I. BACKGROUND

Over the last decade, incidents of sexual violence as part of ongoing conflicts such as the cases of Manorama Devi in Manipur in July 2004, Surekha and Priyanka Bhotmange in Khairlanji in September 2006 and Niloufer and Asiya Jan in Shopian, Kashmir in May 2009, among scores of other cases in Chhattisgarh and elsewhere, have led to the formation of the Women against Sexual violence and State repression, a network of women’s groups and individual women in October 2009. What is clear from a case watch of these and other cases in the recent past is that while the functioning of the police and administration is callous at best, it is more often deeply implicated in protecting the powerful, or the state’s functionaries, especially the security forces, and requiring street protests and dharnas to even register an FIR as the first step to begin the process of seeking justice. Moreover, such protests have not been able to influence the way evidence is collected and the charges registered to include the sexual violence. In the Khairlanji case, the sexual assault of the women who were killed and then thrown into water was not even a part of the trial, even though the naked bodies bore signs of wounds and an officer of the Government of Maharashtra was appointed by it to head a fact finding team which held that the killings were a consequence of caste hatred and that the women victims had been sexually assaulted. The formal charges framed by the magistrate did not include either the sexual assault or the caste hatred. In Shopian the police first refused to file an FIR, complying with people’s demands only 7 days later losing time in the collection of crucial evidence which was wilfully not collected by the police from the site; further the forensic evidence gathering requirements were not complied with by the administration in any transparent manner. This fundamental failure by the police administration in Shopian has been used by the CBI to unconvincingly advocate a theory of drowning—that is, dismissing allegations by the family of the victims and the people of Shopian of sexual assault followed by murder to cover up the assaults, even as the Justice Jan Commission had endorsed this finding in its report.

It is clear from these instances that a widespread culture of impunity is in place to subvert the ends of justice in cases of sexual assault even as no formal immunity can be claimed by the security forces in those areas where special laws are in place; sexual assault is in no way permitted under any section of the AFSPA. Due to the existing culture of impunity in other cases of encounter killings/custodial killings, torture and forced disappearances, these cases too do not get prosecuted. And because there is no formal immunity, various ingenious ways are used to circumvent charges of sexual violence as we saw in the case of Shopian. In Khairlanji it was the deep-rooted culture of impunity that exists in cases of caste-based sexual violence across the country which is widely endorsed by ‘civil’ society comprising the rich, the powerful and the upper castes that lets such cases go without criminal prosecution. Given this situation we believe that there is an urgent need for the women’s movement and the democratic rights movement to work towards creating a legal, medical and forensic understanding of evidence gathering and monitoring of the evidence gathered such that we may hold the state and the judicial system accountable, and thereby render the ends of justice.

A one-day meeting on Tools and Procedures in Sexual Assault, New Delhi, 30th October, 2010 was thus organised to initiate a discussion between experts in the legal and forensic fields on the lacunae in evidence gathering in sexual assault with a view to prepare suggestions towards addressing this evidence deficit within the social and medico-legal contexts. It was hoped that these discussions would form a base for formulating a set of protocols governing cases of sexual assault, which can ultimately be part of training procedure for the police and medical personnel and which should be made public at all hospitals and police stations. For the moment the presentations and discussions will help us in the work of fact-finding and in following up cases of sexual assault with the police and the legal system in an informed manner.
II. DISCUSSIONS AT THE MEETING

The meeting was moderated by Uma Chakravarti, and included thematic presentations made by Dr. Reddy, Dr Rukmini Krishnamurthy, Anuradha Bhasin, Hameedah Nayeem, Vrinda Grover, Rinchin and Anurag Modi. The symposium included presentations by medical experts, activists, a lawyer, an academic and a newspaper editor—all making several important points in relation to the gathering and collection of medical/forensic evidence and to best practice, the use of medical/forensic evidence during trials for sexual assault and experiences from the field.

The following key points emerged during the presentations and in subsequent discussions:

a) **The nature of medical evidence**
   Usually, the nature of medical evidence consists of ‘Trace evidence’ since whenever the accused comes into contact with the victim some traces of material are exchanged. However, if there is use of a condom then the semen gets lost. Even though clothes- Inner and outer - wear, are generally not investigated, they can contain traces of medical evidence. Genital and body injuries are not necessary to prove rape, and they are not present in case of unconsciousness or if the victim is overpowered. As a thumb rule, medical evidence should be documented in such a way to give history and findings of the case in order to help the survivor. It was suggested that three things should definitely be included in a medical report for sexual violence:
   a) Was there sexual intercourse?
   b) In the recent past
   c) With force

b) **The window for gathering medical evidence**
   Medical evidence can be lost due to various reasons including the victim bathing, washing, defecating or urinating. In most rape investigations, emphasis is put on finding spermatozoa but they get lost within 6 to 24 hours. Remnants can be found in the vagina for up to 24 hours after the incident, and in the cervical mucus for up to 72-96 hours. It should be noted that while there is a small window of opportunity to collect the spermatozoa, other tests such as Acid Phosphatase or DNA can be used to detect the presence of semen and sperm months- or even years- after the assault. Also, injuries, depending on their severity and location can also remain for several months or years after the assault.

c) **Gathering medical evidence in cases of death**
   As a general rule, while performing autopsies, the doctors look for sexual assault only if it is mentioned in the preliminary report or if asked to by the police. They do not ask the victim’s family or others if there is any allegation of sexual assaults before conducting the autopsy. This may be in part due to the fact that in a conflict situation, the Panchnama etc. do not mention sexual assault as a separate category. Moreover, if there is a delay in autopsy, which happens frequently in conflict areas, it may lead to loss of medical evidence. In fact, in the Gujarat riots, even though there were allegations of sexual assaults, no such evidence was collected during the autopsy.

d) **Proving Rape or Sexual Assault in the Court**
   Contrary to general belief, medical evidence cannot prove or disprove rape but can only prove sexual intercourse. In fact, most rape cases are proved on circumstantial evidence or the testimony of the rape victim, rather than medical evidence. Therefore, medical evidence should not be taken as necessary to prove rape/sexual assault. The Supreme Court (2008, Justice Arijit Pasayat & Justice P. Sathasivam) ruled that the sole testimony of the prosecutrix is enough if it is credible and believable in the circumstances even if medical evidence is inconclusive. In exploitative relationships consent is forced hence no injuries are evident. So, in these cases the conduct of the offender has to be seen. If the woman says she did not consent her word should be taken as it is. While we should push for DNA tests, they should not be given centrality. Centrality should be given to the prosecutrix’s statement.
e) **Practical problems faced in collecting evidence and proving rape & sexual assault**

Several presentations identified practical problems while gathering medical evidence and its use for prosecuting rape and sexual assault. It was stated that in the **Pardhi case**, where ten women were raped, for two years after the incident no case was filed. HC ordered CBI inquiry but no person has been booked even though women have themselves testified that they were raped. No other evidence was there. In one of the cases, the CBI is claiming that the woman who was raped, murdered and later thrown in the well was wearing underwear so she couldn’t have been raped. Despite irregularities in the investigation, the High Court/Supreme Court said that they could not interfere in the investigation. Moreover, in another case in Amla, Betul District, MP, where judicial custody was awarded, police custody was given to that police station where she was raped.

There is also a risk that the prosecutrix may make conflicting statements because all the records are with the police, and the prosecutrix does not have access to the evidence & statement till the chargesheet is filed. It was felt by some participants that even generally, the doctors are not present in hospitals for post-mortem etc. so emphasis should be given on strengthening criminal justice system rather than solely on forensic evidence.

f) **Challenges in collecting medical evidence and prosecuting rape under the current legal framework**

- The real hurdle is when the victim was sexually active: the stigmatisation has to go from medical records—interpretation of medical evidence is not the job of the doctors, not the place where they bring in their own biases.
- There should be laws fixing responsibility on the different officers—medical, police, forensic. Acts of omission/negligence must be held accountable.
- Awareness of the corrective/additive possibilities under 164A needs to be created among groups and individuals, including the police, who deal with cases of sexual assault.

**g) Dos & Donts listed by Dr. Reddy while collecting medical evidence**

**DOs:**

- Comprehensive care has to be taken of the victim
- In a conflict/post conflict situation, there should be mandatory documentation of sexual assaults while collecting evidence
- There is a need for FSC Labs to be independent of the police
- Semen can be collected from other body parts also, not only hymen
- A few mobile forensic vans can be set-up, especially in conflict areas
- Psychological tests or TIC detection brain-mapping can be conducted in cases of sexual assault where there is no medical evidence
- For comparing of DNA in conflict situations, DNA data pool can be maintained, to help in case of conflict, where one does not know whose DNA to compare with.

**DON Ts:**

- Previous contraception/sexual practices should not be documented by the doctors as it is irrelevant and tends to create unnecessary biases about the victims of sexual assault in the mind of the judges
- Two-finger test should be done away with as it is unreliable, invasive, offends the woman’s right to bodily autonomy, and discriminatory in nature since its leads to bias regarding the survivor’s sexual history.
- There is an over-emphasis on the hymen. The hymen can break or tear for reasons other than sexual intercourse, and therefore, establishing the tear of the hymen should not be of prime importance during the investigations.
- Ignorance of sexual aspects/genitals exists even amongst doctors, and some can even mistake other material for hymen.
Open Discussion

Among the issues that were raised as part of the open discussion following the presentation on the procedures to be followed in collecting, analysing and using forensic evidence was the secrecy followed by the police investigating team since all evidence is retained by the Investigating Officer until the charge sheet is filed. It is only after that is done does the evidence come into the public domain; before that it is not available even to the prosecutrix. However, there is a need to acknowledge and implement the right of the survivor to a copy of the medical report as soon as examination is done so that she is fully informed of what it contains. It was also pointed out that under the new criminal procedures a survivor can make a statement under Section 164, to supplement the FIR. This is one way to ensure that the version written up by the police—which is more often than not is calculatedly botched—does not become the irreversible basis of the case. Further, since the Supreme Court ruling of 2008 holds that the sole testimony of prosecutrix, is enough to establish rape, there is a need to challenge attempts by the criminal justice system to base the trial entirely on medical evidence which it invariably seeks to do.

The issue of looking for injuries to prove absence of consent and use of force, which has dogged cases of sexual assault and the judicial bias against women, led to a useful discussion on the way medical evidence for an intact ‘hymen’ is used to prove or disprove rape; in the Shopian case post exhumation of the body supposedly revealed an intact hymen in the CBI investigative team relying upon a doctor selected by them; this was used to deny sexual assault and float a theory of death by drowning. On the other hand crucial accounts of injuries such as scratch marks etc on thighs of Asiya noticed by women who bathed the dead bodies of Asiya Jan and Nilofar Jan were not treated as evidence, and though recorded informally to fact finding teams, was not included in the medical report prepared by the doctors. In the case of Manorama Devi who was killed while she was in the custody of the security forces with reports that she had been shot in her vagina, the clear inference should be made that it was done deliberately to destroy evidence of rape.

It was therefore suggested that in cases of all unnatural death, but especially so in conflict areas and conflict situations, checking for the possibility of sexual assault must be made mandatory and evidence collected as a matter of course, and this must be comprehensive—not confined to the formal penetrative definition of rape as it currently stands and not merely rely on the two-finger test as is the current practice, which women’s groups have been demanding the scrapping of. Further, in exploitative relationships/situations such as the regions that are under the control of security forces, or dominance by upper castes/classes consent is in any case forced by the circumstances, hence the absence of injuries cannot be claimed as a defence to establish that a sexual assault had not taken place. In a sense the position of the offender is an important indicator of coercion rather than consent. In any case, if the woman says she did not consent her word should be taken as it is. And once the definition of rape widens, these narrowly defined ways of relying on medical evidence would have to be reworked since peno-anal evidence etc would also have to be collected as currently there is not enough emphasis on this aspect of evidence collection.

An issue that came up strongly was that since forensic evidence is so critical to establish an offence when that evidence is manipulated— as happened in the Chittisingpora and Ganderbal cases in J&K—those guilty of such manipulation should be booked as an accused in the case and penalised. Also, there is no time-frame that is insisted upon for the working of the FSLs which should be laid down and strictly adhered to. And the difficulties of the existing structure of forensic sciences laboratories which are under the control of the state made for its non transparency and non neutrality in cases where the state itself is implicated in the crime. As Anuradha Bhaisin pointed out when state’s agents are involved especially in cases of sexual assault, the state’s ‘honour’ and ‘reputation’ is involved, so the case is botched up at every stage from poor investigation, poor evidence gathering and finally the manipulated examination of forensic evidence so that a case never comes to trial.
An important thread in the discussions from activists sharing their experiences from the ground was the sheer irrelevance of evidence, procedures and case proceedings where class, caste and state forces have complete control over the criminal justice system; the entire discussion on medical evidence was thus regarded is meaningless. However, while there is force in this sentiment, which is fully understandable, others argued that we must, as women’s groups, not abandon the field of medical and forensic evidence as a field of understanding because no matter how we may feel these procedures are in place and are being used in bringing cases to trial; we must therefore constructively engage with these processes while continuing to struggle against the situation on the ground that makes for a near absolute impunity shared by a political contract that exists between class, caste and the state, that denies women justice in cases of sexual assault.

III. WAY FORWARD

The meeting was initiated as a preliminary discussion on medical/forensic evidence gathering and its use in cases of sexual assault. Suggestions to take this initiative forward include:

1. The CEHAT manual on standards/procedures for gathering medical evidence should be studied carefully, and the guidelines prescribed can be used for advocacy purposes. CEHAT has also designed a standard questionnaire/format for doctors to assist them in gathering evidence for sexual assault. These guidelines can be further refined after discussions and form the basis for developing a standard format for the collection of medical/forensic evidence for cases of sexual assault.

2. Section 164 A of the Code of Criminal Procedure provides the procedure for the medical examination of the victim of rape. However, it does not criminalise the failure to follow the procedure as laid down in the provision. It was decided to engage with the language of the proposed amendment to Section 164 A, CrPC. A medical/forensics expert was to be consulted in the matter.

3. Responsibility of doctors/police to collect evidence of sexual assault in a timely manner: It is a duty of doctors and police to ensure that evidence is collected professionally and swiftly in cases of rape. However, under the current criminal/legal procedures, they can be held responsible for negligence/obstruction of justice/professional misconduct. Even this happens rarely, and the doctors are never held to account for the failure to perform their duties. It was also felt that the current legal framework was inadequate, and that it would be important to push for greater responsibility for failure to perform their duty as investigations for sexual assault have not been taken forward. This becomes especially important in cases of sexual violence that result in the death of the victim since the evidence/testimony of the victim herself is not available in these cases.

4. Develop a basic document laying out the important medical/forensic information that should be recorded while investigating or documenting sexual violence. This document can be widely disseminated amongst women and human rights groups documenting sexual violence, which can be used as a template for information gathering.

5. Since the mental status of a woman after rape differs from case to case depending on background of woman, her own political understanding etc. using a single standard can harm the case if a single standard of ‘trauma’ is presumed.

6. Finally, organise a meeting of a small (core) group of people to take this initiative forward-including the issue of developing a protocol for forensics/medical examination; a standard format for reporting for doctors; and holding doctors responsible for the failure to act professionally and swiftly during conducting examinations and preparing reports for sexual assault cases by proposing relevant amendments to the existing legal procedures.