A SUMMARY OF CRITIQUES

THE COMMUNAL VIOLENCE (Prevention, Control and Rehabilitation of Victims) BILL, 2005

Submitted to the National Advisory Council

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Several civil society activists, organizations, and legal experts have widely circulated their strong objection and opposition to the COMMUNAL VIOLENCE (Prevention, Control and Rehabilitation of Victims) BILL, 2005 (henceforth referred to as the Bill) These include:

1. A joint critique issued by Anhad (Shabnam Hashmi, Harsh Mander), Human Rights Law Network (Colin Gonzalves), Janvikas (Gagan Sethi), Jansangharsh Manch (Mukul Sinha)
2. Critique by Lawyers Collective (headed by Supreme Court Senior Counsel and Padma Shri awardee Indira Jaisingh)
3. Gender-based critique of the Bill prepared by women's rights activists (Farah Naqvi, Saumya Uma, Uma Chakravarti, Usha Ramanathan, Madhu Mehra, Vrinda Grover) which was endorsed by over 80 organisations and individuals and submitted to the Parliamentary Standing Committee on Home Affairs (List of endorsees is attached as annexure)
4. Critique submitted to the Government by Hon'ble Justice Ahamadi, former Chief Justice of India
5. Critique prepared by the Movement for Peace and Justice, and Ekta, Mumbai (Sukla Sen)

While each critique has its own area of focus and has emphasized a particular aspect of the Bill, what is given below is a summary of the major common points.

1. INTENT OF THE LAW

1.1 Given that the demand for such law followed from the experience of Gujarat, where the State Government was complicit in the violence, the present Bill is entirely misplaced in its intent which it spells out in the preamble as, ***"A Bill to empower the State Governments and Central Government to take measures to provide for the prevention and control of communal violence..."*** This stated intent - to empower the State and Central governments rather than to empower citizens- is thus reflected throughout in all the provisions of the Bill. The experience of the past indicates that should a mass carnage occur after the passage of this Bill, citizens of this country would be no better off in protecting their life and liberty or in accessing justice.

1.2 The Bill in its understanding of the very nature and causes of communal violence assumes that that the State is a neutral party. However it is amply clear that communal violence is in many cases a political strategy engineered by and for political gain and thus a political crime. Leaving this fact to be discovered by Commissions of Enquiry whose reports are left in the cold storage is a highly inadequate response to the ground reality of communal violence.

1.3 The Bill reflects the understanding that communal violence is a 'one off' event lasting one day to few weeks in a designated area, which is 'communally sensitive'. This understanding is no longer valid where newer arenas of violence are being created every day. Communal crimes of exclusion and discrimination towards minorities are part of the build up or otherwise to a mass communally violent act or a series of such acts and need to be crafted into the very understanding of the intent of the Bill therefore in its objectives. Thus a bill of this nature must bring to bear in its creation the combined expertise of jurists, sociologists, political thinkers and activists and not just of bureaucrats who assume that the hands of the State are generally clean with 'minor aberrations here and there'. Essentially, this Bill must reflect the learning from 60 years of communal violence, and on going communalisation in India, and not continue to pay obeisance to the CrPC, IPC etc drafted by a colonial government.

2. ENHANCED POWERS TO STATE GOVERNMENTS

2.1. Too many sweeping powers have been vested in the State Governments. Section. 3 (clause 3) says that, "When any area has been notified as a communally disturbed area under sub-section (1), it shall be lawful for the State Governments to take **all measures,** which may be necessary to deal with the situation in such are." The Competent Authority (appointed by State Governments), with the district magistrate, has preventive powers to regulate assembly, to confiscate arms etc. Yet many of the preventive provisions, which supposedly come into play once an area is declared 'communally disturbed', are already in the statute books, but are not used adequately because of lack of political will. For example, under existing law, District Magistrates have the powers to:

- requisition armed forces to control communal violence
- prohibit loudspeakers
- processions
- conduct searches
- prevent gatherings
- confiscate arms

2.2. Experience tells us that enhanced powers given to State Governments and the Police in a 'communally disturbed area' under the present Bill can and will be used to further intimidate and harass members of the minority community rather than protecting them.

2.3. The power of the Central government to deploy the Army in genocidal situation is negated, because once again, as per Section 55, a request will have to be received from the State government to deploy the army.

2.4. A near fatal folly is that the State Governments are given the choice to issue notification for commencing the bill.

2.5 The Bill needs to dovetail itself with the Protection of Human Rights Act, and not take away superintendence of agencies like NHRC or NCW, because the act is a special legislation but connect the two (the Protection of Human Rights Act and the proposed Communal Violence Bill) for greater public accountability.

2.6. Further, what is the remedy available under this Bill to victims for the failure of State or Central Governments to declare an area 'communally disturbed' despite there being enough justification for making such a declaration?

3. FAILURE TO CREATE ANY NEW CRIMES

3.1 Communal violence in this Bill means any act of commission or omission which constitutes a 'scheduled offence' and is punishable under Section 19. Schedule of offences consist of existing offences under IPC, CrPC and some others. The only difference is that under the present Bill committing a scheduled offence may attract twice the maximum imprisonment and twice the highest fine.

3.2 The Bill creates no new offences. It has no notion of the Crime of Genocide or Crimes Against Humanity. It has no concept of Mass Crime. It only tries to provide justice under IPC, CrPC and Indian Evidence Act. **Mass crime** is not conceptualized as specific category of organized crime, with its own peculiar dimensions and location in the society and polity.

3.3 Communal violence is by its very nature a targeted crime and a mass crime, perpetrated on a community of persons. However, the Indian Penal Code, 1860 is inadequate to combat communal violence, failing repeatedly in the past to redress and protect victims of mass crimes or enforce accountability of perpetrators, including the state agencies complicit through acts of commission and omission of mass crimes. Yet the Bill 2005 fails to take into account this long history of impunity for communal violence, and does not **create new crimes** to fill the legal vacuum on which the demand for a new law is based (but resorting again to the IPC). Because of their nature as 'targeted mass crimes', communal violence needs to be recognized as such, through the **creation of new substantive sections/ definitions** (drawing upon the concepts of genocide and crimes against humanity. The UN Convention on the Prevention and Punishment of the Crime of Genocide, 1948 was ratified by India in 1959)

4. NO ACCOUNTABILITY OF THE STATE AND OF PUBLIC OFFICIALS

4.1 The Bill is unwilling to adequately enforce state accountability for acts of omission and commission by the state agencies. It does not make inroads into the complete

impunity that state agencies enjoy for misdeeds of omission and commission, because of the requirement of prior sanction from the government for prosecution. Such a condition serves to ensure that State agencies will continue to enjoy immunity even after the passing of the Bill, thus nullifying the Bill's own stated commitment to the principle of State accountability. The presumption that the public officials acted in good faith in the light of their proven complicity repeatedly in situations of communal violence is incomprehensible.

4.2 Section 17 of the Bill (Chapter 3) provides for punishment of a public servant, including a police officer who is guilty either of

- Malafide exercise of lawful authority
- Willfully omitting to exercise lawful authority to prevent communal violence

The insertion of the word 'willfully' renders null any accountability of public officials, since it will be virtually impossible to prove "willful" neglect.

4.3 Further, section 17 (2) requires that the court cannot take cognizance without prior sanction of the State Government. This only strengthens the collusion between the elected governments and public officials, including police officers. This is a variant of existing Section 195, 196 and 197 of CrPC – which currently protects all public servants from prosecution unless sanctioned by the govt. If the alleged offence has been committed while discharging duties, then no prosecution can take place without government sanction. Sub-section 3 of section 197 empowers State Government to make exempt from prosecution the members of any force charged with maintenance of law and order except with state government sanction. This section is generally used across the board to prevent prosecution and to provide immunity to public servants and to the armed forces. The present Bill makes no dent in this regime of existing impunity.

4.4 The Bill in Section 19 (clause 3) says that conviction of offences under this Bill will mean disqualification from holding public office for 6 years. But this disqualification only refers to conviction under schedule offences not for malafide exercise or failure to exercise lawful authority.

4.5 Section 57 gives complete immunity from legal action to State and Central Governments and to officers of these governments etc. for anything done or 'intended to be done' in 'good faith' under this Act.

4.6 The Bill violates obligations under the Genocide Convention of 1948, to which India acceded in 1949. The immunities attached to the official capacity of a person under national and international law or claims of sovereign immunity and privilege are not suspended. The Genocide convention makes it mandatory to punish those who commit genocide, whether they are constitutionally responsible rulers, public officials or private individuals.

4.7 **Command Responsibility:** When persons in positions of power have it in their command to prevent the eruption of communal violence, or to stop its continuance, the

responsibility for the eruption, or continuance, of violence can be traced to such person with power. The penal law, as is stands, does not provide for prosecuting or punishing such person. This is despite increasing evidence that the violence is planned, or that situations are used to generate or perpetuate targeted violence, by a commanding mind. Yet this Bill does not define 'command responsibility' thereby refusing to draw the architects of violence into a legal scheme of punishment and deterrence. Command Responsibility should pin criminal liability to the person, civilian or military, under whose command the crimes occurred.

5. FAILURE TO SPECIFICALLY ACKNOWLEDGE AND PROVIDE FOR GENDER-BASED VIOLENCE:

5.1 This Bill is fundamentally flawed in its conception of communally motivated gender-based crimes, in that it has no recognition of **the crimes of sexual assault in peacetime and mass sexual assault with genocidal intent as being inherently different in nature.**

5.2 The evidence of horrific and multiple types of crimes against women in communal carnages is overwhelming. In recent years these have included public and mass acts of sexual violence including mass rapes, gang rapes, cutting off breasts and uterus, forced nudity, stripping and parading women naked, forcible pregnancy, exhibiting sexual organs in the presence of women and mutilation of women's genital organs. Yet since this Bill relies only on a schedule of offences (consisting of existing offences under IPC and CrPC), it fails entirely to acknowledge those crimes, which do not already exist in the IPC and CrPC. All other crimes of a sexual nature are placed beyond legal purview and accountability. Incorporating rape (Section 375) alone is woefully inadequate to the reality of gender-based crimes in communal carnages.

5.3 It is critical that any Bill purporting to deal with gender-based crimes in communal violence must include a new crime - Sexual Violence, and within the category of Sexual Violence, to redefine the crime of Rape. In relation to the crime of RAPE, a new definition rather than the existing IPC definition has to be used in the Bill. This is because the present definition of 'rape' as stated in S. 375 of the Indian Penal Code has been inadequate to respond to crimes against women committed even in 'normal peacetime' let alone during episodes of communal violence. Women's organizations, National Commission for Women and the Law Commission of India in its 172nd report have recommended that Section 375 which defines rape be replaced by the broader concept and definition of sexual assault.

5.4 Further, there is complete failure to lay down a specific standard of proof or procedure suited to proving sexual offences in a situation of communal violence. This is particularly in view of the fact that in situations of communal violence, women's access to police stations (for lodging FIR), government hospitals (for medical examinations) and the confidence / ability to pursue legal procedures is substantially reduced during the period of the violence and till the return to a safe and non hostile environment for the

survivors of the violence. Hence, appropriate evidentiary and procedural standards are imperative.

6. CO-RELATION BETWEEN CRIMES AND DISTURBED AREA IS FALSE AND UNTENNABLE:

6.1 It must be emphasized that crimes that are crimes by definition in law do not have to bide a declaration of an area as a 'disturbed area' by a government. The declaration (or notification) as a disturbed area may have some significance in the nature of executive powers that may be assumed – and this is still a subject that needs deeper deliberation – or for establishing the relationship between the Centre and the States in relation to such 'disturbances'. But they cannot determine when an act amounts to an offence. Stated otherwise, while the 'scale' of the violence may be relevant for deciding whether it falls within a special law on communal and targeted violence, that scale cannot be linked to the temporality of an executive declaration. This is especially so since the declaration may follow upon aggravated acts of targeted violence.

7. RELIEF AND REHABILITATION

7.1 Some critiques have been encouraged by some of the positive aspects of the relief and rehabilitation provisions in the Bill, including the establishment of 3 tier councils with civil society representation in them. Other critiques are however concerned with the overly bureaucratic nature of the 3 tier councils filled by Government nominees and officials, who are notorious for their failure to act.

7.2 Relief and rehabilitation is seen in this Bill as an act of charity by the Government and not articulated as an **inviolable legally enforceable right of the victim-survivor.**

7.3 The Bill gives each individual State the right and mandate to prepare its own relief and rehabilitation scheme and amount of compensation. Thus the Bill entirely **fails to create a national framework of justiciable entitlements for victims of communal violence across the country,** wherever they might be, so that they are not left at the mercy of the capricious will of State governments to give them relief and rehabilitation. The Bill does not even mention the need to create a national policy.

7.4 Further there is no mention of the **rights of internally displaced persons (IDPs)** who in the absence of a national policy framework on forced displacement due to communal or sectarian violence remain entirely unprotected. The Bill fails to acknowledge the existence of UN Guiding Principles on Internal Displacement.

7.5 It further fails to acknowledge the need for the internationally accepted notion of payment of 'reparation' by the State to its citizens for failure to protect life and liberty during mass communal violence.