

# Citizens for Justice and Peace

## Conclusions of the Citizens Consultation on the "Communal Violence Bill"

(prior to the amended Bill 2009-2010 being tabled in Parliament)

To the Hon'ble Union Minister for Home Affairs, Shri P. Chidambaram

Date: February 4, 2010

Dear Sir,

Our Citizens Consultation spearheaded by Justice VR Krishna Iyer, Justice PB Sawant (**that were also part of the Concerned Citizens Tribunal *Crimes Against Humanity Gujarat 2002***) and Teesta Setalvad (**Convenor**) have arrived at some key conclusions/suggestions for the final draft of the Communal Violence Bill in its final drafting stage with your esteemed ministry.

We urge you Sir to look at this memorandum closely to ensure that a **vital and much needed law** comes in its rounded form and creates a historic opportunity for this country. We believe under your leadership this can happen.

Yours In Faith,



Justice PB Sawant  
Justice Hosbet Suresh  
Teesta Setalvad

## **I. TITLE**

(Changes Suggested)

### **The Prevention & Punishment of Sectarian Violence & Rehabilitation of Victims Bill, 2010**

Our suggested changes find support from the Report of the National Commission for Minorities (NCM para 2. Title of the Bill in NCM's Report)

## **II. POINTS TO BE EMPHASISED IN THE STATEMENTS OF OBJECTS AND REASONS OF THE BILL**

- a) Sectarian Violence is not a Law and Order problem. It is essentially a problem that has portents for national integrity and security and is symptomatically expressed as violence between groups.

The Common Minimum Programme of the first UPA Government promised the enactment of a "Comprehensive law on communal violence". As at present we have no less than 15 different laws applicable in a riot situation; yet they were all found wanting in situations like Gujarat carnage, 2002, mainly because the concerned state authorities lacked the political will to effectively enforce them.

It cannot be gainsaid that with a view to prevent any such recurrence of what happened in Gujarat and elsewhere, earlier, [including Delhi 1984 or Bombay 1992-1993], it is necessary to enact a law enabling the Union Government to effectively fulfill its Constitutional obligations through enforceable legislative measures. What happened in Gujarat and in similar carnage elsewhere, earlier, were not merely a matter of law and order; each of these were all organised crimes against targeted groups, the State Governments either actively conniving with the majority group, or remaining as by-standers, resulting in a total collapse of the rule of law and the justice system altogether. In Gujarat, after more than eight years, a process of making the State Government, the politicians and the police accountable has emerged entirely as a result of the tenacity of civil and human rights groups, NGOs, the National Human Right Commission, and most significantly, the Supreme Court of India. This, however, cannot be a perennial solution. The Union and State Governments must not abdicate their function.

India has signed, accepted and ratified the Convention on the Prevention and Punishment of the Crime of Genocide, 1948. It is under an obligation to enact the necessary legislation to give effect to the provisions of the Convention. The Convention, apart from defining the crime, makes all persons committing genocide, punishable, whether they are "Constitutionally responsible rulers, public officials or private individuals". The Union Government has a fundamental duty under Article 51(c) of the Indian Constitution to foster respect for international humanitarian law and treaty obligations. Under Article 253, Parliament has the power to make any law for implementing International Conventions, and decisions made at an international conference, association or other body. Besides, the Union has the Constitutional duty under Article 355 to protect every state which must necessarily include all people within the state, against internal disturbance and to ensure governance in every state in accordance with the Constitution.

Keeping the above obligations and provisions in mind, and at the same time, without requiring to resort to a Proclamation as contemplated under Article 356, this law is being enacted to enable an independent body, a National Authority to inquire into, investigate, prosecute and punish all those, irrespective of their office or status, who are responsible for the Commission of the crime of Genocide and Crimes against Humanity, and to prevent the commission of all such crimes, and for the aforesaid purpose to declare any area as disturbed so as to effectively deal with such situations. The law also provides for all reliefs by way of compensation, restitution and rehabilitation.

Comment: There is a general feeling that through this Act the Centre is trying to encroach upon the powers of the State Government(s) and it amounts to invoking the provisions of Article 356. We want to make it clear that the proposed legislation will not have to invoke Article 356. However the proposed law introduces a mechanism (National Authority), a permanent independent statutory body which is given the power under the law to independently exercise jurisdiction in the circumstances outlined under this law. It is not the Centre that is taking charge but such an independent body under the law.

### **III. DEFINITIONS**

Sectarian Violence has to be defined in terms of the Geneva Convention (Convention on the Prevention & Punishment of the Crime of Genocide) and in terms of the principles formulated by the International Criminal Court-ICC.

### **Definition**

4. In this Act unless the context otherwise requires-

- (i) The 'Code' means the Code of Criminal Procedure, 1973
- (ii) 'Group' means any group or collectivity of people identifiable as distinct and separate, by reason of political ideology, or on the basis of differences in region, race, religion, culture, caste, sex, language or place of birth or any of them;
- (iii) 'Genocide', for the purposes of this Statute means any of the following acts committed with intent to destroy, in whole or in part, any group:
  - (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group;
  - (f) Effecting long-lasting social and economic boycott of the group
- (iv) ' Crimes against humanity', means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
  - (a) Murder;
  - (b) Attempted Extermination;
  - (c) Forcible evictions and enforced migration
  - (d) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
  - (e) Torture;
  - (f) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, debasing, forcibly insertions of objects into the private parts or any other form of sexual violence of comparable gravity;
  - (g) Persecution of a group as defined under this Act
  - (h) Enforced disappearance of persons;
  - (i) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
- (v) For the purpose sections (iii) and (iv)

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in sections (iii) and (iv) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Forced evictions and enforced migration means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted in accordance with national and international law;
- (d) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused;
- (e) "Forced pregnancy" means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (f) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to national and international law by reason of the identity of the group or collectivity;
- (g) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
- (h) Social and economic boycott means the sustained and systematic attempt to socially disenfranchise and economically cripple a specific group, caste or community

**Comment:** We are strongly opposed to the definition of 'communal violence' as it appears in the draft, wherein the phenomenon of mass communal violence has been defined in terms of already existing IPC crimes and other related laws. On analysis, as it is in the draft Bill, offences are the same as in the IPC with the punishment being enhanced. It is our experience, that, as under TADA or POTA, defining an offence in terms of the existing offences in the IPC, with enhanced powers and discretion to the police to choose to apply the harsher law or the existing law, has never eliminated terrorism; but, on the other hand, such laws have been misused. Sectarian violence takes place not because there is no harsh law, but because the State has shown no

political will to enforce the existing law.

#### **IV. The Authority**

There shall be a National Authority for the Prevention & Punishment of Sectarian Violence & to provide Rehabilitation of Victims, constituted within a month from the date this Act comes into force.

Comment: Such an Authority could be the National Human Rights Commission (NHRC) with sufficient powers to act as provided under this law.

#### **Functions and Powers of the Authority**

9. Attempts in the Bill to retain powers to invoke the authority with the State Government will defeat the purpose behind such a Law. It is our experience that the state has always failed in preventing and containing communal violence and, by and large, the state has always sided with the majority community.

Therefore:

The Authority, on receipt of any information received from official or unofficial sources including intelligence reports, or from any other source whatsoever, is satisfied that a situation has arisen in any State or part of any State wherein the Crimes as defined under this Act have occurred and the State Government has failed to control or contain the same, the Authority shall forthwith declare the said area as internally disturbed and as such falling under the control of the Authority.

(b) On such a declaration being made, the Authority will have full jurisdiction to assume full control over the area so declared, in the matter of prevention and prosecution of the crimes under this Act.

(c) For the said purpose the Authority shall have full powers:

- (i) to engage the services of the Central Bureau of Investigation,
- (ii) to avail of the services of any enforcing agencies including the Armed Forces and Para-Military Forces.
- (iii) to invoke such provisions as are available under the Criminal Procedure Code, or the Police Act, for the purpose of controlling and containing the disturbances within the area.
- (iv) to arrest and detain persons indulging in violence and inciting

- people by hate-speeches or otherwise to commit act of violence against any group, or to destroy properties belonging to any group.
- (v) to take all steps that are necessary to restore peace and harmony and order within the said area.
  - (d) On the Authority assuming jurisdiction as mentioned above, the local/district administration including the police personnel, shall aid and assist the Authority, as may be directed, and in no case shall act against/ or contrary to directions given by the Authority.

On the Authority assuming jurisdiction, all the investigations conducted by the local police and the crimes registered by them, shall stand transferred to such agency/agencies as may be specified by the Authority. All further investigation shall be done under the supervision of the Authority or as may be directed by the Authority.

10. The Authority shall also organise relief camps for the victims of violence and the State Government and the local administration shall cooperate with the Authority, as may be called upon by the Authority.

11. The Authority shall, apart from establishing Special Courts for the trial of offences under this law, also Monitor the Trials that follow.

**Comment: Our suggested changes find support from the Report of the Parliamentary Committee evaluating the same Bill**

## **V. Amendments need to be brought into the Bill to Assign a specific Chain of Command Responsibility**

### **Suggested Clauses:**

#### **Chapter on 'Responsibility of State Actors'.**

Under **the Clauses \_\_\_\_ the Bill should** state that ' This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, or as a member of a Government or Parliament, or as an elected representative or a government official shall in no case exempt such a person from criminal responsibility under

this Statute, nor shall such capacity, constitute a ground for reduction of sentence.

(ii) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

(iii) No person shall be entitled to claim any sovereign immunity and privilege for offences committed under this Act.

Under a further section of **the Bill should titled ' Responsibility of commanders and other superiors' the Bill should state: ' In addition to other grounds of criminal responsibility under this Act for crimes within the jurisdiction of the Court:**

(i) A public servant including IAS/IPS officials and civil or public servants effectively following a line of command from state actors (Government or High Officers of the State or Central government) shall be criminally responsible for crimes committed by forces or officers under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control the crimes get committed with impunity; where

(a) That IAS/IPS official and civil or public servants or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That IAS/IPS official and civil or public servants or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(ii) With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes under this Act, committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated,

that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Under further **Clause \_\_\_\_ the Bill should have a section titled ' Superior orders and prescription of law'** it states, ' The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The order was not manifestly unlawful.'

Comment: With a view to obviate any apprehension that the removal of sanction provisions under section 197 of the CrPC would lead to malicious and frivolous prosecutions of public servants it is being suggested that the CrPC be amended to vest the power of according sanction in the District Judge or the State Legal Services Authority (not the State Government).

VI. The Bill has provided for the creation of National, State and District Councils especially for the purposes of compensation, reparation and rehabilitation. These bodies are to be headed by Chief Minister/Chief Secretary/Union Home Minister.

Comment: It is imperative that the constitution of these Councils remain as independent as the Authority. Hence we suggest that the Governor of each state should have the powers to constitute such councils consisting of eminent and respectable citizens from different communities together with one or two officials, not more. This Council shall have powers to make recommendations for communal peace and harmony and the Governor shall direct the state government to take all such steps as per the suggestions made by this Council. Some of the very functions as provided under Chapter VII may be entrusted to the Council under the

Governor. Similarly the Governor should in the like manner constitute District Councils.

**IX. National Council:** The same objection as raised above will apply to the National Council. The National Council may be constituted by the National Authority by including such persons and eminent citizens, as the Authority thinks proper.

Notwithstanding anything to the contrary contained in any other Act or instrument the provisions of this Act will in the event of any inconsistency or repugnancy, prevail.