

Access to Justice for Women

INDIA'S RESPONSE TO SEXUAL VIOLENCE
IN CONFLICT AND SOCIAL UPHEAVAL

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Armed Conflict Resolution and People's Rights Project, Center for Social Sector Leadership
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ARMED CONFLICT RESOLUTION AND PEOPLE'S RIGHTS PROJECT, CENTER FOR SOCIAL SECTOR LEADERSHIP, UNIVERSITY OF CALIFORNIA, BERKELEY, HAAS SCHOOL OF BUSINESS

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This report is dedicated to the survivors of sexual violence
and their brave and honorable struggle against impunity.

Executive Summary

“ Analysis reveals commonalities in the ways that the Indian justice system failed to prevent, investigate, prosecute, and punish perpetrators of sexual violence or to provide effective redress to female victims.

A 2014 report by the Special Rapporteur on Violence Against Women on gender-based crimes describes the female experience in India as consisting of a “continuum of violence . . . from the ‘womb to the tomb.’”¹ According to Indian government data, a woman is raped in the country approximately every twenty minutes.² Women and girls are especially vulnerable to sexual violence during armed conflict and mass violence. Indeed, gender-based crime is a common feature of the armed conflict and mass violence that has marred India since independence.

Access to Justice for Women: India’s Response to Sexual Violence in Conflict and Social Upheaval examines emblematic case examples from conflict zones and incidents of mass violence to understand how the Indian State responds to sexual violence against women and girls in these contexts. The goal of this Report is to analyze the efforts of women victims of sexual violence and their allies to access justice in these contexts and to identify emblematic ways the Indian legal system succeeded or failed to provide effective redress.

Two of the case studies are drawn from contexts of conflict, in the states of Punjab, and Jammu & Kashmir (J&K); two of the case studies are drawn from seminal incidences of mass violence in the states of Gujarat in 2002 and Odisha in 2008 (formerly called Orissa). While the report focuses on the internal dimensions of conflicts, those in Punjab and J&K have cross-border and international dimensions.

The selected case examples span time and place, involve different national and local minority communities, different forms of sexual violence and perpetrators, arise from different political contexts, and result in different legal outcomes. In particular, the history of partition of India and Pakistan in 1947 significantly defines the conflicts in Punjab and J&K, and deeply rooted cultural and political dynamics undergird the incidents of mass violence in Gujarat and Odisha.

Despite the complexities presented by these differences, analysis reveals commonalities among the cases in the ways that the Indian justice system failed to prevent, investigate, prosecute, and punish perpetrators of sexual violence or to provide effective redress to female victims. Impunity was the norm even when members of state security forces carried out the crimes.

The international community recently has placed greater emphasis on legal accountability for sexual violence by strengthening relevant institutions and standards. This Report aims to contribute to greater accountability for sexual violence crimes against women and girls by examining India’s response to exemplary incidents of such attacks. The Report uses the case examples to explore legal and institutional obstacles to effective criminal investigation, prosecution, and reparation of gender-based crimes against women along nine dimensions of the Indian legal system: criminalization, prevention, contextual analysis, reporting, registration of complaints and arrests, collection of evidence, timeliness, legal immunity, and redress. It applies international standards to identify central weaknesses of India’s legal system and offers recommendations to correct those deficiencies.

Based on this analysis and applicable international standards, the Report recommends that India:

** Amend Indian criminal law and employ international criminal and human rights legal standards to define rape and related provisions as a violation of bodily integrity and a crime of violence, rather than a crime against modesty.* Indian criminal law should also recognize the coercive circumstances in custodial situations and armed conflict.

* *Adopt legislation that provides a comprehensive, equitable, and efficient system of reparations for victims of sexual violence in internal conflict or incidences of mass violence.* India should provide adequate, timely, and comprehensive reparations to victims of gender-based crimes and their families, including monetary compensation; rehabilitation, such as medical care and psychological and psychosocial support; measures of satisfaction, such as public acknowledgment of wrongdoing, memorialization, and historical analysis of commitments; and measures of guarantees of non-repetition, including effective criminal investigation and the prosecution and punishment of those responsible.

* *Ensure acts of sexual violence in areas of internal conflict and incidences of mass violence are exhaustively and effectively investigated and those responsible are promptly prosecuted and punished by a competent, independent, and impartial tribunal.* India must repeal legislation, such as the Armed Forces Special Powers Act, 1958 (with subsequent amendments), and sections of the Indian Code of Criminal Procedure, including Section 197, that do not permit the trial or prosecution of paramilitary and military personnel without government permission.³ These laws encumber the investigation, prosecution, and punishment of public officials and members of the armed forces. In particular, it is imperative that India strengthens its efforts to effectively investigate and prosecute historic crimes, such as the acts of sexual violence that occurred in J&K, to signal a break with the legacy of impunity and ensure victims' access to justice. To this end, India should increase resources to the judicial system to address the backlog of cases and establish an effective protection program for victims and witness.

* *Impose criminal and administrative sanctions on public officials, including elected officials, military personnel, and police officers who obstruct investigations or intimidate, harass, or assault victims and witnesses of sexual violence that occurred during internal conflict or mass violence.* Authorities should initiate disciplinary proceedings against public officials who perpetrate or fail in their duties to respond to sexual violence, including investigat-

ing officials who fail to follow investigative procedure by, for example, refusing to register First Information Reports. India also should adopt steps to dismantle the *esprit du corps*, prevalent among police and military forces, that contributes to a climate of impunity in which members of the police and military may harass and intimidate victims and witnesses or their families without consequence.

* *Implement specialized investigative units, prosecutors, and courts to respond to, investigate, and prosecute acts of sexual violence in internal conflict and incidences of mass violence.* India must ensure that individuals responsible for inciting and committing acts of sexual and collective violence are held criminally accountable. India should increase institutional capacity to effectively prosecute and punish perpetrators of sexual violence and care for victims of conflict and mass violence by creating specialized police units to investigate crimes of sexual violence, increasing the number of female police officers and medical examiners, establishing specialized units within prosecutors' offices, and strengthening specialized courts to address the backlog of cases and ensure the independence and impartiality of investigations and prosecutions. India must ensure that the rights of prisoners serving sentences are respected.

* *Adopt effective witness-victim protection measures to enable victims and witnesses of sexual violence, including state officials, in areas of internal conflict and incidences of mass violence to participate fully and safely in proceedings.* Measures must take into account the particular vulnerabilities of victims of sexual violence in these contexts and may include relocation assistance, privacy protections, and other security measures to ensure protection from retaliation or intimidation, and physical and psychological safety.

* *Train officials involved in sexual violence cases, including police, medical personnel, and judicial officers, for the unique challenges of working in areas of internal conflict and mass violence and to appropriately support victims and sensitively conduct their duties.* This should include effective

efforts to standardize medical forensic examination procedures and train medical personnel to competently conduct exams. For example, although Indian courts have rejected the legal validity of the “two-finger” vaginal test, it is still used. India should take steps to eliminate practices that re-traumatize victims of sexual violence.

The Report’s recommendations are confined by its focus and do not, for example, examine theories of criminal liability for sexual violence or sexual violence committed against women outside of internal armed conflict and mass social violence.

Introduction

“Only on the rarest of occasions does a female victim of sexual violence in areas of conflict or mass violence succeed in bringing her case through the Indian justice system. More typically, her efforts to secure justice are disregarded or even thwarted by the State.”

Sexual violence against women in situations of armed conflict and mass violence has garnered increased attention by the international community. Defined as a “serious abuse[] of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity,”⁴ sexual violence is endemic in conflicts throughout the world. Stigma, shame, lack of political will, and the insensitivity and ineffectiveness of legal systems often prevent victims from obtaining justice.⁵ Most girls and women suffer the physical, mental, and social consequences of sexual violence in isolation and without adequate redress. While this Report does not specifically address sexual violence perpetrated against lesbians, or men and boys, transgender,⁶ third gender, or intersex individuals, it is important to note that these groups are also victims of sexual violence.⁷

In the last two decades, the international community has placed greater emphasis on legal accountability for gender-based crimes committed in times of peace and conflict. Today, the vast majority of nations have ratified the *Convention to Eliminate All Forms of Discrimination Against Women* (CEDAW), which protects specifically the rights of women.⁸ The International Criminal Court has recognized sexual violence as an international crime and expanded the definition of a crime against humanity to include instances of “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”⁹ The United Nations’ Security Council has issued multiple resolutions calling on States to end the use of sexual violence as a tactic of war and the impunity of perpetrators.¹⁰ The United Nations also has developed models of best practices for ensuring implementation of State duties to prevent, investigate, prosecute, and punish perpetrators of sexual violence.¹¹ These efforts however have failed to reduce significantly the pervasiveness of sexual violence or the impunity enjoyed by perpetrators.

The Special Rapporteur on Violence against Women, Its Causes and Consequences (SR on Violence against Women) described the female experience in India as commonly consisting of a “continuum of violence . . . from the ‘womb to the tomb.’”¹² According to Indian government data, a woman is raped in the country approximately every twenty minutes.¹³ Rape, mass rape, gang rape, and stripping of women and girls are common features of the social upheaval and mob violence that has marred post-independent India.¹⁴

Since 1947, social upheaval and mob violence frequently has occurred within the context of on-going economic, social, and political struggles. In Punjab, Jammu & Kashmir (J&K), and Gujarat, for example, the Indian State has responded to claims for political and socio-economic rights by Sikhs and Muslims through increased militarization, mass arrests, torture, extrajudicial killings, forced disappearances, and rape.¹⁵ The struggle for human rights, including cultural rights, by Christians in Odisha (formerly called Orissa) has been

perceived as a threat to cultural nationalism by the Hindu majority and has sparked episodes of mass violence.¹⁶ Sexual violence in these areas occurs in the context of the interplay of multiple dynamics related to gender, caste, social class, political power, land, and religion.

In struggles for political power, land, or cultural and religious dominance, rape of women is a weapon to gain or consolidate power over members of the “enemy” or opponent group.¹⁷ Defilement of females in patriarchal cultures serves to assault the collective by publicly exposing men as weak and unable to protect their women or effectively assert the claims to sovereignty of the male-dominated collective.¹⁸ The chaos of conflict and widespread violence also creates the opportunity for rape and the conditions for impunity.¹⁹ Sexualized violence in these contexts, whether orchestrated or opportunistic, frequently occurs with the participation or tolerance of Indian officials.²⁰

Though incidents of targeted, sexualized violence against women and girls in the context of conflict and mass violence in India take different forms, involve different players, and display different types of violence, common to nearly all of these incidents is the impunity enjoyed by perpetrators and the systemic failures of the Indian justice system to prevent, investigate, and prosecute sexual violence or provide effective redress to female victims. Only on the rarest of occasions does a female victim of sexual violence in areas of conflict or mass violence succeed in bringing her case through the Indian justice system. More typically, her efforts to secure justice are disregarded or even thwarted by the State. During and after of mass violence and conflict, the criminal justice system rarely is an ally in the quest for redress and frequently discriminatorily denies women’s access to justice.

Goals

Against this backdrop, *Access to Justice for Women: India’s Response to Sexual Violence in Conflict and Social Upheaval* (Report) examines four examples of sexual violence against women in the Indian

states of Punjab, J&K, Gujarat, and Odisha.

The case examples focus on the efforts of female victims of sexual violence and their allies to seek justice and the response of the Indian justice system to these crimes. The four examples represent a diverse range of incidents and legal outcomes, all of which gained significant attention within each region, if not nationally and internationally. Through these emblematic cases, this Report aims:

- To identify and explore the multiple forms of discrimination and subordination that impact the experience of women and girls of sexual violence and their efforts at accountability;
- To examine the measures adopted by the Indian State to prevent, investigate, prosecute, punish, and provide redress for acts of sexual violence and to identify common patterns of weakness in the State’s response; and
- To apply international standards to propose recommendations for legal and institutional reforms that promote the efficacious protection of the rights of women and girls.

The goal of this Report is not to determine whether India’s actions or omissions constitute violations of its international obligations, although it does make note of *prima facie* violations of international human rights law recognized in official documents. Instead, the goal of this Report is to examine the efforts of women victims of sexual violence and their allies to access justice in particular contexts and to identify emblematic ways the Indian legal system succeeded or failed to provide effective redress. This Report draws on international legal standards to identify systemic normative and institutional weaknesses that foster impunity. To the extent those standards comprise efficacious approaches to rights protection, this Report also employs international human rights, humanitarian, and criminal standards to suggest legal and institutional reforms.

Case Selection

This Report examines India's responses to incidents of targeted sexualized violence against women in the context of social upheaval or internal armed conflict.

regions and different contexts that illustrate ways in which the State has responded to situations of gender violence but that are rarely discussed in the same analysis. These cases, while emblematic for each region, are also exceptional insofar as victims and their allies pursued legal accountability and there is a publicly available record of their efforts.



METHODOLOGY

The particular incidents selected here are aligned with areas of heightened conflict and mass violence identified by the Armed Conflict Resolution and People's Rights Project at Haas-Berkeley (ACRes Project). The ACRes Project identified four cases that exemplify general patterns of violence and difficulties faced by women during the accountability process and for which a legal record of the accountability process is available. The cases were selected with the aim of identifying examples from different

The case study materials are drawn from primary legal documents and publically available secondary sources including scholarly articles, books, reports, newspapers, and official documents. In some cases, there are inconsistencies between official Indian government documents and reports by non-government organizations. The Report makes note of significant discrepancies in the endnotes.²¹ The analysis of the four seminal cases, while indicative of the situation at large in each area, is not exhaustive and offers a partial and limited account of

emblematic issues. The legal analyses of the case studies are based on relevant international human rights treaties India has ratified, namely the International Covenant on Civil and Political Rights (ICCPR),²² Convention on the Elimination of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC). Additional sources of interpretation of international law and standards were consulted, along with jurisprudence from international and regional human rights bodies.

This Report does not identify victims or their relations by name to protect their privacy and in compliance with Section 228A of the Indian Penal Code.²³ Indian law prohibits the disclosure of identifying information about victims of sexual violence.²⁴ Although many victims of the incidents described in this Report wanted to be identified by name, all identifying information about the victims was redacted from the Report.

CASE CHARACTERISTICS

The incidents in Punjab, J&K, Gujarat, and Odisha took place at different times as well as in different states. While the violence in KunanPoshpura, Kashmir, occurred in 1991, the rape of ██████ in Odisha took place nearly 20 years later, in 2008. Kashmir and Punjab lie in the north of India, while Odisha and Gujarat are in the east and west, respectively. The incidents in J&K, and Gujarat each involved mass rape, while in Odisha and Punjab, the incidents involved individual rapes.

In addition, all of the case examples highlight acts of sexual violence perpetrated by men, with the participation or complicity of state actors, against women who experienced marginalization not only because of their gender but also due to their religious affiliation and minority status. The ‘religionization’ of sexualized violence in these case examples is apparent in the victims targeted: military officers raped Muslim women during a raid of village in Kashmir, a region beset with violence since 1947; in Punjab, the police raped a Sikh woman and tortured several Sikh villagers supporting her in the context of the conflict in the late 1980s and early 1990s; Hindu attackers

committed mass rape and murder against Muslims in Gujarat in 2002 following the burning of a train carrying Hindu pilgrims; and a Hindu mob abducted and raped ██████ in Odisha in 2008, after the assassination of a Hindu religious and nationalist leader.

In all of these instances, the Indian State fell short of its obligations to prevent, investigate, prosecute and punish, and ensure redress. Responses ranged from refusing to assist victims (Gujarat and Odisha) to justifying violence that occurred as a necessary to protect ‘law and order’ against the threat of terrorism (J&K and Punjab). Some of the criminal cases were resolved within six years (Odisha), while others remain unresolved more than twenty years after the incident (J&K). The relative success of the legal procedures implemented—measured by convictions of perpetrators, compensation received, and assurances of protection—likewise vary significantly. In each case, the actions of the police and the legal system raise concerns about the protection of the rights of minority women.

International Legal Standards

Introduction

In recent years, the international legal community has increased emphasis on examining the nature of gender-based crimes and strengthened its efforts to develop human rights standards focused specifically on protecting the rights of women and girls regarding sexual violence. In instances of sustained conflict, for example, it has expanded crimes against humanity to include “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”²⁵ The common thread among international efforts is the critical understanding that sexual violence against women and girls is not only a crime but also a violation of international human rights standards. In India, this expansion

implicates not only domestic law²⁶ but also binding international law it has ratified.

RELEVANT INTERNATIONAL INSTRUMENTS

Many international instruments, including treaties, address the human rights of women,²⁷ the most notable of which are the ICCPR and CEDAW.²⁸ In general, these treaties aim to define the various forms of discrimination to which individuals may be subject and establish rights protecting individuals from those various and intersecting discriminations. According to both treaties, State Parties are obligated to ensure the protection of women's right to personal integrity and the prevention of sexual violence against women as a form of gender-based discrimination. India acceded to the ICCPR on April 10, 1979;²⁹ it ratified CEDAW on July 9, 1993.³⁰ As a State Party to each, India is bound by these treaty provisions.

At its core, the ICCPR codifies legal human rights standards considered to be the "natural yardstick for the drafting of . . . fundamental rights" in national constitutions.³¹ Notably, the ICCPR codifies the human right of individuals, including women and children, to protection from "advocacy of national, racial or religious hatred" resulting in "incitement to discrimination, hostility or violence."³² Where sexual violence and gender-based discrimination frequently intersect with one of these other forms of hatred, the ICCPR becomes a critical tool for establishing wrongdoing.

While the ICCPR provides general, codified human rights standards for all persons, CEDAW focuses specifically on the protection of women.³³ The United Nations considers CEDAW to be a major platform for addressing gender-based discrimination as a human rights violation and has now incorporated sexual violence against women as a form of discrimination under the treaty.³⁴ As it pertains to sexual violence against women *during conflict*, CEDAW specifies that States shall take "all appropriate measures" to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudicial customs and all other practices which are based on the idea of the inferiority or the superiority of

either of the sexes or on stereotyped roles for men and women."³⁵ According to the CEDAW General Recommendations, the Convention requires that States protect women against violence of any kind including the use of targeted sexual or gender-based violence as a tool for establishing hierarchies between genders.³⁶ Recognizing that sexual violence is a violation of human rights at any time, the CEDAW General Recommendations can thus be understood to apply to sexual violence in situations of *mass upheaval*.

Since CEDAW came into force, the international community has increasingly focused on violence against women in domestic and intimate settings, and in times of conflict, as a human rights violation. These efforts are manifest in the *Declaration on the Elimination of Violence Against Women*, as well as in several General Assembly resolutions focused specifically on targeted sexual violence against women.³⁷ In addition to CEDAW, the CRC contains several provisions particularly relevant to female child victims of sexual violence during situations of civil unrest and armed conflict. The CRC specifies that State Parties must "protect the child from all forms of sexual exploitation and sexual abuse."³⁸ The explicit language used in this article makes clear that human rights law prohibits sexual abuse against children under any circumstances.³⁹ Additionally, during times of armed conflict where international humanitarian law also applies, the CRC specifies that State Parties must "ensure respect for [the] rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child."⁴⁰ This provision includes the obligation of the State to protect children from acts of sexual violence, as well as a general obligation of the State to minimize harm to civilians, including children.⁴¹

Overall, international human rights treaties and declarations stress that women are frequently subject to "double and triple marginalization," stemming from "multiple intersecting or aggravated forms of discrimination," including gender-based discrimination, which intersects with discrimination based on "otherness" (race, ethnicity, religion, and economic status).⁴² Consequently, States must

be mindful that in responding to crimes of sexual violence, they do not inadvertently re-victimize and thus take measures to ensure that remedies take into account the identity of the victim and the nature of the trauma they have experienced.

State Obligations

When a State ratifies a human rights treaty, the legal obligations of the treaty become binding on the State Party as a whole, imposing a general obligation to respect the rights laid out in the treaty and to ensure such rights to all individuals under the State's jurisdiction.⁴³ The ICCPR, CEDAW, and other international treaties firmly establish sexual and gender-based violence as a human rights violation. International law holds that States must use due diligence to respond to instances of such violence against women.⁴⁴ According to CEDAW General Recommendation No. 19, due diligence requires States to prevent, investigate, punish, and provide compensation for acts of violence against women in accordance with national legislation, regardless of whether state or private actors committed the acts.⁴⁵

DUTY TO PREVENT

As elaborated by the SR on Violence against Women, the duty to protect requires States to use "all means of a legal, political, administrative and cultural nature to promote the protection of human rights and ensure that violations are considered and treated as illegal acts, leading to the punishment of responsible parties and the indemnification of victims."⁴⁶ This duty gives rise to a further affirmative duty to prevent the occurrence of sexual and gender-based crimes against women.⁴⁷

By the same token, CEDAW requires that all State Parties provide legal protection to the rights of women on the same level as men, ensure that public authorities and institutions refrain from any acts of discrimination against women, and adopt legislative and other measures that prohibit gender discrimination, including sanctions where appropriate.⁴⁸ As explained above, CEDAW General

Recommendation No. 19 makes clear that "[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."⁴⁹ In its 2014 review of India's compliance with CEDAW, the CEDAW Committee called on India to enforce legislation relating specifically to violence against women.⁵⁰

DUTY TO INVESTIGATE

“ When a State ratifies a human rights treaty, the legal obligations of the treaty become binding on the State Party as a whole, imposing a general obligation to respect the rights laid out in the treaty and to ensure such rights to all individuals under the State's jurisdiction. The ICCPR, CEDAW, and other international treaties firmly establish sexual and gender-based violence as a human rights violation. International law holds that States must use due diligence to respond to instances of such violence against women.

The duty to investigate requires States to provide victims of human rights violations with a prompt, impartial, thorough, and independent official investigation.⁵¹ The duty arises from the State's obligation to protect all individuals under its jurisdiction from acts committed by private or public persons that may infringe on their enjoyment of human rights.⁵² It places the burden to carry out investigations on the State, requiring them to perform investigations regardless of whether victims or their family members file complaints.⁵³ The burden requires States to perform an investigation but does not require the State to produce a specific result.⁵⁴ As such, the duty is not necessarily violated if an investigation fails to lead to the complete clarification of the facts and legal consequences surrounding a violation, so long as authorities carry out the investigation in accordance with international standards.⁵⁵

According to an authoritative guide drafted by the International Commission of Jurists, international standards require a criminal investigation to meet the following eight discrete requirements:

- i Investigations must be independent and impartial;
- ii Investigations must be capable of leading to the identification and, if appropriate, punishment of perpetrators;
- iii Authorities must have the resources and powers necessary to complete an effective investigation;
- iv Victims and their relatives must have the right to effective participation in investigations;
- v States must provide protection against threat or intimidation to victims, relatives, and witnesses;
- vi Investigations must collect and document all evidence and disclose the facts of the violation and its causes, along with the methods, evidence, and results of the investigation to victims, their relatives, and the public;
- vii States must suspend from duty any officials suspected of involvement in the violations; and
- viii Concluding reports must be made public immediately.⁵⁶

Drawn from criteria established by United Nations human rights bodies and regional courts, these investigative standards reflect international law and best practices.

The CEDAW Committee has raised concerns about India's execution of the duty to investigate. In its *Concluding Observations* on India, the Committee urged the State to "strengthen the efficiency of the police, to ensure that police officers fulfill their duty to protect women and girls against violence and are held accountable, to adopt standard procedures for the police in each state on gender-sen-

sitive investigations and treatment of victims and of witnesses, and to ensure that first information reports are duly filed."⁵⁷

DUTY TO PROSECUTE AND PUNISH

The duty to prosecute and punish is rooted primarily in the interest in combating impunity and denying amnesty through an effective judiciary.⁵⁸ The Office of the High Commissioner for Human Rights (OHCHR) has recognized a state duty to prevent impunity and hold perpetrators and accomplices liable.⁵⁹ States must not prevent prosecution by granting amnesty to parties or by relying on prior immunity or indemnity.⁶⁰ The Human Rights Committee has likewise declared that States cannot provide amnesty or immunity to perpetrators; that States must cooperate in bringing suspects of gross human rights or serious humanitarian law violations to justice; and that States' main obligation is criminal sanctions against guilty parties, complemented by disciplinary measures.⁶¹ The SR on Violence against Women specifically highlighted the problem of impunity in India for police officers that committed gender violence.⁶² Where necessary, States must adopt or amend legislation to provide national courts with universal jurisdiction over serious crimes under international law.⁶³

The duty to prosecute does not guarantee a prosecution or provide victims with any rights against the perpetrator.⁶⁴ Under this obligation, however, the State has a duty to prosecute individuals suspected of involvement in human rights violations⁶⁵ and to punish those found guilty.⁶⁶ The Human Rights Committee has noted that a failure to bring perpetrators to justice could give rise to a breach of the ICCPR.⁶⁷

The UN General Assembly has declared that States should ensure victims' rights by establishing judicial and administrative mechanisms "to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible" and "develop ways and means of providing recourse for victims where national channels may be insufficient."⁶⁸ While the State has the primary responsibility in deciding to

prosecute, victims have the right to become civil parties to the case or, if the State declines to prosecute, bring proceedings themselves where the State recognizes private prosecutions.⁶⁹ States must provide broad legal standing to wronged parties and to any individual or non-governmental organization with a legitimate interest in the violation.⁷⁰

DUTY TO ENSURE REDRESS

“ To be effective, a remedy must provide real, rather than illusory, access to justice.

The duty to ensure redress includes a requirement that remedies be prompt and effective, providing meaningful access to justice for victims.⁷¹ The United Nations has recognized that any individual whose rights or freedoms ensured by the ICCPR are violated has the right to an effective remedy.⁷² Under the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, victims are entitled to prompt redress for the harm they have suffered⁷³ through access to the criminal justice system, services to assist their recovery, and reparations.⁷⁴ To be effective, a remedy must provide real, rather than illusory, access to justice.⁷⁵

Effective redress is often denied to Indian victims of gender violence because of the low rates of prosecution and conviction for such acts.⁷⁶ The CEDAW Committee and the SR on Violence against Women have both called on India to enact legislation that addresses communal violence by adopting gender-sensitive, victim-centered procedural and evidentiary rules and reparations regimes.⁷⁷

Indian Laws and Institutions

The Indian judiciary, a single integrated system, has three main hierarchical levels: subordinate courts, High Courts with jurisdiction over one

or more states, and the Supreme Court, which is the court of last resort in constitutional, civil, and criminal matters.⁷⁸ Although primarily a court of appeals, the Supreme Court also has original jurisdiction over writs alleging violations of fundamental rights.⁷⁹ Supreme Court decisions are binding on India's lower courts.⁸⁰ Decisions by High Courts—the head of judicial administration for states—are binding in the respective state jurisdictions, but not on other High Courts.⁸¹ India's district courts adjudicate civil and criminal cases.⁸² The jurisdiction on criminal matters of district courts, referred to as Sessions Courts, depends upon the severity of the crime and punishment. Sessions courts usually have jurisdiction over rape and forced sodomy cases.⁸³ The state government may also direct a Sessions Court to function as a human rights court for the purpose of trying offenses arising out of violations of human rights.⁸⁴ Subordinate courts of Judicial Magistrates have jurisdiction over “crimes against modesty.”⁸⁵ The jurisdiction on civil matters of the district courts depends upon territorial limitations and the matter's pecuniary value.⁸⁶ Victims of violations of fundamental rights may seek redress through India's system of Public Interest Litigation (PIL).⁸⁷

Criminalization of Sexual Violence

Indian law criminalizes sexualized violence as rape or “assault or criminal force to woman with intent to outrage her modesty.”⁸⁸ From 1860, when British India's first criminal code was enacted, until 1983, Indian criminal provisions related to sexual violence remained largely unchanged.⁸⁹ In 1983, an acquittal in a highly publicized case of a teenaged girl raped by a police constable spurred legal reform.⁹⁰

The 1983 amendments in force at the time of the incidents described by this Report, criminalized rape as penile-vaginal penetration, committed by a man upon a woman, without her consent.⁹¹ Non-vaginal penetration or penetration with an object or finger did not constitute rape but an “unnatural offence” or an “assault or criminal force to woman with intent to outrage her modesty.”⁹²

Under reforms enacted in 1983, the offense of rape became cognizable—a crime for which police may arrest a suspect without warrant⁹³—and non-bailable.⁹⁴ The 1983 law also criminalized, for the first time, aggravated forms of rape, such as gang rape, rape of a minor, and custodial rape.⁹⁵ Additionally, if a victim testified that she did not consent, under the 1983 law, the court must presume a lack of consent.⁹⁶ After 1983, a rape conviction was subject to a mandatory minimum of seven years and the possibility of life imprisonment, and aggravated rape carried a mandatory minimum of ten years.⁹⁷ A conviction of “assault or criminal force to woman with intent to outrage her modesty” carried no minimum, and a maximum sentence of two years.⁹⁸ The crime of “unnatural offenses”—an anti-sodomy law—carried no minimum sentence, and a maximum of life imprisonment.⁹⁹ At the time of the incidents described by this Report, Indian law did not explicitly criminalize attempted rape or marital rape of wives over fifteen years old.¹⁰⁰

The high profile New Delhi gang rape in 2012 sparked widespread protests and calls for reform which led India to enact the Criminal Law (Amendment) Act, 2013.¹⁰¹ By amending Indian criminal law and procedure, the Act introduced important reforms to how crimes of sexual violence are investigated and prosecuted by India’s criminal justice system. The Act expands the definition of rape to include penetration of the labia majora, urethra, mouth, or anus with any object or body part, including the mouth, or any parts of the victim’s body.¹⁰² It also defines consent as “an unequivocal voluntary agreement” and does not require physical resistance to show lack of consent.¹⁰³ Additionally, the Act establishes longer and harsher sentences for crimes of sexual violence.¹⁰⁴ The Act only applies to acts of sexual violence by men against women and did not criminalize marital rape.

Criminal Procedure

A criminal investigation in India begins with the filing of a police report, called the First Information Report (FIR), or by a complaint directly to

a court.¹⁰⁵ Any officer who receives information about a cognizable offense, such as rape or crimes against modesty, is required to document the information in writing and file the FIR with the competent court.¹⁰⁶ Police officers are required to promptly investigate cognizable offenses or document the reasons the investigation was not undertaken.¹⁰⁷ A judge may investigate an offense based on an FIR, a complaint of facts, information received from a person other than a police officer, or personal knowledge of an offense.¹⁰⁸

Following the investigation, the judge considers the record and the prosecution’s opening statements. If the judge decides that trial should continue, the judge “frames the charge” and the defendant enters a plea.¹⁰⁹ If the defendant pleads not guilty, the judge hears evidence from the prosecution and the defense and then renders a judgment of guilty or innocent.¹¹⁰ Under the Indian Code of Criminal Procedure, a court may impose a sentence, fines, and/or order payment of restitution to the victim.¹¹¹ Most convicted offenders are unable to pay restitution.¹¹²

No standard for forensic medical exams existed in India at the time of the incidents discussed in this Report. Prior to 2000, medical personnel only performed forensic medical examinations of rape victims if requested by police or a court. Doctors at hospitals routinely refused to examine women who were the victims of sexual violence¹¹³ and were vulnerable to intimidation to compel changes to examination results.¹¹⁴ Medical examiners used the “two-finger test” during rape exams despite judicial decisions refuting the test’s validity.¹¹⁵

Civil Remedies

The civil recourse for human rights violations under Indian statutory and common law is tort remedy—typically the tort of public misfeasance, trespass to the person, or assault and battery—but tort remedies have not been pursued in sexual assault cases.¹¹⁶ Sovereign immunity and other laws shield public officials, police, and military from civil suits¹¹⁷ and common law remedies are

not used in Indian human rights litigation against the State and its officials.¹¹⁸

Victims of violations of fundamental rights, or any person or organization on their behalf, may seek redress through India's system of Public Interest Litigation (PIL).¹¹⁹ PIL is a unique type of legal action created by members of the Indian Supreme Court "to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed."¹²⁰ The PIL system has no formal pleading¹²¹ or standing requirements¹²² and the Court may initiate a PIL *suo motu*.¹²³ Parties seeking to initiate a PIL may petition the Supreme Court or High Courts by sending a complaint, a letter, or even a newspaper article.

PIL has successfully been used in cases of sexual assault, including cases of gang rape by state actors.¹²⁴ The Supreme Court has repeatedly held that rape is a violation of the fundamental right to life and liberty.¹²⁵ The Supreme Court has also "tak[en] operational control of failing government institutions and requir[ed] systematic efforts to mitigate the effects of past injustices."¹²⁶ It has ordered states to suspend public officials or impose other disciplinary actions, directed authorities to institute criminal investigations and prosecutions,¹²⁷ and rejected the defense of sovereign immunity in cases involving violations of constitutional rights.¹²⁸

Non-Judicial Remedies

In cases of sexual violence in India, the National Commission for Women (NCW), the State Commission for Women (SCW), the National Human Rights Commission (NHRC), the State Human Rights Commission (SHRC), and the National Commission for Minorities (NCM) receive individual and collective petitions by victims, submit reports to Indian state governments with preliminary comments and recommendations, intervene to conduct fact-finding missions, and file peti-

tions before various courts, including the Supreme Court.¹²⁹ The NCW was created in 1992 to investigate the deprivation of women's rights and the failure of the Indian government to implement laws, policies, guidelines, or instructions ensuring women's rights.¹³⁰ The NCW may also intervene in court cases and fund litigation involving issues affecting women.¹³¹ In 1999, the NCW received 4,329 complaints involving sexual harassment, torture, rape, refusal to register a FIR, and gender discrimination.¹³²

In 1993, following national and international concern about human rights violations committed during the conflicts in Punjab, J&K, and the northeastern states, India created the NHRC and fourteen SHRCs.¹³³ The NHRC and SHRC have the authority to investigate complaints of human rights violations, but must initiate the investigation within one year of the alleged violation.¹³⁴ In 2000, the NHRC received over 70,000 complaints.¹³⁵

Both the NHRC and SHRC are authorized to subpoena witnesses, compel discovery, obtain public records from any court or office, and form commissions to examine witnesses or documents.¹³⁶ A government office or agency must support the investigative work of human rights commissions.¹³⁷ The NHRC and SHRC investigating officers can summon individuals to be interviewed, require discovery, and request any public record.¹³⁸ The officer is required to submit a report to the respective state or national human rights commission for publication.¹³⁹ If the human rights commission determines a violation has occurred, it may make recommendations to the government agency involved.¹⁴⁰ Commissions may recommend payment of compensation to victims or family members, disciplinary proceedings against officials, criminal prosecutions of perpetrators, and implementation of other measures to prevent the repetition of violations.¹⁴¹ The NHRC and SHRC also have authority to intervene in human rights cases pending before Indian courts.¹⁴² Both national and state human rights institutions have limited authority to investigate members of the Indian Armed Forces involved in human rights violations. The NHRC may not independently investigate a

member of India's security forces but may request a report from the national government.¹⁴³ Based on this report, the NHRC may issue confidential recommendations to the national government.¹⁴⁴ The national government must inform the NHRC of any action taken to implement the NHRC recommendations within a pre-determined period of time.¹⁴⁵ The SHRCs may not investigate or request information from national government in cases involving the military.¹⁴⁶ However, in Kashmir, for example, the SHRC has acted on matters that reportedly involve the military.¹⁴⁷ The NCM was created in 1992 to monitor the implementation of constitutional and other legal safeguards in India designed to protect the rights of minorities in both central and state governments.¹⁴⁸ The Indian government has recognized six religious communities as "minorities," including Muslims, Christians, and Sikhs.¹⁴⁹ The NCM submits reports and makes public recommendations to the national government.¹⁵⁰ When reviewing complaints, the NCM has "all the powers of a civil court trying a suit;" like the NHRC and SHRC, the NCM is authorized to subpoena witnesses, compel discovery, obtain public records from any court or office, and form commissions to examine witnesses or documents.¹⁵¹ In a two-month period in 2014, the NCM received a total of 366 complaints from Muslims, Christians, and Sikhs.¹⁵²

Case Examples

Punjab

CONTEXT

Between 1984-1995, Punjab was impacted by widespread and armed conflict between Indian state actors and Sikh separatist groups. Conflict-related issues recur intermittently in the present.

By 1984, the demands for increased state autonomy since 1947 had intensified and communication between the national government in New Delhi and the Sikh leadership ceased. In response, the Indian army launched Operation

Bluestar and deployed over 250,000 troops during the height of the operation.¹⁵³ Widespread reports of mass arrests, extrajudicial killings, forced disappearances, torture, and indiscriminate raids of rural villages soon surfaced.¹⁵⁴ The operation included assaults on Gurudwaras—Sikh places of worship—located throughout Punjab.¹⁵⁵ According to official government reports, 492 civilians were killed during the operation.¹⁵⁶ Non-government sources estimate that between 4,000-8,000 civilians were killed.¹⁵⁷ The Armed Forces (Punjab and Chandigarh) Special Powers Act of 1983, repealed in 1997, shielded participating members of the armed forces from prosecution.¹⁵⁸ In October 1984, then Prime Minister Indira Gandhi, who ordered Operation Bluestar, was assassinated by two of her Sikh bodyguards.¹⁵⁹ Anti-Sikh violence ensued across India. In the capital city of New Delhi alone, 2,733 to 3,000 Sikhs were killed in the span of three days.¹⁶⁰

Following Operation Bluestar, Sikh militant groups used armed resistance. Indian state forces committed enforced disappearances, extrajudicial executions, and clandestine mass cremations of civilians.¹⁶¹ International NGOs reported that police officials routinely arrested and tortured Sikh women suspected of having information about male relatives' alleged involvement in Sikh groups, or giving food or shelter to suspected Sikh militants.¹⁶²

Security forces also systematically used sexual violence against women to punish and terrorize entire communities.¹⁶³ The case examined by this Report is one example.

On the morning of February 9, 1989, in this context of political violence and armed clashes, Sikh separatists allegedly murdered a popular principal of a secondary school in Village ██████████.¹⁶⁴ Later that morning, police officers illegally and arbitrarily detained a Sikh woman who worked at a local hospital, ██████████ ██████████ ██████████ for allegedly harboring those responsible for the principal's murder.

INCIDENT

In the early hours of February 9, 1989, thousands

gathered at the scene of the murder and some in the crowd alleged that “terrorists” frequented ██████’s house.¹⁶⁵ Later that morning, a group of police led by Police Station House Officer Radha Krishan (SHO Krishan) entered ██████’s home to ask her about the location of her relative, ██████.¹⁶⁶ According to court records, when ██████ was unable to provide information about her relative’s whereabouts, the officers illegally detained ██████, a woman named ██████, and a boy.¹⁶⁷ The detainees were taken to the murder site where the officers released the boy. The two women were taken to the police station in ██████.¹⁶⁸ ██████ was released later that evening.¹⁶⁹ At the station, ██████ was asked to sign a blank document and when she refused, she was beaten and kicked by SHO Krishan and Police Station Head Constable Charanjit (SHC Charanjit).¹⁷⁰ ██████ remained in police custody that day and night. Police officers did not register her arrest or detention as required by law.¹⁷¹

Around midnight on February 10, 1989, SHO Krishan and SHC Charanjit entered the cell where ██████ was detained. After she rebuffed their sexual requests, the two officers raped her, one after the other.¹⁷² About one hour after the two officers left, two other officers, Assistant Police Clerks Kashmiri Lal (K. Lal) and Hussan Lal (H. Lal) entered ██████’s cell and raped her.¹⁷³ ██████ stated that SHO Krishan threatened to implicate her in a heinous crime if she did not remain quiet about the rapes.¹⁷⁴

██████ was kept in custody until 4:30 pm on February 10.¹⁷⁵ Upon release, ██████ told her husband and ██████, a neighbor, who had been waiting outside of the police station, that she had been raped.¹⁷⁶ ██████ sought medical care at local hospitals but was refused assistance by attending physicians.¹⁷⁷

INVESTIGATION

On February 13, 1989, ██████ sent a letter to the Governor of Punjab describing the crimes committed by the police three days earlier.¹⁷⁸ Police officers investigated the incident, but took no action against the accused.¹⁷⁹ On July 17, 1989,

the Inspector General of Police of Punjab ordered a Deputy Superintendent of Police to record victim and witness statements, but the police did not arrest or discipline the accused officers.¹⁸⁰ Five months after the rape, on July 25, 1989, ██████ filed an initial complaint before Chief Judicial Magistrate ██████.¹⁸¹

“ In Punjab, ██████ filed her initial complaint in 1989 and, the court issued the convictions in 1997—eight years later. During those eight years, ██████ attended more than 80 court hearings and lived in hiding for fear of retribution while officers allegedly tortured her family members and burned her home.

Almost one year after the attack, the four officers appeared in court for the first time.¹⁸² The police officers were accused of minor offenses, including voluntarily causing hurt, and intentional insult with intent to provoke breach of the peace.¹⁸³ They pled not guilty and posted bail.¹⁸⁴ H. Lal died shortly after he was released.¹⁸⁵ ██████ then petitioned the High Court of Punjab & Haryana to charge the three officers with the more serious offenses of kidnapping, wrongful confinement, rape, and criminal intimidation.¹⁸⁶ A year later, on July 29, 1991 the High Court transferred ██████’s case from the Chief Judicial Magistrate ██████ to the Chief Judicial Magistrate in Punjab’s capital city, Chandigarh.¹⁸⁷ There, the Magistrate charged the three officers with wrongful confinement, kidnapping, and criminal intimidation, but not rape.¹⁸⁸ After a three-year delay, ██████’s case was again transferred, this time to Additional Sessions Judge Madaan in Chandigarh.¹⁸⁹ On August 5, 1994, the accused officers pled not guilty to the charges.¹⁹⁰ On July 8, 1995, the court added the charge of rape committed during communal or sectarian violence.¹⁹¹ The officers, however, were released on bail. They failed to appear in court despite repeated summons, and

were not formally charged with rape until a year later.¹⁹² The case was transferred for a fourth time, and assigned to Additional Sessions Judge Batra in Chandigarh on March 14, 1997.¹⁹³

TRIAL & APPEAL

Eight years after the incident, the trial against SHO Krishan, SHC Charanjit, and K. Lal began before Judge Batra. To substantiate the charges against the officers, the prosecution called three witnesses: ██████, ██████'s husband; ██████, a neighbor; and ██████.¹⁹⁴ The three officers who testified in their defense alleged that ██████ was arrested for sheltering militants who were connected to the murder of the principal, and denied that she was held overnight.¹⁹⁵ Doctors from the two hospitals that had refused to provide ██████ medical attention testified on behalf of the defense that ██████ had never sought medical care.¹⁹⁶ The judge found ██████ testimony credible, noting that her account had remained consistent, from her initial letter to the Governor in 1989, to her testimony at trial in 1997.¹⁹⁷ The judge also praised ██████'s bravery and courage, describing ██████ as a "hapless" woman who belonged to an "illiterate village community," but wrote to the Governor of Punjab requesting an investigation against the officers who were "persons of great authority."¹⁹⁸ When the governor and police failed to act, the judge noted that ██████ resorted to the "cumbersome, time and money consuming process of filing the complaint in the court of law."¹⁹⁹ The judge also recognized that police officers had "harassed and tortured" potential witnesses "so as to prevent them" from testifying in ██████'s support.²⁰⁰ On August 14, 1997, the judge found the three defendants guilty of rape, kidnapping, and wrongful confinement and sentenced each to 10 years in prison.²⁰¹

SHO Krishan, SHC Charanjit, and K. Lal immediately appealed the convictions.²⁰² The appeal alleged that ██████ was a terrorist, and that she fabricated the rape story to "pre-empt [the] effective investigation of her involvement in the murder of [the principal]."²⁰³ The appeal was admitted on January 21, 1998, and on September 9, 1998,

██████ petitioned the High Court to be named as respondent in the appeal.²⁰⁴ In that petition, ██████ alleged that police officers had burned her home and tortured her relatives to compel her to withdraw her complaint.²⁰⁵ She also stated that she had attended more than 80 court hearings during the trial process.²⁰⁶

“ In that petition, ██████ alleged that police officers had burned her home and tortured her relatives to compel her to withdraw her complaint. She also stated that she had attended more than 80 court hearings during the trial process.

On October 3, 2000, after four years in custody, the High Court of Punjab & Haryana granted SHO Krishan's application for bail.²⁰⁷ According to the victim's briefs, SHO Krishan had continued to receive his salary while in custody, had not been disciplined, and had returned to the police force after he was released on bail.²⁰⁸ Between September 2003 and November 2005, SHO Krishan moved to adjourn the appeals hearing or failed to appear on several occasions.²⁰⁹ The defendants were detained in November 2005 after the High Court upheld their conviction. The police department later dismissed the officers from service.²¹⁰

On July 4, 2013, the Supreme Court of India upheld the convictions. Crediting the consistency of ██████'s account, and finding the officers' version unreliable, the Supreme Court concluded that she had been detained and raped in February 1989.²¹¹ The defendants served a sentence of almost six years²¹² and were released although available court records do not indicate when the defendants served their sentences.

While the three officers were convicted of rape, the process was lengthy, onerous, and dangerous for the victim and her family. The police department failed to properly investigate the incident or discipline the officers. Additionally, there is no

evidence available that the acts of intimidation or torture suffered by the victim's family were investigated and those responsible punished.

Jammu & Kashmir

CONTEXT

For more than half a century, Jammu & Kashmir (J&K) has been the site of ongoing conflict between Indian security forces and local communities. J&K has a majority Muslim population and Hindu Pandits, Sikhs, Christians, Buddhists, and others comprise local minorities. Historically, disputes around issues related to political autonomy, self-determination, control over resources, and religionization have sparked protests and armed conflict.²¹³ Since the late 1980s, armed actors have committed atrocities against the civilian populations, including mass killings, forced disappearances, mass displacement, rape, and torture.²¹⁴ Security forces inflicted collective punishment on communities suspected of, or portrayed as, sympathizing with militants.²¹⁵ During cordon-and-search operations, security forces routinely and indiscriminately detained men, searched and burned houses, and raped women.²¹⁶ Sexual violence has been used to “punish and humiliate” communities in militant occupied areas.²¹⁷ The Indian government has also used repressive policies, including unlawful detentions and torture, to silence political dissent and weaken opposition parties.²¹⁸ For example, Indian security forces reacted to militant bombings in 1990 by killing hundreds of unarmed protestors.²¹⁹

Fighting between security forces and local insurgent groups was most intense between 1989-2004. The armed militancy largely dissipated between 2004-2007. However, during the summers of 2008 thru 2010, major protests took place. The conflict continues to interrupt civilian life.²²⁰ By some accounts, the “years of strife have seen more than 70,000 dead and more than 8,000 disappeared.”²²¹ Many victims were buried in clandestine graves.²²² J&K has been called “one of the world’s most militarized areas of this planet.”²²³ The J&K state

constitution and laws regulate all matters in the territory except in the areas of defense, currency, and foreign affairs, which remain under the control of the national Indian government.²²⁴ With regards to the sections most relevant to this Report, J&K’s penal code, the Ranbir Penal Code, is materially similar to the Indian Penal Code. In 1990, the J&K state government categorized J&K as a disturbed area.²²⁵ That same year, the Indian national government enacted The Armed Forces (J&K) Special Powers Act of 1990 (AFSPA), which provides military officials with broad powers to arrest, enter, search, and seize, without warrant, and to use force, “even to the causing of death” in disturbed areas.²²⁶ The AFSPA prohibits the prosecution or punishment of members of the military acting in disturbed areas without the express authorization of the national government.²²⁷

INCIDENT

Located in the northwestern corner of the Kashmir Valley, in Kupwara District, the twin villages of Kunan and Poshpora²²⁸ are approximately ninety kilometers from J&K’s summer capital, Srinagar.²²⁹ On February 23, 1991 at approximately 11:00 p.m., villagers reported that approximately 125 soldiers of the Fourth Rajputana Rifles and the Sixty-Eighth Mountain Brigade cordoned off the villages and forcibly removed the male villagers from their homes and detained them in two houses.²³⁰ While army personnel interrogated and tortured the men,²³¹ small groups of soldiers allegedly raided most of the village homes and gang raped between 23 and 100 women.²³²

In court documents, women from KunanPoshpora narrated the incidents of sexualized violence in graphic detail. They described groups of up to eight soldiers raping girls and women ranging in ages from eight years old to 70 years old.²³³ The soldiers also allegedly gang raped a woman who gave birth four days after the attack.²³⁴ Most of the women reported that the soldiers smelled of alcohol or were drinking alcohol while they gagged and bound their victims before gang raping them.²³⁵

After forcing villagers to sign No Objection Certificates,²³⁶ the soldiers left KunanPoshpora at approximately 9:00 a.m. the morning of February 24, 1991.

INVESTIGATION

“ In Kashmir, despite an entire village of eye-witnesses, torn and bloodied clothes, and discarded liquor bottles, the investigating officer closed the investigation “for want of evidence.”

On February 27, 1991, villagers reported the attack to army official headquarters located approximately five kilometers from KunanPoshpora.²³⁷ According to army officials, the villagers stated that “women had been molested at Kunan on the night of the search[,]” but the villagers stated that they did not know the victims or any of the victims’ names and no one filed a complaint.²³⁸ Village leaders reported that in response to their serious accusations, army officials “denied the charges and took no further action.”²³⁹

On March 4, 1991, villagers of KunanPoshpora sent a letter to the District Magistrate/Deputy Commissioner S.M. Yasin that described the incident.²⁴⁰ Yasin visited KunanPoshpora the following day²⁴¹ with police officers from Trehgam, including two constables who allegedly had accompanied the army into the villages on the night of the search.²⁴² Yasin interviewed twenty-three women in KunanPoshpora against whom “atrocities ha[d] been committed.”²⁴³ He also “was shown the rooms which were used for gang-raping and was shown the clothes which were torn by the Army . . .”²⁴⁴ His report recommended that the government investigate and prosecute those responsible, and that “measures be taken to prevent any more such unfortunate incident[s] in the district.”²⁴⁵ Yasin sent the report to the head of the Kashmir civil authority, Divisional Commissioner Wajahat Habibullah and to the Superintendent of

Police in Kupwara.²⁴⁶ Fifteen days after filing his report, Yasin was transferred from his post.²⁴⁷

On March 18, almost three weeks after the village raid, the Trehgam Police Station registered a First Incident Report (FIR).²⁴⁸ The FIR alleged the crimes of rape, trespass with the intention of assault, and wrongful confinement.²⁴⁹

Between March 15 and 21, 1991, medical officers examined thirty-two women and found evidence of rape, including healing abrasions and contusions.²⁵⁰ The medical reports also stated that, four days after allegedly being kicked in the stomach by a soldier, a woman gave birth to a baby with a fractured arm.²⁵¹

The highest-ranking police officer in Trehgam concluded that “[a]s per medical examination report, offense . . . [of rape] stands prima facie proved and made out.”²⁵² On March 22, 1991, the Director General of Police, the highest-ranking police officer in J&K, reassigned the investigation to a Kupwara police official, Assistant Superintendent Dilbagh Singh.²⁵³ Singh worked with a Special Investigation Team (SIT) to interview witnesses, victims, and army officials.²⁵⁴ The SIT also gathered physical evidence, including the victims’ clothes, and compiled a list of 125 soldiers that participated in the village attack.²⁵⁵ In July, Singh was transferred from Kupwara.²⁵⁶ The police investigation was reassigned in July to a Senior Superintendent of Police (SSP), who “started afresh” the investigation.²⁵⁷

A fact-finding delegation led by Chief Justice of the High Court of J&K in March 1991 interviewed fifty-three rape victims.²⁵⁸ The delegation’s report expressed concern that local officials had failed to follow “normal investigative procedures.”²⁵⁹

Intense coverage of the attack by the national and international press elicited “strong denials from army officials.”²⁶⁰ On March 18, 1991, Divisional Commissioner Habibullah also visited KunanPoshpora.²⁶¹ Following his visit, Habibullah concluded in his report that “[i]t is impossible to believe that officers of a Force such as the Indian Army would lead their men into a village with

the sole aim of violating its women.”²⁶² Finding the allegations of mass rape “highly doubtful,” he argued that “[i]f in each case rape was committed by 5 to 15 persons as alleged there would have had to have been at least 300 men in the village doing nothing but this!”²⁶³ He reasoned that the villagers may “have acted under militant pressure” and “[t]hat elements wishing to discredit the army as brutal, the civilian administration as ineffective and the Govt of India as uncaring ha[d] orchestrated a campaign . . .”²⁶⁴

“ In March 2013, twenty-two years after the village attack, the police filed a closure report—a document police submit when the investigation does not uncover sufficient evidence of a crime— in Kupwara District Court for judicial evaluation. The High Court subsequently denied a Public Interest Litigation (PIL) petition to investigate the military’s crimes . . .

At the request of the Indian army, the Press Council of India appointed a committee to investigate the incident.²⁶⁵ In June of 1991, Council members interviewed alleged victims and hospital officials.²⁶⁶ The Council concluded that abrasions described by the medical reports were “common among village folk in Kashmir” and “such a delayed medical examination prove[d] nothing.”²⁶⁷ The Council also noted that the baby’s broken arm may have been caused by doctors’ efforts “to position the foetus [sic] correctly or otherwise to ease the delivery.”²⁶⁸ The Council determined that the evidence “simply d[id] not add up [] [and] [wa]s riddled with contradictions of the most elementary kind.”²⁶⁹ “In the absence of any credible evidence,” the Council reasoned that the allegations “appear[ed] to be an invention, a hurriedly contrived piece of dissimulation which finally broke down under the weight of its own contradictions [The story was] a carefully rehearsed piece of disinformation that was made and

marketed to arouse anger and hatred . . .”²⁷⁰

In September of 1991, the police forwarded the criminal investigation to the Director Prosecution (DP), located in the office of the Director General of Police.²⁷¹ The DP concluded that the “challenge [wa]s not maintainable,”²⁷² and the allegations were “unfit for launching criminal prosecution.”²⁷³ He enumerated four “defects” with the accusations: (1) “[t]he statements of witnesses [were] not only stereotyped but also suffer[ed] from serious discrepancies and contradictions”; (2) the crime was not immediately reported to the police; (3) the District Magistrate did not receive the initial complaint from villagers until March 4, “which could give rise to the legal presumption that the incident ha[d] been stage managed”; and (4) “[t]he inability of the witnesses to identify the alleged accused ha[d] introduced a fatal and incurable lacuna in the prosecution story.”²⁷⁴

On September 12, 1991, the police closed the investigation as “untraced” without filing the required “closure report” to the District Magistrate.²⁷⁵ The Code of Criminal Procedure requires a police officer closing an investigation to submit a report to the court.²⁷⁶ No further investigations were conducted despite repeated attempts by the alleged victims to file complaints.²⁷⁷

Between 2004 and 2011, thirty-nine alleged victims submitted individual and group petitions to the State Human Rights Commission (SHRC).²⁷⁸ The SHRC consolidated the complaints and issued a report in October of 2011.²⁷⁹ The report concluded that army officials had “turned into beasts,” consumed alcohol, and “gagged the mouths of the victims and committed forced gang-rape . . .”²⁸⁰ The SHRC recommended that the J&K government prosecute officers allegedly responsible for the cover up, reopen the investigation, and compensate all of the victims named in the various petitions.²⁸¹ At the time of the publication of this Report, the Indian government had yet to inform, as required by law, the SHRC of the efforts to comply with its recommendations.²⁸²

In March 2013, twenty-two years after the village attack, the police filed a closure report—a

document police submit when the investigation does not uncover sufficient evidence of a crime—in Kupwara District Court for judicial evaluation.²⁸³ The High Court subsequently denied a Public Interest Litigation (PIL) petition to investigate the military’s crimes, ruling that the litigation would be “premature” due to the filing of the closure report.²⁸⁴ Two survivors filed a protest petition in response and requested that the court reopen the investigation.²⁸⁵

““ *The criminal courts of Kashmir never prosecuted or punished any of the alleged perpetrators of the mass rapes and police filed an official closure report with the court in 2013—twenty-two years after the attacks.*

On June 18, 2013, the Kupwara District Court rejected the closure report and found that the circumstances of the allegations “ma[de] an unbreakable chain to put the suspects on trial.”²⁸⁶ The court criticized the Director Prosecution’s 1991 findings, the failure of investigating agency to “unveil[] the identity of the culprits despite having a clear cut nominal role of 125 suspects[,]” and ordered the police to hold an “investigation parade” to determine the identities of the accused.²⁸⁷ The court also ordered the police to conduct an investigation within three months.²⁸⁸

In November of 2013, after the District Court’s deadline expired, the army appealed the court’s order to the J&K Sessions Court. The army appeal argued that an “identification parade” was too difficult to organize so many years after the incident.²⁸⁹ The appeal denied the allegations of rape and torture, asserted the goal of “total [immunity] for the alleged perpetrators[,]” and stated that army would not cooperate with the investigations but make “every effort . . . to stall them.”²⁹⁰ In response, the Sessions Court criticized the army for their “non-seriousness” and “casual irresponsible manner” before the dismissing the army’s appeal and ordering an investigation of the crimes.²⁹¹

On January 15, 2015, the J&K High Court stayed both the District Court order to reopen the investigation and the Sessions Court order to continue the investigation.²⁹² An appeal of the High Court’s stay is pending before the Supreme Court of India. In March 2015, the Supreme Court of India also stayed the compensation order for the victims issued by the J&K High Court. As of the time of this Report, the government has not investigated, charged, or prosecuted those responsible for the acts of sexual violence.²⁹³

Gujarat

CONTEXT

Gujarat has a long history of communal violence. Since 1947, Hindu and Muslim communities living in the western State of Gujarat have experienced political, economic, and religious tensions which periodically flare into social upheaval and violence.²⁹⁴ In the 1960s, a housing shortage in Gujarat’s capital city exacerbated the tensions; the shortage was generated by population growth, struggles over public resources, and job losses in the textile industry.²⁹⁵ In September 1969, the first major Gujarat riot resulted in more than 660 dead, 1,000 injured, and widespread destruction to property when Hindu crowds attacked Muslims and Muslim-owned property.²⁹⁶ In 1985, protests against a state policy to allocate government jobs to underrepresented communities²⁹⁷ became violent and resulted in hundreds of dead and injured.²⁹⁸ An official inquiry concluded that the police had failed to respond effectively, and in fact had participated in the violence.²⁹⁹ Major riots in 1990 and 1992 coincided with incidents of communal violence throughout India.³⁰⁰

By the early 2000s, many members of Hindu and Muslim communities in Ahmedabad, Gujarat’s largest city, lived segregated lives.³⁰¹ Many members of the Muslim community, which comprised twelve percent of the city’s population in 2001, lived in neighborhoods located in the outskirts of the city.³⁰² Juhapura, Ahmedabad’s largest Muslim neighborhood, currently of 400,000

inhabitants, lacks basic services including access to clean water, sanitation, and education.³⁰³ Muslims were underrepresented in government, including the judiciary, and business.³⁰⁴

“ In Gujarat, public officials and police officers reportedly seized control of police control rooms on the day of the massacre, facilitated the mob’s access to the community, prevented Muslims from fleeing mob violence, and failed to respond to calls for assistance from Muslim victims.

In 2001, the Hindu nationalist Bharatiya Janata Party (BJP) came to power in Gujarat.³⁰⁵ The Hindu nationalist movement advocates for the establishment of a Hindu state in India and contends that minority religious communities, including Muslims, are “foreigners” and a threat to the security of the Hindu majority.³⁰⁶ On February 27, 2002, a Muslim mob allegedly set fire to two train cars travelling in eastern Gujarat carrying Hindu pilgrims.³⁰⁷ In total, 59 Hindu passengers, including 10 children and 27 women, died in the incident.³⁰⁸ In the days following, government officials and local media described Muslims as “terrorists.”³⁰⁹ For three days after the train fire, Hindu nationalists attacked Muslims in Gujarat.³¹⁰ While some claimed that the violence was a spontaneous reaction to the killings of Hindu pilgrims, an Indian court determined that members of the Hindu nationalist parties planned the violence.³¹¹

INCIDENT

On February 28, 2002, at approximately 8:00 a.m., about 5,000 to 10,000 armed individuals carrying spears, swords, tridents, gas cylinders, petrol bombs, and acid bombs attacked the Muslim community of Naroda Patiya.³¹² Located in eastern Ahmedabad, Naroda Patiya was a community of nearly one thousand low-income Muslim families.³¹³ Attackers, led by members of the BJP and the Vishva Hindu Parishad (VHP),

another Hindu nationalist organization, shouted “Jai Sri Ram” [long live Lord Ram], “Not a single Miya [Muslim] should be able to survive,” and “Slaughter, Cut.”³¹⁴ Some perpetrators used *trishuls*—a three-pronged metal trident of religious significance to many Hindus—and wore saffron scarves and khaki shorts—the uniform of Hindu nationalist groups.³¹⁵

The attack on the neighborhood lasted until 10:00 p.m.³¹⁶ A court judgment found that “[members of the mob] were shattering the property of Muslims into pieces; they were ransacking the property of Muslims by getting into their homes; they were outraging the modesty of Muslim women; they were torching even women, children and cripples, burning them alive.”³¹⁷ According to officials, 96 persons were killed, including 25 children and 35 women, and 125 persons were injured.³¹⁸

Egregious crimes of sexual violence were committed during the attack on Naroda Patiya. Hindu rioters raped, gang raped, inserted foreign objects into, and stripped victims.³¹⁹ According to witnesses, most of the female victims—girls and women—were raped before they were murdered and burned.³²⁰ Several victims observed an attacker slice open the womb of a pregnant Muslim woman with a sword, extract her fetus, and subsequently throw both the woman and her fetus into a nearby fire; the woman was at or near full-term in her pregnancy.³²¹ Another witness described how a perpetrator sliced a young girl’s vagina open and threw her onto a fire.³²² Witnesses also observed the rape of girls as young as 12 years old.³²³

Muslim women were killed by sword or burned alive in front of their families and alongside their children.³²⁴ One witness reported that his daughter was dragged away, raped by four to five men, and beaten.³²⁵ She later died at a hospital.³²⁶ The witness’ wife and two other daughters were also dragged away and burned alive.³²⁷ Members of fleeing Muslim families were detained, stripped, raped, and then murdered.³²⁸ One woman recalled seeing “a naked girl running from twenty-five men.”³²⁹ Another survivor testified that four men cut off the string of her petticoat, sliced her hand with a sword, and gang raped her.³³⁰

Victims and eyewitnesses stated that police officers were complicit in the sexual crimes against women both during and after the incident.³³¹ According to human rights reports, Muslim requests for help went unheeded.³³² For example, one victim recalled: “The police was on the spot but helping the mob. We fell in their feet but they said they were ordered from above (not to help). Since the telephone wires were snapped we could not inform the fire brigade.”³³³ The local police station did not erect a barrier to block entry into the Muslim area³³⁴ or deploy *Mahila* [women] Police.³³⁵

Some police officers also actively participated in the violence. For example, witnesses reported that police officers led the mob to Muslim homes and fired on Muslims.³³⁶ One perpetrator testified that “[t]here were 50-60 policemen. We were co-operated by Police.”³³⁷

At midnight, when victims of the attack were taken to a relief camp under police protection, groups attempted to block the vehicles carrying victims.³³⁸ Victims remained in relief camps for months until the government of Gujarat ordered the camps closed in October 2002.³³⁹ Some of the survivors never returned to their homes in Naroda Patiya and resettled in homes provided by the Islamic Relief Committee.³⁴⁰

INVESTIGATION

The First Incident Report (FIR) was filed at the Naroda Police Station on the night of the massacre. From February 28, 2002 to March 8, 2002, the First Investigation Officer (IO) of Naroda Police Station led the criminal investigation.³⁴¹ The IO is authorized to record statements from witnesses, collect evidence, and arrest suspects.³⁴² The First IO did not preserve physical evidence of the massacre, including victim remains or weapons, nor did he explore investigative leads, such as the source of the agent used to burn the victims, or arrest the perpetrators identified by witnesses and victims.³⁴³ Survivors and witnesses criticized the IO for his ill-treatment of Muslims, insensitivity towards victims, and refusal to take statements from witnesses.³⁴⁴

On March 8, 2002, the Assistant Police Commissioner of Gujarat took over the investigation.³⁴⁵ While he recorded statements from a few of the injured parties at the hospital, he did not arrest any of the accused named in the FIRs.³⁴⁶ The investigator interviewed Hindus, but did not visit the victims’ relief camps.³⁴⁷ The Special Court concluded: “he was too careless to even know that the complainants and victims were Muslims.”³⁴⁸

In May 2002, the investigation was transferred to the Crime Branch in Ahmedabad where it remained until April 2008.³⁴⁹ According to a court ruling, the investigators within the Crime Branch often refused to record the names of perpetrators provided by witnesses.³⁵⁰ A witness alleged that the investigators only asked for the names and addresses of witnesses and completed the remainder of the witness statements according to their “whim and will.”³⁵¹

The National Human Rights Commission (NHRC), National Commission for Women (NCW), and the National Commission for Minorities criticized the police investigation and police operations.³⁵² According to the final judgment in the case, “the entire police record of statements [wa]s suspect and unreliable.”³⁵³ One attorney at the NHRC noted:

*When witnesses file complaints, the police enter their statements according to their [own] preference. They don’t file complaints properly. People are uneducated and the police don’t show them the statement, they just get them to sign it In some cases, [the police] won’t write the name of the accused. In one case, for example, seven people were identified but they didn’t write their names.*³⁵⁴

The NCW criticized the way police in Gujarat registered details of violence against women.³⁵⁵ The chair of the Commission stated that “the number of FIRs registered was much less than the incidents of violence against women reported to the NCW.”³⁵⁶ Police officers disregarded eyewitness accounts and ended the criminal investigations of thousands of rioters for lack of evidence.³⁵⁷

“ Police merged the 120 reports filed by victims of sexual violence into 26 official complaints two to three months following the massacre. These “omnibus” FIRs did not identify individual perpetrators but attributed the violence to anonymous “mobs”.

During the investigation, there is evidence that police mistreated and re-traumatized victims of sexual violence. According to the Special Court, “the psychological aspect and the result of such crimes which . . . traumatiz[ed] victims is [a] very important factor. It is clear that none of the previous investigators has taken any care for the victims of the crime[s] all of which was necessary for effective investigation of [the] crime[s] to unearth the modus, the preparation, the conspiracy, the perpetrators, etc.”³⁵⁸ Moreover, investigating officers did not follow-up with witnesses to obtain accurate, detailed information.³⁵⁹

Police merged the 120 reports filed by victims of sexual violence into 26 official complaints two to three months following the massacre.³⁶⁰ These “omnibus” FIRs did not identify individual perpetrators but attributed the violence to anonymous “mobs.”³⁶¹ Without information about the identity of the perpetrators of sexual violence, the prosecutor was unable bring charges of rape and the court was unable to determine criminal liability for the crimes.³⁶² One victim reported: “I am not a ‘mob,’ I am a woman who was gang-raped by three men. How can I hope for justice when they don’t even register my complaint properly?”³⁶³

TRIAL

A stay by the Supreme Court from 2003 to 2008 delayed the beginning of trial.³⁶⁴ In 2008, the Supreme Court ordered a reinvestigation of the case in response to petitions filed by the National Human Rights Commission and NGO Citizens for Justice and Peace.³⁶⁵ The Supreme Court appointed a Special Investigation Team (SIT) to conduct the new investigation.³⁶⁶

In 2009, the Supreme Court constituted a fast-track court, a special prosecutor was appointed,³⁶⁷ and charges were filed against 62 accused, including prominent figures within the BJP and VHP.³⁶⁸ Of the 62 accused, 57 had been arrested and released on bail between 2002 and 2009.³⁶⁹ Some of the accused released on bail threatened witnesses and pressured victims to withdraw their cases.³⁷⁰ During the trial, 327 witnesses testified,³⁷¹ including 25 women and 42 doctors.³⁷² Trial records reveal that the doctors who examined women after the attack did not testify about the evidence of sexual violence.³⁷³

“ In 2012, approximately three years after the trial began and ten years after the attack on Naroda Patiya, an Indian court rendered the only judgment in the case.

In 2012, approximately three years after the trial began and ten years after the attack on Naroda Patiya, an Indian court rendered the only judgment in the case. The Special Court Judge convicted 32 defendants of murder, attempted murder, conspiracy, spreading enmity and communal hatred, and unlawful assembly, and acquitted 29 defendants.³⁷⁴ A former government cabinet member and a leader of the [REDACTED] were among those found guilty.³⁷⁵

Although nine of the 62 defendants were charged with crimes of sexual violence, including rape, “assault or criminal force to woman with intent to outrage her modesty,” and an “act done with intention of preventing child from being born alive,”³⁷⁶ only one of the accused was convicted.³⁷⁷ The Special Court Judge concluded that, while acts of sexual assault, rape, and gang rape did in fact occur, the prosecution did not successfully make the case against the identified individuals.³⁷⁸ The one conviction was based on a confession by a defendant who raped a 16-year-old Muslim girl and killed her by throwing her from a roof.³⁷⁹

The trial judge found another victim was gang raped but concluded that the government had not

proven the guilt of any of the accused.³⁸⁰ The trial judge ordered the government to compensate the gang rape victim in the amount of INR 500,000 (USD 8,267).³⁸¹ The victim did not receive the compensation until months later, following several visits from the victim's lawyers to the state Social Welfare Department and an additional court order.³⁸² Allegations of police participation and complicity were not investigated and the government of Gujarat did not initiate disciplinary proceedings against police officers or public officials involved in the Naroda Patiya massacre.

Odisha

CONTEXT

One of the poorest states in India, Odisha has been a site of Hindu-Christian tension for decades.³⁸³ Since the 1860s, marginalized groups in the region, including Dalits (oppressed castes including so-called "untouchables") and Adivasis (indigenous tribes),³⁸⁴ have converted to Christianity to gain access to education, healthcare, and employment.³⁸⁵ Hindu nationalist groups view conversions to Christianity as a threat to the security and the future of a Hindu India.³⁸⁶ When the rate of conversions rose in the 1960s, Hindu nationalists forced Dalit Christians and Adivasi Christians to convert to Hinduism.³⁸⁷ The government of Odisha outlawed the practice of forced conversions in 1967.³⁸⁸

The most recent wave of violence by Hindu nationalists against Christians in Odisha began in 1986 when nationalists reportedly set fire to sixteen churches.³⁸⁹ Since the mid-1990s, Hindu nationalist groups strengthened and mobilized cultural, political, militia organizations in the state.³⁹⁰ In late 2007, Hindu mobs destroyed dozens of Christian churches and hundreds of Christian homes.³⁹¹ Although the police were warned about the attacks, no measures were taken to prevent them³⁹² and nationalist organizers were able to block roadways and sever power and phone lines in preparation for the violence.³⁹³

By 2008, Hindu nationalist organizations were

active in 25 of 30 districts in Odisha.³⁹⁴ On August 23, 2008, a prominent Hindu nationalist and religious leader and four of his disciples were assassinated in the district of Kandhamal.³⁹⁵ Some state officials claimed the attackers were Maoist insurgents.³⁹⁶ Various Hindu nationalist groups accused the local Christian community of carrying out the attack.³⁹⁷ Between August and October 2008, Hindu nationalists forced Christians out of 450 villages, burned 4,901 homes, and injured 18,000 people, displacing 53,000 individuals, many of whom sought shelter in nearby forests and makeshift relief camps. Approximately 54 to 86 persons were killed.³⁹⁸

INCIDENT

According to court records, on August 24, 2008, fleeing from Hindu mobs, ██████, ██████, and ██████ left their residence at a Christian-run pastoral center to seek safety in the home of ██████.³⁹⁹ On August 25, 2008, an armed mob of 40 to 50 people entered the private home and forcibly removed ██████ and ██████.⁴⁰⁰ After dragging ██████ from the residence by her hair, the mob brought the pair to a Catholic-██████ organization that mobs had ransacked and burned the previous day.⁴⁰¹ There, men removed ██████'s clothes including her underwear while pushing her onto the veranda.⁴⁰² When ██████ begged the mob not to hurt ██████, he was dragged away, doused with kerosene, and forced to kneel on the road.⁴⁰³ Men stood on ██████'s hands while she was raped by ██████.⁴⁰⁴ Observers clapped while ██████ was raped.⁴⁰⁵

After the rape, the mob took ██████ to the road where the ██████ was kneeling.⁴⁰⁶ Members of the police watched while the mob paraded half-naked ██████ and ██████ through the village and physically and verbally abused them.⁴⁰⁷ ██████ later stated that, during this ordeal, "he saw police personnel and prayed for help, but they paid a deaf ear to him."⁴⁰⁸ In a later account of her attack to newspapers, ██████ stated that "State Police failed to stop the crimes, failed to protect me from the attackers, [rather,] they were friendly with the attackers."⁴⁰⁹ The mob later left ██████ and ██████ at a police outpost.⁴¹⁰

INVESTIGATION

█████ reported that the police at the village police outpost were “very insensitive towards [the victims].”⁴¹¹ A doctor provided medical treatment to both █████ and █████ before they were escorted to the █████ police station that same night.⁴¹² When █████ arrived at the █████ police station, she disclosed to the investigating officer that she had been raped.⁴¹³ The investigating officer asked █████ whether she knew “the meaning of rape and the consequences she [would] face for lodging a complaint.”⁴¹⁴ A female Special Investigator took █████ to a closed room to question her about the attack and reported █████’s account of her rape back to the investigating officers.⁴¹⁵ The female Special Investigator then accompanied █████ to the █████ hospital for a medical examination.⁴¹⁶

At the hospital, two female doctors examined the victim by using the “two-finger test” and concluded: “the vaginal canal admitted two fingers loose and [was] severely tender.”⁴¹⁷ The medical examination report filed by the doctors documented abrasions and scratches on █████’s chest, a swollen left eye, and bruises on her cheek, neck, and back.⁴¹⁸ According to the report, █████’s injuries indicated that she was “raped over a cemented floor without clothing on her back.”⁴¹⁹

The next morning on August 26, 2008, both █████ and █████ were taken to █████ police station where they lodged a written First Information Report (FIR).⁴²⁰ While the FIR included the allegation of rape, the police officers ordered █████ not to write the details of the incident in her official complaint and advised her not to press charges.⁴²¹ According to █████, “They tried their best to keep me from registering a formal investigation request.”⁴²² █████ filed a second FIR about his ordeal, however, his FIR did not include details about █████’s rape or the suspects’ identities.⁴²³

Later that day, the police put █████ and █████ on a public bus from █████ toward Bhubaneswar, the capital of Odisha.⁴²⁴ The police escorted the bus for the approximately five-hour journey.⁴²⁵ Without police protection, █████ then

transferred to a bus from Bhubaneswar to New Delhi and travelled from place to place in search of shelter and protection.⁴²⁶

“ in Odisha the police did not prevent a mob from parading the injured, half-naked victim through the village by detaining and arresting individuals engaged in criminal conduct.

The police visited the site where █████ was raped for the first time a week after the incident.⁴²⁷ The judgment later determined that the evidence collected there by the Scientific Officer had “no evidentiary value.”⁴²⁸ Although the female Special Investigator requested a copy of the medical report on several occasions, the hospital did not release the report to the police until October 1, 2008, more than a month after the incident.⁴²⁹

The case was subsequently transferred to the Inspector of Police at the Crime Branch of Odisha.⁴³⁰ Almost five months after the incident, on January 5, 2009, the Crime Branch arranged the first Test Identification Parade (TIP) for █████ and █████ to identify their attackers.⁴³¹ Over the course of three TIPs, █████ identified Santosh Patnaik as the person who raped her and █████, Gajendra Digal, and Saroj Badhei as persons who were present when she was raped.⁴³² Charges were filed against ten persons for gang rape, assault, or criminal force to a woman with intent to outrage her modesty; assault or criminal force with intent to dishonor a person; rioting, armed with a deadly weapon; criminal intimidation; unlawful assembly; and obscene acts and songs.⁴³³ All of the accused resided in █████ knew █████ and █████ personally, and denied the charges.⁴³⁴

Once Santosh Patnaik had been identified as a suspect, a Medical Officer conducted a medical examination. The report determined that Santosh Patnaik was capable of sexual intercourse.⁴³⁵

TRIAL

On March 24, 2009, the trial began in a fast track Judicial Magistrate court in ██████.⁴³⁶ Feeling unsafe in ██████, ██████ requested that ██████ court transfer the case to ██████,⁴³⁷ roughly 180 miles east and the second-largest city in Odisha, but the district court denied her request.⁴³⁸ The Odisha High Court intervened to transfer the case to a ██████ court.⁴³⁹

At trial, the accused pled not guilty.⁴⁴⁰ The suspects' defense lawyers reportedly characterized the rape as an act of retaliation for the death of a prominent Hindu nationalist and religious leader, which occurred a few days prior to the attack on ██████.⁴⁴¹ During the trial, a BJP spokesman criticized the local archbishop for using the story of ██████'s rape as a means of rallying Christians against Hindus.⁴⁴²

Twenty-nine witnesses testified at trial.⁴⁴³ During cross-examination, most witnesses admitted that while they saw ██████ and ██████ ██████ paraded half-naked ██████ through the streets, they had not witnessed the rape.⁴⁴⁴

One of the female doctors who had examined ██████ testified during trial and detailed ██████'s injuries as described in the medical examination report.⁴⁴⁵ The doctor concluded in her testimony that the findings of the medical report were "consistent with recent signs and symptoms of forceful attempted sexual intercourse."⁴⁴⁶

When ██████ testified, the defense argued that ██████'s failure to mention ██████'s rape in the FIR was evidence that the rape had not occurred.⁴⁴⁷ The court noted that ██████ had not identified a single assailant during the TIPs.⁴⁴⁸ The court concluded however that ██████'s testimony that Santosh Patnaik, Gajendra Digal, and three others not facing trial were at the scene of the rape "inspires confidence."⁴⁴⁹

The court concluded that ██████'s religious affiliations called into question the credibility of her testimony, noting that "she was being financially and morally supported by the Christian organization."⁴⁵⁰ As evidence of her bias, the court referred to her participation in a conference organized by

Christian bishops after the attack, the presence of her advocates during the TIP, and her failure to disclose "how the journey expenses were met by her."⁴⁵¹ The court also questioned the credibility of ██████'s testimony because she did not give a description of her assailants in her FIR, although she had stated that the police had told her to keep her FIR short and "did not take down [her] statement as [she] narrated in detail."⁴⁵² In speaking to the press about her negative interactions with the police, ██████ stated, "I was raped and now I don't want to be victimized by the Odisha police."⁴⁵³

““ The suspects' defense lawyers reportedly characterized the rape as an act of retaliation for the death of a prominent Hindu nationalist and religious leader, which occurred a few days prior to the attack on ██████. During the trial, a BJP spokesman criticized the local archbishop for using the story of ██████'s rape as a means of rallying Christians against Hindus.

The court issued its final judgment on March 14, 2014, five years after trial began.⁴⁵⁴ The court found three of the ten men initially listed on the charge sheet guilty of several offenses. Santosh Patnaik was convicted of gang rape and, in addition to Gajendra Digal and Saroj Badhei, was found guilty of assault or criminal force to a woman with intent to outrage her modesty; assault or criminal force with intent to dishonor a person, otherwise than on grave provocation; rioting, armed with a deadly weapon; criminal intimidation; and obscene acts and songs.⁴⁵⁵ Six defendants were fully acquitted due to lack of evidence, while another man fled before trial and was never arrested or prosecuted.⁴⁵⁶

Three of those convicted were sentenced to "rigorous imprisonment" for 26 months, while Santosh Patnaik received an additional sentence of 11 years and a fine of Rs. 10,000 (USD 159)

for gang rape to be paid directly to ██████.⁴⁵⁷ If he could not pay the fine, the court authorized that the fine be converted into an additional six-month jail sentence.⁴⁵⁸ Allegations of police complicity were not investigated.

Discussion

Sexual violence is a form of gender discrimination prohibited by international law “at all times, in all places.”⁴⁵⁹ Under certain circumstances, rape may constitute torture, a crime against humanity, or a war crime.⁴⁶⁰ States use due diligence to prevent, investigate, punish, and provide redress for acts of sexual violence against women, regardless of whether the acts were committed by state or private actors.⁴⁶¹ This section highlights some of the key ways India has failed to provide justice to victims of sexual violence and examines the structural and institutional weaknesses in the domestic justice system revealed by this analysis.

““ Laws based on modesty or feminine chastity focus on the victim’s status rather than prohibit acts of violence against women.

The crimes described by the Report occurred in a context of impunity. International human rights bodies have held that impunity “fosters chronic repetition of human rights violations and total defenselessness of victims and their relatives.”⁴⁶² When viewed as a whole, the case examples described by this Report reveal patterns and common shortcomings of India’s legal system that contribute to legal impunity.

Organized according to the different stages of India’s response to acts of sexual violence, this section discusses the following nine dimensions of the Indian legal system: criminalization, prevention, contextual analysis, reporting, registration of complaints and arrests, collection of evidence, timeliness, legal immunity, and redress. For each

dimension, this section draws on the case examples to identify legal and institutional obstacles to effective criminal investigations, prosecutions, and reparations of gender-based crimes. The section also employs international human rights, humanitarian, and criminal standards to guide the analysis of access to redress for victims of sexual violence in two ways: (i) to diagnose common and central weaknesses of India’s legal system and (ii) to identify reforms to respond to those deficiencies.

Criminalization of Sexual Violence

At the time of the incidents described in this Report, the Indian Penal Code criminalized rape as penile-vaginal penetration defined by lack of consent.⁴⁶³ Non-vaginal penetration or penetration with an object or finger did not constitute rape⁴⁶⁴ but instead an “unnatural offence”⁴⁶⁵ or an “assault or criminal force to woman with intent to outrage her modesty.”⁴⁶⁶

As a result of this narrow definition of rape, many of the acts of sexual violence described in this Report did not constitute a crime, or constituted a crime against the victim’s modesty under Indian law, rather than a serious crime of violence. For example, the stripping of ██████ in Odisha and the acts of sodomy and penetration with objects in Gujarat and Kashmir were charged as “unnatural offenses” or “criminal force with intent to outrage [the victim’s] modesty” under Indian law.⁴⁶⁷

International law defines rape in terms of coercion rather than the absence of consent and defines sexual violence as a violation of bodily integrity rather than a violation of feminine modesty.⁴⁶⁸ Laws based on modesty or feminine chastity focus on the victim’s status rather than prohibit acts of violence against women.⁴⁶⁹ By institutionalizing “existing beliefs and practices linked to chastity” and morality, Indian criminal justice system fails to provide adequate protection against sexual violence,⁴⁷⁰ to acknowledge “all forms of violence against women[,]” or to address “the root and structural causes of violence against women.”⁴⁷¹

“ [T]he ICTR determined that “coercion may be inherent in armed conflict situations or when military personnel . . . are present.”

Broader definitions of rape and sexual violence ensure the criminalization of a range of unacceptable conduct.⁴⁷² For example, the International Criminal Tribunal for Rwanda (ICTR) has defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive” and sexual violence more broadly as “any act of a sexual nature which is committed on a person under circumstances which are coercive,” including non-physical acts, such as forced nudity.⁴⁷³ Coercion need not amount to physical force, but rather “[t]hreats, intimidation . . . [and] forms of duress which prey on fear or desperation may constitut[e] coercion.”⁴⁷⁴ Indeed, the ICTR determined that “coercion may be inherent in armed conflict situations or when military personnel . . . are present.”⁴⁷⁵ Standards using coercion rather than consent also provide evidentiary advantages to victims by shifting the focus of investigation from whether the victim provided consent to the perpetrator’s use of force.⁴⁷⁶ Further, recognition of inherent coercion in armed conflict situations may encourage victims to report rape by armed men or act as a deterrent.⁴⁷⁷

Prevention

Despite warnings of impending attacks in Gujarat and Odisha, public officials and police did not act to protect minority communities. Instead, state actors participated in or tolerated the acts of violence. In Gujarat, public officials and police officers reportedly seized control of police control rooms on the day of the massacre,⁴⁷⁸ facilitated the mob’s access to the community, prevented Muslims from fleeing mob violence,⁴⁷⁹ and failed to respond to calls for assistance from Muslim victims.⁴⁸⁰ Prominent figures of the Hindu nationalist

political party were convicted of “conspiracy” and “spreading enmity and communal hatred,” although the role of police officials was not investigated or prosecuted.⁴⁸¹ Similarly, in Odisha the police did not prevent a mob from parading the injured, half-naked victim through the village by detaining and arresting individuals engaged in criminal conduct.

Rather than fulfilling the duty to prevent violence by protecting civilian populations, state security forces employed their power to facilitate acts of sexual violence. The court found that the police in Punjab used their authority to detain and brutalize a woman in state custody. In Kashmir, the Indian government granted members of the military the legal authority to enter civilian homes without warrant and use force “even to the causing of death,” with legal immunity from prosecution.⁴⁸² The authorization to use lethal force and lack of accountability contribute to conditions that permit sexual violence and impunity. These legal conditions also pose challenges to domestic and international law.

“ a [S]tate may be liable under international law not only for its officials’ actions but also for its officials’ inaction.”

Under the Constitution of India, the State must provide its citizens with equal protection under the law. State actors are prohibited from discriminating against persons on the grounds of religion, race, caste, or sex.⁴⁸³ The Constitution mandates that every person “renounce practices derogatory to the dignity of women.”⁴⁸⁴ The failure to prevent the acts of sexual violence described by this Report against marginalized, vulnerable, and protected classes also may constitute discrimination under international law.

International law obligates States to prevent gender-based crimes against women.⁴⁸⁵ The SR on Violence against Women has explained that the scope of international responsibility of States extends to acts of omission as well as commission:

“a [S]tate may be liable under international law not only for its officials’ actions but also for its officials’ inaction. It is unlawful for the [S]tate: to refrain from assistance where assistance is so clearly required; to fail to investigate and thereby guarantee women’s rights; and, to discriminate in the manner in which it enforces human rights (even where such discrimination is not intentional).”⁴⁸⁶ A State must provide legal protection of the rights of women equal to that of men, ensure that public authorities and institutions refrain from acts of discrimination against women, and adopt legislative and other measures that prohibit gender discrimination.⁴⁸⁷ Relevant international law standards concerning gender-based violence also encompass the State’s duty to prevent violence against women and children who are subject to “national, racial, or religious hatred.”⁴⁸⁸

International human rights bodies have recognized the heightened vulnerability of women during armed conflict and mass violence. The CEDAW Committee has determined that situations of armed conflict lead to increased incidents of sexual assault of women and therefore require “specific protective . . . measures.”⁴⁸⁹ According to the Committee against Torture, women are at particular risk of torture or ill-treatment in situations of communal violence, and State parties must therefore take measures to prevent rape or sexual violence and abuse in these circumstances.⁴⁹⁰ International standards highlight that multiple factors may contribute to the victims’ vulnerability. In the case examples described in this Report, the victims were female, members of religious minorities, and, in some cases, living in isolated rural communities located in regions impacted by armed conflict and therefore were at greater risk for sexual assault and rape. During peacetime and in time of conflict, international bodies have emphasized the importance of preventative measures, such as the naming and defining of gender-based crimes through the passage of legislation, public awareness raising campaigns, educational activities, and police trainings to prevent that communities are targets of violence.⁴⁹¹

Contextual Analysis

International due diligence standards require States to take into account the context in which the acts occurred in adopting measures to respect and protect women’s rights. Attention to the complexity of the facts, the context in which they occurred, and patterns are critical to determining the criminal liability of complex criminal structures, modus operandi, and the nature and motive of certain types of criminal acts.⁴⁹² A failure to analyze context, including systematic patterns surrounding a specific violation of human rights, can render any measure of prevention or redress ineffective.

“ One common weakness of the criminal investigations and prosecutions described by this Report is the inattention to context. At every stage of the investigation, the case records suggest that Indian authorities disregarded the socioeconomic, political, cultural, and religious context in which the perpetrators committed the acts of violence.

One common weakness of the criminal investigations and prosecutions described by this Report is the inattention to context. At every stage of the investigation, the case records suggest that Indian authorities disregarded the socioeconomic, political, cultural, and religious context in which the perpetrators committed the acts of violence. Investigators and court officials ignored that ██████’s detention occurred at a time when police routinely harassed, tortured, and/or detained Sikh women, including those suspected of having information about male relatives involved in Sikh separatist groups;⁴⁹³ that Hindu nationalist leaders specifically targeted Muslim women during the Gujarat violence;⁴⁹⁴ that Kashmir is “one of the world’s most militarized areas” and the military has broad legal authority to use lethal force; and that Hindu nationalists had attacked Christians in

Odisha and injured tens of thousands at the time of the incident. The disregard for context undermined investigators' efforts to identify perpetrators of sexual violence, prosecutors' mandate to bring charges related to the incidents of sexual violence, and the courts' authority to convict perpetrators of sexual violence.

Although investigators disregarded context in their efforts to identify motive and individualize perpetrators, the victim's gender, ethnicity, religion, and economic status appear to have heavily influenced the way the investigation and prosecution unfolded. In Odisha, police officials attempted to prevent the Christian victim from incorporating the details of her rape by a Hindu mob in her First Information Report. In Gujarat, investigators systematically refused to register complaints from Muslim female victims of gender-based violence perpetrated by members of a Hindu mob. In Punjab, the police officer who raped ██████, a Sikh woman, alleged in his appeal that ██████ was a terrorist supporter of Sikh separatists and had fabricated the rape story while doctors testified that ██████ never sought medical care. And, in Kashmir, investigating authorities called the allegations of mass rape "a dirty trick to frame the Army."⁴⁹⁵ Instead, the accountability process often re-victimized the women victims.

Reporting

Incidents of sexualized violence in India are grossly underreported. Indeed, sexual violence is one of the most under-reported crimes in India.⁴⁹⁶ According to one recent study, only one in ten rapes is reported⁴⁹⁷ although some claim that the figure may be as low as one in 100.⁴⁹⁸ Many victims, including those who suffered sexual violence during the Naroda Patiya attacks and other Gujarat violence, were unable or unwilling to report the incidents. Other victims of the violence described by the Report were atypical in that they successfully overcame the obstacles to report the crimes of sexual violence. Both types of experiences reveal a variety of difficulties faced by women in reporting crimes of sexual violence, such as hos-

tility from police;⁴⁹⁹ the political and institutional influence of the perpetrators;⁵⁰⁰ and social stigma and discrimination.⁵⁰¹

“ Another barrier to reporting lies in the authorities' participation in or complicity with incidents of sexual violence, as illustrated in Punjab, Gujarat, Odisha, and Kashmir. Rather than reporting to a neutral authority, victims and witnesses endangered their lives and safety by reporting the crimes to officials or institutions linked to the crimes.

All the cases described in this Report reveal instances where Indian authorities failed to take the victims seriously, disregarded their allegations, or were insensitive. Military officials in Kashmir disregarded the allegations of atrocities by villagers and took no further action. In Gujarat, investigators never visited the relief camps where victims fled after the violence. Indeed, they refused to register FIRs by Muslim victims. The court found that police officers in Odisha who interviewed the victim were "very insensitive" and asked whether she knew the meaning of rape.

Another barrier to reporting lies in the authorities' participation in or complicity with incidents of sexual violence, as illustrated in Punjab, Gujarat, Odisha, and Kashmir. Rather than reporting to a neutral authority, victims and witnesses endangered their lives and safety by reporting the crimes to officials or institutions linked to the crimes. Villagers in Kashmir reported the crime to the same army officials who were implicated in the attack and their allegations were disregarded. Army officials refused to comply with a 2013 court order to conduct a line-up of suspects, asserting that "every effort will be made to stall [the investigations]."⁵⁰² In Gujarat, victims of the attack filed the FIR at the local police station despite alleged participation by local police. Allegations of police collusion have never been investigated. ██████ reported the

rape to state officials in Punjab despite threats by the officers who raped her. As a consequence, local police officers allegedly burned her home and tortured several of her relatives and supporters in the village. Although the trial judge acknowledged these acts of intimidation and violence, there is no evidence that the authorities investigated the crimes or provided the victim with protection.

Victims who reported crimes also faced stigma, discrimination, and violence. The trial judge in Punjab who presided over ██████'s case, for example, recognized that a woman risked her reputation by reporting crimes against "her chastity."⁵⁰³ Indeed, during the lengthy trial and appeal, the defendants derided ██████'s character and motives for reporting the rape. ██████ in Odisha requested that her case be moved to another city because she did not feel safe in Baligunda. The trial court questioned ██████'s credibility merely because she was supported by a Christian organization, and attended a Christian conference after the attack. The Press Council of India, which investigated the rapes in Kashmir at the behest of the military, disregarded physical evidence to conclude that the allegations of sexual violence were rehearsed and marketed to "arouse anger and hatred."⁵⁰⁴

The victims were mistrustful of the criminal justice process and skeptical of its effectiveness. For those who reported crimes of sexual violence, the experience generated feelings of fear, powerlessness, frustration, and insecurity. During the reporting process, it is crucial that investigators avoid revictimizing the victim and lay the foundation to prosecute and punish the perpetrators.⁵⁰⁵ Problems at the early stage of the investigation undermine the process by hindering efforts to identify, prosecute, and punish those responsible for the crimes.

Registration of Complaints and Arrest of Suspects

The First Information Report (FIR) is central to the Indian criminal justice process. FIRs often initiate the criminal investigation and form the basis for charges. Under Indian law, police officers

that receive information related to a cognizable offense⁵⁰⁶ have the obligation to file a FIR⁵⁰⁷ and the authority to arrest suspects without a court order.⁵⁰⁸ Sexual crimes, including rape, crimes against modesty, and "unnatural offences," are cognizable.⁵⁰⁹

“ Conflicts exacerbate existing gender inequalities, placing women at heightened risk of various forms of gender-based violence by both State and non-state actors.

Investigating authorities refused to file FIRs or inadequately or incorrectly recorded information provided by witnesses and victims in the case studies. In Odisha, police officers ordered ██████ not to write the details of her rape in the FIR and advised her not to press charges. In Gujarat, police officers denied women survivors the right to file FIRs or omitted details about rape and murder victims in recording the FIRs. Regarding the Gujarat violence, the NCW determined that "[t]he number of FIRs registered was much less than the incidents of violence against women reported to the NCW."⁵¹⁰ When officers did record FIRs, the FIRs often were "distorted or poorly recorded" according to the "will and whim" of the police officers.⁵¹¹

The failure to register FIRs or adequately register information of sexual violence had serious implications for the criminal investigations and prosecutions. First, state actors denied victims, including the victims of Punjab and Kashmir, the most accessible mechanism to initiate a criminal investigation by refusing to file FIRs. These victims were forced to report the crimes to local magistrates, a "cumbersome" process that consumes "time and money."⁵¹² Second, authorities impeded the timely collection of critical physical and testimonial evidence by delaying the initiation of the criminal investigation. Despite timely complaints about the attack, for example, authorities filed the FIR in Kashmir after a two-week delay. Investigators

used this delay to question the victims' credibility. Finally, poorly recorded FIRs undermined efforts to identify perpetrators and prove offenses. After the Gujarat violence, some investigating officers refused to record the names of the accused in the FIR. It is reasonable to assume that this failure to register victim and witness statements explains in part why, out of the approximately 5,000 to 10,000 armed individuals participating in the attack, only 62 were charged, and only one was convicted of a sexual crime.

Although police officers had the authority to arrest suspects of cognizable offenses without a court order, authorities refused to exercise that authority even in cases where they witnessed the crimes. In Odisha, for example, police did not detain members of the mob that had raped ██████, paraded her half-naked through the streets, and left her at the police outpost.

The case examples reveal that victims who reported acts of sexual violence were stigmatized, harassed, and even attacked. The case files do not indicate that disciplinary actions were brought against officers who failed to file FIRs or properly investigate procedures. The lack of prosecution promotes impunity and hinders the ability to ensure full redress for the victims.

The duty to protect women's human rights at all times and advance substantive gender equality is enshrined by international law.⁵¹³ Under international law, state agents are obligated to investigate crimes of gender-based violence even if the victim or the victim's relatives do not file a complaint.⁵¹⁴ "[C]onflicts exacerbate existing gender inequalities, placing women at heightened risk of various forms of sexual and gender-based violence by both state and non-state actors."⁵¹⁵ In times of conflict, women may be less likely to report violations themselves. If a victim does make a statement, investigating authorities should be sensitive to the trauma victims suffered.⁵¹⁶ The failure to investigate and punish gender-based violence can foster further violence against women.⁵¹⁷

Collection and Preservation of Evidence

Under relevant international standards, state authorities who conduct an investigation must attempt to recover and preserve the physical evidence related to the crime, including samples of blood, hair, fibers, threads, and other clues, and identify possible witnesses to obtain their statements.⁵¹⁸ Moreover, the scene of the crime must be protected and searched exhaustively, and competent professionals should undertake forensic examinations that use appropriate and effective procedures.⁵¹⁹

PHYSICAL AND TESTIMONIAL EVIDENCE

“ Court records and reports indicate that officials who diligently investigated the incidents were offered bribes, punished, or removed from the investigation to shield perpetrators from criminal prosecution.

The record indicates that authorities investigating the examples discussed in this Report failed to adequately preserve the crime scene, collect physical evidence, or interview witnesses. In Gujarat, the first investigating officer did not recover weapons, or identify the source of the fuels used to burn victims, or preserve remains. The second investigating officer neglected to take statements from hospitalized victims and did not visit the relief camps where victims had fled. According to the court judgment, “the entire police record of statements [wa]s suspect and unreliable.”⁵²⁰ According to Amnesty International, the Gujarat investigations “were marred by . . . the investigating agencies' refusal to examine crucial evidence including official telephone records, and the destruction of evidence linking key political leaders to the violence.”⁵²¹ In Kashmir, despite an entire village of eye-witnesses, torn and bloodied clothes, and discarded liquor bottles, the investigating officer closed the investigation “for want of evidence.”⁵²²

Finally, investigating officers in Odisha returned to the site of the rape a week after the incident to, by which time they collected material of “no evidentiary value.”⁵²³

In 2013, the Special Rapporteur on Extrajudicial Killings “found that witnesses [in India] are often intimidated and threatened.”⁵²⁴ No witness protection existed in India at the time of the incidents discussed in this Report and many witnesses were afraid to make statements to investigators, particularly in areas of armed conflict where state actors participated or were complicit in the incident. In the Gujarat case, “21 accused were acquitted due *inter alia* to the reported refusal of 37 witnesses for the prosecution to testify.”⁵²⁵ ██████ in Odisha indicated that she was hesitant to cooperate with the police investigation because she not did want to be “revictimized by the Odisha police.”⁵²⁶

Court records and reports indicate that officials who diligently investigated the incidents were offered bribes, punished, or removed from the investigation to shield perpetrators from criminal prosecution. Following the attacks in Gujarat, five different police officers from three different police branches were charged with the investigation between 2002 and 2008. The NHRC determined that there was a “widespread lack of faith in the integrity of the investigating process, not[ing] that numerous allegations had been made . . . that ‘senior political personalities’ sought to ‘influence’ investigations by remaining present in police stations” during interviews and investigative work.⁵²⁷

Similarly, in Kashmir, when the first investigator concluded that the victims made a *prima facie* showing of rape, the Director General of Police reassigned the investigation to a second investigator. In total, three different officers in the course of five months were assigned to lead the investigation, each one starting “afresh.”⁵²⁸ After a judicial officer wrote detailed letters to the head of the Kashmir civil authority and to the Superintendent of Police in Kupwara urging immediate action, he was transferred. He later reported that he “was offered every kind of incentive in terms of political offers, promotion . . . [and] money,” in order to “alter the

findings of the report.”⁵²⁹ After refusing to change the report, he was told by an army official: “You are on the hit list of the army.”⁵³⁰

International law requires States to “[i]nvestigate violations effectively, promptly, thoroughly and impartially . . .”⁵³¹ Law enforcement officers are required “to carry out the investigation with utmost objectivity and impartiality. The whole process must be free from any discriminatory reasoning or bias.”⁵³² The case studies indicate that in several instances, the Indian State did not meet this standard.

FORENSIC EVIDENCE

“ The failure to collect and preserve physical, testimonial, and forensic evidence in these cases materially damaged the investigations and hindered prosecutions.

Prior to 2000, Indian medical personnel performed forensic medical examinations of rape victims only upon request by the police or court. Women who went directly to a hospital after a rape were often “denied this crucial medicolegal examination.”⁵³³ In addition, according to Amnesty International, “[w]hile there are detailed standards for the gathering of medical evidence to support claims of . . . rape and sexual violence, the availability of competent medical examiners [in India] who can undertake such examinations in an appropriately sensitive and professional manner is often not available, especially in conflict situations.”⁵³⁴ Protection from retaliation for medical examiners does not exist.⁵³⁵

Authorities failed to gather forensic evidence, conducted exams in an untimely manner, or disregarded results. In Punjab, doctors refused to examine ██████ and in Gujarat and Kashmir medical examiners failed to conduct forensic exams or excluded results from their testimony at trial. The judgment in the Odisha case criticized the medical officer for negligence in failing

to provide results in a timely manner. Finally, an investigative report of the mass rapes in Kashmir disregarded the medical exam results of thirty-two women conducted three weeks after the incident that determined the women had been “repeatedly raped.”⁵³⁶ The report stated that “[s]uch a delayed medical examination proves nothing.”⁵³⁷

Medical examinations were also conducted in a manner that resulted in unreliable evidence. No standard for forensic medical exams existed at the time of the incidents discussed in this Report.⁵³⁸ At the time, the “two-finger test,” often was used by medical examiners to assess whether a rape victim is “habituated to sexual intercourse” by testing the laxity of the vaginal canal although the test is unreliable. In Odisha, ██████ was subjected to the “two-finger test” during her medical examination, despite Supreme Court decisions and government protocols that rejected the test’s validity.

International standards require thorough collection of forensic evidence by “competent law enforcement officials trained in forensics or supported by specialized personnel . . .”⁵³⁹ Specially trained staff must conduct forensic exams in a manner that avoids re-traumatization and humiliation of the victim.⁵⁴⁰ Investigators “must take the victim’s particular situation into consideration and make every effort to respect and to protect his or her privacy and, as far as possible, to avoid any re-traumatization.”⁵⁴¹

“Without reliable evidence gathered in compliance with national and international standards, few perpetrators of crimes of sexual violence were identified, arrested, charged, and convicted.”

The failure to collect and preserve physical, testimonial, and forensic evidence in these cases materially damaged the investigations and hindered prosecutions. Without reliable evidence gathered in compliance with national and international

standards, few perpetrators of crimes of sexual violence were identified, arrested, charged, and convicted. Lack of standardization, training, and access to competent forensic exams increased barriers to justice for victims and further traumatized them.

Timeliness of Court Proceedings

“A state’s consistent failure to do so when women are disproportionately the victims amounts to unequal and discriminatory treatment, and constitutes a violation of the state’s obligation to guarantee women equal protection of the law.”

Indian law requires prompt filing of the First Information Report and the immediate investigation of cognizable offenses, like rape, is mandatory. The investigation, prosecution, and punishment of perpetrators of the acts of sexual violence documented in this Report were affected by serious and unjustified delays. The first victim statements, for example, were taken three weeks after the incident in Kashmir, and five months after the incident in Punjab. In Odisha, police did not visit the site where ██████ was raped until a week after the incident, at which point the crime scene had been altered and the Scientific Officer was unable to collect reliable physical evidence.

Prosecution was also substantially delayed, or the crimes were never prosecuted. In Punjab, ██████ filed her initial complaint in 1989 and, the court issued the convictions in 1997—eight years later. During those eight years, ██████ attended more than 80 court hearings and lived in hiding for fear of retribution while officers allegedly tortured her family members and burned her home. The convictions did not become final until 2013—twenty-four years after the rape. Similarly, in Gujarat, from 2002 to 2008, five different officers conducted “ineffective and unreliable” investigations. The Special

Court judge delivered his judgment in 2012—ten years after the initial attack. The criminal courts of Kashmir never prosecuted or punished any of the alleged perpetrators of the mass rapes and police filed an official closure report with the court in 2013—twenty-two years after the attacks.

India has an international obligation to conduct prompt and impartial investigations and prosecute, and punish perpetrators of sexual violence.⁵⁴² Delays result in frustration and exacerbate the vulnerability of victims to threats and intimidation.⁵⁴³ Prompt investigations and executions of final judgment are “indispensable” to a court’s successful functioning.⁵⁴⁴ The UN Human Rights Committee has not provided a standard definition of promptness but assessed the issue on case-by-case basis, finding, for example, that a delay of three months in opening an investigation violated the timeliness standard.⁵⁴⁵ Trial proceedings must also be completed with undue delay. Proceedings that required two and a half, six, or ten years to complete have been considered a violation of the ICCPR.⁵⁴⁶ A State’s failure to promptly investigate crimes that disproportionately impact women constitutes unequal and discriminatory treatment and violates the State’s obligation to ensure that the law equally protects women.⁵⁴⁷

State Agents and Legal Immunity

Impunity has been defined as: “the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account.”⁵⁴⁸ In India, impunity for members of state security forces exists as the result of practice and law. The Indian Code of Criminal Procedure requires the national government to authorize the arrest of any member of the armed forces or the prosecution of public officials, including police officers and members of the armed forces. According to the Special Rapporteur on Extrajudicial Killings, this provision “has led to a context where public officers evade liability as a matter of course, which encourages a culture of impunity and further recurrence of violations.”⁵⁴⁹ Human Rights Watch reports that “[e]ven in the exceptional case in which action is

taken, the punishment most often consists of temporary suspension or transfer of the offending officer to another police station.”⁵⁵⁰

Police officers also enjoy “de facto impunity” based on “a code of silence” and fear of police retaliation.⁵⁵¹ UN experts have found that victims or their family members who attempt to file First Information Reports with police may be subjected to “threatening treatment . . . which dissuade[s] them from complaining and impede[s] the accountability of State agents.”⁵⁵² In Punjab, for example, the trial court stated police officers had “harassed and tortured” potential witnesses “so as to prevent them” from testifying in ██████’s support.⁵⁵³ ██████ also alleged that police officers burned her home and tortured her relatives in order to compel her to withdraw her complaint. The use of fear and terror not only impacts the victims but also may influence investigating authorities, prosecutors, and judges. In Kashmir, the District Magistrate discovered that he was “on the hit list of the army” after refusing to change his report about the mass rapes.⁵⁵⁴ Doctors in Punjab refused to examine the victim and in Gujarat did not document or testify to evidence of rape at trial.

Residents of Kashmir and other “disturbed” regions of India are doubly affected under the controversial Armed Forces (Jammu & Kashmir) Special Powers Act (AFSPA). The AFSPA provides military officials with broad powers to arrest, enter, search, and seize, without warrant, and to use lethal force.⁵⁵⁵ Section 7 of the AFSPA states:

*No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.*⁵⁵⁶

The AFSPA, passed in 1958 and expanded in 1972, grants the national government and state governors the power to declare areas “disturbed”⁵⁵⁷ and therefore subject to the AFSPA. The national government rarely permits prosecutions in disturbed areas.⁵⁵⁸ In 2004, a special committee established by the national government concluded that the act

had “become a symbol of oppression, an object of hate and an instrument of discrimination.”⁵⁵⁹ The CEDAW committee has repeatedly urged India “to abolish or reform the Armed Forces Special Powers Act and to ensure that investigation and prosecution of acts of violence against women by the military in disturbed areas and during detention or arrest is not impeded.”⁵⁶⁰ Despite years of domestic and international protest and criticism, India continues to defend the act.⁵⁶¹

The incidents of sexual violence described by this Report are *prima facie* violations of international human rights law. Some of these acts of violence potentially also constitute international crimes. A State’s duty to prosecute perpetrators of international crimes and human rights violations extends to all persons irrespective of their political position or military authority. Human rights bodies have established that

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights . . . recognized by international human rights law.⁵⁶²

Effective Remedy

The case examples illustrate the inattentiveness of Indian institutions and authorities to the psychological, medical, moral, and material consequences suffered by the victims of sexual violence, their families, and their communities. At every stage of the criminal process, from the filing of First Information Reports to the collection of physical and forensic evidence, and the bringing of criminal charges, victims encountered impediments and delays to access to justice. Rather than generating a reparatory or rehabilitative effect, the criminal justice process subjected victims to “secondary victimization.”⁵⁶³

Victims of serious violations of international law have a right to an effective remedy.⁵⁶⁴ Victims are entitled to equal and effective access to justice; adequate, effective, and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.⁵⁶⁵ Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁵⁶⁶ Victims of human rights violations are entitled to prompt redress for the harm they have suffered⁵⁶⁷ through restitution and compensation.⁵⁶⁸ Monetary damages are “adequate” when they are “proportionate to the gravity of the human rights violation . . . and to the suffering of the victim and the family.”⁵⁶⁹ Monetary damages should account for physical or mental harm, lost opportunities, material damages, loss of earnings, and costs required for legal assistance.⁵⁷⁰

“ Although Indian security forces and public officials participated in or tolerated the attacks in Odisha, Kashmir, Punjab, and Gujarat, the Indian government has neither recognized responsibility nor officially apologized to the victims.

Under Indian law, a court may impose criminal sanctions in the form of payment of a fine by the perpetrator or compensation to the victim by the government.⁵⁷¹ The vast majority of victims and their families discussed in the Report did not receive monetary compensation for the harm suffered. Authorities in Kashmir, for example, have not implemented the High Court recommendation to “explore the possibility” of compensation to the villagers.⁵⁷² In Punjab, ██████ was never compensated for damages incurred. The government compensated one victim of the Gujarat massacre after numerous inquiries from the victim’s lawyers and months of delay.

Other avenues of judicial redress have also proven ineffective. Through Public Interest Litigation (PIL), for example, the Indian Supreme Court

can review a legal matter *suo motu* that implicates a large number of “economically disadvantaged” people.⁵⁷³ The PIL system has no formal pleading requirements or standing requirements and the Court may initiate a PIL *suo motu*. The Court has significant remedial authority to order compensation and rehabilitation.⁵⁷⁴ Procedural flexibility has not ensured the effectiveness of PIL as avenue of redress. The PIL petition filed in April 2013, twenty-two years after the incident in Kashmir, for example, was deemed “premature” by the High Court.⁵⁷⁵

In some cases involving violations of fundamental rights, the Supreme Court of India has ordered states to suspend public officials or impose other disciplinary actions.⁵⁷⁶ In the past, army and paramilitary personnel have been dismissed, demoted, or reprimanded for “unexplained abuses,” including rape.⁵⁷⁷ The National Human Rights Commission (NHRC) and the National Commission for Minorities (NCM) may recommend disciplinary proceedings against officials upon determining that a human rights violation has occurred.⁵⁷⁸ Following the Gujarat violence, for example, the NHRC recommended that “action[s] should be initiated to identify and proceed against [public servants] who have failed to act appropriately to control the violence in its incipient stages, or to prevent its escalation thereafter.”⁵⁷⁹ Additionally, the NCM requested that the Government of Gujarat punish officers who did not perform their duties during the communal violence.⁵⁸⁰ However, the government has failed to initiate disciplinary actions against police officers or military personnel in any of the case examples.

Indian law does not provide rehabilitation for the victim in the form of long-term physical or psychological care following an act of sexual violence. None of the victims had access to psychological care or medical care provided by the State. Indeed, ██████ was turned away when she sought medical attention in Punjab. Yet experts attest that physical and psychological rehabilitation is integral to facilitating the reintegration and readaptation of victims of sexual violence to society.⁵⁸¹ Rehabilitation restores the individual’s full health and repu-

tation after the traumatic experience, and without it, the victim risks experiencing long-term negative consequences, such as isolation and economic hardship.⁵⁸²

Although Indian security forces and public officials participated in or tolerated the attacks in Odisha, Kashmir, Punjab, and Gujarat, the Indian government has neither recognized responsibility nor officially apologized to the victims. Indeed, in Punjab, at least one of ██████’s attackers, the head of the Station House, remained on police payroll during his incarceration. In Gujarat, women have been unable to return home and continue to live in Muslim enclaves even eight years after the massacre.⁵⁸³ Indian authorities have failed to implement a 2010 recommendation by the CEDAW Committee to promote reconciliation by creating a truth and reconciliation commission to investigate the Gujarat massacre.⁵⁸⁴ The lack of measures of satisfaction, including official recognition of wrongdoing, can have long-term negative consequences as “not infrequently, the social reaction [to victims] is indifference or avoidance leading to a silence that is detrimental to the victims, producing isolation and mistrust.”⁵⁸⁵

Human rights law provides a holistic, victim-centered approach to redress that encompasses restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁵⁸⁶ It is not enough assume that compensation alone restores the victim to his or her prior position but rather, a broad range of remedies are necessary to provide redress to the harmed individual.⁵⁸⁷

Conclusion and Recommendations

This Report identifies common obstacles faced by Indian women in seeking effective redress for crimes of sexual violence committed in the context of social upheaval and armed conflict. Although some of the victims of the violent acts described by this Report were provided a measure of justice, none fully realized their rights as enshrined

by international law. It is imperative that India reduces high rates of impunity by enacting institutional and legal reforms. The vulnerability and suffering of victims, their families, and their communities and the recurrence of sexual violence is a certainty as long as impunity is the rule and not the exception in these kinds of cases. India took an important step to address the pervasiveness of sexual violence by enacting the 2013 Anti-Rape Act; however India should do more to prevent sexual violence and protect the victims. India must seize on existing political will and international attention to the issue of sexual violence against women to strengthen its laws and institutions so that they serve all Indians, including religious and ethnic minorities. The following recommendations for actions by the Indian State aim to address common weaknesses of the national legal system that obstruct full realization of women's rights.

In particular, India should

** Amend Indian criminal law and employ international criminal and human rights legal standards to define rape and related provisions as a violation of bodily integrity and a crime of violence, rather than a crime against modesty.* Indian criminal law should also recognize the coercive circumstances in custodial situations and armed conflict.

** Adopt legislation that provides a comprehensive, equitable, and efficient system of reparations for victims of sexual violence in internal conflict or incidences of mass violence.* India should provide adequate, timely, and comprehensive reparations to victims of gender-based crimes and their families, including monetary compensation; rehabilitation, such as medical care and psychological and psychosocial support; measures of satisfaction, such as public acknowledgment of wrongdoing, memorialization, and historical analysis of commitments; and measures of guarantees of non-repetition, including effective criminal investigation and the prosecution and punishment of those responsible.

** Ensure acts of sexual violence in areas of internal conflict and incidences of mass violence are exhaustively and effectively investigated and those responsible are promptly prosecuted and punished by a*

competent, independent, and impartial tribunal. India must repeal legislation, such as the Armed Forces Special Powers Act, 1958 (with subsequent amendments), and sections of the Indian Code of Criminal Procedure, including Section 197, that do not permit the trial or prosecution of paramilitary and military personnel without government permission.⁵⁸⁸ These laws encumber the investigation, prosecution, and punishment of public officials and members of the armed forces. In particular, it is imperative that India strengthens its efforts to effectively investigate and prosecute historic crimes, such as the acts of sexual violence that occurred in J&K, to signal a break with the legacy of impunity and ensure victims' access to justice. To this end, India should increase resources to the judicial system to address the backlog of cases and establish an effective protection program for victims and witnesses.

** Impose criminal and administrative sanctions on public officials, including elected officials, military personnel, and police officers who obstruct investigations or intimidate, harass, or assault victims and witnesses of sexual violence that occurred during internal conflict or mass violence.* Authorities should initiate disciplinary proceedings against public officials who perpetrate or fail in their duties to respond to sexual violence, including investigating officials who fail to follow investigative procedure by, for example, refusing to register First Information Reports. India also should adopt steps to dismantle the *esprit du corps*, prevalent among police and military forces, that contributes to a climate of impunity in which members of the police and military may harass and intimidate victims and witnesses or their families without consequence.

** Implement specialized investigative units, prosecutors, and courts to respond to, investigate, and prosecute acts of sexual violence in internal conflict and incidences of mass violence.* India must ensure that individuals responsible for inciting and committing acts of sexual and collective violence are held criminally accountable. India should increase institutional capacity to effectively prosecute and punish perpetrators of sexual violence and care for

victims of conflict and mass violence by creating specialized police units to investigate crimes of sexual violence, increasing the number of female police officers and medical examiners, establishing specialized units within prosecutors' offices, and strengthening specialized courts to address the backlog of cases and ensure the independence and impartiality of investigations and prosecutions. India must ensure that the rights of prisoners serving sentences are respected.

** Adopt effective witness-victim protection measures to enable victims and witnesses of sexual violence, including state officials, in areas of internal conflict and incidences of mass violence to participate fully and safely in proceedings.* Measures must take into account the particular vulnerabilities of victims of sexual violence in these contexts and may include relocation assistance, privacy protections, and other security measures to ensure protection from retaliation or intimidation, and physical and psychological safety.

** Train officials involved in sexual violence cases, including police, medical personnel, and judicial officers, for the unique challenges of working in areas of internal conflict and mass violence and to appropriately support victims and sensitively conduct their duties.* This should include effective efforts to standardize medical forensic examination procedures and train medical personnel to competently conduct exams. For example, although Indian courts have rejected the legal validity of the "two-finger" vaginal test, it is still used. India should take steps to eliminate practices that re-traumatize victims of sexual violence.

Notes

- 1 Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Mission to India*, ¶ 7, U.N. Doc. A/HRC/26/38/Add.1 (Apr. 1, 2014) (by Rashida Manjoo) [hereinafter Manjoo 2014, *Mission to India*].
- 2 NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, CRIME IN INDIA-2013 81 (2013), available at <http://ncrb.gov.in/CD-CII2013/Chapters/5-Crime%20against%20Women.pdf>.
- 3 Sanction of prosecution is the granting of formal permission by state or central government to authorize prosecution of a public servant for alleged crimes committed while discharging duty.
- 4 See Prosecutor v. Furundzija, Case No. IT-95-17/1-T, The Judgment of the Trial Chamber, ¶ 186 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>.
- 5 The authors have elected to use the term “victim” in lieu of “victim-survivor” in this Report for two main reasons. First, “victim” is a legal category of persons with established rights under domestic and international law. Second, many of the women referred to in this Report did not survive incidents of sexual violence described. By using this terminology, it is not the authors’ intention to diminish the agency or struggle of women-survivors of sexual violence.
- 6 In April 2014, the Indian Supreme Court recognized transgender individuals as a legal third gender. Editorial Board, *Transgender Rights in India*, NEW YORK TIMES (Apr. 25, 2014), http://www.nytimes.com/2014/04/26/opinion/transgender-rights-in-india.html?_r=0.
- 7 Section 377 of the Indian Penal Code criminalizes homosexuality. Kranti Kumara, *India’s Supreme Court re-criminalizes homosexuality*, WORLD SOCIALIST WEB SITE (Dec. 28, 2013), <https://www.wsws.org/en/articles/2013/12/28/indi-d28.html>; Sonia Paul, *Living in Fear: LGBTs in India*, AL JAZEERA (Apr. 17, 2014), <http://america.aljazeera.com/articles/2014/4/17/living-in-fear-lgbtsinindia.html>.
- 8 To date, 188 states have ratified the Convention to Eliminate All Forms of Discrimination Against Women. Convention to Eliminate All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-8&chapter=4&lang=en [hereinafter CEDAW].
- 9 Rome Statute of the International Criminal Court art. 7(1) (g), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].
- 10 See e.g., S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008); S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sept. 30, 2009); S.C. Res. 1889, U.N. Doc. S/RES/1889 (Oct. 5, 2009); S.C. Res. 1960, U.N. Doc. S/RES/1960 (Dec. 16, 2010); S.C. Res. 2106, U.N. Doc. S/RES/2106 (June 24, 2013).
- 11 See, e.g., U.N. OFFICE ON DRUGS AND CRIME, HANDBOOK ON EFFECTIVE PROSECUTION RESPONSES TO VIOLENCE AGAINST WOMEN AND GIRLS (2014).
- 12 Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Mission to India*, ¶ 7, U.N. Doc. A/HRC/26/38/Add.1 (Apr. 1, 2014) (by Rashida Manjoo) [hereinafter Manjoo 2014, *Mission to India*].
- 13 NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, CRIME IN INDIA-2013 81 (2013), available at <http://ncrb.gov.in/CD-CII2013/Chapters/5-Crime%20against%20Women.pdf>.
- 14 See generally RAM NARAYAN KUMAR ET AL., REDUCED TO ASHES: THE INSURGENCY AND HUMAN RIGHTS IN PUNJAB, FINAL REPORT: VOLUME ONE 39-40 (2003), available at <http://www.ensaaf.org/publications/other/reducedtoashes.pdf>; HUMAN RIGHTS WATCH, “WE HAVE NO ORDERS TO SAVE YOU”: STATE PARTICIPATION AND COMPLICITY IN COMMUNAL VIOLENCE IN GUJARAT 13 (2002), available at <http://www.hrw.org/reports/2002/india/gujarat.pdf> [hereinafter HRW, WE HAVE NO ORDERS TO SAVE YOU]; ANGANA P. CHATTERJI, VIOLENT GODS: HINDU NATIONALISM IN INDIA’S PRESENT; NARRATIVES FROM ORISSA 317 (2009).
- 15 See KUMAR ET AL., *supra* note 14; HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 4; HUMAN RIGHTS WATCH, HUMAN RIGHTS CRISIS IN KASHMIR: A PATTERN OF IMPUNITY 21-24 (1993), available at <http://www.hrw.org/sites/default/files/reports/INDIA937.PDF> [hereinafter HRW, HUMAN RIGHTS CRISIS IN KASHMIR].
- 16 See CHATTERJI, *supra* note 14, at 296-297 n.56.
- 17 See Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 297-98 (2003).
- 18 Saeed Ahmad Watto, *Conventional Patriarchal Ideology of Gender Relations: An Inexplicit Predictor of Male Physical Violence Against Women in Families*, 36 EUR. J. SCI. RES. 561, 561-62 (2009).
- 19 See ASSOCIATION OF PARENTS OF DISAPPEARED PERSONS, HALF WIDOW, HALF WIFE?: RESPONDING TO GENDERED VIOLENCE IN KASHMIR 2 (2011); KUMAR ET AL., *supra* note 14, at 42.
- 20 See LAURENT GAYER & CHRISTOPHE JAFFRELOT, MUSLIMS IN INDIAN CITIES: TRAJECTORIES OF MARGINALISATION 55 (2012). See also ASIA WATCH & PHYSICIANS FOR HUMAN RIGHTS, RAPE IN KASHMIR: A CRIME OF WAR 1 (1993), available at <http://www.hrw.org/sites/default/files/reports/INDIA935.PDF>.
- 21 Additionally, all quotes are within inverted commas and all insertions within quotes are in brackets.
- 22 International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. NO. E, 95-2, 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR].
- 23 PEN. CODE § 228A; Orissa v. Santosh Patnaik, 3, 26 (2014).
- 24 PEN. CODE § 228A (“Whoever prints or publishes the name or any matter which may make known the identity of any person against whom [a sexual offense] is alleged or found to have been committed shall be punished . . .”).
- 25 Rome Statute, *supra* note 9.
- 26 Indian law does not criminalize all forms of marital rape or domestic violence law. Human Rights Watch, India: Reject New Sexual Violence Ordinance, HUMAN RIGHTS WATCH (Feb. 11, 2013), <https://www.hrw.org/news/2013/02/11/india-reject-new-sexual-violence-ordinance>.
- 27 See, e.g., Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49 (Dec. 20, 1993); U.N. FOURTH WORLD CONFERENCE ON WOMEN, BEIJING, CHINA, SEPT. 4-15, 1995, ¶ 14, U.N. Doc. A/CONF.177/20, U.N. Sales No. 96.IV.13 (1996); Intensification

of Efforts to Eliminate All Forms of Violence Against Women, G.A. Res. 67/144, U.N. Doc. A/RES/67/144 (Dec. 20, 2012); Accelerating Efforts to Eliminate All Forms of Violence Against Women: Preventing and Responding to Rape and Other Forms of Sexual Violence, G.A. Res. 23/25, U.N. Doc. A/HRC/RES/23/25 (June 25, 2013) [hereinafter Accelerating Efforts to Eliminate All Forms of Violence Against Women]; S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

28 CEDAW, *supra* note 8.

29 India has not signed the Optional Protocol I and II. NATIONAL HUMAN RIGHTS COMMISSION, INDIA, A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS CONVENTIONS 24 (2012), available at http://nhrc.nic.in/documents/india_ratification_status.pdf.

30 India ratified CEDAW with two declarations and one reservation, though none of these items relate to the obligations of the State to prevent sexual violence against women. Convention to Eliminate All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13, *ratified by India* July 9, 1993; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, *ratified by India* April 10, 1979. India has not ratified the Optional Protocol to the ICCPR or the Optional Protocol to CEDAW, which establishes an individual petition process. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 99 U.N.T.S. 171; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 10, 1999, 2131 U.N.T.S. 83.

31 Christian Tomuschat, *Introduction to International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171.

32 ICCPR, *supra* note 22.

33 CEDAW, *supra* note 8.

34 U.N. Secretary-General, *In-depth Study on All Forms of Violence Against Women*, ¶ 31, U.N. Doc. A/61/122/Add.1 (Jul. 6, 2006) [hereinafter *In-depth Study on All Forms of Violence Against Women*].

35 CEDAW, *supra* note 8.

36 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19 on Violence against Women, Eleventh Sess. 1992*, ¶ 26, U.N. Doc. A/47/38 (1992) [hereinafter *CEDAW General Recommendation No. 19*].

37 *See, e.g.*, Declaration on the Elimination of Violence Against Women, *supra* note 27; U.N. FOURTH WORLD CONFERENCE ON WOMEN, *supra* note 27; Intensification of Efforts to Eliminate All Forms of Violence Against Women, *supra* note 27; Accelerating Efforts to Eliminate All Forms of Violence Against Women, *supra* note 27; S.C. Res. 1325, *supra* note 27.

38 Convention on the Rights of the Child art. 34, Nov. 20, 1989, 1577 U.N.T.S. 3.

39 *See id.*

40 *Id.* at art. 38(1).

41 *Id.* at art. 38.

42 Special Rapporteur on Violence against Women, Its Causes and Consequences, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Doc. A/HRC/17/26 (May 2, 2011) (by Rashida Manjoo).

43 Human Rights Committee, *General Comment No. 31 on*

the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶¶ 3-4, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) [hereinafter *HRC General Comment No. 31*].

44 Manjoo 2014, *Mission to India*, *supra* note 12, ¶ 47.

45 CEDAW *General Recommendation No. 19*, *supra* note 36; *see* Committee on the Elimination of Discrimination against Women, *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, U.N. Doc. CEDAW/C/GC/30 (Oct. 18, 2013) [hereinafter *CEDAW General Recommendation No. 30*]; *see also* U.N. OFFICE ON DRUGS AND CRIME, *supra* note 11, at 23. Many other international human rights instruments, including the UN Declaration on the Elimination of Violence against Women, the Inter-American Convention on the Prevention of Violence against Women, and the Council of Europe Convention Preventing and Combating Violence against Women and Domestic Violence, contain a due diligence obligation.

46 Special Rapporteur on Violence against Women, Its Causes and Consequences, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ¶ 15, U.N. Doc. A/HRC/23/49 (May 14, 2013) (by Rashida Manjoo) [hereinafter *Manjoo 2013*].

47 *Id.*; *see also* HRC *General Comment No. 31*, *supra* note 43, ¶¶ 6, 8; *In-depth Study on All Forms of Violence Against Women*, *supra* note 34, ¶ 104-108.

48 CEDAW, *supra* note 8.

49 CEDAW *General Recommendation No. 19*, *supra* note 36.

50 *See* Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India*, U.N. Doc. CEDAW/C/IND/CO/4-5 (July 18, 2014) [hereinafter *CEDAW Concluding Observations*]. The Committee called on India to implement the Verma Committee's recommendation to enact the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill and to amend the Criminal Law (Amendment) Act.

51 HRC *General Comment No. 31*, *supra* note 43, ¶ 15.

52 *Id.* ¶ 3.

53 *Id.* ¶ 15. INTERNATIONAL COMMISSION OF JURISTS, THE RIGHT TO A REMEDY AND TO REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS – A PRACTITIONERS GUIDE 65-66 (2006) [hereinafter *ICJ-A PRACTITIONERS GUIDE*].

54 *Id.* at 65; *see Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988); *see also Finucane v. United Kingdom*, App. No. 29178/95, 2003-VIII Eur. Ct. H.R. ¶ 69 (2003).

55 ICJ-A PRACTITIONERS GUIDE, *supra* note 53, at 65.

56 *Id.*

57 CEDAW *Concluding Observations*, *supra* note 50, ¶ 11(e).

58 “Impunity” means “the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims.” Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *Question of the Impunity of Perpetrators of Human Rights (Civil and Political)*, ¶¶ 15-16, delivered to the Commis-

- sion on Human Rights*, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997) [hereinafter *Question of the Impunity of Perpetrators of Human Rights*].
- 59 ICJ-A PRACTITIONERS GUIDE, *supra* note 53, at 153; *see, e.g.*, Comm'n on Human Rights Res. 72, Impunity, 59th Sess., Mar. 17 – Apr. 25, 2003, U.N. Doc. E/CN.4/RES/2003/72 (Apr. 25, 2003); Comm'n on Human Rights Res. 79, Impunity, 58th Sess., Mar. 18 – Apr. 26, 2002, U.N. Doc. E/CN.4/2002/79 (Apr. 25, 2002).
- 60 Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, ¶ 101, U.N. Doc. A/HRC/27/56 (Aug. 27, 2014) (by Pablo de Grieff).
- 61 HRC *General Comment No. 31*, *supra* note 43, ¶ 18; ICJ-A PRACTITIONERS GUIDE, *supra* note 53, at 155.
- 62 Manjoo 2014, *Mission to India*, *supra* note 12, ¶ 63.
- 63 Diane Orentlicher, *Report: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Addendum)*, at 13, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).
- 64 63ICJ-A PRACTITIONERS GUIDE, *supra* note 53, at 152.
- 65 Pablo de Grieff, *supra* note 60; Human Rights Committee, *Concluding Observations of the Human Rights Committee, Serbia and Montenegro*, ¶ 9, U.N. Doc. CCPR/CO/81/SEMO (Aug. 12, 2004).
- 66 *Question of the Impunity of Perpetrators of Human Rights*, *supra* note 58, ¶ 7.
- 67 CEDAW, *supra* note 8; HRC *General Comment No. 31*, *supra* note 43, ¶ 18.
- 68 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, ¶ 5(d), Annex, ¶ 5, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/34 (Nov. 29, 1985).
- 69 *Question of the Impunity of Perpetrators of Human Rights*, *supra* note 58, ¶ 7; Orentlicher, *supra* note 63, at 12.
- 70 Orentlicher, *supra* note 63, at 12.
- 71 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, Annex, ¶ I(2)(c), U.N. Doc. A/RES/60/147 (Dec. 16, 2005); *see also* Orentlicher, *supra* note 63, at 12.
- 72 ICCPR, *supra* note 22; *see also* HRC *General Comment No. 31*, *supra* note 43, ¶ 15.
- 73 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 68, at Annex ¶ 4.
- 74 U.N. OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, HANDBOOK ON JUSTICE FOR VICTIMS: ON THE USE AND APPLICATIONS OF THE DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER IV (1999) [hereinafter UNODC HANDBOOK ON JUSTICE FOR VICTIMS], *available at* http://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf.
- 75 ICJ-A PRACTITIONERS GUIDE, *supra* note 53, at 46.
- 76 *See* Manjoo 2014, *Mission to India*, *supra* note 12, ¶ 66.
- 77 *See* CEDAW *Concluding Observations*, *supra* note 50. In 2003, the Indian Parliament introduced legislation to address reparations for communal violence. The bill did not pass and related legislation was withdrawn in 2014. The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, PRS LEGISLATIVE RESEARCH, <http://www.prsindia.org/billtrack/the-communal-violence-prevention-control-and-rehabilitation-of-victims-bill-2005-165/> (last visited May 10, 2015) (listing the current status of as “withdrawn”); Government of India Ministry Of Home Affairs, Unstarred Question No. 1162 To Be Answered On The 3rd December, 2014 *available at* <http://mha1.nic.in/par2013/par2014-pdfs/rs-031214/1162.pdf> (stating “the Bill titled ‘The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005’ was withdrawn on 5.2.2014”).
- 78 *Jurisdiction of the Supreme Court*, SUPREME COURT OF INDIA, <http://supremecourtindia.nic.in/jurisdiction.htm> (last visited Apr. 15, 2015).
- 79 INDIA CONST. art. 32 (“Remedies for enforcement of rights conferred by this Part [Right to Constitutional Remedies]”).
- 80 Additionally, the Supreme Court may grant special leave to appeal from any judgment or sentence passed by any Indian court or tribunal, except from those passed by courts of the armed forces. INDIA CONST. art. 136.
- 81 *Jurisdiction of the Supreme Court*, *supra* note 78.
- 82 *District Courts*, INDIAN COURTS, <http://indiancourts.nic.in/districtcourt.html> (last visited Feb. 28, 2015).
- 83 Section 16 of the Criminal Procedure Code, No. 2 of 1974, CODE CRIM. PROC. (1973).
- 84 The Protection of Human Rights Act, 1993, No. 10 of 1994, INDIA CODE, ¶ 30, *available at* http://nhrc.nic.in/documents/Publications/TheProtectionofHumanRightsAct1993_Eng.pdf. Although the Act authorizes state governments to create human rights courts, it does not appear that state government have exercised this authority.
- 85 CODE CRIM. PROC. § 29. The Sessions Court will hear any matter outside of the jurisdiction of the lower courts. *Id.* § 9.
- 86 *District Courts*, *supra* note 82.
- 87 *Id.* at 478-82.
- 88 Sections 375, 376, 354 of the Indian Penal Code, No. 45 of 1860, respectively. Section 509 of the Indian Penal Code also codifies “Word, gesture, or act intended to insult the modesty of a woman.” PEN. CODE § 509.
- 89 Changes to rape law prior to 1983 addressed age of consent and marital rape. VANDADA, SEXUAL VIOLENCE AGAINST WOMEN: PENAL LAW AND HUMAN RIGHTS PERSPECTIVES 95-104 (2009).
- 90 *Id.* at 103-04. In *Tuka Ram v. Maharashtra*, known as the ██████ case, the Supreme Court concluded that the sex was likely a “peaceful affair” because the medical examination showed no injuries on ██████’s body and had reported that she was “habituated to intercourse[.]” (1979) S.C.C. 143 (1978) at 146, 144; *see also* PRATIKSHA BAXI, PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA 11-14 (2014).
- 91 PEN. CODE §§ 375(1)-(6).
- 92 *Id.* §§ 377, 354. Indian law criminalized sodomy regard-

less of gender or consent. *See* Shaksi v. Union of India, (1999) 6 S.C.C. 591 ¶ 10 (defining “modesty” as “an attribute associated with female human beings as a class”).

93 Section 4 of the Criminal Law (Amendment) Act, No. 46 of 1983, “Amendment of the First Schedule”.

94 A non-bailable crime is a crime for which no bail may be posted. *Id.*

95 Section 3 of the Criminal Law (Amendment) Act, No. 46 of 1983, “Substitution of new sections for sections 375 and 376”.

96 *Id.* § 6, “Insertion of New Section 114A”; Section 114A of the Indian Evidence Act, “Presumption as to absence of consent in certain prosecutions for rape”.

97 Section 3 of the Criminal Law (Amendment) Act, No. 46 of 1983, “Substitution of new sections for sections 375 and 376”.

98 PEN. CODE § 354.

99 *Id.* § 377.

100 Section 511 provided a general attempt provision, punishable by “one-half of the longest term of imprisonment provided for [the attempted] offence.” PEN. CODE 511. However, unsuccessful rape attempts were often prosecuted as assaults on modesty rather than attempted rape. *See, e.g.,* State v. Pankaj Chaudhary, CrI.A.No.813/2011 (unreported) (Delhi High Court reducing attempted rape and sodomy convictions to a modesty conviction where the perpetrator put his fingers in the five-year-old victim’s vagina and anus).

101 This enactment amended existing provisions in the Indian Penal Code, Indian Evidence Act, and the Code of Criminal Procedure. *President gives his assent to anti-rape bill*, TIMES OF INDIA (Apr. 4, 2013), <http://timesofindia.indiatimes.com/india/President-gives-his-assent-to-anti-rape-bill/article-show/19372967.cms>; *India: Criminal Law Amendment Bill of Rape Adopted*, THE LIBRARY OF CONGRESS, GLOBAL LEGAL MONITOR (Apr. 9, 2013), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403545_text.

102 Section 9 of the Criminal Law (Amendment) Act, No. 13 of 2013, “Substitution of new sections for sections 375, 376, 376A, 376B, 376C and 376D”.

103 Section 9 of the Criminal Law (Amendment) Act, No. 13 of 2013, “Explanation 2”.

104 The Act allows application of the death penalty in certain cases of rape and adds a minimum sentence of one year and extends the maximum available sentence from two years to five years for a modesty offense. Section 6 of the Criminal Law (Amendment) Act, No. 13 of 2013, “Amendment of Section 354”.

105 CODE CRIM. PROC. § 156, “Police officer’s power to investigate cognizable case”. *Id.* § 190, “Cognizance of offences by Magistrates”.

106 *Id.* § 154, “Information in cognizable cases”.

107 *Id.* § 173, “Report of police officer on completion of investigation”. *Id.* § 157, “Procedure for investigation preliminary inquiry”.

108 *Id.* § 190, “Cognizance of offences by Magistrates”.

109 *Id.* § 228, “Framing of charge (before a Court of Session)”. *Id.* § 240, “Framing of charge (in Warrant-Cases by Magistrates)”.

110 *Id.* § 235, “Judgment of acquittal or conviction (before a Court of Session)”. *Id.* § 248, “Acquittal or conviction (in War-

rant-Cases by Magistrates)”.

111 *Id.* § 357, “Order to pay compensation”.

112 Preeti Misra & Alok Chantia, *Compensatory Jurisprudence In India With Special Reference To Dispensation Of Justice To The Victims Of Rape: A Critical Appraisal*, 1 INDIAN J. OF HUM. RTS. STUD. 8 (2011), available at <http://www.freewebs.com/manab/6.pdf>.

113 Karnataka v. Manjanna, (2000) 6 S.C.C. 188 (holding that the need for medical examination was a “medicolegal emergency”). In 2005, Indian law began to require medical exams of both the victim and accused within twenty-four hours of the report of the assault. Many rural medical facilities still do not comply with this rule. N. Jagadeesh, *Legal changes towards justice for sexual assault victims*, 7(2) INDIAN J. OF MED. ETHICS 108, 109 (2010), available at <http://ijme.in/index.php/ijme/article/view/377/678>.

114 ANGANA P. CHATTERJI ET AL., *MILITARIZATION WITH IMPUNITY: A BRIEF ON RAPE AND MURDER IN SHOPIAN, KASHMIR* 12 (2009), available at <http://www.kashmirprocess.org/shopian>.

115 The “two finger test” assesses if a rape victim is “habituated to sexual intercourse” by testing the laxity of the vaginal canal. Indrajit Khandekar, *Pitiable and horrendous quality of medical examination of rape victims in Wardha district (MH)*, 12(4) INT’L J. MED. TOXICOLOGY & LEGAL MED. 1 (2010); *Is two-finger rape test still in use, CIC asks govt*, TIMES OF INDIA (Feb. 9, 2015), <http://timesofindia.indiatimes.com/india/Is-two-finger-rape-test-still-in-use-CIC-asks-govt/articleshow/46169221.cms>; Rebecca Samervel, *Shakti Mills gang-rape case: Judge slams 2-finger test, identity parade*, TIMES OF INDIA (Mar. 25, 2014), <http://timesofindia.indiatimes.com/city/mumbai/Shakti-Mills-gang-rape-case-Judge-slams-2-finger-test-identity-parade/articleshow/32618329.cms>.

116 Lutz Oette, *India’s International Obligations Towards Victims of Human Rights Violations: Implementation in Domestic Law and Practice*, in HUMAN RIGHTS, JUSTICE, & CONSTITUTIONAL EMPOWERMENT 462, 476 (C. Raj Kumar & K. Chockalingam eds., Oxford Univ. Press 2007).

117 *See* The Armed Forces (Jammu & Kashmir) Special Powers Act, No. 21, Acts of Parliament, 1990; CODE CRIM. PROC. § 197, “Prosecution of Judges and public servants”; CODE CRIM. PROC. § 45, “Protection of members of the Armed Forces from arrest”; HUMAN RIGHTS WATCH, “EVERYONE LIVES IN FEAR”: PATTERNS OF IMPUNITY IN JAMMU & KASHMIR JAMMU 28-29 (2006), available at <http://www.hrw.org/sites/default/files/reports/india0906web.pdf> [hereinafter HRW, “EVERYONE LIVES IN FEAR”].

118 Oette, *supra* note 116, at 477.

119 *Id.* at 478-82.

120 People’s Union for Democratic Rights v. Union of India, (1982) 3 S.C.C. 235, ¶ 2.

121 India uses a formal pleading system for ordinary litigation. Order VI of the Code of Civil Procedure, No. 5 of 1908, “Pleadings Generally.”

122 Chairman, Railway Board v. Chandrima Das, (2000) 2 S.C.C. 465, at 479 (“[P]ublic-spirited citizens having faith in the rule of law are rendering great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on technical or conservative yardstick of the rule of locus standi or absence of personal loss or injury. There has, thus, been a spectacular expansion of the concept of locus standi. The

- concept is much wider and it takes in its stride anyone who is not a mere ‘busy-body.’”).
- 123** *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 S.C.C. 490, at 493 (“[T]he court can itself take cognizance of the matter and proceed suo muto or on a petition of any public-spirited individual.”).
- 124** See *Chairman, Railway Board v. Chandrima Das* (holding the state vicariously liable and awarding compensation to the victim of gang rape committed by railway employees in a PIL case initiated by an advocate); *Delhi Domestic Working Women’s Forum v. Union Of India*, (1995) 1 S.C.C. 14 (ordering payment by the State for compensation and rehabilitation of four victims of gang rape by seven army officers in a PIL).
- 125** See, e.g., *Delhi Domestic Working Women’s Forum v. Union Of India; Bodhisattwa Gautam v. Subhra Chakraborty*, at 492 (“Rape is an offence against basic human rights as [] the fundamental right of personal liberty and life.”).
- 126** Burt Neuborne, *The Supreme Court of India*, 1(3) INT’L J. CONST. L. 476, 503 (2003). For example, in *Delhi Domestic Working Women’s Forum v. Union of India*, the Court ordered the National Commission for Women to create a “scheme for compensation and rehabilitation to ensure justice to victims of such crimes of violence.” 1 S.C.C. 14, at 18.
- 127** See *Punjab & Haryana High Court Bar Ass’n v. Punjab*, (1996) 4 S.C.C. 742, at 748 (directing the State to prosecute, to suspend the police officers during the trial, and to take “suitable action” against the supervisor of the police officers).
- 128** See *Chairman, Railway Board v. Chandrima Das*.
- 129** *Victims & Inhabitants of the Village of Kunan Poshpora v. J&K State, J&K State Human Rights Comm’n*, at 7-16 (Oct. 16, 2011); HRW, *WE HAVE NO ORDERS TO SAVE YOU*, *supra* note 14, at 60-62; *About us*, NATIONAL COMMISSION FOR WOMEN, INDIA, <http://ncw.nic.in/frnAboutUS.aspx> (last visited May 4, 2015).
- 130** *About us*, NATIONAL COMMISSION FOR WOMEN, *supra* note 129; The National Commission for Women Act, No. 20 of 1990, ¶ 10 INDIA CODE (1990), available at <http://www.ncw.nic.in/PDFfiles/newact.pdf>.
- 131** The National Commission for Women Act, 1990, ¶ 10.
- 132** *Complaint & Investigation Cell*, NATIONAL COMMISSION FOR WOMEN, *supra* note 129; Shri Tezoswie Dowarah, *Legal Protections of Women Under the Constitution of India*, 166 (June 1, 2010) (unpublished B.A.L.L.B. dissertation, Dibrugarh University), available at <http://www.scribd.com/doc/51644251/LEGAL-PROTECTIONS-OF-WOMEN-UNDER-THE-CONSTITUTION-OF-INDIA-BY-TEZOSWIE-DOWARAH#scribd>.
- 133** The Protection of Human Rights Act, 1993. See also MANDEEP TIWANA, COMMONWEALTH HUMAN RIGHTS INITIATIVE, *NEEDED: MORE EFFECTIVE HUMAN RIGHTS COMMISSIONS IN INDIA* 3 (2004), available at http://www.humanrightsinitiative.org/publications/nl/articles/india/needed_more_effective_hr_comm_india.pdf.
- 134** The Protection of Human Rights Act, 1993, ¶¶ 12(a), 29, 36(2).
- 135** TIWANA, *supra* note 133, at 4.
- 136** The Protection of Human Rights Act, 1993, ¶¶ 13(1), 29.
- 137** *Id.* ¶¶ 14(1)-(2).
- 138** *Id.* ¶¶ 14(2).
- 139** *Id.* ¶¶ 14(4)-(5).
- 140** *Id.* ¶¶ 18(e).
- 141** *Id.* ¶¶ 18(a)-(c). See also TIWANA, *supra* note 133, at 3.
- 142** The Protection of Human Rights Act, 1993, ¶¶ 12(b), 29.
- 143** *Id.* ¶ 19(1). See also TIWANA, *supra* note 133, at 4.
- 144** The Protection of Human Rights Act, 1993, ¶ 19(1)(b). See also TIWANA, *supra* note 133, at 4.
- 145** The Protection of Human Rights Act, 1993, ¶ 19(2).
- 146** TIWANA, *supra* note 133, at 4.
- 147** *Victims & Inhabitants of the Village of Kunan Poshpora v. J&K State*, *supra* note 129, at 15-16.
- 148** National Commission for Minorities Act, No. 19 of 1992, ¶ 9(i) INDIA CODE (1993), http://ncm.nic.in/NCM_Act.html (last visited May 10, 2015). See also *Profile of NCM*, NATIONAL COMMISSION FOR MINORITIES, http://ncm.nic.in/Profile_of_NCM.html (last visited May 10, 2015).
- 149** *Id.*
- 150** National Commission for Minorities Act, 1992, ¶ 9(i).
- 151** *Id.* ¶ 9(iv).
- 152** *Community Wise Complaints (1 Apr 2014 – 31 May 2014)*, NATIONAL COMMISSION FOR MINORITIES, available at http://ncm.nic.in/pdf/cms_reports/CMS_update/Community%20Wise_14-15.pdf.
- 153** JUGDEP S. CHIMA, *THE SIKH SEPARATIST INSURGENCY IN INDIA: POLITICAL LEADERSHIP AND ETHNONATIONALIST MOVEMENTS* 4 (2010).
- 154** See KUMAR ET AL., *supra* note 14.
- 155** See Hamish Telford, *The Political Economy of Punjab: Creating Space for Sikh Militancy*, 32 ASIAN SURV. 969, 984-85 (1992), available at http://www.jstor.org/stable/2645265?seq=1#page_scan_tab_contents.
- 156** RAMACHANDRA GUHA, *INDIA AFTER GANDHI: THE HISTORY OF THE WORLD’S LARGEST DEMOCRACY* 568 (2011).
- 157** See JASKARAN KAUR, *TWENTY YEARS OF IMPUNITY: THE NOVEMBER 1984 POGROMS OF SIKHS IN INDIA* 16 (2d ed. 2006), available at <http://www.ensaaf.org/publications/reports/20years/20years-2nd.pdf>.
- 158** See HUMAN RIGHTS WATCH, *GETTING AWAY WITH MURDER: 50 YEARS OF THE ARMED FORCES (SPECIAL POWERS) ACT 14-15* (2008), available at <http://www.hrw.org/legacy/background/2008/india0808/india0808web.pdf>. Although this act does not directly shield police officers from arrest or prosecution, it may have contributed to a general culture of impunity by discouraging victims from reporting.
- 159** *1984: Indian prime minister shot dead*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/31/newsid_2464000/2464423.stm (last visited Apr. 10, 2015).
- 160** See KUMAR ET AL., *supra* note 14, at 42. HRW has the official count at 2,733. *India: No Justice for 1984 Anti-Sikh Bloodshed*, HUMAN RIGHTS WATCH (Oct. 29, 2014), <https://www.hrw.org/news/2014/10/29/india-no-justice-1984-anti-sikh-bloodshed>.
- 161** See generally RAM NARAYAN KUMAR ET AL., *supra* note 14.
- 162** AMNESTY INT’L, *INDIA: HUMAN RIGHTS VIOLATIONS IN PUNJAB: USE AND ABUSE OF THE LAW* 18 (1991), available at <https://www.amnesty.org/en/documents/ASA20/011/1991/ru/>.

- 163** See, e.g., Inderjit Singh Jajee, *Politics of Genocide* 200-203 (1995).
- 164** ██████ v. Radha Krishan, C.C. 4 of 1997, D. & S.C. Chandigarh 8, 15 Aug. 1997. While the police alleged Sikh militants had killed the principal, some villagers pointed out that the principal was well-liked in the area for supporting political activists and alleged that he had been killed with police complicity. E-mail from Rajvinder Singh Bains to author (Apr. 9, 2015, 7:52 AM) (on file with author). Skeptics of Sikh separatist involvement in the murder claimed that the principal of the secondary school was known for good relations with Sikh political activists in the area. *Id.*
- 165** Thirty-two people of Village Paili filed a petition before Police Station House Officer Radha Krishan (“Krishan”). *Charanjit v. Punjab*, (2013) 11 S.C.C. 163, 165.
- 166** ██████ v. *Radha Krishan*, at 19.
- 167** *Id.*
- 168** *Id.*
- 169** *Id.* at 20.
- 170** *Id.* at 3, 23.
- 171** *Id.* at 22-23.
- 172** *Id.* at 4.
- 173** *Id.*
- 174** *Id.*
- 175** *Charanjit v. Punjab*, at 169. See also ██████ v. *Radha Krishan*, at 5.
- 176** ██████ v. *Radha Krishan*, at 5.
- 177** *Id.*
- 178** See Letter from ██████ to S.S. Ray, Governor, Punjab (Feb. 13 1989).
- 179** ██████ v. *Radha Krishan*, at 5.
- 180** *Id.*
- 181** *Charanji v. Punjab*, at 165.
- 182** ██████ v. *Radha Krishan*, at 5.
- 183** *Id.* (referring to Sections 323 and 504 of the Indian Penal Code).
- 184** *Id.* at 6.
- 185** *Id.*
- 186** PEN. CODE §§ 366, 342, 376, 506, respectively.
- 187** ██████ v. *Radha Krishan*, at 6.
- 188** *Id.*
- 189** *Id.* at 7. In addition to the district judge, there may be a number of Additional District Judges depending on the workload.
- 190** *Id.*
- 191** See *id.* (referring to Section 376(2)(g) of the Indian Penal Code).
- 192** *Id.* at 7. See also E-mail from Rajvinder Singh Bains, *supra* note 164.
- 193** ██████ v. *Radha Krishan*, at 7.
- 194** *Id.*
- 195** *Id.* at 9.
- 196** *Id.* at 15.
- 197** *Id.* at 23, 26.
- 198** *Id.* at 27.
- 199** *Id.* at 28.
- 200** *Id.* at 30.
- 201** *Id.* at 38.
- 202** See Appeal of Radha Krishan, *Radha Krishan v. Chandigarh*, No. 769 S.B. of 1997, Cr.A. H.C. P. & H., 25 Sept. 1997.
- 203** *Id.* at 9.
- 204** See Pet. of ██████ Praying for Impleading the Complainant as Resp’t No. 2, *Radha Krishan v. Chandigarh*.
- 205** *Id.* at 2.
- 206** *Id.*
- 207** See Order Granting Bail to Krishan, *Radha Krishan v. Chandigarh*.
- 208** ██████’s Motion for Cancellation of Bail Granted to the Appellant at 4, *Radha Krishan v. Chandigarh*. SHO Krishan claimed that he had been suspended from the police force on August 13, 1996 and merely was receiving a “subsistence allowance.” Reply Br. of Krishan to ██████’s Motion Opposing Bail at 5, *Radha Krishan v. Chandigarh*.
- 209** See Record of Hearings 17 Sept. 2003, 14 Jan. 2004, 25 Feb. 2004, 12 May 2004, 28 July 2004, *Radha Krishan v. Chandigarh*.
- 210** E-mail from Rajvinder Singh Bains, *supra* note 162.
- 211** *Charanjit v. Punjab*, at 170.
- 212** E-mail from Rajvinder Singh Bains, *supra* note 162.
- 213** E.g., ASSOCIATION OF PARENTS OF DISAPPEARED PERSONS, *supra* note 19, at 2.
- 214** ASSOCIATION OF PARENTS OF DISAPPEARED PERSONS, *supra* note 19, at 2; HRW, HUMAN RIGHTS CRISIS IN KASHMIR, *supra* note 15.
- 215** ASIA WATCH & PHYSICIANS FOR HUMAN RIGHTS, *supra* note 20.
- 216** *Id.*
- 217** *Id.*
- 218** HRW, HUMAN RIGHTS CRISIS IN KASHMIR, *supra* note 15, at 36.
- 219** *Id.* at 21-22.
- 220** ANGANA P. CHATTERJI ET AL., INTERNATIONAL PEOPLE’S TRIBUNAL ON HUMAN RIGHTS AND JUSTICE IN INDIAN-ADMINISTERED KASHMIR (IPTK), BURIED EVIDENCE: UNKNOWN, UNMARKED, AND MASS GRAVES IN INDIAN-ADMINISTERED KASHMIR—A PRELIMINARY REPORT 10 (2009); Ishfaq-ul-Hassan, *Issue of unmarked graves returns to haunt Mufti government*, DNA (Mar. 27, 2015), <http://www.dnaindia.com/india/report-issue-of-unmarked-graves-returns-to-haunt-mufti-government-2072215>; SEEMA KAZI, IN KASHMIR: GENDER, MILITARIZATION, AND THE MODERN NATION-STATE (2011).
- 221** ASSOCIATION OF PARENTS OF DISAPPEARED PERSONS, *supra* note 19, at 2. The government acknowledged 4,000 victims of forced disappearance in J&K. *Id.*
- 222** ANGANA P. CHATTERJI ET AL., *supra* note 220; Ishfaq-ul-Hasan, *supra* note 220.
- 223** ASSOCIATION OF PARENTS OF DISAPPEARED PERSONS, *supra* note 19, at 2. In 2011, there were 400,000 to 750,000 Indian soldiers stationed in J&K. *Id.* See generally SEEMA KAZI, IN KASHMIR: GENDER, MILITARIZATION, AND THE MODERN NATION-STATE (2011);

Junaid Ahmad, *Putting India on the Agenda*, ZNET (Mar. 24, 2002), <https://zcomm.org/znetarticle/putting-kashmir-on-the-agenda-by-junaid-ahmad/>. 146 Cong. Rec. 3132 (2000), available at <http://thomas.loc.gov/cgi-bin/query/z?r106:E21MR0-0039> (remarking on the new massacre of Sikhs in India).

224 HRW, HUMAN RIGHTS CRISIS IN KASHMIR, *supra* note 15, at 20 and n.20; see INDIA CONST. art. 370, “Temporary provisions with respect to the Jammu & Kashmir.” The investigations described in this Report were internal to J&K and do not implicate Indian law.

225 HRW, “EVERYONE LIVES IN FEAR,” *supra* note 117, at 29-30. The first Disturbed Areas Act was promulgated in 1990. *Id.* By identifying J&K as a “disturbed” area, rather than an area of “armed conflict,” India may avoid incurring obligations under international humanitarian law and increased scrutiny under international human rights law. Committee on the Elimination of Discrimination against Women, *General Discussion on women in conflict and post-conflict situations*, July 18, 2011, Written Submission, North East Network, available at <http://www.ohchr.org/Documents/HRBodies/CEDAW/Womenconflictsituations/NorthEastNetwork.pdf>; see generally Amichai Cohen & Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, in 14 Y.B. INT’L HUMANITARIAN L. 37 (M.N. Schmitt & L. Arimatsu eds., 2012).

226 The Armed Forces (Jammu & Kashmir) Special Powers Act, 1990, § 4, available at http://mha.nic.in/sites/upload_files/mha/files/pdf/Armedforces%20_J&K_%20Splpowersact1990.pdf. The applicability of the AFSPA in J&K has been recently called into question by the expiration of the Disturbed Areas Act of 1997. Zahid Rafiq, *J&K not under Disturbed Areas Act*, THE HINDU (Mar. 26, 2015), <http://www.thehindu.com/news/national/other-states/jk-not-under-disturbed-areas-act/article7033478.ece> (last visited May 11, 2015). The Mufti government stated “that the power to declare an area disturbed was ‘inherent in AFSPA.’” Muzamil Jaleel, *Explained: AFSPA-Disturbed Areas debate in J&K*, INDIAN EXPRESS, <http://indianexpress.com/article/explained/explained-afspa-disturbed-areas-debate-in-jk/> (last visited May 11, 2015).

227 The Armed Forces (Jammu & Kashmir) Special Powers Act, 1990, § 7, available at http://mha.nic.in/sites/upload_files/mha/files/pdf/Armedforces%20_J&K_%20Splpowersact1990.pdf.

228 The villages are often referred to together as KunanPoshpora, Kunan-Poshpora, or Kunan Poshpora.

229 *Official Website of District Kupwara*, NATIONAL INFORMATICS CENTRE—DISTRICT KUPWARA (Feb. 2, 2015), <http://www.kupwara.gov.in>.

230 *Victims & Inhabitants of the Village of Kunan Poshpora v. J&K State*, at 1.

231 Writ petition under Article 226 of the Constitution of India and 103 of the Constitution of J&K ¶ 2, Abdul Ahad Shah v. Union of India (2013) (“Throughout the night, the men were physically and emotionally tortured in the most brutal ways. The tools of torture included the passing of electric currents on the bodies of the men, including their penis, hanging the men upside down and beating them with sticks, and pushing their heads into cold, chilly water.”).

232 HUMAN RIGHTS WATCH, ABDICATION OF RESPONSIBILITY:

THE COMMONWEALTH AND HUMAN RIGHTS 14 (1991), available at <http://www.hrw.org/reports/pdfs/g/general/general291o.pdf> [hereinafter HRW, ABDICATION OF RESPONSIBILITY]. Though the exact number of rape victims remains unknown, medical officials conducted rape exams on at least 32 women following the alleged attack. Writ petition under Article 226 of the Constitution of India and 103 of the Constitution of J&K ¶ 6, Uzma Qureshi v. J&K Chief Civil Sec’y (2013).

233 *Victims & Inhabitants of the Village of Kunan Poshpora v. J&K State*, at 3 (“[A]t about 11 pm . . . security personnel entered in her house[,] gagged her mouth and tied down her hands[,] and then till she was [un]conscious[,] eight army personnel one after another did all that what was not expected of them. They ravished her chastity and even ravished her in unnatural way[s].”).

234 Writ petition, ¶ 8, *Uzma Qureshi v. J&K Chief Civil Sec’y* (quoting in its entirety the report by then-Deputy Commissioner of Kupwara District, S.M. Yasin submitted to then-Divisional Commissioner, W. Habibullah [hereinafter Yasin Report]). Human Rights Watch report that a woman was gang raped four days after giving birth. HRW, ABDICATION OF RESPONSIBILITY, *supra* note 230, at 15.

235 *Id.* *supra* note 234 (quoting Yasin Report).

236 No Objection Certificates (NOCs) are waivers of liability. *Id.* (quoting Yasin Report, *supra* note 234).

237 B.G. VERGHESE, CRISIS AND CREDIBILITY, THE LANCER PAPER, PRESS COUNCIL OF INDIA 114 (1991).

238 *Id.*

239 HRW, ABDICATION OF RESPONSIBILITY, *supra* note 232, at 14. Two police constables also allegedly reported the abuse to their commanding officer after seeing men emerge from interrogations unable to walk and hearing women’s screams. *Id.* at 14 n.4.

240 Writ petition, ¶ 8, *Uzma Qureshi v. J&K Chief Civil Sec’y* (quoting Yasin Report, *supra* note 234). According to Human Rights Watch, villagers submitted their complaint to Yasin on March 5, 1991 and he visited the community on March 7, 1991. HRW, ABDICATION OF RESPONSIBILITY, *supra* note 232, at 7.

241 HRW, ABDICATION OF RESPONSIBILITY, *supra* note 232, at 14.

242 VERGHESE, *supra* note 237.

243 Writ petition, ¶ 8, *Uzma Qureshi v. J&K Chief Civil Sec’y* (quoting Yasin Report, *supra* note 234).

244 *Id.*

245 *Id.*

246 *Id.*

247 Safwat Zargar & Bashaarat Masood, *Probe Official Speaks Up, Says Was Threatened*, INDIAN EXPRESS (Feb. 24, 2014), <http://indianexpress.com/article/india/india-others/konan-poshpora-probe-official-speaks-up-says-was-threatened/>.

248 Writ petition, ¶ 8, *Uzma Qureshi v. J&K Chief Civil Sec’y*.

249 Order re: Ikhtitani (final report) at 2, In the case of Final Police Report u/s 173 Cr.P.C. (June 18, 2013) (Court of Sub-Judge Judicial Magistrate, Kupwara).

250 Writ petition, ¶ 8, *Uzma Qureshi v. J&K Chief Civil Sec’y*; HRW, ABDICATION OF RESPONSIBILITY, *supra* note 232, at 15.

251 VERGHESE, *supra* note 237, at 120-21; HRW, ABDICATION OF

RESPONSIBILITY, *supra* note 232, at 15; Order re: Ikhtitani (final report) at 2, In the case of Final Police Report u/s 173 Cr.P.C.

252 Order re: Ikhtitani (final report) at 2, In the case of Final Police Report u/s 173 Cr.P.C.

253 *Id.*

254 *Id.*

255 *Id.*

256 *Id.* HRW, ABDICATION OF RESPONSIBILITY, *supra* note 232, at 14 (reporting that ██████ was transferred in July “without ever carrying out the investigation.”).

257 Order re: Ikhtitani (final report) at 2, In the case of Final Police Report u/s 173 Cr.P.C.

258 HRW, ABDICATION OF RESPONSIBILITY, *supra* note 232, at 14.

259 *Id.*

260 *Id.*

261 Writ petition ¶ 6, *Abdul Ahad Shah v. Union of India*.

262 W. HABIBULLAH, CONFIDENTIAL REPORT OF DIVISIONAL COMMISSIONER, KASHMIR ON INCIDENT AT KUNAN POSHPORA, KUPWARA 1, 3 (March 18, 1991). Victims and advocates rebutted this presumption, stating that the purpose of Habibullah’s report was “clear—to chart out a course of action to restore confidence in the armed forces.” Writ petition ¶ 6, *Abdul Ahad Shah v. Union of India*. The petition cites Habibullah’s report in which he stated that he had a discussion with the DGP and the Corps Commander “to determine the course of action required to be followed to allay doubts and restore confidence.” *Id.* ¶ 6. Habibullah recently stated that the Indian government “‘deleted important portions of his confidential report’ on the KunanPoshpura mass rape case in which he had recommended a police probe, upgradation in the level of investigation, entrusting the case to a gazette police officer and seeking an order from the 15 Corps Commander to ensure Army cooperation in the probe.” Muzamil Jaleel, *Habibullah Breaks Silence: Govt Deleted Key Portion of My Report on J&K Mass Rape Case*, THE INDIAN EXPRESS (Jul. 7, 2013), <http://archive.indianexpress.com/news/habibullah-breaks-silence-govt-deleted-key-portions-of-my-report-on-j-k-mass-rape-case/1138601/>; *see also* Arun Mohan Sukuma, *Interview with Wajahat Habibullah: ‘Govt used my name and standing as a defence against the outcry over Kunan-Poshpura’*, INDIAN EXPRESS (Feb. 27, 2014), <http://indianexpress.com/article/india/india-others/govt-used-my-name-and-standing-as-a-defence-against-the-outcry-over-kunan-poshpura/>.

263 HABIBULLAH, *supra* note 262, at 3-4.

264 *Id.* at 4.

265 The Press Council of India is an autonomous quasi-judicial body enacted by the Indian Parliament that is intended to serve as “a watchdog of the press.” *Introduction*, PRESS COUNCIL OF INDIA, http://presscouncil.nic.in/Content/1_1_Introduction.aspx (last updated Dec. 6, 2013); *see* Prashant Jha, *Unravelling a mass rape*, THE HINDU (July 8, 2013), <http://www.thehindu.com/opinion/op-ed/unravelling-a-mass-rape/article4892195.ece>.

266 HRW, ABDICATION OF RESPONSIBILITY, *supra* note 232, at 15. During their investigation, Council members “stayed in the quarters of the brigade alleged to have committed the offence and took along with them as interpreter someone from the local police-station.” *Unravelling a mass rape*, THE HINDU (July 8, 2013), [http://www.thehindu.com/opinion/op-ed/unravelling-a-](http://www.thehindu.com/opinion/op-ed/unravelling-a-mass-rape/article4892195.ece)

[mass-rape/article4892195.ece](http://www.thehindu.com/opinion/op-ed/unravelling-a-mass-rape/article4892195.ece).

267 VERGHESE, *supra* note 237, at 116.

268 *Id.* at 121.

269 *Id.* at 127. In a recent article, B.G. Verghese, the head of the Press Council committee in 1991, stated that he still believed the claims were “bogus” and merely the product of a militant-inspired Army smear campaign that would “make them reluctant to go into areas.” Prashant Jha, *Unravelling a mass rape*, THE HINDU (July 8, 2013), <http://www.thehindu.com/opinion/op-ed/unravelling-a-mass-rape/article4892195.ece>.

270 VERGHESE, *supra* note 237, at 127.

271 Order re: Ikhtitani (final report) at 2-3, In the case of Final Police Report u/s 173 Cr.P.C.

272 *Id.* at 3.

273 *Id.* at 5 (quoting the observations recorded by the then-Director Prosecution).

274 *Id.* at 4-5 (quoting the observations recorded by the then-Director Prosecution).

275 *Victims & Inhabitants of the Village of Kunan Poshpora v. J&K State*, at 5; *see id.* at 3-5 (stating that the then-Director Prosecution had “opined that the [allegations were] not maintainable and accordingly . . . closed the investigation on 12-09-1991 as untraced” and noting that the investigation was closed on September 9, 1991, but the closure report was submitted to the district court on April 3, 2013).

276 CODE CRIM. PROC. § 173(2).

277 *Victims & Inhabitants of the Village of Kunan Poshpora v. J&K State*, at 1.

278 *Id.* at 1-4.

279 *See id. generally.*

280 *Id.* at 7.

281 *Id.* at 15-17.

282 *See* Writ petition, ¶¶ 8-11, *Uzma Qureshi v. J&K Chief Civil Sec’y*.

283 Order re: Ikhtitani (final report) at 1-3, In the case of Final Police Report u/s 173 Cr.P.C.

284 Denial of PIL Petition, *Uzma Qureshi v. J&K Chief Civil Sec’y*, ¶ 7 (May 14, 2013) (High Court of J&K) (determining that “it may not be prudent for the writ petitions to press for this petition at this stage because whatever has been prayed before this Court might be given to the victims by the State itself”). The first PIL petition was filed April 20, 2013. Writ petition, *Uzma Qureshi v. J&K Chief Civil Sec’y*. This petition was rejected in May 2013. Denial of PIL Petition, *Uzma Qureshi v. J&K Chief Civil Sec’y*. A second PIL petition was filed the following October. Writ petition, *Abdul Ahad Shah v. Union of India*.

285 A Protest Petition/Application under section 173(8) of the Cr.P.C., 1989 at 7 (June 10, 2013) (Kupwara District Court).

286 Order re: Ikhtitani (final report) at 1-3, In the case of Final Police Report u/s 173 Cr.P.C.

287 *Id.* (denying the final police report and directing “further investigation to unravel the identity (sic) of . . . perpetrators of the alleged crime”).

288 *Id.*

289 Ishfaq Tantry, *HC stays 2013 magisterial orders in Kunan*

- Poshpora 'mass' rape*, TRIB. NEWS SERV., SRINAGAR (Jan. 15, 2015), <http://www.tribuneindia.com/news/courts/hc-stays-2013-magisterial-orders-in-kunan-poshpora-mass-rape/30514.html> (quoting army revision petition filed in the J&K High Court, Nov. 2015).
- 290** FRENY MANECKSHA, KUNAN-POSHPORA: RECONSTRUCTING TRUTH, HIMAL SOUTHASIAN, THE SOUTHASIA TRUST 5 (2014), *available at* <http://himalmag.com/kunan-poshpora-reconstructing-truth/> (quoting army revision petition filed in the J&K High Court, Nov. 2015).
- 291** *Press Release—Crime Never Dies, Indian Army Legal Challenged Dismissed*, KRACTIVISM (Aug. 10, 2014), <http://www.kractivist.org/tag/kunan-poshpora/> (quoting the Aug. 8, 2014 J&K Sessions Court dismissal of the appeal filed by the army in response to the Kupwara District Court order to reopen the KunanPoshpora investigation).
- 292** *HC stays re-investigation in Kunan-Poshpora mass rape case*, HINDUSTAN TIMES (Jan. 16, 2015), <http://www.hindustan-times.com/india-news/hc-stays-re-investigation-in-kunan-poshpora-mass-rape-case/article1-1307423.aspx> (quoting the Jan. 15, 2015 J&K High Court order staying the reopening of the KunanPoshpora investigation).
- 293** *Kunan-Poshpora case: SC stays High Court proceedings*, THE HINDU, <http://www.thehindu.com/news/national/kunan-poshpora-case-sc-stays-high-court-proceedings/article6975871.ece> (last updated Mar. 10, 2015, 2:48 a.m.); Bashaarat Masood, *SC stays proceedings in Kunan Poshpora case*, Indian Express (Mar. 10, 2015, 3:23 a.m.), <http://indianexpress.com/article/india/india-others/sc-stays-proceedings-in-kunan-poshpora-case/>.
- 294** Between 1961 and 1971, 799 incidents of community violence occurred involving Hindu and Muslim communities in Gujarat. See AKSHAYAKUMAR RAMANLAL DESAI & WILFRED D’COSTA, STATE AND REPRESSIVE CULTURE: A CASE STUDY OF GUJARAT 99 (1994).
- 295** ORNIT SHANI, COMMUNALISM, CASTE AND HINDU NATIONALISM: THE VIOLENCE IN GUJARAT 163-64 (2007). During the mid-1960s, seven large mills in Ahmedabad shut down and around 17,000 workers—predominantly Hindus—lost their jobs. *Id.* at 164.
- 296** GAYER & JAFFRELOT, *supra* note 20, at 53-60. SHANI, *supra* note 295, at 162.
- 297** SHANI, *supra* note 295, at 16, 157-60.
- 298** Howard Spodek, *From Gandhi to Violence: Ahmedabad’s 1985 Riots in Historical Perspective*, 23(4) MODERN ASIAN STUDS. 765-95 (1989).
- 299** JUDGE V.S. DAVE, REPORT OF THE COMM’N OF INQUIRY: INTO THE INSTANCES OF VIOLENCE AND DISTURBANCES WHICH TOOK PLACE AT VARIOUS PLACES IN THE STATE OF GUJARAT SINCE FEBRUARY, 1985 TO 18TH JULY, 1985 269-70 (1990).
- 300** SHANI, *supra* note 295, at 157.
- 301** *Id.* at 161.
- 302** GAYER & JAFFRELOT, *supra* note 20, at 51, 66, 78.
- 303** Basharat Peer, *Being Muslim Under Narendra Modi*, N.Y. TIMES (Apr. 18, 2014), http://www.nytimes.com/2014/04/19/opinion/being-muslim-under-narendra-modi.html?_r=0.
- 304** GAYER & JAFFRELOT, *supra* note 20, at 53-60.
- 305** Ratna Kapur, *Normalizing Violence: Transitional Justice and the Gujarat Riots*, 15 COLUM. J. GENDER & L. 885 (2006).
- 306** *Id.* at 892-93.
- 307** Jyoti Punwani, *The Carnage at Godhra, in GUJARAT: THE MAKING OF A TRAGEDY* 45-74 (Siddharth Varadarajan ed., 2003). Later investigations revealed that, in fact, the fire was not set from the outside of the train, suggesting that it was not the result of Muslim on Hindu violence. *Id.* at 45.
- 308** NANAVATI-SHAH COMMISSION, REPORT: SABARMATI EXPRESS TRAIN INCIDENT AT GODHRA ¶1 (2008), *available at* <http://www.home.gujarat.gov.in/homedepartment/downloads/godharaincident.pdf>.
- 309** *Id.* at 4.
- 310** *Id.*
- 311** Gujarat v. Chhara, 1583-84 (2012) (Before the Special Court, Designated for Conducting the Speedy Trial of Riot Cases, Navrangpura, Ahmedabad) (“The above discussion shows that different charged offences which have been proved to have been committed in the morning occurrences were committed with common intentions, objects, and were based on the agreement the accused had arrived at. The presence of all these mentioned accused clearly proves their oneness.”).
- 312** Gujarat v. Chhara, at 15-16. See also HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 5, 15-17.
- 313** *Id.*
- 314** Gujarat v. Chhara, at 15, 22-23. According to a news report, Muslim men, women, and children were sliced with swords, rammed with iron rods, doused with acid, and tossed alive into fires during the attack. Anumeha Yadav, *A Partial Sense of Closure*, THE HINDU (Sept. 6, 2012), <http://www.thehindu.com/opinion/op-ed/a-partial-sense-of-closure/article3863086.ece>.
- 315** Gujarat v. Chhara, at 16.
- 316** Gujarat v. Chhara, at 235. Yadav, *supra* note 314.
- 317** Gujarat v. Chhara, at 15-16, 983.
- 318** Gujarat v. Chhara, at 13. See also *Naroda Patiya Case: [REDACTED] 30 Others Get Life Term*, BUS. STANDARD (Sept. 1, 2011), http://www.business-standard.com/article/economy-policy/naroda-patiya-case-kodnani-30-others-get-life-term-112090102011_1.html (stating that 36 women and 25 children were killed).
- 319** HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 15-17. See also CITIZENS’ INITIATIVE, THE SURVIVORS SPEAK (2002), *available at* <http://cac.ektaonline.org/resources/reports/womensreport.htm>.
- 320** HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 16-17.
- 321** Gujarat v. Chhara, at 474-475. See also HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 6.
- 322** CITIZENS’ INITIATIVE, *supra* note 319.
- 323** *Id.* According to one witness: “The residents of the . . . [neighborhood] segregated young girls (Muslims) and made them stand on one side. . . . The girls were stripped and then two men held them down by legs and arms. Those who raped were 20-25 in number. The girls screamed so loud that even now when I remember my blood boils The rape started at 6:00 in the evening until 9:00 at night. The girls were then burnt.” HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 17-18.
- 324** *Id.* at 15-17.

- 325** *Gujarat v. Chhara*, at 657, 664-65.
- 326** *Id.* at 653.
- 327** *Id.* at 663-64.
- 328** HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 15-17.
- 329** CITIZENS' INITIATIVE, *supra* note 319.
- 330** *Gujarat v. Chhara*, at 1699.
- 331** *Id.* at 16-17.
- 332** *Id.* See also HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 15-16.
- 333** *Id.* at 17. According to Human Rights Watch, state government officials were involved in the rioting and contributed to the police's ineffective response to the mob violence. *Id.* at 15-27.
- 334** *Gujarat v. Chhara*, at 15-17.
- 335** CITIZENS' INITIATIVE, *supra* note 319.
- 336** HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 21-27.
- 337** *Gujarat v. Chhara*, at 767.
- 338** *Gujarat v. Chhara*, at 17, 486.
- 339** DIPANKAR GUPTA, JUSTICE BEFORE RECONCILIATION: NEGOTIATING A "NEW NORMAL" IN POST-RIOT MUMBAI AND AHMEDABAD (2011).
- 340** *Gujarat v. Chhara*, at 17.
- 341** *Id.* at 485.
- 342** *Id.* at 152, 1529.
- 343** *Id.* at 489, 491-495.
- 344** *Id.* at 493, 495-96, 502-03.
- 345** HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 48.
- 346** *Gujarat v. Chhara*, at 496, 498.
- 347** *Id.* at 497-498.
- 348** *Id.* at 497.
- 349** *Id.* at 499-500.
- 350** *Id.* at 500-01.
- 351** *Id.* at 503-06.
- 352** HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 48, 60-61.
- 353** *Gujarat v. Chhara*, at 482, 1530.
- 354** HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 48.
- 355** NATIONAL COMMISSION FOR WOMEN, REPORT OF THE COMMITTEE CONSTITUTED BY THE NATIONAL COMMISSION FOR WOMEN TO ASSESS THE STATUS AND SITUATION OF WOMEN AND GIRL CHILDREN IN GUJARAT IN THE WAKE OF THE COMMUNAL DISTURBANCE (2002).
- 356** *Women's commission indicts Gujarat govt*, REDIFF.COM (Apr. 24, 2002), <http://www.rediff.com/news/2002/apr/24train2.htm>.
- 357** Gardiner Harris, *Gujarat Riot Trials May Alter India's Cycle of Violence*, N.Y. TIMES (July 2, 2012), <http://www.nytimes.com/2012/07/03/world/asia/gujarat-riot-trials-may-alter-indias-cycle-of-violence.html?pagewanted=all>.
- 358** *Gujarat v. Chhara*, at 380-81.
- 359** *Id.* at 502.
- 360** *Id.* at 14.
- 361** HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 49.
- 362** *Id.*
- 363** Rama Lakshmi, *Rapes Go Unpunished in Indian Mob Attacks: Muslim Women Say Claims are Ignored*, WASH. POST, June 3, 2002.
- 364** See *Charge to be Filed in Naroda Patia Case*, REDIFF.COM (June 4, 2002), <http://www.rediff.com/news/2002/jun/04train1.htm>; Manoj Mitta, *Riot Cases Still Drag On*, TIMES OF INDIA (Dec. 30, 2005), <http://timesofindia.indiatimes.com/india/Riot-cases-still-drag-on/articleshow/1351761.cms>.
- 365** *Gujarat v. Chhara*, at 17. The National Human Rights Commission has strongly condemned the Gujarat government for its failure to deliver justice to the riot victims. Nat'l Human Rights Comm'n v. Gujarat, (2009) 6 S.C.C. 767.
- 366** Christopher Jaffrelot, *Gujarat 2002: What Justice for the Victims? The Supreme Court, the SIT, the Police and the State*, ECON. & POL. WEEKLY (Feb. 25, 2012), <http://www.epw.in/special-articles/gujarat-2002-what-justice-victims.html>.
- 367** *Gujarat v. Chhara*, at 311; Kritivas Mukherjee, *Special courts to try India's 2002 religious riots*, REUTERS (May 1, 2009), <http://www.reuters.com/article/2009/05/01/idUSDEL75016>; *Supreme Court Fast-Tracks Key Gujarat Riot Cases, Victims Hopeful*, HINDUSTAN TIMES, May 1, 2009, available at Proquest, Doc. No. 469224648; Bhadra Sinha, *Crack Team to Probe Gujarat Riot Cases again*, HINDUSTAN TIMES (Mar. 26, 2008), <http://www.hindustantimes.com/newdelhi/crack-team-to-probe-gujarat-riot-cases/article1-284502.aspx>; Hari Kumar, *India's Top Court Orders New Inquiry into 2002 Sectarian Clashes*, N.Y. TIMES, Mar. 27, 2008, available at Proquest Doc. No. 433805646.
- 368** *Id.* at 1-11, 23-24.
- 369** *Id.* at 1-11.
- 370** See HUMAN RIGHTS WATCH, COMPOUNDING INJUSTICE: THE GOVERNMENT'S FAILURE TO REDRESS MASSACRES IN GUJARAT 21 (2003).
- 371** *Id.* at 26-77.
- 372** *Id.*
- 373** *Id.* at 156, 181-82, 263-65.
- 374** *Id.* at 1-11, 1911. M. Dasgupta, *Ex-BJP Minister among 32 Convicted of Naroda-Patiya Massacre*, THE HINDU (Aug. 29, 2012), <http://www.thehindu.com/news/national/other-states/exbjp-minister-among-32-convicted-of-narodapatiya-massacre/article3835078.ece>.
- 375** These individuals were respectively, [REDACTED] and [REDACTED]. See *Gujarat v. Chhara*, at 1914, 1919.
- 376** PEN. CODE § 315. See *Gujarat v. Chhara*, at 1694-95.
- 377** *Gujarat v. Chhara*, at 259, 1708.
- 378** *Id.* at 1708. With the exception of one accused, the Court held that "[i]n none of the [other] case[s] of rape or outraging [the] modesty against any Muslim woman [has] it . . . [been] proved beyond reasonable doubt as to who the tormentor was." *Id.*
- 379** *Id.* at 771, 1697-1709.
- 380** *Id.* at 1702-1703.

- 381** *Id.* at 1965-66. See *11 yrs after, 2002 rape victim gets Rs5 lakh compensation*, DAILY NEWS & ANALYSIS (Feb. 20, 2013), <http://www.dnaindia.com/ahmedabad/report-11-yrs-after-2002-rape-victim-gets-rs5-lakh-compensation-1801911>.
- 382** See *id.*
- 383** Aasha Kapur Mehta & Amita Shah, *Chronic Poverty in India: Incidence, Causes and Policies*, 31(3) WORLD DEVELOPMENT 491, 492-94 (2003); David Griffiths, Conversion, Re-Conversion and Violence in Central Orissa 11 (Sept. 2010) (unpublished M.A. dissertation, School of Oriental and African Studies, University of London).
- 384** *Id.* at 25.
- 385** CHATTERJI, *supra* note 14, at 302-03; Griffiths, *supra* note 383, at 26-27.
- 386** CHATTERJI, *supra* note 14, at 35, 303, 324; Griffiths, *supra* note 383, at 14-15. Somini Sengupta, *Hindu Nationalists Are Enrolling, and Enlisting, India's Poor*, N.Y. TIMES (May 13, 2002), <http://www.nytimes.com/2002/05/13/international/asia/13HIND.html>.
- 387** CHATTERJI, *supra* note 14, at 303. Hindutva organizations have framed these conversions as “reconversions” as Adivasis and Dalits were viewed as originally Hindu, and their forcible conversion to Hinduism is thus “Ghar Vapasi” (“return home”) to their original faith. *Id.* at 243-44, 296.
- 388** The Orissa Freedom of Religion Act states that “[n]o person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means.” Section 3 of The Orissa Freedom of Religion Act, 1967, No. 2 of 1967, INDIA CODE.
- 389** CHATTERJI, *supra* note 14, at 297 n.56.
- 390** ANGANA P. CHATTERJI, VIOLENT GODS: HINDU NATIONALISM IN INDIA’S PRESENT; NARRATIVES FROM ORISSA 155-227 (2009).
- 391** *Id.* at 296-97.
- 392** *Id.* at 289. See also Asma Jahangir, Special Rapporteur on Freedom of Religion or Belief Concludes Visit to India, (Mar. 20, 2008), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9400&LangID=E>.
- 393** CHATTERJI, *supra* note 14, at 289.
- 394** *Id.* at 287.
- 395** *Id.* at 311.
- 396** *Id.*
- 397** *Id.* at 311-13.
- 398** *Id.* at 317. While government figures confirmed 54 deaths, Janvikas, a civil society organization stated that 86 died. SAUMYA UMA, KANDHAMAL: THE LAW MUST CHANGE ITS COURSE (Vrinda Grover ed., 2010).
- 399** Orissa v. ██████████, 3, 26 (2014).
- 400** *Id.* at 3. The roof of the home was subsequently destroyed and the house was set on fire. *Id.* at 15.
- 401** *Id.* at 3-4, 16.
- 402** *Id.*
- 403** *Id.* at 14, 24, 27-28.
- 404** *Id.* at 24-27.
- 405** *Id.* at 25.
- 406** *Id.* at 27-28.
- 407** *Id.* at 4, 14.
- 408** *Id.* at 14.
- 409** ██████████, I, ██████████, *raped by Hindus while police stood watching*, ASIA NEWS, Oct. 25, 2008.
- 410** *Id.* at 4.
- 411** *Id.* at 28.
- 412** *Id.*
- 413** *Id.*
- 414** *Id.*
- 415** *Id.* at 10, 20.
- 416** *Id.* at 21.
- 417** *Id.* at 31, 34.
- 418** *Id.* at 30-35.
- 419** *Id.* at 35.
- 420** *Id.* at 4-5.
- 421** *Id.* at 5, 28. See also ██████████, I, ██████████, *raped by Hindus while police stood watching*, ASIA NEWS, Oct. 25, 2008; John Dayal, *Gang rape of ██████████ in Orissa, India – partial justice angers activists*, DR. JOHN DAYAL (Mar. 18, 2014), <http://john-dayal.com/2014/03/>.
- 422** Nirmala Carvalho, ██████████ *raped in Orissa accuses police of being “friendly” toward rapists*, ASIA NEWS (Oct. 24, 2008), <http://www.asianews.it/index.php?l=en&art=13576&size=A>.
- 423** Orissa v. Patnaik and Others (2014), at 15. Rohini Mohan, *The Second Rape*, TEHELKA MAGAZINE (Oct. 9, 2010), <http://www.tehelka.com/the-second-rape/?singlepage=1>.
- 424** Orissa v. Patnaik and Others (2014), at 5, 29. See generally RAVI KALIA, BHUBANESWAR: FROM A TEMPLE TOWN TO A CAPITAL CITY (1994).
- 425** Orissa v. Patnaik and Others (2014), at 29.
- 426** *Id.* at 29-30. Dayal, *supra* note 421.
- 427** Orissa v. Patnaik and Others (2014), at 19.
- 428** *Id.*
- 429** *Id.* at 36.
- 430** *Id.* at 5.
- 431** *Id.* During Test Identification Parades (TIPs), arrested persons are lined up in front of the victim or witness for identification. For every arrested person, nine “dummies,” or prisoners with similar physiques, appear in the line. Mohan, *supra* note 423.
- 432** *Id.* at 5-6, 27.
- 433** *Id.* at 5-7.
- 434** *Id.* at 6, 23.
- 435** *Id.* at 24.
- 436** *Id.* at 5.
- 437** ██████████ is the former capital of Orissa. Orissa’s High Court is located in ██████████. Dr. S. Chand & Dr. S. Tripathy, *History of Cuttack*, available at <http://cuttack.nic.in/history/HISTORY-CUTTACK.htm>.
- 438** ██████████ *rape case shifted to court in ██████████*, THE HINDU, (Apr. 1, 2010), <http://www.thehindu.com/todays-paper/tp-national/tp-otherstates/█████████-rape-case-shifted-to-court-in-cuttack/article742301.ece>.

- 439 *Id.*; Mohan, *supra* note 423.
- 440 *Orissa v. Patnaik and Others* (2014), at 6.
- 441 Mohan, *supra* note 423.
- 442 *Id.*
- 443 *Orissa v. Patnaik and Others* (2014), at 7, 58.
- 444 Mohan, *supra* note 423.
- 445 *Id.*
- 446 *Id.*
- 447 *Id.*
- 448 *Orissa v. Patnaik and Others* (2014), at 15.
- 449 *Id.* at 53.
- 450 *Id.* at 30.
- 451 *Id.* at 29-30. [REDACTED] is a lawyer from [REDACTED] who is associated with [REDACTED], the archdiocese's legal affairs coordinator for the 2008 [REDACTED] violence.
- 452 [REDACTED], *I.*, [REDACTED], *raped by Hindus while police stood watching*, ASIA NEWS, Oct. 25, 2008.
- 453 *Id.*
- 454 *Orissa v. Patnaik and Others* (2014), at 2, 54-55.
- 455 *Id.* at 55. According to witness testimony, Digal and Badhei made extrajudicial confessions. *Id.* at 47.
- 456 *Id.* at 6, 55. Dayal, *supra* note 421.
- 457 *Orissa v. Patnaik and Others* (2014), at 56-57.
- 458 *Id.* at 57.
- 459 Askin, *supra* note 17, at 293; *see generally* David S. Mitchell, *The Prohibition Of Rape In International Humanitarian Law As A Norm Of Jus Cogens: Clarifying The Doctrine*, 15 DUKE J. COMP. & INT'L L. 219 (2005); *In-depth Study on All Forms of Violence Against Women*, *supra* note 34, ¶ 31.
- 460 *In-depth Study on All Forms of Violence Against Women*, *supra* note 34, ¶ 31. *See also* AMNESTY INT'L, RAPE AND SEXUAL VIOLENCE: HUMAN RIGHTS LAW AND STANDARDS IN THE INTERNATIONAL CRIMINAL COURT 6 (2011) (arguing that “[a]cts of rape which are committed in the jurisdiction of the [International Criminal] Court can be identified as war crimes and crimes against humanity of rape and torture”). *See* Shaksi v. Union of India, (1999) 6 S.C.C. 591, ¶ 14 (stating that “[u]nder Article 5 of the Statute of the International Tribunal, rape is a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of the war or an act of genocide, if the requisite elements are met, and may be prosecuted accordingly.”). Additionally, evidence is mounting that sexual violence has reached the level of a *jus cogens* norm. Askin, *supra* note 17, at 293; *see generally* Mitchell, *supra* note 459.
- 461 *See, e.g.*, CEDAW *General Recommendation No. 19*, *supra* note 36; CEDAW *General Recommendation No. 30*, *supra* note 45; U.N. OFFICE ON DRUGS AND CRIME, *supra* note 11, at 23. Many other international human rights instruments, including the *UN Declaration on the Elimination of Violence against Women*, the *Inter-American Convention on the Prevention of Violence against Women*, and the *Council of Europe Convention Preventing and Combating Violence against Women and Domestic Violence*, include a due diligence obligation.
- 462 Inter-American Commission On Human Rights Follow-Up On The Demobilization Process Of The AUC In Colombia, Digest of published documents (2004-2007), *Report On The Demobilization Process In Colombia*, OEA/Ser.L/V/II, CIDH/INF.2/07, ¶ 21 (Dec. 13, 2004).
- 463 Although a rape conviction required penetration, “the slightest degree of penetration [was] sufficient to prove sexual intercourse.” *Premiya AKA Prem Prakash v. Rajasthan*, (2008) 10 S.C.C. 81, at 83.
- 464 *See Tarkeshwar Sahu v. Bihar* (now Jharkhand), (2006) 8 S.C.C. 560, at 569 (“No offence under Section 376 IPC can be made out unless there was penetration to some extent.”). “[R]ape by the metonymic substitutes of the penis like sticks, fingers, and other objects did not constitute the legal meaning of rape.” BAXI, *supra* note 90, at 4.
- 465 PEN. CODE § 377. Section 377 criminalizes sexual assault not covered by Section 375 and consensual sodomy.
- 466 *Id.* § 354. In 2007, the Indian Supreme Court clarified that a woman’s modesty meant her “reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions.” *Ramkripal S/O Shyamlal Charmakar v. Madhya Pradesh*, (2007) 11 S.C.C. 265. Thus, “[t]he act of pulling a woman, removing her saree, coupled with a request for sexual intercourse . . . would be an outrage to the modesty of a woman.” *Id.* The criminal offense of outraging a woman’s modesty thus falls short of a completed act of sexual penetration. *See id.*
- 467 The crime of “offense against modesty” is often used to charge or convict attempted rape or for charges in marriage cases. *See e.g.*, *Bodhisattwa Gautam v. Subhra Chakraborty; Tarkeshwar Sahu v. Bihar*. The Criminal Amendment Act of 2013 added Section 354B, “Assault against or use of criminal force on a woman with the intent to disrobe.” The Criminal Law (Amendment) Act, No. 13 of 2013, *available at* <http://indiacode.nic.in/acts-in-pdf/132013.pdf>.
- 468 ACCESS TO JUSTICE FOR WOMEN VICTIMS OF SEXUAL VIOLENCE IN MESOAMERICA, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ¶ 122 (2011).
- 469 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *supra* note 468.
- 470 Manjoo 2014, *Mission to India*, *supra* note 12, ¶ 50.
- 471 *Id.* ¶¶ 61, 75.
- 472 *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, 2 Sept. 1998.
- 473 *Id.*
- 474 *Id.*
- 475 Askin, *supra* note 17, at 228, 319.
- 476 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *supra* note 468 (“In many criminal codes, values such as honor, social decency, virginity, chastity, and good morals prevail over values such as the mental and physical integrity of the woman and her sexual self-determination, thereby impeding the due protection under the law of victims of such crimes, or compelling them to prove that they resisted in the case of the crime of rape, or subjecting them to interminable procedures that perpetuate victimization.”).
- 477 *See* Askin, *supra* note 17, at 228, 319.
- 478 HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 5, 24.

- 479** *Gujarat v. Chhara*, at 16-17, 490. See also HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 21, 27.
- 480** *Gujarat v. Chhara*, at 490. See also HRW, WE HAVE NO ORDERS TO SAVE YOU, *supra* note 14, at 15, 16.
- 481** *Gujarat v. Chhara*, at 1914.
- 482** The Armed Forces (Jammu & Kashmir) Special Powers Act, 1990, § 4.
- 483** INDIA CONST. art. 15 § 1. In India, caste-based discrimination “condemns women to a life of . . . marginalization,” as women from low-caste communities are denied education and economic opportunities and perform dangerous and unprotected work, including manual scavenging. Manjoo 2014, *Mission to India*, *supra* note 12, ¶ 15.
- 484** INDIA CONST. art. 51(A) § (e).
- 485** *In-depth Study on All Forms of Violence Against Women*, *supra* note 34, ¶¶ 2, 15, 104-108. See also Declaration on the Elimination of Violence Against Women, *supra* note 27.
- 486** Manjoo 2013, *supra* note 46, ¶ 25 (quoting Bonita Meyersfeld, *Developments in International Law and Domestic Violence*, 16(3) INTERIGHTS BULLETIN 110 (2011) (internal quotation marks omitted)).
- 487** CEDAW *General Recommendation No. 19*, *supra* note 36, ¶¶ 9, 24; CEDAW *Concluding Observations*, *supra* note 50, ¶¶ 8, 9; Manjoo 2014, *Mission to India*, *supra* note 12, ¶ 69.
- 488** ICCPR, *supra* note 22, at art. 20(2). The Human Rights Council observed that sexual violence “often target[s] victims associated with communities, ethnic groups or other groups regarded as antagonistic to or insufficiently supportive of the group or entity whose forces commit the crime;” and are frequently calculated to “humiliate, dominate, instill fear in, disperse and/or forcibly relocate members of such groups . . .” Accelerating Efforts to Eliminate All Forms of Violence Against Women, *supra* note 27.
- 489** CEDAW *General Recommendation No. 19*, *supra* note 36, ¶ 16. According to the Special Rapporteur on Violence Against Women in India, women are “discriminated against and subordinated” on the basis of sex, caste, class, and traditions, underscoring a continuum of structural and institutional violence from the “womb to the tomb.” Manjoo 2014, *Mission to India*, *supra* note 12, ¶ 7.
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588 Sanction of prosecution is the granting of formal permission by state or central government to authorize prosecution of a public servant for alleged crimes committed while discharging duty.

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