 30/1/98, February 1998.

8.1 Recommendations with regard to police and other state officials' inaction towards, participation, connivance or acquiescence in crimes, including crimes of sexual violence

Amnesty International urges the Government of Gujarat to investigate promptly, thoroughly and impartially all reports of police connivance or participation in crimes of sexual violence with a view to holding those responsible to account. They should report crimes of sexual violence and other abuses, including threats, sexual fondling and the use of sexually explicit language intended to degrade or humiliate. Any police officer committing such abuse should be held to account.

8.2 Recommendations with regard to police failure to protect girls and women against crimes committed by private actors

The organization calls on the Government of Gujarat to investigate impartially the reported failure of police to perform their constitutional duty to protect girls and women who turned to them for protection against imminent sexual violence; dereliction of this duty should be effectively and independently investigated and punished.

8.3 Recommendations with regard to the failure of the criminal justice system (police

and judiciary) to provide justice and reparations

“Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or the law.” Universal Declaration of Human Rights, Article 8.

The impunity with which sexual violence against girls and women was perpetrated is a matter of grave concern to Amnesty International. Impunity, literally the absence of punishment, is the failure to bring to justice perpetrators of human rights violations. As shown above, most acts of sexual violence against girls and women were inadequately recorded and investigated and those that came to court were treated by public prosecutors and judges in a biased manner. Medical personnel were biased in a large number of cases leading to faulty medical reports and therefore lack of medical evidence. The Indian law relating to rape is insufficient. It should be made consistent with the most recent definition of this crime under international law as articulated in international jurisprudence by the ICTY. Indian law does not also prohibit all crimes of sexual violence, including the many forms of sexual assault committed against Muslim girls and women in Gujarat.³³³ Human rights defenders who spoke up for the victims were not adequately protected when threatened by perpetrators and their sympathizers. As a result of these failures, there has been impunity in virtually all the cases of sexual assault that occurred in Gujarat in 2002.

Amnesty International urges the Government of India and particularly the Government of Gujarat to take urgent steps to end impunity in the state. The Supreme Court is leading the way in ensuring justice for many victims in Gujarat with the directives it has issued (these are described throughout the report) but there are hundreds of cases which have remained pending and where the adherence of courts to the Supreme Court's guidance is not assured. Impunity, if left unaddressed, leads to a climate in which perpetrators feel emboldened to commit more crimes, secure in the knowledge that they will never face arrest, prosecution and punishment, in short that they will not be held to account.

³³³ See, for example, *Prosecutor v. Kunarać*, Judgment, Case Nos. IT-96-23-T and IT-96-23/1-T (ICTY Trial Chamber 22 February 2001), para. 460.

To this end, clear guidelines should be issued to police, stating that deterring women from reporting crimes of sexual violence will not be tolerated and insisting on the duties of police to register truthfully complaints of sexual violence against girls and women and to investigate them speedily and accurately. Those who are derelict in performing these duties should be disciplined and, where this is not yet the case, such dereliction should be a criminal offence. Girls and women who have been the victims of crimes of sexual violence should be treated with respect and understanding; those police officers who treat them insensitively and add to their suffering should be disciplined.

Gender sensitivity training

As a preventive measure, police officers, both in post and new recruits should be trained in gender sensitivity, an adequate number of women police officers should be recruited and police officers whose political opinions interfere with the objective performance of their duties should as a minimum measure be transferred to other posts where such opinion would have no likely effect on the performance of their duties.

Action on complaints

Police should be clearly instructed that girls and women approaching them with complaints of sexual assault should be immediately referred to a medico-legal practitioner for medical examinations to ensure that evidence is safeguarded and recorded.

Recruitment of experts and screening

Police should appoint investigating officers who specialize in cases of sexual violence and are given special training in the sensitive handling of such cases and the specific requirements of collecting medical and other forensic evidence.

Witness protection

Rigorous witness protection schemes should be put in place for all victim survivors and witnesses at risk of further attack because of their willingness to come forward to testify.

Gender sensitivity

All police, lawyers, prosecutors and judges should be trained in the need for non-discrimination in the performance of their duties generally and the specific requirements when dealing with cases of sexual

assault on girls and women. An adequate number of women should be appointed in the various law enforcement professions.

The UN General Assembly Resolution 52/86 of 1997 regarding Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women provides model strategies and practical measures on the elimination of violence against women in the field of crime prevention and criminal justice and gives guidance to states on the protection and support to be offered to survivors and witnesses of violence. The Governments of India and Gujarat should ensure that women subjected to crimes of violence, including crimes of sexual violence, have an opportunity to testify in court proceedings and that measures are available to facilitate such testimony and to protect their privacy in a manner consistent with the right to fair trial.

Drawing upon the experience of international criminal courts, the Governments of India and Gujarat should make available to women and girl survivors of crimes of violence, including crimes of sexual violence, information on rights and remedies and on how to obtain them, in addition to information about their anticipated role in criminal proceedings, the scheduling process and ultimate disposal of the proceedings. The Governments of India and Gujarat should encourage and assist these women and girls in filing and following through on formal complaints. Court mechanisms and procedures should be made accessible and sensitive to the needs of women and girls subjected to violence.

8.4 Recommendations with regard to failure to provide medical assistance and relief to victims

Despite nearly three years having past since the crimes of sexual violence in Gujarat, the state government should fund and develop special units or procedures in hospitals to help assist girls and women who have been the victims of crimes of a sexual nature and to provide them with medical care and counselling. Forensic services should be strengthened and made available to women victims of crimes of violence. Girls and women who have been subjected to crimes of sexual violence should be provided with information on their rights and how to obtain remedies. Anyone interfering with the medical

assistance to victims of crimes of sexual violence should be held criminally accountable.

The Government of Gujarat should provide emergency services to girls and women victims of crimes of sexual violence, where still required. These should include crisis intervention services, shelter, safe havens, immediate medical attention, emergency medical and legal advice, crisis counselling, financial assistance and any other immediate assistance that the victims may require. Victims of crimes of sexual violence and their families should be given prompt reparation, including compensation, medical care and rehabilitation, commensurate with the harm suffered and sufficient to enable them to rebuild their lives.

8.5 Recommendations with regard to the inadequacy of the legal provisions relating to crimes of sexual violence

Amnesty International calls on the central government and legislature to pay urgent attention to the need to ensure that the substantive and procedural legal provisions relating to all acts of sexual violence against girls and women are adequate and reflect the wide variety of abuses reported. The current laws are clearly inadequate; this inadequacy has hampered victims' chances to obtain legal redress.

The Government of India should review and modify existing legislation to ensure their conformity with the ICCPR and CEDAW to eliminate violence against women.

The government of India should define crimes under international law, in particular, crimes of sexual violence, consistently with international law, as reflected in the Rome Statute and other international treaties and customary international law and in the most recent jurisprudence of international criminal courts. Principles of criminal responsibility for such crimes and defences should be consistent with the strictest standards in international law.

8.6 Recommendations with regard to the protection of human rights defenders

The Government of Gujarat should recognize the valuable contribution made by human rights activists, lawyers and human rights groups in raising awareness of women's issues, supporting victims and combating abuses, and fully cooperate with them. It should

ensure that human rights defenders and human rights groups can pursue their legitimate activities without harassment, or fear for their safety. The Government of India should ensure that the principles contained in the Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the UN General Assembly in 1998, are incorporated in law and implemented in practice.

8.7 International legal commitments and scrutiny

Amnesty International urges the Government of India to ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The Optional Protocol provides for individual petitions and for inquiries into systematic violations of the Convention, affording an international remedy for women who have suffered human rights abuses.

Amnesty International also urges the Government to ratify the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which it signed in October 1997.

India should ratify the Rome Statute and implement it in national law (see Recommendation 8.5 above) as set forth in the Amnesty International paper, *The International Criminal Court: Guidelines for Effective Implementation*, AI Index: IOR 40/011/00, July 2000.

Amnesty International also calls on the Government of India to permit UN human rights mechanisms and international human rights organizations free and regular access to enable them to research human rights issues in the country.

9. APPENDIX

The cases of Bilqis Yakoob Rasool and Zahira Sheikh

9.1 Bilqis Yakoob Rasool

In Randhikpur village, Limkheda *taluka* (sub-district), Dahod district, violence against the Muslim community began in the night of 28 February 2002 with the looting and burning of Muslim owned shops; on 1 March, a swelling mob burned houses, livestock

and crops owned by Muslims and the local mosque. Muslim residents approached the police post but received no help. They then sent an FIR by fax, naming the attackers, to the Superintendent of Police and the Collector (District Administrator). With no help forthcoming, terrified Muslim residents of Randhikpur fled to the hills to hide.

Nineteen-year old Bilqis Yakoob Rasool, then five months pregnant, fled the village on 28 February with her three-year old daughter, two sisters and two brothers, their mother, her maternal uncle, her paternal uncle and aunt, and their daughters. Moving from place to place, they stopped at Kujaval mosque where Bilqis' cousin Shameem delivered a baby. While fleeing, they were on 3 March 2002 caught by right wing Hindus from their own and neighbouring villages in a forested country lane. The attackers screamed "kill them, cut them up" and raped or gang raped all eight women and hacked them and the male relatives to death. Bilqis' little daughter was killed before her eyes. Bilqis lost consciousness and was left for dead. When she regained consciousness, she found herself naked, injured and alone, surrounded by the dead bodies of 14 relatives. Two surviving children had run away.

Bilqis hid overnight and on the following morning, 4 March, borrowed clothes from a tribal woman. She was picked up by a car which took her to Limkheda police station where she lodged a complaint. Though she stated that she had been raped and named the rapists, the First Information Report (FIR) stated that some 500 unnamed attackers had killed several people after raping two women but spared Bilqis as she was pregnant. After reaching Godhra relief camp on 5 March, Bilqis filed another FIR in the Godhra Town police station. This FIR stated that she had been raped and named the rapists. She also deposed before a magistrate naming 12 attackers on the same day. Police conducted an inquest on 5 March; they examined the crime scene and reported recovering seven bodies. Bilqis' other family members were declared "missing". A medical examination conducted on 7 March established that Bilqis had been physically and sexually assaulted and injured.

Police proceeded on the first FIR, claiming that the Code of Criminal Procedure (CrPC) did not allow the filing of several complaints. Lapses in the police investigation were noted by the Deputy Superintendent of Police Limkheda division in November 2002 who directed a more thorough

investigation. This was ignored. Police on 7 November 2002 submitted a charge sheet which stated that a “crowd of 500 Hindu people got together and with common intention, beat and tore the clothes of Halimaben and Shamimben and raped them and killed them ... The complainant has named certain persons in her written compliant. However, she has not named any accused person in the FIR filed by her. Therefore, as there is no proof against the accused a request for granting A summary has been made”. On 25 March 2003, a magistrate in Limkheda granted that the case be closed under “A summary”, i.e. the case is “true but undetected” in the sense that those responsible could not be identified.

Police claimed throughout that Bilqis had made contradictory statements as she had not initially mentioned that she had been raped nor named the accused. Police argued that if Bilqis had really experienced rape she would not have contradicted herself and that she had given names of prominent persons in the village simply because she knew them. Four of the accused named by her gave statements to police in July 2002 that they had in 1998 protested when Muslims had abducted Hindu girls and that Bilqis had named them in revenge at the behest of Muslim community leaders.

Bilqis later clarified that she had indeed told Limkheda police on 4 March that she had been gang raped and named the attackers but that police had refused to record this. Police disbelieved the names of the attackers she gave, claiming that they were “respectable persons in the village”. A constable also told Bilqis that she would be sent for a medical examination and given a “poisonous injection” if she reported rape.

After hearing Bilqis deposition, the National Human Rights Commission (NHRC) arranged for legal aid for her and appointed former Solicitor General, Harish Salve, and former Supreme Court Bar Association secretary, Ashok Arora, to assist her. Her petition in the Supreme Court asking that the magistrate’s order closing her case be set aside and requesting direction to the Central Bureau of Investigation (CBI) to investigate the case afresh was admitted. In a hearing on 8 September 2003 the Supreme Court issued notice to the Government of Gujarat and the Dahod police to respond to Bilqis’ allegations.

Police harassment began almost immediately. On 16 September 2003 a police officer visited her at 10pm demanding that she accompany him to the forest where the rape and murders had taken place. When she refused as no new evidence could be found in the forest at night, the police officer allegedly tried pressurizing her to comply. The Supreme Court responding to her urgent application in this regard, on 25 September 2003 directed: “it would be appropriate for the state police to keep off (Bilqis) till the court decides her plea for transfer of the case to the CBI”.

Harassment continued, however. Local police reportedly arrested her husband’s cousin on the pretext of inquiring about the whereabouts of other witnesses. Bilqis reported receiving threatening calls from different people demanding that she withdraw her petition seeking a new probe. Fearing for their lives and safety, Bilqis and her husband then left Gujarat with the help of social service organizations.

On 16 December 2003 the Gujarat Government agreed before the Supreme Court to Bilqis’ request for re-investigation; the Supreme Court on the same day directed the CBI to conduct an investigation of the case. On 7 January 2004 the CBI filed criminal complaints against three persons and some other unknown persons for gang raping Bilqis and several other relatives and the murder of family members. Following interrogation of police officers who had conducted the original investigation, the CBI located the skeletal remains of several victims as well as clothes and other items in a mass grave near a river.

In its preliminary report filed by the CBI in mid-February 2004, it charged state police with inaction and lapses in the investigation and confirmed that pieces of clothing exhumed at the mass grave matched the clothes shown in photographs taken of the bodies. On 21 February 2004, 13 witnesses who feared for their lives if they spoke up were taken to Mumbai for questioning by the CBI. They alleged that many of the local Hindus, including one of the key accused, had meanwhile appropriated the properties which fleeing Muslims had abandoned, making it impossible for them to return.

A status report submitted by the CBI to the Supreme Court in March 2004 listed details of police cover-up. This included discrepancies between photos taken on 4 March by a photographer called by police which showed five bodies, including Bilqis’ daughter Saleha

and photos taken by another photographer on 5 March showing seven bodies, but not Saleha. There was evidence of medical neglect as the post mortem reports appeared to have been “prepared in a haphazard and vague manner and (did) not indicate details of injuries” on the bodies. Though doctors appeared to have been informed that this was a case of mass rape and murder, they failed to collect vaginal swabs, saliva samples, blood samples, nail filings or victims’ clothes and to match these with material from the suspects. Most incriminating still, the CBI were told by the *panch* witnesses, people called by police to testify to findings at the place of a crime, that they had been ordered by police to bring 60 kg of salt. This was poured into a shallow grave dug by police and some grave diggers near the river in which several bodies had been placed, apparently to hasten their decomposition. The CBI said that skeletal remains of several bodies, clothes and other materials recovered by it in the mass grave were being examined by central forensic institutions whose analysis would take three months to complete. In early April 2004, forensic experts succeeded in isolating DNA samples from the remains of the exhumed bodies and said that they would seek to establish the identity, age and sex of the bodies. They said the task was difficult as the bodies were in a highly decomposed state on account of having been covered in salt.

On 19 April 2004, the CBI filed criminal charges in the court of Chief Judicial Magistrate, Dahod against 20 people for the rape of Bilqis, the murder of her relatives and for criminal conspiracy in obstructing the course of justice. They included the 12 persons named by Bilqis, including three men charged with gang rape and one man charged with murdering her daughter, six police officers accused of criminal conspiracy in siding with the attackers and destroying evidence and two doctors charged with dereliction of duty and suppression of facts in the post-mortem examinations of victims.

Counsels for the accused made a series of attempts to obtain bail; for instance counsel for 14 arrested accused argued before a sessions court in Dahod in May 2004 that the CBI had overstepped its brief as the Supreme Court had only directed it to carry out further investigation from where the Gujarat police had left off and that it had no competence to register complaints against the accused. Counsel for the two arrested doctors claimed that they had followed the

norms for post mortem examinations and had not tampered with the evidence. On 20 May 2004, the Dahod sessions court rejected the bail application of all the accused, all of whom remain in judicial custody. Already in February 2004, an Ahmedabad court had rejected anticipatory bail applications of two accused police officers saying that “they were influential persons and could hamper the case at this stage”.³³⁴

On 6 August 2004, the Supreme Court directed that the case be transferred to the jurisdiction of the Bombay High Court for trial. The court said that the transfer was based on the apprehension of the CBI and Bilqis Yakoob Rasool that witnesses might come to harm if the case was tried in Gujarat. It also directed the CBI to appoint a public prosecutor to conduct the trial. The trial began on 2 September 2004 in Mumbai and on 19 November new charges were framed. Following Zahira Sheikh’s withdrawal of earlier statements on 3 November 2004 in unclear circumstances, social activists reportedly moved Bilqis Yakoob Rasool and her family to an undisclosed secure location to prevent any unlawful pressure being brought on her.

9.2 Zahira Sheikh and the Best Bakery Case

In Hanuman Tekri, a lower middle class area on the outskirts of Vadodara, where few Muslims live, the Sheikh family, running the Best Bakery, were the only Muslim family to have stayed behind when violence against the community began. Locally influential persons had given them assurances of their safety.

In the evening of 1 March, some 500-700 Hindus began attacking the multi-storied house of the Best Bakery, shouting threatening slogans and throwing petrol bombs. Three trucks loaded with wood for the bakery were burned and destroyed. The family repeatedly called the Vadodara police control room and the Panigate police station; police every time promised to come soon. One and a half hour after the violence had begun, a police vehicle drove by, stopped briefly and moved on without any attempt to intercede.

After police had left, the mob burned the ground floor, killing eight people. Twenty members of the family trapped on the roof terrace endured a 14-hour long assault in which 14 people were killed. Some of the victims were reportedly still alive when thrown

³³⁴ NDTV.COM, 24 March 2004.

into the fire. The victims included the owners' wives and children and three Hindu employees. The attackers were Hindu neighbours, known to the Sheikh family and led by the man who had assured their safety.

Nineteen-year-old Zahira Sheikh on the following day filed a complaint at Panigate police station. Police filed the charge-sheet in June 2002; it listed 21 accused. The trial of the Best Bakery case before a Fast Track court in Vadodara began on 20 February 2003; during the trial the court heard 73 of 120 named witnesses. Of these 37, Zahira Sheikh, her mother Sherunissa Sheikh and other eye-witnesses withdrew the statements they had made before police and refused to identify the accused. On 27 June 2003, Judge Mahida acquitted all 21 accused saying there was "not an iota of evidence admissible under law produced on record suggesting the guilt of the accused".

On 5 July, Sherunissa told the *Indian Express* that she had lied in court as she had been "trembling with fear for her life". Two days later, Zahira Sheikh told the *Indian Express* that BJP Member of Legislative Assembly (MLA) Madhu Srivastava and his cousin Chandrakant Srivastava, a Congress councillor who had links with the accused, were behind threats against her and her family and put pressure on her to withdraw her statement to police. She said that she had had to choose between pursuing the truth and the lives of her family and had chosen the latter; no one had helped her in these difficult circumstances.

On 6 July a NHRC team visited Vadodara to scrutinize the Best Bakery case materials and on 11 July met Zahira. On 31 July 2003, the NHRC filed a Special Leave Petition (SLP) in the Supreme Court requesting it to set aside the judgment of the trial court and direct further investigation by an independent agency and retrial of the case outside Gujarat in order to ensure a fair trial. The petition argued that the right to a fair trial is "a constitutional imperative and ... explicitly recognized as such ... in Articles 14, 19, 21, 22 and 39A of the Constitution", provisions of the criminal procedure code, Article 14 of the ICCPR "which now forms part of the statutory legal regime explicitly recognized as such under Section 2(1)(d) of the Protection of Human Rights Act, 1993" and international human rights obligations of India. It further requested the Supreme Court to lay down guidelines for the protection of witnesses and victims of crime for law enforcement and

prosecuting agencies. The Supreme Court admitted the petition and turned it into public interest litigation.

The Gujarat government filed an appeal against the trial court judgment in the Gujarat High Court on 7 August 2003, a step widely seen as a measure to pre-empt criticism from the Supreme Court which was to hear the NHRC petition on 8 August. The state appeal argued that the trial court had erred in law and "with material irregularities, in totally discarding the evidence" of witnesses who had turned hostile during the trial; in doing so, the "trial court ignored the settled legal position" that statements of such witnesses to police can still be relied upon by the trial court to corroborate circumstantial evidence. However, the appeal did not link the witnesses' withdrawn statements to specific evidence ignored by the trial court.

On 8 August 2003, during a hearing of the NHRC petition, the Chief Justice issued notice to the Gujarat government on the petition, directed that it provide "full and complete protection" to witnesses and observed: "We are prima facie of the opinion that the criminal justice delivery system is not in sound health". On 1 September 2003, the Supreme Court said it was going to hear a special leave petition filed by the organization CJP and Zahira Sheikh together with the NHRC petition; Zahira sought a fresh probe of the Best Bakery case by a central agency under the supervision of the Supreme Court, transfer of the case for re-trial out of Gujarat, security for the witnesses in the Best Bakery as well as prosecution for abetting arson, looting and killings and other related offences against the then Commissioner of Police, Vadodara, and the officers of the Panigate police station Vadodara. Contending that the trial court judgment was based on evidence which was given under threat, intimidation and fear, she said it was bad in law and liable to be set aside. She said all the elements of the criminal justice process had contributed to a miscarriage of justice; the investigation was defective, the witnesses were unprotected, the public prosecutor did not fulfil his duty of effective representation of the victims and the trial judge mechanically acquitted the accused and failed to take any steps to end the hostile atmosphere in court.

On 12 September 2003, Chief Justice V.N. Khare while hearing the petitions filed by the NHRC and Zahira, called the state appeal a "complete eyewash" and lacking in seriousness and reprimanded the state

for its handling of the Best Bakery case. The Gujarat government on 29 September 2003 filed an amended criminal appeal seeking the admission of additional evidence contained in the affidavits filed in the Supreme Court by four witnesses who had turned hostile during the original trial.

The Gujarat High Court on 19 December 2003 started hearing the state appeal against the trial court acquittal; after only six days of hearings, the judgment was announced on 26 December 2003 dismissing the appeal; on 12 January 2004, it gave its detailed reasons. It said, "we are fully convinced that there is no substance in all these matters, including the Appeal". It did not accept the additional evidence submitted to it and relied on testimonies that had been before the trial court. Human rights activists said the judgment had heightened the tragedy of the trial court judgment "into a farce".³³⁵

The Supreme Court on 30 January 2004 admitted an appeal filed by Zahira Sheikh challenging the Gujarat High Court judgment. On 16 February 2004, the Supreme Court asked the Gujarat government to file an appeal in the Supreme Court against the High Court; this was filed on 20 February 2004 by the Gujarat state.

In a landmark ruling, of the Supreme Court on 12 April 2004 overturned the High Court verdict in the Best Bakery case and directed that a retrial of the case be undertaken by a court in Maharashtra. It rebuked the trial court and the High Court for their failing to exercise all their powers in the pursuit of justice and the state government for a range of failings and reiterated the importance of the right to a fair trial.

In an apparent attempt to avoid or delay the retrial of the Best Bakery case in Maharashtra, the Gujarat government filed an application on 19 April 2004 in the Supreme Court claiming that the appeal to the apex court had not asked for a transfer of the trial outside the state but merely a re-trial and asked for a modification of the order. It also said a transfer might have a demoralizing effect on the judiciary of the state. On 7 May 2004, the Supreme Court dismissed this application, describing it as an "abuse of the process of court"

The Mumbai High Court appointed Additional Sessions Judge A.M. Thipsay as trial judge in the Best Bakery case on 10 May and directed that the trial be

concluded by December 2004. On 7 June 2004, the retrial of the Best Bakery case was to begin in the Sewri sessions court in Mumbai. Confusion over which state, Gujarat or Maharashtra, should appoint the new public prosecutor delayed the beginning of the trial. The Supreme Court on 9 August 2004, reprimanded the Gujarat government for appointing a public prosecutor who objected to the Mumbai court's attempt to issue non-bailable warrants of arrest against some seven accused then still absconding and admonished the Gujarat government to shed its "ego problem" on the question of appointment of a public prosecutor. On 16 August, the Supreme Court replaced the Gujarat appointed public prosecutor with P.R. Vakil as Special Public Prosecutor to avoid further delays of the trial.

The trial began on 4 October 2004 after a new charge sheet was framed on 22 September 2004 against 16 accused, 15 of whom were in judicial custody in Mumbai at the time while one accused was free on bail. Notice was issued earlier to five accused as to why contempt of court proceedings should not be initiated for failing to surrender to the court. The Gujarat Director General of Police had declared in an affidavit that the absconders could not be found and that police had begun attaching their properties to secure their presence in court. Public Prosecutor P.R. Vakil has complained to the Mumbai trial court that Gujarat police had failed to keep him informed on steps taken to trace the absconding suspects.

Meanwhile those who threatened Zahira Sheikh and her family remained free; on 7 October 2004, police of the Crime Branch had registered a criminal complaint filed by Zahira's brother Nafitullah against BJP legislator Madhu Srivastava and four others, including his cousin and Congress councillor Chandrakant Srivastava, and two others, for allegedly threatening to eliminate him and his family if Zahira maintained her statements against the accused.

On 3 November 2004, the day before Zahira Sheikh was to appear in court, she retracted her previous statements in a press conference in Vadodara. She claimed that Teesta Setalvad and Rais Khan of the CJP had her kidnapped by local residents, wrongfully confined her in Mumbai and had "tutored" her to implicate the 21 accused who in fact, were innocent. She also claimed that Teesta Setalvad had made her sign legal documents in English which she did not understand and took the issue to the Supreme Court against her wishes.

³³⁵ PUCL press release of 15 January 2004.

Zahira's brothers withdrew their earlier statements as well. Nafitullah Sheikh, Zahira's elder brother told the court that the organisation Janadhikar Samiti had organised and financed Zahira's press conference on 3 November. This was confirmed when Tushar Vyas, an advocate from Vadodara, stated that Zahira had approached the organisation for help. Vyas and Ajay Joshi, the Vadodara VHP President, had set up the organisation after the Godhra incident; it reportedly took formal shape after the Supreme Court judgment in the Best Bakery case. Meanwhile, the trial court in Mumbai heard four witnesses who identified several of the persons accused in the original trial.

Teesta Setalvad on 6 November filed a petition in the Supreme Court requesting that it order a CBI inquiry of the circumstances which led Zahira Sheikh to make her statement on 3 November before the press in Vadodara, the persons who assisted her in the process and the role of the Vadodara police who were present at the press conference. The Supreme Court is to hear the petition on 6 December 2004.

At earlier stages of the retrial in Mumbai, four witnesses identified several of the persons accused in the original trial. In November and December 2004, Zahira Sheikh, her brothers Nasibullah and Nafitullah, her mother Sehrunissa and her sister Saira stated in court that they did not know any of the accused, did not know how their own relatives had died as thick smoke had enveloped the bakery during the incident and that they could not recall their own earlier statements. They were declared hostile to the prosecution. On 22 December 2004, the weekly magazine Tehelka released secretly filmed material which purports to show Zahira and her family negotiated payment of a large amount of money obtained from a relative of BJP MLA Madhu Srivastava in return for withdrawing earlier statements implicating the accused. Chandrakant Srivastava and Madhu Srivastava have denied the allegations. The veracity of the Tehelka materials has not so far been scrutinized and established.