

# LAW RELATING TO GENOCIDE: A CRITICAL APPRAISAL WITH SPECIAL REFERENCE TO INDIAN LAW

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**Abstract:** This study has been undertaken to throw light on the instances of genocide committed and the response of the Indian legal regime towards such grotesque crime against humanity. To inquire into the question as to whether the existing provisions relating to punitive and preventive measures against offences amounting to genocide are adequate under penal laws in India or not. An attempt has been made to derive an answer to this significant question by studying the enacted provisions under Indian laws and also by developing an understanding of the provisions of same nature in the international arena.

**Index words:** Genocide, Human Rights violation, Genocide a crime in India.

## 1. INTRODUCTION

Increasing attention has been paid to the need for more effective sanctions against those who authorize order, commit or abet genocide and other crimes against humanity and what are sometimes related war crimes that are proscribed under both customarily and treaty-based international law. In recent years a growing number of criminal and civil cases have been brought outside the territory of states where such international crimes have occurred but actual sanction efforts within domestic legal forums have not always proven to be effective. The customary principle of universal jurisdiction has been applied for more than two hundred years to a variety of international crimes – by including piracy, war crimes, and breaches of neutrality and appears today in a variety of international criminal law instruments and domestic legislation. However use of such a jurisdictional competence with respect to acts of genocide and other crimes against humanity has not been adequate and threatens to undermine respect for the rule of law.<sup>1</sup>

### 1.1 Research Methodology

This paper basically throws light on the instances of genocide committed and the response of the Indian legal regime towards such grotesque crime against humanity. The research methodology adopted for this project is primarily doctrinal in nature, by primarily reviewing existing literature. The data collected and interpreted in this project is mainly secondary in nature. The primary hypothesis of this project involves the question as to whether the existing provisions relating to punitive and preventive measures against offences amounting to genocide are adequate under penal laws in India or not. An attempt has been made to derive an answer to this significant question by studying the enacted provisions under Indian laws and also by developing an understanding of the provisions of same nature in the international arena.

### 1.2 Meaning

To begin to understand the intricate problem of laws regarding genocide at a national and international level we need to first trace the origin and the following development of the meaning of the term 'genocide'. The term "genocide" did not exist before 1944. It is a very specific term, referring to violent crimes committed against groups with the intent to destroy the existence of the group. Human rights, as laid out in the *U.S. Bill of Rights* or the 1948 *United Nations Universal Declaration of Human Rights*, concern the rights of individuals.

In 1944, a Polish-Jewish lawyer named Raphael Lemkin (1900-1959) sought to describe Nazi policies of systematic murder, including the destruction of the European Jews. He formed the word "genocide" by

<sup>1</sup> J Jordan, Paust, *The Need for New U.S. Legislation for the Prosecution of Genocide and Other Crimes Against Humanity*, Vermont Law Review, Vol. 33, p. 718, 2009; U of Houston Law Center No. 2009-A-24. <http://ssrn.com/abstract=1481827>, last visited on 04.04.2018.

combining 'geno' from the Greek word for race or tribe, with 'cide' from the Latin word for killing.<sup>2</sup> In proposing this new term, Lemkin had in mind "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves." The next year, the International Military Tribunal held at Nuremberg, Germany<sup>3</sup>, charged top Nazis with "crimes against humanity. The word "genocide" was included in the indictment, but as a descriptive, not legal, term.

On December 9, 1948, in the shadow of the Holocaust and in no small part due to the tireless efforts of Lemkin himself, the United Nations approved the *Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>4</sup> This Convention establishes "genocide" as an international crime, which signatory nations "undertake to prevent and punish." It defines genocide as:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- 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.

The Convention also lays down that the following crimes will be made punishable once the laws corresponding to the convention are made in the ratifying countries:-

- a) Genocide;
- b) Conspiracy to commit genocide;
- c) Direct and public incitement to *commit* genocide;
- d) Attempt to commit genocide;
- e) Complicity in genocide.

Thus it can be seen from the definition that there are two essentials to the definition of the crime genocide, firstly the mental element, meaning the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", and secondly the physical element which includes five acts described in sections a, b, c, d and e. A crime must include both elements to be called "genocide."<sup>5</sup> The clauses under Article II include many acts under their purview as we will be further discussing. Firstly causing serious bodily or mental harm includes inflicting trauma on members of the group through widespread torture, rape, sexual violence, forced or coerced use of drugs, and mutilation. Secondly deliberately inflicting conditions of life calculated to destroy a group includes the deliberate deprivation of resources needed for the group's physical survival, such as clean water, food, clothing, shelter or medical services. Deprivation of the means to sustain life can be imposed through confiscation of harvests, blockade of foodstuffs, detention in camps, forcible relocation or expulsion into deserts. Thirdly prevention of births includes involuntary sterilization, forced abortion, prohibition of marriage, and long-term separation of men and women intended to prevent procreation. Fourthly forcible transfer of children may be imposed by direct force or by fear of violence, duress, detention, psychological oppression or other methods of coercion. The Convention on the Rights of the Child<sup>6</sup> defines children as persons under the age of 18 years.

Genocidal acts need not kill or cause the death of members of a group. Causing serious bodily or mental harm, prevention of births and transfer of children are acts of genocide when committed as part of a policy to destroy a group's existence.

Thus though the Convention was a big step towards thwarting genocide and providing protection to various groups the situation has not really improved from the past. While many cases of group-targeted violence

<sup>2</sup> United States Holocaust Memorial Museum, *What is Genocide*, [www.ushmm.org/wlc/en/article.php?ModuleId=10007043](http://www.ushmm.org/wlc/en/article.php?ModuleId=10007043), last visited on 04.04.2018.

<sup>3</sup> The Nuremberg Trials were a series of military tribunals, held by the main victorious Allied forces of World War II, most notable for the prosecution of prominent members of the political, military, and economic leadership of the defeated Nazi Germany. The trials were held in the city of Nuremberg, Bavaria, Germany, in 1945-46, at the Palace of Justice. The first and best known of these trials was the Trial of the Major War Criminals before the International Military Tribunal (IMT), which tried 22 of the most important captured leaders of Nazi Germany.

<sup>4</sup> Convention on the Prevention and Punishment of the Crime of Genocide, <http://www.un.org/millennium/law/iv-1.htm>, last visited on 04.04.2018.

<sup>5</sup> Information available at <http://www.preventgenocide.org/genocide/officialtext.htm>, last visited on 04.04.2018.

<sup>6</sup> Convention on Right of Child, 1989, [www.unicef.org/crc](http://www.unicef.org/crc), last visited on 06.04.2018.

have occurred throughout history and even since the Convention came into effect, the legal and international development of the term is concentrated into two distinct historical periods: the time from the coining of the term until its acceptance as international law (1944-1948) and the time of its activation with the establishment of international criminal tribunals to prosecute the crime of genocide (1991-1998). Preventing genocide, the other major obligation of the convention, remains a challenge that nations and individuals continue to face.

### 1.3 Historical Perspective

Given below is jurisprudential aspect to the instances of genocide all over the world and how the heinous and grotesque crime came to be recognised legally after repeated instances kept bringing the world's attention towards the ever persistent and urgent need to provide protection on an international and national level to various groups effected by such acts as are continuing to date in different parts of the world. Though this does not attempt to detail all cases which might be considered as genocides, but rather how the term becomes a part of the political, legal, and ethical vocabulary of responding to widespread threats of violence against groups.<sup>7</sup>

#### a) 1900: Raphael Lemkin

Raphael Lemkin, who would later coin the word "genocide", is born into a Polish Jewish family in 1900. His memoirs detail early exposure to the history of Ottoman attacks against Armenians (which most scholars believe constitute genocide), anti semitic pogroms, and other histories of group-targeted violence as key to forming his beliefs about the need for legal protection of groups.<sup>8</sup>

#### b) 1933: Rise of Adolf Hitler

With the appointment of Adolf Hitler as Chancellor on Jan 30, 1933, the Nazi Party took control of Germany. In October, German delegates walked out of disarmament talks in Geneva and Nazi Germany withdrew from the League of Nations. In October, at an international legal conference in Madrid, Raphael Lemkin (who later coined the word "genocide") proposed legal measures to protect groups. His proposal did not receive support.<sup>9</sup>

#### c) 1939: World War II

World War II began on September 1, 1939, when Germany invaded Poland triggering a treaty-mandated Anglo-French declaration of war on Germany. On September 17, 1939, the Soviet army occupied the eastern half of Poland. Lemkin fled Poland, escaping across the Soviet Union and eventually arriving in the United States.<sup>10</sup>

#### d) 1941: A Crime Without a Name

On June 22, 1941, Nazi Germany invaded the Soviet Union. As the German forces advanced further east, SS, police, and military personnel carried out atrocities that moved British Prime Minister Winston Churchill to state in August 1941: "We are in the presence of a crime without a name." In December 1941, the United States entered World War II on the side of the Allied forces. Lemkin, who arrived in the United States as a refugee in 1941, had heard of Churchill's speech and later claimed that his introduction of the word "genocide" was in part a response to Churchill's statement.<sup>11</sup>

#### e) 1944: "Genocide" Coined

Nazi leadership embarked on a variety of population policies aimed at restructuring the ethnic composition of Europe by force, using mass murder as a tool. Included among these policies and involving mass murder were the attempt to murder all European Jews, which we now refer to as the Holocaust, the attempt to murder most of the Gypsy (Roma) population of Europe, and the attempt to physically liquidate the leadership classes of Poland and the former Soviet Union. Also included in these policies were numerous smaller scale resettlement policies involving the use of brutal force and murder that we now refer to as a form of ethnic cleansing. In 1944, Raphael Lemkin, who had moved to Washington, D.C. and worked with the U.S. War Department, coined the word "genocide" in his text *Axis Rule in Occupied Europe*. This text documented patterns of destruction and occupation throughout Nazi-held territories.<sup>12</sup>

#### f) 1945-1946: International Military Tribunal

<sup>7</sup> Genocide Timeline, [www.ushmm.org/wlc/en/article.php?ModuleId=10007095](http://www.ushmm.org/wlc/en/article.php?ModuleId=10007095), last visited on 07.04.2018.

<sup>8</sup> *Supra* note 7

<sup>9</sup> Genocide by Adolph Hitler, [www.auschwitz.dk/hitler.htm](http://www.auschwitz.dk/hitler.htm), last visited on 07.04.2018.

<sup>10</sup> Genocide in World War II, [www.bbc.co.uk/history/worldwars/wwtwo/](http://www.bbc.co.uk/history/worldwars/wwtwo/), last visited on 07.04.2018.

<sup>11</sup> Crime Without a Name, Winston Churchill, [www.Preventgenocide.Org/Genocide/Crimewithoutaname\\_.Htm](http://www.Preventgenocide.Org/Genocide/Crimewithoutaname_.Htm), last visited on 07.04.2018.

<sup>12</sup> Term Genocide Coined, [http://www.experiencefestival.com/genocide - coining\\_of\\_the\\_term\\_genocide](http://www.experiencefestival.com/genocide - coining_of_the_term_genocide), last visited on 07.04.2018..



Between November 20, 1945, and October 1, 1946, the International Military Tribunal in Nuremberg tried 22 major Nazi German leaders on charges of crimes against peace, war crimes, crimes against humanity and conspiracy to commit each of these crimes. It was the first time that international tribunals were used as a post-war mechanism for bringing national leaders to justice. The word “genocide” was included in the indictment, but as a descriptive, not legal, term.<sup>13</sup>

**g) 1947-1948: Creating an International Convention on Genocide**

Raphael Lemkin was a critical force for bringing “genocide” before the nascent United Nations, where delegates from around the world debated the terms of an international law on genocide. On December 8, 1948, the final text was adopted unanimously. The United Nations Convention on the Prevention and Punishment of Genocide entered into force on January 12, 1951, after more than 20 countries from around the world ratified it.<sup>14</sup>

**h) 1950-1987: Cold War**

Massive crimes against civilian populations were all too common in the years after World War II and throughout the Cold War. Whether these situations constituted “genocide” was scarcely considered by the countries that had undertaken to prevent and punish that crime by joining the Genocide Convention.

**i) 1988: U.S. Signs the Genocide Convention**

On November 5, 1988, U.S. President Ronald Reagan signed the UN Convention on the Prevention and Punishment of Genocide. The Convention had faced strong opponents, who argued it would infringe on US national sovereignty, and supporters. One of the Convention’s strongest advocates, Senator William Proxmire from Wisconsin delivered over 3,000 speeches advocating the Convention in Congress from 1968-1987.<sup>15</sup>

**j) 1991-1995: Wars of the Former Yugoslavia**

The wars of the former Yugoslavia were marked by massive war crimes and crimes against humanity. The conflict in Bosnia (1992- 1995), brought some of the harshest fighting and worst massacres to Europe since World War II. In one small town, Srebrenica, 7,800 Bosnian men and boys were murdered by Serbian forces.<sup>16</sup>

**k) 1993: Resolution 827, United Nations Security Council**

In response to the atrocities occurring in Bosnia, the United Nations Security Council issued resolution 827, establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. It was the first international criminal tribunal since Nuremberg. Crimes the ICTY can prosecute and try are: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. Its jurisdiction is limited to crimes committed on the territory of the former Yugoslavia.<sup>17</sup>

**l) 1994: Genocide in Rwanda**

From April until July, up to 800,000 people, mostly from the Tutsi minority group, were killed in Rwanda. It was killing on a devastating scale, scope, and speed. In October, the UN Security Council extended the mandate of the ICTY to include a separate but linked tribunal for Rwanda, the International Criminal Tribunal for Rwanda (ICTR), located in Arusha, Tanzania.<sup>18</sup>

**m) 1998: First Conviction for Genocide**

On September 2, 1998, the ICTR issued the world’s first conviction for genocide in an international tribunal when Jean-Paul Akayesu was judged guilty of genocide and crimes against humanity for acts he engaged in and oversaw as mayor of the Rwandan town of Taba.

<sup>13</sup> The Nuremberg Trials were a series of military tribunals, held by the main victorious Allied forces of World War II, most notable for the prosecution of prominent members of the political, military, and economic leadership of the defeated Nazi Germany. The trials were held in the city of Nuremberg, Bavaria, Germany, in 1945-46, at the Palace of Justice. The first and best known of these trials was the Trial of the Major War Criminals before the International Military Tribunal (IMT), which tried 22 of the most important captured leaders of Nazi Germany.

<sup>14</sup> Convention on the Prevention and Punishment of the Crime of Genocide, <http://www.un.org/millennium /law/iv-1.htm>, last visited on 08.04.2018.

<sup>15</sup> Information available on, [www.ushmm.org/wlc/en/article.php?ModuleId=10007095](http://www.ushmm.org/wlc/en/article.php?ModuleId=10007095), last visited on 08.04.2018.

<sup>16</sup> Information available on, [http://www.ppu.org.uk/genocide/g\\_bosnia.html](http://www.ppu.org.uk/genocide/g_bosnia.html), last visited on 08.04.2018.

<sup>17</sup> Information available on [www.un.org/Docs/scres/1993/scres93.htm](http://www.un.org/Docs/scres/1993/scres93.htm), last visited on 09.04.2018.

<sup>18</sup> Between April and June 1994, an estimated 800,000 Rwandans were killed in the space of 100 days. Information available on <http://news.bbc.co.uk/2/hi/1288230.stm>, last visited on 08.04.2018.

While these tribunals and the emerging International Criminal Court help establish legal precedents and investigate crimes within their jurisdictions, punishment of genocide remains a difficult task. Even more difficult is the continuing challenge to prevent genocide.<sup>19</sup>

#### n) 2004: Genocide in Darfur

For the first time U.S. government history, an ongoing crisis is referred to as “genocide.” On September 9, 2004, Secretary of State Colin Powell testifies before the Senate Foreign Relations Committee that “We concluded -- I concluded -- that genocide has been committed in Darfur and that the Government of Sudan and the Janjaweed bear responsibility -- and that genocide may still be occurring.”<sup>20</sup>

#### 1.4 International Communities’ Commitment to Combat Genocide and India’s Efforts

The International community’s efforts with regards to combating the grotesque tragedies that take place on account of genocides in various parts of the world include the Genocide Convention<sup>21</sup> that has already been discussed before, followed by the *Geneva Conventions of 1949*<sup>22</sup>, *Additional Protocols to the Geneva Conventions, 1977*<sup>23</sup>, *Rome Statute of the International Criminal Court*<sup>24</sup>. It is important to discuss how these instruments of international law have contributed to combating genocide.

*Genocide Convention* defines genocide under Article II and Article V lays down how the convention has to be implemented into domestic laws of a country ratifying and making laws at the domestic level in accordance with the convention.

India ratified the *Genocide Convention* on August 27, 1959.<sup>25</sup> It also ratified the *Geneva Conventions of 1949 on November 9, 1950*<sup>26</sup>, but did not sign and has not yet become a party to *Additional Geneva Protocols of 1977*. It has also not signed and has not yet become a party to the *Rome Statute of the International Criminal Court*.

The government of India is committed to enact a law for the prevention and punishment of genocide under Article V of the *Genocide Convention 1948*<sup>27</sup> to which the country acceded in August 1959. Article 51(c) of the Indian Constitution directs the state, “to foster respect for international law and treaty obligations”. Article 253 empowers the parliament “to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention”. Moreover, Article 20 of the *International Covenant on Civil and Political Rights (ICCPR)*<sup>28</sup>, which has been acceded to by India in 1979 binds the Indian state to

<sup>19</sup> At the time of the [Nuremberg trials](#), there was no legal concept of “genocide.” On September 2, 1998, the International Criminal Tribunal for [Rwanda](#) (a court established by the United Nations) issued the world’s first conviction for the defined crime of genocide after trial before an international tribunal. A man named Jean-Paul Akayesu was judged guilty of genocide and crimes against humanity for acts he engaged in and oversaw while mayor of the Rwandan town of Taba. Information available on [www.ushmm.org/wlc/en/article.php?ModuleId=10007157](http://www.ushmm.org/wlc/en/article.php?ModuleId=10007157), last visited on 09.04.2018.

<sup>20</sup> Information available on [www.genocideintervention.net/educate/darfur](http://www.genocideintervention.net/educate/darfur), last visited on 09.04.2018..

<sup>21</sup> The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.

<sup>22</sup> The Geneva Conventions and their Additional Protocols are international treaties that contain the most important rules limiting the barbarity of war. They protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war).

<sup>23</sup> In 1949, an international conference of diplomats built on the earlier treaties for the protection of war victims, revising and updating them into four new conventions comprising 429 articles of law. These treaties, known as the Geneva Conventions of August 12, 1949, have been signed by almost every nation in the world. The Additional Protocols of 1977 supplement the Geneva Conventions, <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079> last visited on 09.04.2018.

<sup>24</sup> The Rome Statute of the International Criminal Court (often referred to as the International Criminal Court Statute or the Rome Statute) is the treaty that established the International Criminal Court (ICC). It was adopted at a diplomatic conference in Rome on 17 July 1998 and it entered into force on 1 July 2002. As of October 2009, 110 states are party to the statute, and a further 38 states have signed but not ratified the treaty. Among other things, the statute establishes the court’s functions, jurisdiction and structure, [www.un.org/icc/](http://www.un.org/icc/) last visited on 10.04.2018.

<sup>25</sup> India ratified the Genocide Convention on August 27, 1959. [www.un.org/documents/ga/docs/51/plenary/a51-422.htm](http://www.un.org/documents/ga/docs/51/plenary/a51-422.htm), last visited on 10.04.2018.

<sup>26</sup> The *Geneva Conventions* entered into force on 21 October 1950. *Ratification* grew steadily through the decades, [www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions](http://www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions), last visited on 10.04.2018.

<sup>27</sup> Article V of the Genocide Convention - *The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.*

<sup>28</sup> Article 20 of ICCPR: 1. *Any propaganda for war shall be prohibited by law. Any advocacy of national racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

However India has made no efforts to enact a national legislation in the form of a *Genocide Act* which would effectively criminalize the offence of genocide. This willful abdication of state responsibility for more than four decades has seen the 1083 Nellie massacre, the 1984 Anti Sikh Riots and the 2002 Gujarat massacre and the continuing struggle for justice within the inadequate conceptual frame of Indian law. Considering these facts it is a grave lapse on the part of the government of India, which has, to date, not enacted any law in compliance with Article V of the *International Convention on the Prevention and Punishment of the Crime of Genocide, 1948*. India has signed the Genocide Convention in 1948 and ratified it in 1958. Under the Convention, a state that is signatory is bound to effectively act upon and legislate upon the intents of the legislation. So far, India has not enacted any law in compliance with the Convention.<sup>29</sup>

Since it acceded to the Convention in 1959, India has taken no steps to comply with the Convention obligations by effecting necessary changes in its internal law. Article 51 (c) of the Indian Constitution requires the state to endeavour to "foster respect for international law and treaty obligations". Keeping this in view, Article 253 mandates Parliament to make any law "for implementing any treaty, agreement or convention". Prudence would demand that India should enact the necessary enabling legislation before it becomes party to a treaty, so that there is no time lag between undertaking of international treaty obligations and their domestic implementation where called for.<sup>30</sup>

The Genocide Convention is one of the glaring cases where this rule of prudence has been totally ignored. Indeed, this is not a rare instance of India failing to implement international treaty obligations by introducing the necessary changes in the domestic law-an issue that calls for a separate debate, involving the Law Commission, the Ministry of External Affairs and the various 'nodal' Ministries responsible for matters covered by various treaties to which India is a party. Although the principles embodied in the Convention are part of general international law and therefore, part of the "common law of India", they are not self-executory in the sense that they can be readily made operational within the criminal justice system of the country. The penalties for genocide and acts associated with it need to be prescribed and the "competent tribunal" to try these offences need to be designated or established.<sup>31</sup>

## 2. INDIAN PENAL LAWS AND GENOCIDE AS A CRIME

### 2.1 Treatment of Genocide under Indian Penal Laws

Genocide as a crime is not given any legal recognition in the laws of our country including *Indian Penal Code, 1860*, though there are provisions which make some acts which maybe otherwise taken to be in the nature of genocide as culpable offences. In this chapter we will deal with every aspect of Indian Penal Laws that help make such acts offences or provide exceptions or immunity to the government or any other aspect of any law with regards to offences which may constitute the essentials of genocide.

#### 2.1.1 Genocide and Indian Penal Code, 1860

#### 2.1.2 Impunity Given to the Government

In substantive terms, Indian law remains unable to conceptualize the mass crime within the inadequate framework of the *Indian Penal Code (IPC)* which is better suited to deal with individual crimes. Taken a step further Indian law refuses to entertain the possibility of the state being accountable for offences it might commit. This is made explicit in Sec 197<sup>32</sup> of the *Cr P.C*<sup>33</sup> which lays down that the sanction of the Government (Central or State) is necessary before the prosecution of a public servant for acts committed in the discharge of his duty. Indian law entrenches impunity in

<sup>29</sup> India- Genocide- Ideology and Policy Result in Gujarat Massacre, Concerned Citizens Tribunal-Gujarat 2002, <http://www.hrsolidarity.net/mainfile.php/2002vol12no05/2237/> last visited on 10.04.2018.

<sup>30</sup> V.S. Mani, *Needed, A Law on Genocide*, The Hindu, 10.04.2002, <http://indianterrorism.bravepages.com/anti-muslim%20riots%2009.htm>, last visited on 10.04.2018.

<sup>31</sup> *Ibid.*

<sup>32</sup> Section 197: 'When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty no court shall take cognizance of such offence except with the previous sanction- .... of the Central Government .... of the State Government'.

<sup>33</sup> *Code of Criminal Procedure*, 1973.



law for its officials for offences it might commit against its citizens. The question of justice within the framework of Indian law will have to grapple with both the substantive and procedural provisions in the IPC and the Cr. P.C.

The philosophy of the *Indian Penal Code* in providing immunity to those in control of the state of course makes sense when we understand that the IPC was drafted in 1860 and was an instrument of ensuring colonial control. In that context the classification offences includes among others the categories of offences against the body, offences against property and offences against the state. The significant omission in this classification remains the idea of offences by the state.

### **2.1.3 Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989**

The only possible exception in terms of conceptualizing crimes against a collectivity is the *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* which provides a brilliant ethnography of crimes against members of a specific community by actually fifteen different ways in which SC/ ST are deprived of their rights. The listing of the *SC/ST (Prevention of Atrocities Act)* is a fairly accurate description of the kinds of offences to which SC/ST communities are subject to in independent India. It concretely describes what the *Rome Statute* might have called persecution.<sup>34</sup>

The history of the *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* can be traced back to Article 17 of the Constitution is that provision of our constitutional mandate through which untouchability was abolished and its practice in any form forbidden.<sup>35</sup> Despite clear and specific constitutional provisions guaranteeing every individual's right to a life of dignity, equality and non-discrimination, the shameful existence of caste-based discrimination and denials made this specific articulation on untouchability a necessity at the point of time when the Constitution was drafted.

The *Protection of Civil Rights Act, 1955* was enacted in order to enforce this constitutional provision. The provisions of this Act extended to the whole of India. Thirty-four years later even these enactments were found at the ground level to be inadequate.<sup>36</sup>

### **2.1.4 Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill**

The one opportunity to take the question of mass crime seriously was the promise of the UPA government to 'enact a model comprehensive law to deal with communal violence'.<sup>37</sup> This promise was made in the Common Minimum Programme (CMP). The reason for this provision finding a place in the CMP was clearly the horrific communal violence in Gujarat in 2002 under the former National Democratic Alliance (NDA). To implement this promise, the United Progressive Alliance (UPA) has introduced the *Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005*. Even prior to the introduction of the 2005 Bill, there were a series of bills circulated by both the state and civil society which sought to deal with aspects of mass crimes.<sup>38</sup>

The Bill was an opportunity to codify into Indian law critical ways in which the impunity which the perpetrators of Gujarat, 2002 enjoyed would become a thing of the past. However the Bill does not seriously consider any of the points made above and makes a mockery of any serious efforts to tackle state impunity for mass crimes. The critical analysis of the said Bill has been incorporated in the following segment.

### **2.1.5 Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2009**

The government's final version of the communal violence law empowers the Centre to take charge of an area where riots have broken out once it sends in central forces, if it finds the state government concerned

<sup>34</sup> Information available on <http://sangama.org/files/PUCL%20Report.pdf> last visited on 10.04.2018.

<sup>35</sup> The purpose of this Act is to prevent crimes against members of scheduled castes and scheduled tribes; and to provide for relief and rehabilitation of victims of such offences. Information available on [www.hrw.org/reports/1999/india/India994-16.htm](http://www.hrw.org/reports/1999/india/India994-16.htm), last visited on 11.04.2018.

<sup>36</sup> Development of the Scheduled Castes is the collective responsibility of the Central as well as the State Governments and Union Territory Administrations. In the Central Government, various Ministries/Departments deal with sectoral programmes relating to development of Scheduled Castes and they are also required to formulate Special Component Plan for Scheduled Castes. The Ministry of Social Justice & Empowerment deals with overall policy and co-ordination of matters relating to development of Scheduled Castes and supplements through special programmes to provide a fillip and augment the schemes implemented by other Central Ministries/Departments, <http://socialjustice.nic.in/pdf/arpcr05.pdf>, last visited on 11.04.2018.

<sup>37</sup> National Common Minimum Programme of the Government of India, May 2004.

<sup>38</sup> Draft-The Communal Crimes Act, 2004 By Human Rights Law Network, Anhad, Jansangharsh Manch, Centre For Study Of Society And Secularism, The Prevention and Punishment of Genocide and Crimes against Humanity (Draft) Bill, 2004; The Prevention and Punishment of Genocide and Crimes against Humanity Bill 2004, Justices PB Sawant and Hosbet Suresh, (Alternate Bill).

reluctant to act against the rioters. The new law still does not allow the Centre to send armed forces on its own to a riot-hit spot.<sup>39</sup> But once a state has asked for central forces to quell violence, the Centre will have the right under certain circumstances of setting up a unified command, comprising these forces and the local police. The amendment was cleared by the Cabinet last December and is expected to come for parliamentary approval soon this year.

The *Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill*, however, says the Centre can declare an area “communally disturbed” and take direct charge only if the state concerned refuses to act against the violence being perpetrated to such an extent that the secular fabric of the country, or internal security, is endangered. To guard against political misuse, the law stipulates that the Centre must first draw the attention of the state government to the deteriorating state of affairs, and set a deadline for it to take necessary steps to suppress the violence. Until now, central forces deployed in a state worked under the control of the local district administration. But henceforth, in special circumstances, it will work under the unified command, which will report to the Centre. The amendment was conceived of in the backdrop of the 2002 Gujarat riots, when it was widely believed the state government had done little to discourage the rioters. Even so, it is bound to anger state governments who will see it as an encroachment on their powers. Eight of 12 states that responded to a survey by a parliamentary panel had even opposed an earlier, milder version.<sup>40</sup>

## 2.2 Instances That Can be Termed as Genocide in India

The *Indian Penal Code, 1860* does not directly make genocide a culpable offence but has provided for certain situations and circumstances that may be defined internationally as genocide though have been provided under the offences as discussed in this chapter.

India has had a long history of horrific mass crimes committed against specific religious and ethnic groups. The history of what can be called mass crimes or crimes against collectivities of people can be traced back to the partition of India when Muslims, Sikhs and Hindus were both the perpetrators and victims of violence on a massive scale. Mass crimes are committed or intended to be committed against large masses of people identified on ethnic, religious, social, linguistic, cultural, geographical etc. grounds. It often but not necessarily stretches across large geographical areas, and may include crimes against humanity, genocide, war crimes etc.<sup>41</sup>

The post independence history of India is marked with mass crimes against entire groups of people. Among the most shameful episodes in post independent India's history are the massacres at Nellie in 1983<sup>42</sup>, the pogrom against the Sikhs in 1984. The brutal suppression of the insurgency in Punjab from the mid 80's to the mid 90's, the pogroms following the destruction of the Babri Masjid in 1992, the ongoing violations in Kashmir and the genocide in Gujarat in 2002.

Apart from a centuries' old tradition of caste crimes, brutal pogroms against groups belonging to religious minorities have become a tragic recurrence, not surprisingly following similar patterns of subversion. These bouts of concentrated violence have had serious genocidal traits. There has been systemic and vicious, involving high-level preparation and pre-planning behind these genocidal pogroms (involving those in power and even the State), active verbal and written demonization through hate propaganda, targeting of women belonging to these communities, large scale and brutal extermination along with economic targeting and religio-cultural desecration.<sup>43</sup>

Two central features which mark out this entire history of mass human rights violations right from the mass killings of partition to the Gujarat genocide of 2002 are the issue of state complicity and the question of impunity. Mass crimes are inevitably the result of a state which by action or inaction allows these

<sup>39</sup> Alope Tikku, *Amended Law to Let Centre Take Charge in Riot-Hit States*, Hindustan Times New Delhi, 17.03.2013, <http://www.hindustantimes.com/india-news/newdelhi/Amended-law-to-let-Centre-take-charge-in-riot-hit-states/Article1-519963.aspx>, last visited on 11.04.2018.

<sup>40</sup> *Supra* note 39.

<sup>41</sup> Krishna Kumari Areti, *Incidents of Genocide in India*, <http://works.bepress.com/krishnaareti/1/>, last visited on 11.04.2018.

<sup>42</sup> The Nellie massacre took place in Assam during a six-hour period in the morning of 18 February 1983. The massacre claimed the lives of 2,191 people (unofficial figures run at more than 5,000) from 14 villages, of Nagaon district. Most of the victims were Bangladeshi Muslims who had illegally immigrated to the region during Bangladesh war. A group of media personnel passing by the region were witness to the massacre. The forgotten Nellie Massacres, The Hindu 14.12.2008, <http://www.sacw.net/article423.html>, last visited on 12.04.2018.

<sup>43</sup> In India, all this takes place within a discourse of Hindu-Muslim hostility that denies the deliberate and purposive character of the violence by attributing it to the spontaneous reactions of ordinary Hindus and Muslims, locked in a web of mutual antagonisms said to have a long history. Paul R Brass, *The Gujarat Pogrom of 2002*, <http://conconflicts.ssrc.org/archives/gujarat/brass/>, last visited on 12.04.2018.



offences to happen and the aftermath of the mass crime is a cover up which results in impunity for all perpetrators.

### 2.2.1 *The Gujarat Riots and the Response of Indian Legal Regime*

It has been rightly stated that the International Criminal Court is a safety net to tackle situations where perpetrators escape the clutches of domestic law.

The carnage in Gujarat conveys a message of triumph of violence and brutality over law, impunity over accountability, and high-handedness over justice. As in the case of perpetrators of the communal attacks in Mumbai, for the persons who have inflicted violence against the religious minorities in Gujarat, impunity seems probable and accountability seems illusive. It is precisely to end impunity that a judicial mechanism has been created and has gained overwhelming support at the international level - the International Criminal Court (ICC).<sup>44</sup>

The ICC is the first permanent forum mooted at an international level to deal with individual perpetrators (not states) committing the most serious breaches under international humanitarian and human rights law - crimes against humanity, war crimes and genocide. The ICC would not oust the prerogative of the national legal system to prosecute offenders, but would come into play only if the government is either unwilling or unable to prosecute the offender. The primary responsibility for taking action, therefore, vests with the government. The ICC is a safety net to tackle situations where perpetrators escape the clutches of domestic law.<sup>45</sup>

On April 11, 2002, the number of ratifications to the treaty creating the ICC exceeded the sixty required for it to become functional. The ICC is now a reality. However, the jubilation I felt at the creation of this important international mechanism was dampened by the fact that India has neither signed nor ratified the treaty. The disappointing factor was the fact that the ICC is of great relevance to the situation within the country, particularly the violent attacks against the minorities in Gujarat.

In Gujarat, though the National Human Rights Commission has swung into action, it is not a court of law. It would make useful recommendations on what needs to be done in future to avoid the recurrence of such incidents. However, the task of prosecuting the perpetrators is the task of the state legal machinery.

On the basis of independent reports, it is clear that the violence was a state-sponsored carnage targeting the Muslim community<sup>46</sup>. The police force, which has to carry on investigations into the violence for effective prosecutions to take place, is biased, communal, has acted in a partisan manner, and is itself guilty of participating in the attacks.<sup>47</sup> That the State Government is itself biased in its approach to the situation is obvious from the Gujarat Chief Minister's statement of justification for the attacks on minorities — "Every act has an equal and opposite reaction". Therefore, it is unrealistic to expect impartiality in meting out justice to the victims.

In such situations, the possibility of prosecution of such offenders by the ICC could at least persuade the domestic law enforcement agency to act, and act effectively. The ICC is a means of encouraging the national legal machinery to address these crimes, as it will intervene only in cases in which a state is either unwilling or unable to prosecute an offender. After all, no state wants its citizens to be dragged to an international forum for a trial as that would undermine the efficacy of its legal system. If it fails to prosecute, the international machinery would be brought into action to end impunity.

#### 2.2.1.1 *Crimes against humanity*

<sup>44</sup> Saumya Uma, The Gujarat Carnage and ICC, The Hindu, 12.04.2013, <http://www.thehindu.com/thehindu/op/2002/05/14/stories/2002051400050200.htm>, last visited on 12.04.2018.

<sup>45</sup> *Ibid.*

<sup>46</sup> Report on Gujarat by the CPI(M) and the All India Democratic Women's Association, March 2002; a central delegation of the Communist Party of India (Marxist) and leaders of the All India Democratic Women's Association have been in Gujarat for the last three days from March 10 to 12 to express solidarity with the victims and to get first hand reports of the situation, <http://www.pucl.org/Topics/Religion-communalism/2002/gujarat-cpm.htm>, last visited on 12.04.2018.

<sup>47</sup> For the past four decades, the Gujarat state has experienced extensive Hindu-Muslim communal violence. In 1969, close to 2,500 people were killed in state-wide violence. Fighting between Muslims, which constitute 12 to 13 percent of the state's population, and the majority Hindus through the 1980s and again in 1992 claimed the lives of several thousand more people. After a decade of relative peace, violence flared again in February 2002 when Muslims were blamed for a train fire that killed 59 Hindus inciting retaliatory attacks by both the Hindu and Muslim communities. The Gujarat state government of the Bharatiya Janata Party (BJP) was accused of organizing anti-Muslim violence in order to manipulate Hindu nationalist sentiment for its own political gain, Statement of the Commonwealth Human Rights Initiative on the Gujarat Riots and the Role of the Police, April 8, 2002, <http://www.ploughshares.ca/libraries /ACRText/ACR-IndiaGujarat.html>, last visited on 12.04.2018.

Among the crimes listed in the ICC statute, “crimes against humanity” are among the most serious crimes of concern to the international community as a whole.<sup>48</sup> “Crimes against humanity” is of specific importance, as this is a set of crimes which can be committed not only during war time (as in the case of “war crimes”) but also during “peace” time. Crimes listed under this include murder, extermination, enslavement, torture, sexual violence, enforced disappearances and other inhuman acts of similar gravity. It includes the heinous crimes committed in the Gujarat attacks. This category of crimes under the ICC is distinguished from ordinary crimes defined under national penal laws in three ways:

1. The acts constituting the crimes must have been committed as part of a widespread or systematic attack;
2. They must be knowingly directed against a civilian population;
3. They must have been committed pursuant to a "state or organizational policy" — that is, they must be committed by state agents or by persons acting under their instigation or with their acquiescence.

If this yardstick were to be applied to the Gujarat carnage, it appears that all the three requirements are satisfied. There is no doubt that the attacks on minorities were widespread. The use of cranes, shovels and trucks to demolish walls of the Muslim houses and shops, and the recent house checks in the guise of census data collection to identify targets indicate that the attacks were not spontaneous, but were systematic and planned.<sup>49</sup> The attacks were directed against a civilian population. It involved direct attacks on the civilians by agents of the state, as well as a deliberate failure of the State Government to take action against the perpetrators, aimed at encouraging/instigating such an attack.

In addition, the attacks are undoubtedly genocidal in nature, as they are aimed at the destruction of lives and property of a certain group of people on religious grounds. The Gujarat attacks cover the first two of the five prohibited acts stated in the definition of genocide under the ICC statute, namely:

1. killing members of a group;
2. causing serious bodily harm to the members of a group;
3. deliberately inflicting on a group conditions of life calculated to bring about their physical destruction in whole or in part;
4. imposing measures intended to prevent births within a group;
5. forcibly transferring children of a group to another group.<sup>50</sup>

The intention to destroy, in whole or in part, a religious group would also satisfy the definition of genocide stated in the ICC statute.

It is apt here to mention that the Indian Government ratified in August 1959 the U.N. Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (which contains a similar definition of genocide). It is therefore additionally duty-bound to prosecute and punish the offenders, irrespective of their position. Further, it is rather ironic that not too long ago, experts from the Ministry of Law helped the Cambodian Government draft a law on crimes against humanity and genocide (to facilitate the trial of Khmer Rouge leaders), while being complacent of the adequacy of the Indian legal machinery in responding to similar crimes. This is a case of preaching what we do not practice.

The utter failure of the state law and order machinery in protecting the victims from further violations and taking prompt action against the perpetrators illustrate the fact that our legal machinery is not as efficient as we boast of. It also reminds us of the need for an effective, permanent and impartial international machinery to be brought into action in situations where a prompt and proper prosecution through the national legal system seems impossible.

#### 2.2.1.2 A culture of impunity

<sup>48</sup> Rome Statute of ICC, Crime Against Humanity under Article 7, include acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:(a) Murder; (b)Extermination;(c) Enslavement; (d)Deportation or forcible transfer of population;(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;(f)Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;(i)Enforced disappearance of persons; (j)The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health, <http://www.un.org/icc/crimes.htm>, last visited on 12.04.2018.

<sup>49</sup> Report on Gujarat by the CPI(M) and AIDWA, March 2002.

<sup>50</sup> Article 6 of the *Rome Statute of International Criminal Court*.

At present, India has not ratified the treaty establishing the ICC. The ICC would have only prospective jurisdiction-that is, deal with crimes that are committed after a country ratifies it. Therefore, sadly, the perpetrators of the Gujarat carnage, as in the case of those of the communal riots in Mumbai in the last decade, would never be tried by the ICC. However, the exercise undertaken in this article is not without purpose. It is to illustrate the gravity of the crimes committed in Gujarat from the standpoint of international law, and further to highlight the potential that exists for using an international mechanism to terminate a culture of impunity within the country.

It would be desirable for the Indian Government to review its reluctance over acceding to the treaty creating the ICC. If our human rights record is good, and our legal machinery foolproof, we have nothing to fear from the ICC. But if we are afraid that our dirty linen may be washed in public, it is time we ensure that our laundry system becomes sound.

### **2.2.2 Anti Sikh Riots and Babri Masjid Demolition**

The 1984 anti Sikh pogroms was a clear case of state complicity. Various reports<sup>51</sup> have made it clear that it was acts of omission and commission at the very top which resulted in the death of over 1000 Sikhs, rape of Sikh women and the destruction of property belonging to Sikhs. While the Reports are horrifying in their description of the kinds of brutalities inflicted on the Sikh community, what underlies its message is that the 'guilty' remains those at the helm of the state. Responsibility flows downwards from the then Home Minister PV Narasimha Rao (later to preside as the Prime Minister over the demolition of the Babri Masjid) to the police officers who either choose to do nothing or actively aided the criminal elements.<sup>52</sup>

With respect to the Babri Masjid demolition its quite clear that it would never have happened if the State government was not criminally complicit in allowing the mob to assemble there on December 6, 1992 and proceed to destroy the Babri Masjid unhindered. Similarly the demolition could have been prevented by the Centre which choose to stand by and do nothing inspite of adequate warning of the proposed demolition.<sup>53</sup>

### **2.2.3 Ethnic Cleansing of Kashmiri Pandits**

In the Kashmir region, approximately 300 Kashmiri Pandits were killed between September 1989 to 1990, in various incidents. In early 1990, local Urdu newspapers Aftab and Al Safa called upon Kashmiris to wage jihad against India and ordered the expulsion of all Hindus choosing to remain in Kashmir. In the following days masked men ran in the streets with AK-47 shooting to kill Hindus who would not leave. Notices were placed on the houses of all Hindus, telling them to leave within 24 hours or die.<sup>54</sup>

Since March 1990, estimates of between 250,000 to 300,000 pandits have migrated outside Kashmir due to persecution by Islamic fundamentalists in the largest case of ethnic cleansing since the partition of India. The proportion of Kashmiri Pandits in the Kashmir valley has declined from about 15% in 1947 to, by some estimates, less than 0.1% since the insurgency in Kashmir took on a religious and sectarian flavour.

Many Kashmiri Pandits have been killed by Islamist militants in incidents such as the Wandhama massacre and the 2000 Amarnath pilgrimage massacre. The incidents of massacring and forced eviction have been termed ethnic cleansing by some observers.<sup>55</sup>

### **2.2.4 Genocide in Orissa**

From late August through October 2008, organized Hindu extremist groups committed systematic attacks killing more than 100 people, mostly Christians, in the eastern India state of Orissa. Most worrying, the Hindu terrorists responsible for Orissa's violence remain at-large and have explicitly threatened to repeat their attacks after December 25, 2008. Three Hindu extremist groups - the RSS, VHP, and the Bajrang Dal - are responsible for this autumn's violence, destroying some 4500 homes and burning 147 churches in India. The dead are mostly Christians and some moderate Hindus. Father Akbar Digal, a Christian, was beheaded

<sup>51</sup> The Joint PUCL-PUDR Report, 'Who are the guilty?', Report of a joint inquiry into the causes and impact of the riots in Delhi from 31 October to 10 November 1984, <http://www.pucl.org/Topics/Religion-communalism/2003/who-are-guilty.htm>, last visited on 13.04.2018.

<sup>52</sup> Information available on <http://www.pucl.org/Topics/Religion-communalism/2003/who-are-guilty.htm>, last visited on 13.04.2018.

<sup>53</sup> A.G. Noorani, *The Babri Masjid Question*, 1528-2003, Vol II, Tulika Books, Delhi, 2003. This documentary history makes the point that the demolition of the Babri Masjid was preplanned and that the State and Central Government were complicit in its demolition.

<sup>54</sup> In the 1989-1991 time period, nearly 400,000 Kashmiri Pandits were expelled from their native Kashmir valley after a combination of violence and explicit threats by Islamic terrorists aided and inspired by Pakistan. In the last decade, India-Pakistan tensions have continued and spiraled, especially over the state of Jammu and Kashmir. The tensions recently culminated in the Kargil invasion by thousands of Pakistani troops and supporting Islamic mercenaries, <http://www.kashmir-information.com/fundamentalism.html>, last visited on 13.04.2018.

<sup>55</sup> Information available on <http://ikashmir.net/massacres/khirm.html>, last visited on 13.04.2018.



after three times refusing to convert to Hinduism. Gayadhar Digal, a Hindu, was hacked to death, and his wife and son nearly killed for appearing sympathetic to Christianity. Others have been burned alive and beaten, then buried alive. Some 40,000-60,000 sought refuge in the forests where they were further hunted. Hundreds remain missing. Over 11,000 remain displaced and the attackers have threatened to kill them upon returning if they do not convert to Hinduism.<sup>56</sup>

The attacks have been alarmingly systematic. Repeating tactics used by these Hindu terror groups in similar attacks last year, the August attacks began with cutting down trees to block the roads and cutting phone lines to block communications. Mobs led by these Hindu extremist groups were armed with guns and machetes, shouting slogans such as "*Christians must become Hindu or die. Kill Them. Kill Them. Kill Them.*" The same Hindu terror groups have organized related attacks across the country, the best known being in Gujarat, India, in 2002 where about 2000 to 5000 Indian-Muslims were killed.<sup>57</sup>

In each of these cases, violence continued for weeks without intervention by the state and the Hindu perpetrators have enjoyed impunity thereafter. Six years after the Gujarat killings, there has been only one conviction. There were no convictions after the December 2007 violence. Without any punishment, we can expect these Hindu extremist groups to continue terrorizing civilians as a tactic to impose their will on the state and drive out minority religious communities.

It is this history which combines both an entrenched impunity as well as a determined politics of forgetting which makes the efforts to ensure justice in cases of mass crimes such an uphill task. It is in this context, that we feel the relevance of work which can combat this history of both impunity and the politics of forgetting. Any work on mass crimes will have to take into serious account the conceptual and historical understanding of mass crimes and base itself upon that understanding. For that we will have to understand the patterns of impunity.

In short, it is necessary to fix responsibility and penetrate the clouds of deception, rhetoric, mystification, obscurity, and indeterminacy to uncover what can be uncovered, knowing full well that the whole truth can never be known, but that the evident actions and inaction of known persons, groups, organizations, political leaders, media, academics seeking causes, and patriots seeking comfort can be uncovered, exposed, and brought to book.

### 3. GENOCIDE AND DOMESTIC PENAL LAWS: COMPARATIVE ANALYSIS

As aforesaid, India had ratified the *Genocide Convention* as early as in the year 1959, where it had identified genocide as a potential threat posed to humanity and recognized the need to have comprehensive domestic laws in order to counter the threat. The take of India, post ratification, on genocide and penal laws regarding the same has been already brought to light in the discussion in the earlier chapters. This chapter focuses on the existence of domestic or municipal laws with regard to genocide in other countries of the globe. For the sake of brevity and relevance, it is important to note that few selected countries from each continent of the world have been taken into consideration for the discussion in this chapter.

Article V of the Convention lays down:

*"The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III."*

In accordance to this requirement of the Convention, different countries have incorporated certain provisions to counter the menace of genocide. The need to recognize the crime or offence of genocide under domestic or municipal laws also arose with regard to the jurisdictional issues as to taking cognizance of the offence within the state territories and beyond. In this regard, it is to be noted that the failure of nations to enact laws against genocide, crimes against humanity and war crimes are matters of international concern. In April 1999, a Swiss court threw out the charge of genocide in the trial of Rwandan mayor, Fulgence Niyonteze<sup>58</sup>, because the crime of genocide was not at that time a part of Swiss law; while it is a striking feature that many countries have more effective laws for air piracy (hijacking) than for genocide.<sup>59</sup>

<sup>56</sup> Mr. Chad Hazlett is Protection Director of the Genocide Intervention Network (GIN) based in Washington DC, USA. He has lived and worked in India. <http://www.fiacona.org/newsdetail.php?catid=100&newsid=705>, last visited on 13.04.2018.

<sup>57</sup> Information available on <http://www.genocideintervention.net>, last visited on 13.04.2018.

<sup>58</sup> The trial of Fulgence Niyonteze, 35, formerly mayor of the Rwandan town of Mushubati, marked the first time a Rwandan war-crimes suspect had gone on trial in a Western country, [http://articles.orlandosentinel.com/1999-04-13/news/9904120835\\_1\\_trial-in-switzerland-rwandan-fulgence](http://articles.orlandosentinel.com/1999-04-13/news/9904120835_1_trial-in-switzerland-rwandan-fulgence), last visited on 13.04.2018.

<sup>59</sup> Information available on [www.preventgenocide.org/law/convention/newparties.htm](http://www.preventgenocide.org/law/convention/newparties.htm), last visited on 14.04.2018.

The failure of countries to prosecute or extradite perpetrators of genocide, crimes against humanity and war crimes has become a matter of tremendous international interest since the October 1998 arrest of former Chilean dictator Pinochet in the United Kingdom on Spanish charges of torture and genocide. Pinochet was released in March 2000 and allowed to return to Chile, but his case has become a crucial turning point in the effort to bring an end to impunity for torture, genocide and other international crimes.<sup>60</sup>

In the continent of Africa, where the countries are most affected by the menace of genocide, Article 313 of the *Code Pénal of Burkina Faso*, Article 137 of *Penal Code of Ivory Coast*, Article 281 of *Ethiopian Penal Code*, Section 1 of the *Ghana Criminal (Amendment) Act, 1993*, Article 30 of Mali's *Penal Code*, Congo (Brazzaville)'s 'Law No. 8 - 98 of 31 October 1998' on genocide, war crimes and crimes against humanity, *Seychelles' Genocide Act* of 1969, South Africa's '*Implementation of the Rome Statute of the International Criminal Court Act* '27 July 12, 2002, Rwanda's *Organic Law No. 08/96 on Genocide and Crimes Against Humanity* incorporate specific provisions for taking cognizance and penalization of the offence of genocide.<sup>61</sup>

Further, in the continents of Americas, it is significant to note the developments in the genocide laws in the different countries. Chapter 50 A of the *United States Federal Code*, comprising Sections 1091 to Section 1093 deal with the offence of genocide, the significant terms and meanings related to this offence and the provisions of imprisonment and penalization. Canada has under its *Bill C-19* incorporated a special legislation to combat genocide, which provides for the punitive provisions of this offence, dealing separately with its commission inside and outside Canada. Apart from this, countries like Trinidad and Tobago, Antigua and Barbados have enacted separate legislations to specifically deal with genocide as a mark of allegiance to the Convention and respect to international obligation and co-operation. Other countries like Argentina, Brazil and Columbia have separate provisions in their respective penal codes.<sup>62</sup>

Coming down to the countries in Asia and the Pacific region, Australia, to begin with has enacted the *Genocide Convention Act, 1949* to honour the obligations to protect the world from genocide. The application of this Act, even extends to territories beyond borders upon obtainment of assent from the Secretary General of the United Nations Organization. Other legislations to this effect enacted by the countries in this said region include, Bangladesh's *International Crimes (Tribunals) Act 1973*, *Statute of the Iraqi Special Tribunal, issued December 10th, 2003*, *Israeli Law on the Crime of Genocide, 5710 -1950*, New Zealand's *International Crimes and ICC Act* of Sept. 6, 2000, Tonga's *Genocide Act, 1969*, etc. Few other nations have specific provisions in their Penal codes.

Coming to Europe, what can be noted is that United Kingdom has enacted United Kingdom's *ICC Bill - 25 August 2000* giving effect to its act of ratification of the *Genocide Convention*. In Europe, while most countries have amended their domestic penal legislations to incorporate provisions on genocide, few countries like Belgium, Finland and Italy have specific enactments.

### 3.1 Reservation

Once, the countries, sign or ratify a Convention, it is customary to provide that state party to allow to put reservations, i.e., certain restrictive clauses to the application of the Convention as specified by the countries. A total of thirty of the 132 nations which are party to the Genocide Convention have made reservations, declarations and understandings.<sup>63</sup>

Since 1989, eleven countries have withdrawn reservations to Article IX, concerning submission of disputes to the International Court of Justice. As of October 3, 2000 28 countries continue to have active reservations. Many countries have registered objections to these reservations, some nations objecting to reservations from a specific nation and some nations refusing to accept any of the reservations.

With reference to Article IX of the Convention<sup>64</sup>, the Government of India has declared that, for the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all the parties to the dispute is required in each case. The United States of America has declared reservations as to that with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this Article, the specific consent of the United States is required in each case and that nothing in the Convention

<sup>60</sup> Information available on [www.preventgenocide.org/law/domestic/](http://www.preventgenocide.org/law/domestic/), last visited on 14.04.2018.

<sup>61</sup> *Ibid.*

<sup>62</sup> United States Federal Code, Chapter 50A deals with the offence of genocide, in the United States of America, which has both territorial and extra-territorial application.

<sup>63</sup> Information available on <http://www.preventgenocide.org/law/convention/reservations/>, last visited on 14.04.2018.

<sup>64</sup> Article IX of Convention on the Prevention and Punishment of the Crime of Genocide.

requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

Further, the Australian Government does not accept any of the reservations contained in the instrument of accession of the People's Republic of Bulgaria, or in the instrument of ratification of the Republic of the Philippines. The Australian Government does not accept any of the reservations made at the time of signature of the Convention by the Byelorussian Soviet Socialist Republic, Czechoslovakia, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics. The Government also does not accept the reservations contained in the instruments of accession of the Governments of Poland and Romania.

The Government of China objects to all the identical reservations made at the time of signature or ratification or accession to the Convention by Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics. The Chinese Government considers the above-mentioned reservations as incompatible with the object and purpose of the Convention and, therefore, by virtue of the Advisory Opinion of the International Court of Justice of 28 May 1951, would not regard the above-mentioned States as being Parties to the Convention.

As regards United Kingdom, the Government of the United Kingdom does not accept the reservations to Articles IV, VII, VIII, IX or XII<sup>65</sup> of the Convention made by Albania, Algeria, Argentina, Bulgaria, Burma, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Mongolia, Morocco, the Philippines, Poland, Romania, Spain, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics or Venezuela. The Governments of the United Kingdom of Great Britain and Northern Ireland have consistently stated that they are unable to accept reservations in respect of Article IX of the said Convention; in their view this is not the kind of reservation which intending parties to the Convention have the right to make. Accordingly, the Government of the United Kingdom do not accept the reservation entered by the Republic of Rwanda against article IX of the Convention. They also wish to place on record that they take the same view of the similar reservation made by the German Democratic Republic. With regard to statements made by Vietnam concerning Articles IX and XII<sup>66</sup> and reservation made by China concerning Article IX, the Government of the United Kingdom has consistently stated that they are unable to accept reservations to Article IX. Likewise, in conformity with the attitude adopted by them in previous cases, the Government of the United Kingdom does not accept the reservation entered by Viet Nam relating to article XII.

With regard to a reservation made by Democratic Yemen concerning Article IX, the Government of the United Kingdom of Great Britain and Northern Ireland have consistently stated that they are unable to accept reservations in respect of article IX of the said Convention; in their view this is not the kind of reservation which intending parties to the Convention have the right to make. Accordingly the Governments of the United Kingdom of Great Britain and Northern Ireland do not accept the reservation entered by the People's Democratic Republic of Yemen against article IX of the Convention. The Government of the United Kingdom has consistently stated that they are unable to accept reservations to article IX. Accordingly, in conformity with the attitude adopted by them in previous cases, the Government of the United Kingdom does not accept the first reservation entered by the United States of America. The Government of the United Kingdom object to the second reservation entered by the United States of America. It creates uncertainty as to the extent of the obligations which the Government of the United States of America is prepared to assume with regard to the Convention.

With regard to reservations to Article IX<sup>67</sup> made by Malaysia and Singapore upon accession, the Government of the United Kingdom of Great Britain and Northern Ireland have consistently stated that they are unable to accept reservations to Article IX. In their view, these are not the kind of reservations which intending parties to the Convention have the right to make. Accordingly, the Government of the United Kingdom does not accept the reservations entered by the Government of Singapore and Malaysia to article IX of the Convention.

#### 4. CRITICAL ANALYSIS

It is now important to analyse whether or not the new Bill will be actually effective in preventing genocide

<sup>65</sup> Articles IV, VII, VIII, IX and XII of Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>66</sup> Articles IX and XII of Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>67</sup> Article IX of Convention on the Prevention and Punishment of the Crime of Genocide.



or prosecuting perpetrators of the crime.<sup>68</sup> Communal violence is defined as '*act of commision or omission which constitutes a scheduled offence.*' The scheduled offence includes IPC offences murder, rape, outraging modesty of a woman etc and offences under acts such as *Arms Act,1959, Explosives Act,1884, Places of Worship(Special Provisions) Act,1991, Religious Institutions (Prevention of Misuse ) Act,1988*<sup>69</sup> In terms of conceptualization of offences, the Statute falls back upon the *Indian Penal Code, 1860* and other special statutes, none of which are able to conceptualize in adequate terms the offence which was committed in Gujarat, 2002. There is in short a complete failure to take on board either genocide or crimes against humanity and the law sticks to looking at mass violence within the framework of individual acts of violence. Equally there is a failure to understand sexual violence (which formed a key part of the violence in Gujarat, 2002) as a part of the mass crime thereby being complicit in hiding violence against women. More importantly, it does not both theoretically and provision-wise contextualize the Communal violence/riots as a variant of mass-crime because of a specific intent and place communal violence as a mass crime and recognize that other extremes are crimes against humanity and genocide which needs to be separately but holistically legislated upon. The Statute shows no recognition that internationally there might have been significant advances in thinking through the very formulation of mass crimes which have implications for how we can capture the concept of communal violence in legal terms.

Section 57 of the Statute lays down that '*No suit , prosecution or other legal proceeding shall lie against the State Government..... for anything done in good faith or intended to be done under this Act or the rules made thereunder.*' Sec 17(2) lays down that '*Notwithstanding anything contained in this Code, no court shall take cognizance of any offence under this section except with the previous sanction of the State Government.*'

What these provisions in effect do is re-entrench impunity for the state when the state authority may at times (as in Gujarat, 2002) be a central actor when it comes to the question of complicity in mass crimes. Particularly in the context of the mass crimes, a statute which is based on state immunity from prosecution is being utterly dishonest in its very intent.

The Bill is also silent on the equally crucial and long pending issue of police reforms which, among other things, must guarantee the independence of the police force from the executive and at the same time make it accountable.

Instances of communal carnage such as Gujarat 2002 are not spontaneous acts. They are meticulously planned and organized over a long period of time where hate speech and hate propaganda play a major role. But the Bill fails to seriously address the hate-building process.

The attempt has been made by the Central Government to legislate upon a subject which is primarily of the nature of law and order which as per list II of the VII schedule of the Constitution of India is a State subject. Therefore an attempt has been made to broad base the issue with respect to "scale" to impact on the secular fabric, unity, integrity and internal security of the country. In common observance it is seen that a communal, sectarian violence may not necessarily be of a certain scale only to impact as aforesaid but however the same may deserve State and Central intervention on account of lack of redressal and perceived magnitude by the victim.

Moreover it can also be said that for issues which squarely come in the purview of the union of India has not been incorporated in the topics which has been legislated upon in the current bill. They pertain to (1) Internally displaced persons – As per Article 252 of the *Constitution of India* the Union is competent to legislate basing on the recommendation of the United Nations declaration on internally displaced persons, 1985 and (2) The *Convention on Genocide* – The same has been ratified and signed by the Parliament and therefore the Union of India is competent to legislate upon the subject matter of the said convention.

Further, there is no clarity as to the institutional mechanism in which such offences must be investigated and tried etc, and it fails to expand on definitions of violence against women beyond those currently contained within the *Indian Penal Code* and often do not correspond with the range of violations provided for under international law, nor sufficiently recognize the gender-specific nature of offences inflicted on women.

It only attempts at individual responsibility and does not in any way address the critical issue of the chain of command responsibility. The proposed draft can only be seen as a decorative piece meant to increase the democratic capital of the Government without in any way changing the law to making the state accountable for mass crimes. Indian responses to mass crimes in the form of law reform efforts need to exhibit serious thinking about the issue. Law reform cannot be allowed to become the submission of ill thought out,

68 For an analysis of the many other failures of the Bill, Clifton Rozario, The Communal Violence( Prevention, Control and Rehabilitation of Victims) , Bill 2005: Some Reflections, [www.altlawforum.org/publications](http://www.altlawforum.org/publications), last visited on 15.04.2018.

69 Sec 2(c) read with Schedule for a complete list of offences.

conceptually weak bills which do more damage than good. What is of particular concern here is the penchant of the Indian State to do 'social change' by proposing ill thought out legal drafts. There is no systematic effort at defining the problem and articulating a legal solution taking on board grass roots experience, limitations of national legal frameworks, international legal frameworks and comparative experiences to articulate a policy which can then become the basis for a legal draft.<sup>70</sup>

Further this bill makes no provision for punishing and legally making offences such as genocide culpable under law instead it is only further centralizing the power to the government to be specific the central government instead of the state government to handle a situation of riot.

They have failed to recognize that the riots in Gujarat brought to light the situation where the State government authorities failed to act but this is not the only factor that the lawmakers need to take into consideration they need to consider the fact that it was a communal riot in which the essentials of genocide were present. It was ethnic violence powered by the failure of the State to act in time the authorities need to be prosecuted in instances like this. We as a nation need to make laws in consonance with the Convention on Genocide which we have ratified and recognize genocide as a crime. The instances of violence that can be defined as genocide if its essentials are applied have been taking place time and again and in most instances in the history of such events they have been with participation by the State. If the national laws are not sufficient to prosecute the State authorities then international intervention must be sought through the provisions of the Genocide Convention. Such a stage may already have been reached as it has been seen that most perpetrators especially the ones who are part of any form of government get acquitted even after being charged with heinous cases and some are not even reported against all due to a lack of witnesses or hostile witness. Like recently in the case where a whole village of Christians were burnt alive in the name of religion, two fast track courts were constituted and 307 accused people including a politician from the BJP party who was a MLA at that time were acquitted due to lack of witnesses and the only witness that did not turn hostile was a 6 year old girl who identified the accused MLA of murdering her father. These are the practical problems one faces when a government authority involved in communal violence is to be prosecuted. These problems can only be solved if the law is amended or international intervention is sought in matters where our courts fail to prosecute the perpetrators of heinous crimes.

The substitution of an ill thought out legal draft instead of a policy statement becomes a way of short circuiting public discussion as legal drafts by their nature exclude public participation due to their specialized nature. The Indian State has perfected the art of excluding public participation by making it a habit to submit bills rather than policies for public discussion. It is time that this method of doing social change is rejected *in toto* with a clear demand from concerned citizens that the state follow a more systematic and well thought out approach in all efforts to end impunity through reforming Indian law.

## 5. CONCLUSION AND SUGGESTIONS

Concluding with certain suggestions with regard to countering the bane of genocide and violence against humanity, some legal cum institutional reforms can be listed for quick perusal and careful consideration. Some legal institutional reform measures (on the basis of the recommendations of various commissions, including those related to judicial and police re-organisation, independent of the cynical political directions of the ruling party and for an effective preventive mechanism for conflict resolution) are required for impartial, effective and humane law enforcement for the prevention and control of all inter-group riots. Transparency and accountability of the institutions and impartiality; no undue delay in bringing the guilty to justice; rehabilitating and compensating the victims are important considerations. Further, the relative roles of the state and central governments in the manner which will incorporate the principle of check and balance at all levels of decision making so as to make the institutions function in an environment of transparency and accountability are also significant. One needs to fix responsibility for the failure of governance and to undertake investigation and prosecution and reparation and rehabilitation of victims; regard the spirit of National Police Commission's Report VI (1981) dealing with communal riots, expressed the opinion that the trial of cases related to riots required not only special courts and prosecutors but also special procedure.

The other issue which requires national attention relates to rights of victims - both to reparation and protection as witness. Time was ripe for the Supreme Court to settle the jurisprudence of victim-

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70 Work of the South African Law Commission which does adopt the framework of first circulating a issue paper widely, getting responses to the issues raised and then formulating a discussion paper which takes on board issues raised by grass roots level groups, national law, international law, comparative perspectives and articulates a draft policy. This is then further circulated among the public and after feedback a draft policy which could become the basis of a legislation is prepared [www.info.gov.za/aboutgovt/contacts/bodies/salc.htm](http://www.info.gov.za/aboutgovt/contacts/bodies/salc.htm), last visited on 15.04.2018.

compensation in the light of the UN Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985. Besides compensation, the rights of victims include their protection and participation in the entire process of justice.

And it should not be forgotten that any law is only as good as its implementation and therefore, in the given context and without brushing aside the need for a larger criminal justice reform, it is important to take a decision as to the institutional mechanism in which a complaint mechanism for both the communal violence related offences or acts of Genocide and crimes against humanity shall be placed.

Since a good number of countries (including Bangladesh in 1973) have enacted domestic legislation either specifically on genocide or on international crimes in general, there is no dearth of legislative models and techniques for the Government of India to choose from. Care should, however, be taken to avoid the pitfalls of our own *Geneva Conventions Act, 1960*, which were in fact judicially noted at least once. The legislation should be such that all perpetrators of genocide whether they are individuals, groups or the constitutional rulers, can without exception be readily punished. The legislation should be such that all perpetrators of genocide whether they are individuals, groups or the constitutional rulers, can without exception be readily punished. The prosecution should not rest exclusively at the discretion of the Government or a Government official, as is currently the case with the *Geneva Conventions Act, 1960*. At the crux of it all, the evidence needs to point to an "intention" to destroy and harm; it is a crime not computed in numbers of dead or harmed but in the intention and desire to commit it- the sheer planning, pre-meditation, extent and thoroughness of the killings. India, like every other country, is bound by the general international law obligations to prevent and punish acts of genocide. India's obligations are further strengthened by its participation in the *1948 Genocide Convention* in the drafting of which it had made a worthwhile contribution. India became a party to the Convention on August 27, 1959. From the factual context, we propose to make the legal argument that the startling inadequacy of Indian law combined with the failure of Indian parliament to enact a law on genocide, renders it imperative that the Supreme Court intervene in the interests of justice.

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