INADEQUACY OF EXISTING INDIAN LAW IN CURBING MASS CRIMES

By Venus Pasricha[1]

"Law should not sit limply, while those who defy it go free and those Who seek its protection lose hope[2] *".*

ABSTRACT

During the whole process of the adaptation and implementation of the Two-Nation Theory (particularly based on Religion) several lives were lost, and millions were displaced. Unfortunately, the killings on communal ground continued even after the partition. Some incidents like killing of Sikhs, annihilation of Kashmiri Pandits and Godhra killings and recent communal violence in Delhi again gave a rethought as to whether existing Indian Criminal Law is adequate to deal with such mass crimes. As inspite of various provisions there existed not so tolerant history, wherein perpetrators of crimes had gone free, and victims are still crying for justice. In a multicultural society like India, it is very difficult though essential to maintain social harmony. The happening of this crimes reflect that India has failed to fulfil its obligation under humanitarian international law as despite of ratifying The United Nation Convention on the Prevention and Punishment of the Crime of Genocide, 1948, India has not come up with a specific law to curb communal violence. In this article, author reflects upon the need for such specific law.

Keywords - Genocide, Religion, National Unity, Secularism, Humanitarian International Law.

History of India reflects numerous incidents where religious identity has been the reason of sporadic bloodshed of adults, innocent children, and old people. The heartless killings at such a massive level imparts true meaning to the words of Stalin that *"a single death is a tragedy; a*

[1] LLM, National Law University, Delhi.
[2] Jennison vs. Baker (1972) 1 All ER 997.

million deaths are a statistic[3]". At international level, the Genocide Convention 1948[4] prohibits such acts and imposes an obligation on all the member states to bring specific legislation to curb such incidents. India, despite of ratifying the convention has never come up with such law. On several occasions[5] the exercise of bringing up of law on these lines was started but never ripened because of the disbelief that the existing criminal law adequately deals with it. For instance, When the question regarding enactment of such law was brought up for discussion on 2nd March 2016 in Rajya Sabha, the Minister of State for Home said-

> "By acceding to the Convention on the Prevention and Punishment of the Crime of Genocide in 1959, India has recognised genocide as an international crime. The principles embodied in the Co-Convention are part of general international law and therefore already part of common law of India. The provisions of the Indian Penal Code including the procedural law (Criminal Procedure Code) provide effective penalties for persons guilty of the crime of genocide and take cognizance of the acts which may be otherwise taken to be genocide.[6]"

Along with other arguments this same claim was also invoked by Indian establishment at the time of drafting of Rome statute[7] which establishes the first permanent International criminal court having universal jurisdiction on four serious crimes- (1) The crime of genocide (2) Crimes against humanity (3) War crimes; (4) The crime of aggression which constitutes the ratione materiae jurisdiction of the court. However, this claim does not hold fully true with respect to cases dealing with mass crimes.

In light of the above, this article begins with a brief look at the Genocide Convention which lays down the definition of Genocide and also states out the duty of the member states in prevention of the crime as it will help in understanding the true nature of the crime and then goes on to evaluate the existing provisions which are acclaimed as providing "effective penalties for persons guilty of crime of genocide" and showcases the difficulties that emerged due to lack of specific law during the trial of persons indicted

[3] Anuradha Rajesh Saibaba, *India and the International Criminal Court: Re-Invigorating and Re-Visiting the Non-Ratification Debate*, 11 ISIL Y.B. Int'l Human. & Refugee L.189, 190 (2011).
[4] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, (entered into force on January 12, 1951).
[5] The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, see also Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011.
[6] Aftab Alam, *India must enact a law on Genocide*, COUNTER CURRENTS (July 15, 2020, 12:23 AM), https://countercurrents.org/2019/01/india-must-enact-a-domestic-law-on-genocide.
[7] Rome Statute of the International Criminal Court, 2187 UNTS 90 (2002),

with such charge by citing various judgments and finally concludes that in view of India's obligation towards international law and constitutional law, non-recognition of the crime of genocide results in double victimization of victims of such crime as recognition of crime is the first step towards delivering justice to the victims. Moreover, most often in India this heinous crime has been given the name of riots or subjugation of law and order which takes away the very essence of the matter that these killings are directed towards individual of a particular community because of his membership in the community.

THE GENOCIDE CONVENTION 1948

It was the after effect of this holocaust committed during second world war that the term Genocide came into existence. Referring to the atrocities of Nazis, the British Prime Minister commented that the world has exposed to a "crime without a name". In 1944, A Polish jurist of Jewish origin, Raphael Lemkin who had lost his 49 family members in the Jewish holocaust coined this term i.e., Genocide to symbolise an old evil tradition in its contemporary development. As a reaction to this holocaust, he is not only accredited to have named this catastrophe but also as a developer of the subject matter of crime of Genocide.

Raphael Lemkin's contribution and the hostilities conducted during the Second World War provided a strong base for punishing and outlawing the serious crimes committed against mankind including Genocide and thereby forced the United Nation to enact prescriptive instrument to condemn and criminalise Genocide. Resultantly, In the year 1946, The United Nation General Assembly in its very first session passed a resolution which recognised "genocide as a crime[8]". Though the resolutions passed by the General Assembly are not binding in nature but the wide acceptance of this resolution by the civilised nations gave it a prescriptive force. Furthermore, this resolution became very instrumental in the drafting of "The Convention on the Prevention and Punishment of the crime of Genocide, 1948.[9]" (hereinafter termed as Genocide Convention).

[8] G.A. Res. 96(I), U.N. GAOR, U.N. Doc. A/64/Add.1 (1946).

[9] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, (entered into force on January 12, 1951), [hereinafter Genocide Convention].

DEFINITION OF GENOCIDE AS GIVEN UNDER THE CONVENTION AND ITS INTERPRETATION:

The very purpose for which the convention has been adopted is reflected by its Preamble in the following terms:

> *"*Genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world, recognizing that at all periods of history genocide has inflicted great losses on humanity, and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required"

To pursue this broad aim, the definition of the Genocide has been broadly worded by covering the overall acts which could result in destruction of a specified group.

Article II of the Genocide Convention sets out the definition of Genocide in the following words:

Genocide means – "committing of any of the following acts 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 crime of Genocide has two material elements - The mental element and the physical element. The part I of the definition reflects mental element (Mens Rea) and physical elements (Actus Reus) is specified by the part II of the definition. The highly sensitive *"ratione materiae"* of the crime and absence of cases of prosecution since the adoption of the convention until 1990 gives the impetus to analyse each element in detail[10]. The rulings of two tribunals- "International Tribunal for former Yugoslavia" and "International Tribunal for Rwanda" since 1990 have created an influential understanding of what acts could fit the definition of crime and gave a real context to the implementation of Genocide Convention.

III. ANALYSIS OF DEFINITION

[10] William A. Schabas, *The Jelisic Case and the Mens Rea of the Crime of Genocide*, 14 LJIL 125-140 (2001).

The legal development of international Genocide law largely based on practices of ICTY and ICTR [11]. The profound author on the Genocide studies, William A. Schabas has noted in his Special report, *United States Institute for Peace* that the convention on genocide had remained a 'forgettable document' for so long as the focus of modern human rights movement shifted to other mass atrocities such as torture, apartheid etc. The convention has taken a second birth following the establishment of International Tribunals by United Nations Security Council by exercising its power under Article 39 of the United Nation charter.

As mentioned above, the Part-I of the definition reflects upon the mental element of the crime. This mental element is coupled with four sub-elements which are as follows-
Firstly – The perpetrator should have "intent".
Secondly- Intent should be to "destroy."
Thirdly- Destruction should be "in whole or in part".
Fourthly – Intent must be to target "a national, ethnic, racial, or religious group, as such."

Part- II mentions the five physical acts. Each of which if committed with the necessary intent will give rise to a case of Genocide. It is an extremely specific crime. If in any case the abovementioned ingredients are not fulfilled the offence will be treated as an ordinary crime. So, mass killings of civil population no matter how brutal it may be will not qualify to be designated as Genocide.

MENTAL ELEMENT (MENS REA) OF THE OFFENCE

The crime of genocide specifically requires that prosecution must prove that the perpetrator possessed the required mental state when he had committed the act. This section will analyse each sub- element of mental element -

'INTENT TO DESTROY MEANING'- The introductory part of the definition explicitly mentions the 'precise description of intent' that is the act must have done "with the intent to destroy, in whole or in part a national, ethnic, racial or religious group as such". The major finding of the international tribunals confirms that it is 'specific intent' or 'special intent' or the French version of the judgment uses the word 'Dolus specialis' which means a criminal act

[11] Derenzo, J. et al., *(September 14, 2004) Genocide: Legal Precedent Surrounding the Definition of the Crime* available at https://heinonline.org/HOL/License.

done with an intent to produce a specific result[12]. In case of Genocide this act must be done to effect destruction of the protected group either in its entirety or in part.

In the *Akayesu* Judgment, the ICTR found that this 'special intent' or '*Dolus specialis*' differentiates the crime of Genocide with other crimes of general nature. The trial chamber used these three words interchangeably and holds that "specific intent is the requisite element of the crime which in effect seeks that perpetrator wants the desired result[13]". On other occasion the same tribunal held that the element of 'dolus specialis' makes this crime unique[14]. In *Jelisic* case tried by the ICTY, the acquittal of the accused was based on the fact that the accused did not kill with the specific intent to destroy rather he killed arbitrarily. As in the crime of Murder if specific intention is not produced the offence gets reduced to the case of "Manslaughter or unintentional homicide" likewise in the case of Genocide non fulfilment of this specific intent reduced the case to normal murder or "crimes against humanity". In Genocide cases, the act of the accused goes beyond its 'actual commission' i.e. physical act accompanied with the realization of ulterior motive[15].

TO DESTROY

The five physical acts prescribed under part II of the definition in addition to the general intention requires that these acts should also be accompanied with other four elements prescribed under Part I. One such element is 'to destroy'. While determining the cases before it, the international tribunals came up with the question that what acts of the accused would result in destruction and to what would be the nature of such destruction.

The drafters of the genocide convention explicitly mention the only possibility of "physical and biological genocide" in part II of the definition but still the difficulty arise in respect of the fact that whether the physical acts given under part II corresponds with the words 'to destroy' as used in part I. ICTY had in depth considered this issue in *Prosecutor v. Krstic*[16] where it held that it only constitutes the "material destruction by physical or biological means." So, if a

[12] *Supra* note 17 at 132.

[13] Prosecutor *v.* Akayesu, Case No. ICTR-96-4-T, ¶ 522 (lnt't Crim. Trib. for Rwanda Sep.2, 1998).

[14] Prosecutor *v.* Kambanda, Case No. ICTR 97-23-S, ¶ 235 (lnt't Crim. Trib. for the Former Yugoslavia Oct 19, 2000).

[15] *Supra* note 21 ¶522.

[16] Prosecutor v. Krstic, Case No. IT-98-33-A, Appeals Chamber Judgment ¶25 (lnt't Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

protected group is forced to assimilate with the other group resulting in loss of its cultural values, language, religion it would not be considered a case of Genocide.

EXISTING LEGAL FRAMEWORK TO SUBDUE MASS VIOLENCE IN INDIA-

One of the aspects of mass violence, especially in case of genocides is the involvement of groups, inflicting violence upon another group. Indian Penal Code does not lay down any specific penal provision to deal with violence committed by one group against other. However, Chapter VIII of the code penalizes those activities by groups which tend to disturb public order and peace. The essence of the chapter is that the liability of those who perpetrate an offence is imputed upon the other members of such group. Thus, Chapter VIII of IPC is applicable wherein the perpetrator is 'a group'. However, the object of their offence maybe an individual, a group, property or even the state.

Section 141 of IPC classifies such a group as unlawful assembly when it consists of five or more persons. Once it is so classified, every person who, being aware of this fact continues to be a part of the group or joins later[17] is designated as the "member of an unlawful assembly" which is per se an offence[18]. The chapter additionally enumerates various other species and sub-species of unlawful assembly. When an unlawful assembly resorts to "force or violence", it is termed as rioting[19]. A person declared guilty for complicit in rioting may be incarcerated for a maximum period of 2 years[20]. An aggravated form of rioting, wherein the guilty is in possession of "deadly weapons", is punishable with incarceration which may extend to a period of 3 years[21].

Ancillary to rioting, section 152 penalises the act of obstructing or assaulting any law enforcement official attempting to suppress a riot or any other offence under this chapter, and section 153 punishes an act of wanton provocation committed "with the intention to cause rioting". Section 149 is the heart of this chapter and enshrines a principle of constructive liability under which every person, being part of an unlawful assembly and endeavouring to

[17] Indian Penal Code§ 142.
[18] *IbId.* § 143.
[19] *IbId.* § 146.
[20] *IbId.* § 147.
[21] *IbId.* § 148.

achieve its common object, shall be held liable for the act of an individual member of such unlawful assembly.

Section 153-A of this chapter comes close to defining and punishing any act which may jeopardise the harmony between different identity groups based on "religion, race, place of birth, residence, language, etc.). Thus, this provision has been enacted as a kind of catch all provision to penalize fomentation of any kind of communal violence. However, considering the frequency of occurrences of communal violence and susceptibility of India's pluralistic society to give in to heightened passions, this provision provides a disproportionate punishment of incarceration for a maximum duration of three years. Section 153B is a specific application of the principle enshrined in section 153A and penalises exhortations and rhetoric which questions affiliation and fidelity with the nation of any identity group or foments one group against another on these grounds.

As mass violence includes a variety of offences being conducted during its furtherance, they are penalised under their respective heads. For instance, if a murder is committed by any person who is a part of an unlawful assembly, he will be prosecuted for the offence of murder under section 302 of IPC. However, in IPC, liability of a person varies according to his mental culpability which may render the offence either as murder or culpable homicide not amounting to murder. And if looting is committed by assailants, as was the case during Sikh pogroms of 1984 by at least five persons, a prosecution for dacoity may lie against them[22].

It is pertinent to note here that for each such charge, evidence will be led separately. But in the fog of chaos that mass violence accompanies, it becomes extremely difficult to get reliable evidence to prove the guilt of alleged assailants "beyond reasonable doubt". Section 120-A and 120-B which penalises conspiracy enables the prosecution to establish a prior plan before the execution of mass violence. However, the charge is not one which could be easily proved by direct evidences as conspiracy is always done secretly. Moreover, it is not in every case of mass violence that there is some larger plan working the background. It can be spontaneous too, and if that is the case, a charge of conspiracy, in all eventualities, will fall apart.

Considering the deeply religious nature of Indian society and the fact that most of the communal flare ups occur around the religious identities so much so that even rumours often trigger a violent response, Chapter XV of IPC lays down offences which tend to disrupt the

[22] *IbId.* § 399.

peace among various religious groups. The provisions of this chapter are not directed at any religious group and are secular in nature.

The broad objective behind this chapter is to curtail hate speech which may create communal discord among various religious groups. Moreover, they also promote the ideal of religious freedom enshrined in article 25 of the Constitution. Right to practise one's religion include right to worship and perform religious rites and rituals peacefully without external disturbances[23]. Destroying a place of worship[24], deliberately and maliciously outraging religious feelings, disturbing a lawful religious assembly, trespassing into burial sites or any place wherein funeral rites are performed are in violation of this freedom and penalised under this chapter. Besides, section 505 penalises publications and rumours which prompt one group against other and fosters mutual ill-will. All these criminal acts become a common occurrence during mass violence triggered on religious basis. Often, they themselves are the cause of mass violence.

For instance, demolition of 'Babri masjid' sparked off communal riots across north India. Since, genocide involves systemic destruction of cultural heritage in addition to destruction of group. These provisions may come in handy. However, they remain underutilised even as hate speech continues to be employed to serve the political interests of few.

During mass violence another common occurrence is wanton destruction of property belonging to people of any community against whom the mass violence is directed. For instance, during 1984 Sikh pogroms, shops and houses belonging to people of Sikh community were vandalised and burnt to the ground. For these wrongful acts of destruction, a charge may lie under provisions dealing with offence of "mischief" in IPC. But here also the main issue remains of identifying the perpetrators who commit these acts to fix the liability.

Sexual violence has been used as a tool of war and genocide since antiquity. If one looks at history of genocides across the continents, instances of use of sexual violence with impunity are abound. It is intended to diminish dignity and integrity of the targeted group and to terrorise them. During Rwandan genocide, women of all age groups were subjected to rape by HIV infected men to bring about destruction of the group to whom such women belong[25]. In India,

[23] INDIAN CONST. art 25.
[24] *Supra* note 8 at § 295.
[25] ADAM JONES, GENOCIDE A COMPREHENSIVE INTRODUCTION, 256 (2nd eds. Routledge 2010).

penal provisions dealing with rape are both, expansive and punishable with stringent punishment ranging from minimum long duration imprisonment (10 years minimum in case of rape) to death (Gang rape of minor girl child below 12 years of age). Moreover, there are special acts like POCSO to protect children from sexual abuse, wherein the law raises presumption of guilt against the accused, and it is for the accused to prove his innocence[26] and that too "beyond reasonable doubt".

State complicity through its officers is often witnessed in mass communal violence in India. Their role in such occurrences may be active wherein they aid those who inflict the violence, or passive wherein they choose not to act and render their statutory and constitutional obligations. Bringing these erring officers to justice is hindered by provisions such as section 197 of CrPC which mandates requirement of previous sanction from the concerned government to prosecute them in a court of law. Their behaviour may be attributed to their subservience to the political executive who, as mentioned before, use these pluralistic divisions to further their political ambitions and to secure electoral support based on age-old tactic of 'divide and rule'. Law, however, discourages it.

Section 125 of Representation of People Act has declared promoting hatred, in relation to elections, between different groups based on various identities that they might bear a punishable offence. It is also a ground for disqualification from being chosen as a member of legislature for a period of 6 years. However, presence of a law in law books per se is not a guarantee that these practices could be checked. This makes it imperative to have institutional safeguards in place to protect those who are entrusted with the power to execute these laws.

LACUNA IN LAW AND PURSUIT OF JUSTICE

Numerous instances that have taken place in contemporary India could be clearly classified as acts of Genocide but could not be because the Indian legal system does not provide for any such offence. During the prosecution of the perpetrators of mass violence some common factors emerged like flawed investigations, improper conduct of public prosecutors, state of

[26] The Protection of Children from Sexual Offences (POCSO) Act, 2012 § 29.

impunity, lack of accountability, inordinate delays that provided blanket to the perpetrators to shield criminal liability[27].

Time and again judges have called on the need for changes in the criminal law of the country to include offences for "crimes against humanity" and "genocide". The Delhi High Court in a recent judgment while adjudicating upon a case pertaining to Sikh-riots of 1984 observed that these acts are of such a nature that no existing law address the crime perpetrated[28].

The absence of specific law dealing with such crimes poses a serious challenge in "bringing such criminals to justice." This loophole in the existing criminal law has allowed perpetrators of such crimes to escape the prosecution and punishment for over more than two decades. In majority of cases, some political leaders and police officials who actively participated in the violence were indicted. Multiple committees and commissions were appointed to enquire into the role played by them. Ultimately Nanavati commission in 2005 indicted some of them and recommended re-registration of cases and investigation by Central Bureau of Investigation[29]. This present appeal was also amongst one of them. The political influence in the case was clear from the fact that Trial court acquitted the appellant (Sajjan kumar, local leader from congress party) of all the charges citing the testimonies of the victims and witnesses as unreliable and inconsistent. The court has also reiterated the position laid in *Dinubhai Boghabhai Solanki vs. State of Gujarat* that " the onus to prosecute an accused in instances of crime against humanity where thousands have been brutally murdered and there has been complete breakdown of civil administration has to be entirely on the state and not on the victim[30]".

The importance of Witness protection scheme has been emphasized in almost all communal riot cases. In a case pertaining to Gujarat riots, the apex court has observed that "the state has definite role in protecting the witnesses, it can start the process at least by giving protection in cases of serious offences involving those in power, who has political patronage and could wield muscle power to avert the punishments[31]".

[27] Zahira Habibullah Sheikh *v.* State of Gujarat (2004) 4 SCC 158, see also Jakia Nasim Ahesan v. State of Gujarat (2011) 12 SCC 302.
[28] State Through CBI v. Sajjan Kumar and Ors (2018) SCC Online Del 12930 ¶ 392.
[29] Justice Nanavati Commission of Inquiry 1, 1984 Anti-Sikh riots.
[30] (2018) 2 SCC (Cri) 430.
[31] National Human Rights Commission v. State of Gujarat and Ors., W/P (Cri.) No. 109 of 2003.

In these types of cases witness often turn hostile after being intimidated with life threats. Witnesses play a fundamental role in establishing the guilt or innocence of the accused, in the words of Bentham "witnesses are the eyes and ears of justice" and quality of trial process depends on the testimony of witnesses. The fundamental right to fair trial[32] will be paralysed and truth will become a casualty if witnesses are not protected to depose freely. The establishment of truth and delivering justice is the very reason for the existence of courts. In one of the landmark cases related on Gujarat riots, the Apex court while condemning the role of police officials, public prosecutor and the trial judge observed that:

> "*Justice delivery system was being taken for a ride and utterly allowed to be abused, misused, and mutilated by subterfuge. Criminal trials should not be reduced to mock trials or shadow or fixed trials. Judicial Criminal Administration System must be kept clean, and beyond the reach of whimsical political will or agendas and properly insulated from discriminatory standards or yardsticks of the prohibited by the mandate of the Constitution*".[33]

Where it is apparent that, for some reasons like due to fear or favour witnesses have resiled (turned hostile) from their statements, victims should not be let to their fate. "Trial should be a search for truth and not a bout over technicalities". Though the Indian justice system is adversarial in nature wherein the role of the judge is to give a finding based on evidence adduced before it. But there are some inquisitorial features incorporated in the procedural code which casts a duty on the just to arrive at the just decision of the case[34]. The Indian justice system tilt towards the protection of accused but right of accused cannot be safeguarded at the cost of larger interest of the society and victim.

By the time of prosecution of Gujarat riot cases, National Human Rights Commission had been functioning for the cause of Human Rights for more than ten years. Moreover, the active role played by the Indian supreme court to see that justice is being served by overseeing the investigation helped a lot in securing the convictions and brought some semblance of justice for the victims in comparison to total whitewash of prosecution in 1984 Sikh riot cases. These two developments were a boon to some extent for the victims of Gujarat riot but still it was not able to disclose full-fledged conspiracy involving high political leaders.

[32] Maneka Gandhi v. Union of India, 1978 SCR (2) 621.

[33] *Supra* note 17 ¶ 41

[34] Code of Criminal Procedure, 1973 § 311.

One more extra-ordinary step taken by the Apex court was the transfer of cases and ordered for re-trial of cases. The court observed that the prevailing situations in the state are such that fair trial cannot be conducted and allowed for the for the recording of evidence through video conferencing to ensure the safety of witnesses. Furthermore, the Apex court stayed the trial of nine major cases of carnage[35] and appointed a special investigation team to investigate the same[36]. Apart from this supreme court also ordered for witness protection in the home state i.e., Gujarat as well as in the state where the cases have been transferred. However, despite of taking these pathbreaking measures, the Apex court nowhere in any judgment acknowledged that these cases constitute a different category and could be classified as "Crimes against Humanity or Genocide."

It was done only in the recent Judgment *State Through CBI v. Sajjan Kumar and Ors* wherein the Delhi High Court designated the Sikh riots of 1984 comparable to killings of Armenians by the Turks in 1919. The court also observed that "these cases are extraordinary and require a different approach to be followed by courts[37]". The same Court also noted that similar patterns taken place in the mass killings in Mumbai (1993), Gujarat in (2002), Odisha (2008) and Muzaffarnagar (2013) In the same vein, the Court expressed its dissatisfaction over inadequacy of the domestic legal framework in India to deal with mass atrocities and hence, emphasized upon the need for domestic law on "Crime against Humanity" or Genocide.

Differentiating between the two concepts lies on the point of intention. In genocide there is an element of specific intention (dolus specialis) i.e., intention to kill is accompanied with intention targeted against group. However, in "Crimes against Humanity" there is "systematic attack and widespread on civil population[38]" and charge can be easily proved even without proving the specific intention which is a pre-requisite for Genocide. However, in the instances cited in the last section it was confirmed by the finding of various commissions constituted aftermath of communal violence that violence was indeed targeted against minority communities under the political patronage along with the complicity of law enforcement agency.

[35] *Supra* note 21.
[36] *Id.*
[37] State Through CBI v. Sajjan Kumar and Ors (2018) SCC Online Del 12930 ¶ 387.
[38] *Supra* note 6 at art. 7.

The case study of various mass carnages which have occurred in India and the context in which they have occurred present a plausible ground that there is a need for a specific law on genocide which would not only prevent it from happening, but also, in the event of its occurrence, bring those who are responsible to justice. Letting the perpetrators of these mass violence go scot-free every time without any consequences will undermine the rule of law as well as accountability of the state to its populace. It is true that in the present framework of laws, justice has indeed been secured in some cases. But this transpired for the most part because of the activism of the Supreme Court to uphold the law, but only after a considerable amount of time, sometimes even decades, had elapsed since the occurrence of those incidents. This inordinate delay poses serious questions to the quality of justice meted out the victims. Moreover, dealing with fait accompli situation is itself controversial when the problem could and should have been dealt with at the earliest possible stage.

One reason for the reluctance on part of the government to take note of the need for enacting specific law against Genocide is perhaps due to the Article IV of the Genocide Convention which makes the "Persons committing genocide whether they are constitutionally responsible rulers or public officials." In simple terms, compliance with the Genocide Convention would sacrifice the protection given to public servants from prosecution U/s. 197 of the Code of Criminal Procedure 1973 which provides that prior sanction is needed from the concerned authority before prosecution of any public servants.

It is in the wake of this provision that prosecution of public servants is delayed and prevented in the country. As in Sajjan Kumar judgment Delhi High court had also dropped the charge U/S 505 "statements conducing to public mischief" against him for the want of prior sanction[39]. However, this failure of the government to enact the required law is in clear violation of its Constitutional obligations to enact separate laws in furtherance of its ratification of the Genocide Convention.[40] Art.51(c) of the Constitution of India which States must "foster respect for international law and treaty obligations". Further, Art.253 of the Constitution of India mandates the Parliament "to make any law for implementing any treaty, agreement or convention".

[39] *Supra* note 18 at 314.

[40] Colonel R. Hariharan, *Mass Killings: How About a Law for Genocide*?, INDIA LEGAL LIVE (July 25,2020, 7:03 PM) 2018) https://www.indialegallive.com/viewpoint/mass-killings-how-about-a-law-for-genocide-58702.

It should also be noted that India follows 'dualistic' system in the matter of implementation of international law whereby any treaty to which India is a signatory will not automatically become part of our national law. For this purpose, the parliament will have to enact an enabling legislation under Article 253 of the constitution which obliges parliament to make any law "for implementing any treaty, agreement, or convention.

Also, the principle of prohibition on Genocide has been recognised as part of general international law and constitutes obligations erga omnes[41] and thus India is bound by, besides treaty obligations, the general international law obligations to prevent and punish the acts of Genocide. But as these principles are not self-executory, there is a need not only to render the acts referred to under genocide convention as punishable offences but also require designating or establishing competent tribunal to try them.

The study of struggle for pursuit of justice by the victims of communal violence who have fought for over more than two decades highlight the failure of the legal system to provide adequate remedy in such cases. The most basic argument for a separate law on Genocide is based on the fact that Genocide cannot be rightfully categorised as a simple case of murder or mass killing as it is normally done. The most important aspect that distinguishes genocide from Murder is the intent to harm individuals of a particular national, ethnic, racial, or religious group[42]. None of the provisions of the Indian criminal law take this intent into consideration. Due to the absence of a law on Genocide in the country, all these incidents of mass killings came before the judiciary as individual cases in which evidence are to be led for every charge separately and lose the largest context in which they are committed i.e., to destroy a particular group in whole or in part. Furthermore, the dead bodies of the deceased are often burnt which results in moping off the material evidence. In most cases, the sexual violence as part of the mass crime goes unnoticed.

The reporting of cases as individual cases fails to go to the root of the matter, and only deal with accusations on the individual accused. However, mass killings are not the brainchild of the local goons who carry out the attacks. More often than not, there are high level perpetrators behind such incidents, on the instructions of whom the acts of murder and homicide are

[41] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (1970) ICJ Rep 3 ¶ 23.

42 Sentinel Project, *Uncovering the Components and Elements of Genocidal Acts*, SENTINEL PROJECT (Aug 1, 2020, 11:05 A.M) https://thesentinelproject.org/2013/05/08/uncovering-the-components-and-elements-of-genocidal-acts/.

committed. In dealing with such cases in criminal law, it becomes difficult to establish the role of such persons as they are seldom present in the unlawful assembly or are seldom seen by anyone as abetting or aiding the crimes. However, their presence cannot be established in each individual case and hence it is nearly impossible to convict them. For example, in Sikh riot cases no high-level politician was even indicted. Cases were filed against local leaders who encouraged the violence by giving hate speech and were seen by the victims and witnesses at the crime[43] scene but these were mere individual cases for offences under the IPC, in which most of the accused were acquitted, the only political conviction has been of Congress leader Sajjan Kumar, who was imprisoned for life in the 1984 anti-Sikh riots case.[44] However, there is still no way to be sure that there weren't many others involved who were not even reported due to lack of witnesses or hostiles witnesses. If all these incidents would have been treated as Genocide, a proof of the 'specific intent' of attacking a particular group, coupled with their involvement in even a limited number of crime scenes would have made these individuals liable for Genocide. In other words, a law on Genocide would have been able to capture the hate-building process and those involved in it. They would thus be punished not for petty offences related to abetment or aiding, but for the unlawful acts and deaths caused during the Genocide.[45]

Treating these mass killings as murders means that victims are either not sufficiently, or in some cases not at all, repatriated or compensated. There is also a need for witness protection which is seldom to be got if these incidents are treated as mere criminal offences.[46] By treating the victims as victims of riots, no steps are taken for their rehabilitation and reintegration.

The investigations into the role of the State are conducted by committees formed by the State itself which raises serious doubts on their impartiality. Further, these committees take years to submit a report, where in the end they exclude any liability on part of the State. A classic example of this can be seen in the Godhra riots case where the Justice Nanavati-Mehta Commission, which was formed in 2002, submitted its report as late as in 2008, in which it

---

43 MANOJ MITTA & HS PHOOLKA, WHEN A TREE SHOOK DELHI, 49 (Lotus Roli Books 2008).

[44] State Through CBI v. Sajjan Kumar and Ors. (2018) SCC Online Del 12930.

[45] *1984 Anti-Sikh Riots: Crimes Against Humanity, Genocide Not part of Criminal Law, Notes HC*, The week (Aug3,2020,1:05A.M)https://www.theweek.in/wire-updates/national/2018/12/17/lgd25-dl-hc-riots-genocide.amp.html

[46] Aditya P Arora, *Genocide- An Indian Perspecti*ve, LAWCTOPUS (Aug 2,2020, 5:07 P.M) https://www.lawctopus.com/academike/genocide-indian-perspective/

ultimately gave a clean chit to the Modi government and its allies regarding any involvement in the riots. It is to avoid these instances of delay and possible biased and unfair decisions, that the Genocide Convention in Art.VI provides for the formation of an independent tribunal to investigate acts of Genocide.

In the absence of a law on Genocide, mass killings are looked at as individual offences of Murder, Unlawful Assembly and Rioting under the IPC wherein each element of the crime must be proved or securing conviction. For instance, the charge of Murder is reduced to culpable homicide if intention is not proved. In IPC all the crimes committed in the wake of destroying the other community are punished inadequately, with even lesser punishment for the abetment or aid of such crimes. The crime of Genocide on the other hand looks at all elements of these incidents together and thus carries the same amount of punishment for each element.[47] The non- recognition to the wrong done to a community as a whole play down the sufferings and trifles the severity of the acts committed. For instance, the Babri Masjid and Godhra Riots have been subdued as mere law and order situations.[48]

Hence, now is the right time for the Indian government to immediately take steps towards the enactment of a domestic Genocide law for the country and fulfil its obligation under the Genocide Convention. Many countries that ratified the Genocide Convention have enacted domestic laws either specifically on Genocide or on international crimes in general. The government thus has various legislative models and techniques to base its own law on. Whatever model the government chooses, it should ensure punishment for all perpetrators of Genocide, whether individuals or groups, irrespective of their political standing.[49]

One reason for the reluctance on part of the government to take note of the need for enacting specific law against Genocide is perhaps due to the Article IV of the Genocide Convention which makes the "Persons committing genocide whether they are constitutionally responsible rulers or public officials." In simple terms, compliance with the Genocide Convention would sacrifice the protection given to public servants from prosecution U/s. 197 of the Code of Criminal Procedure 1973 which provides that prior sanction is needed from the concerned

[47] Ankita Guru, *Need for Law on Genocide in India: In Light of India's Obligation to the Genocide Convention 1948*, 2 RSRR (2015).
[48] *Id.*
[49] *Id.*

authority before prosecution of any public servants. It is in the wake of this provision that prosecution of public servants is delayed and prevented in the country.

As in Sajjan Kumar judgment Delhi High court had also dropped the charge U/S 505 "statements conducing to public mischief" against him for the want of prior sanction[50]. However, this failure of the government to enact the required law is in clear violation of its Constitutional obligations to enact separate laws in furtherance of its ratification of the Genocide Convention. Art.51(c) of the Constitution of India which States must "foster respect for international law and treaty obligations". Further, Art.253 of the Constitution of India mandates the Parliament "to make any law for implementing any treaty, agreement or convention".

The constitution of India specifically prohibits identity-based discrimination[51] and guarantees the linguistic and religious minorities, fundamental right to preserve their culture.[52] These rights are considered pivotal because of the heterogeneous nature of Indian society. It helps the distinct groups to preserve their diverse culture and to realize the ideal of united India. However, the irony is that the same argument of diverse nature of Indian society is raised whenever any step-in furtherance to bring a law to address this issue is taken.

For example, when Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011 was introduced the same was criticized on the ground that it will divide the citizens into minority and majority groups and will further widen the gap of harmony within different communities[53]. However, this argument is not tenable because bringing up of law with severe punishments will have a deterrent effect on the people. The law will make people tolerant of another religion as well as prohibits the political actors as well to take unfair advantages of communal difference to serve their political ends.

At first place, every member of a group is an individual. The preamble of "India's secular, democratic Constitution guides the guides the people of the nation to promote fraternity and to have respect for human dignity". The Protection of the human dignity of every person

[50] *Supra* note 3 ¶ 314.

[51] INDIAN CONST. art. 14,15,16.

[52] INDIAN CONST. art. 29.

[53] Ram Jethmalani, *Communal Violence Bill is vicious, will divide society*, INDIA BEHIND THE LENS, (13, Aug. 2020, 6:08 A.M) http://www.ibtl.in/news/national/1279/communalviolence-bill-is-vicious—will-divide-society?ram-jethmalani

regardless of his or her gender, class, religion, race, ethnic group forms the essence of the whole corpus of human rights law.

In modern times, this principle has become *raison de' etre* of human rights law[54] and seeks to protect human beings from extreme human atrocities and violence on their personal dignity. The introductory sentence of the universal declaration of human rights "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" is a mighty achievement against the mass destruction and human rights violations that have marked human history. Human dignity is integral to the Right of life[55] and prevention of the crime of Genocide forms an important aspect of Right to Life. Article 21 of Indian Constitution provides that "right to life and personal liberty shall not be deprived of any person" and1 when this deprivation is on a larger scale, as in case of Genocide, this wrong is aggravated and puts a question mark on the legal system that seeks to uphold this right.

Many countries have introduced a law to prohibit the crime of Geocide. For example, Britain has enacted a law on this subject matter since 1969 in pursuant to its international obligation under Genocide Convention. It was repealed by the International Court Act, 2001 to incorporate offences recognised under Rome statute into its municipal law. It lays down legal framework for arrest and delivery of persons accused of offences like genocide, war crime, crimes against humanity to ICC and to enable incarceration of those who are convicted by the ICC in prisons of United Kingdom. Section 57 of the Act makes such protections to the victims and witnesses as would be available to victims of sexual offences which may include limitations on access to defendant. It also recognises the command responsibility under the act.

As India has adopted so many changes in its law following the foreign jurisdictions including Britain, the adoption of law following the Britain law would be a remarkable step by the India as Britain has regularly revised its law as per the ICC requirements.

[54] Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239 (2000).
[55] Francis Coralie Mullin v. Administrator, Union Territory of Delhi A.I.R. 1981 S.C. 746.

RECOMMENDATIONS

INDIA SHOULD RATIFY ROME STATUTE

The primary purpose of the International Criminal Court established under the Rome statute is to establish a culture of accountability by putting an end to the impunity to offenders of egregious crimes against mankind. This epoch-making event in world history was welcomed by majority of states but unfortunately India abstained to vote in favour Court's founding instrument. This has resulted in the foregoing of last hope whereby even if a state does not recognise the crime of genocide under its domestic jurisdiction, the perpetrators can still be tried by this international court.

RECOGNISING THE CRIME OF GENOCIDE AND REVERSE BURDEN CLAUSE

The primary function of Law is to regulate the relationship among various actors. It seeks to redress the wrongs and to restore the balance in society. Time and again, the legislature as well as Judiciary have recognised the interrelationship between law and society and have changed the law as per the needs of the society. The Dowry Prohibition Act of 1961, The Narcotic Drugs and Psychotropic Substances Act, 1985 and Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 are such examples where special legislations has been enacted to tackle the growing social problems of the society. One remarkable feature of these special laws is reverse burden clause.

In criminal law, generally the burden of proof is on the prosecution to prove its case against the accused "beyond reasonable doubt" but in these legislations this burden has been reversed which casts a duty on the accused to satisfy the court that he has not committed the crime. The presumption of innocence which maintains pivotal position in criminal law has been shifted to presumption of guilt. Law Commission also in its 47th report on socio-economic offences recommended that some offences create such a negative impact in society that it is necessary to implement 'reverse burden clause' with respect to such offences. Secondly, it creates a deterrent effect in the society and people refrain from committing such offences. The same recommendations were given by the Malimath Committee which was constituted in the year 2003 to suggest reforms to revamp the criminal justice system.

5.1.3 TRUTH AND RECONCILIATION COMMISSION:

The reason for establishing truth and reconciliation commission is to reveal the truth of the past human atrocities and to bring about a reconciliation amongst the conflicting groups. its purpose distinguishes it from other commissions of enquiry. Its primary aim is not to prosecute the perpetrators. It runs on the restorative model i.e., including reconciliation, compensation, reparations etc. rather than retributive i.e., concerned with the prosecution only.

In India, after every instance of criminal violence, a commission of enquiry was constituted under the Commissions of Enquiry Act 1952. The terms of the reference of the commissions were very limited such as to investigate the role of some actors and to give suggestions for indictments. Under existing scheme of the legal framework, the victims can merely prosecute the offenders under the provisions of IPC. However, retribution is not the true case of justice for Genocide. The crime of Genocide is the result of extreme hatred and intolerance that exists amongst the groups. Therefore, it requires long-term solutions. The establishment of Truth and Reconciliation Commissions offers for long-lasting peace because first condition of reconciliation is acknowledgement of victim's sufferings[56]. The reconciliation efforts guarantee the "Never again promise" which is not a possibility in criminal prosecutions that tend to generate the feelings of revenge.

NEED FOR AN EFFECTIVE REMEDY

It is often observed that crime of Genocide accompanies with it the offence of Ethnic cleansing i.e., forced disappearance of persons. There is no provision in the IPC about it which reflects that existing framework does not provide for effective remedy. This is in clear violation of the India's obligation under the International Covenant on Civil and Political Rights (ICCPR) which recognizes the right to effective remedy[57].India has ratified the convention as well as the additional protocols attached to the convention.

The basic framework of remedies that the State should ensure to the victims of gross violations is disaggregated under Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights law and Serious

[56] Surabhi Chopra, *Massacres, Majorities and Money: Reparation after Sectarian Violence in India,* 4 Asian JLS 157 (2017).

[57] International Covenant on Civil and Political Right (1996), 999 UNTS 171, art 2.

Violations of International Humanitarian Law adopted by the United Nation General Assembly. This casts a corresponding obligation on the state to provide "adequate, effective and prompt reparation". The principle of reparation includes – restitution, compensation, rehabilitation, and satisfaction[58]. All this combined provides for a proportionate remedy for the Crime of Genocide.

The need has been time and again pointed out by the judiciary; however, India continues to evade its responsibility of enacting the law in clear violation of its Constitutional and international obligations. Although, a Genocide law, even if enacted now will not be applied retrospectively as per the provisions of the Genocide Convention; this in no way lessens its need. Enactment of the law and establishment of a specialised tribunal which accepts and reconciles what happened, may to some extent relieve the victims of such crimes. More importantly, given the religious, cultural, and ethnical differentiations in India, it would be hard to rule out the possibility of such mass killings happening in the future. Thus, India must do away with the myth the current laws are sufficient and take immediate steps to upgrade its criminal law regime, lest another Genocide might go unpunished in the country.

[58] *Supra* note 22.