

# NEED FOR LAW ON GENOCIDE IN INDIA: IN THE LIGHT OF INDIA'S OBLIGATION TO THE GENOCIDE CONVENTION, 1948

- Ankita Guru \*

## ABSTRACT

*"We too will find ourselves unable to look our own children in the eye, for the shame of what we did and didn't do. For the shame of what we allowed to happen."*<sup>1</sup>

*The killing of Sikhs in 1984 after the death of the then Prime Minister Indira Gandhi, solely based on their religious identity has long been disputed as to whether would amount to a genocide of the Sikhs or not.<sup>2</sup> The Babri Masjid and Godhra Riots of 1992 and 2002 have been subdued as a law and order situation. Within the secular trough of the largest democracy there exists, a not so tolerant history among the religious and racial communities. In absence of a law on genocide such grave offences against humanity have been hushed in India time and again. India has failed to fulfill its obligation to enact a national law on genocide to prevent and protect its citizens, religious minorities and vulnerable groups against the crimes of genocide. What has been more shocking is the acts have gone unpunished due to lack of evidences demanded by the national law, as it treats acts of genocide as mere individual acts, punishable under various sections of the Indian Penal Code. Today, we continue to live in a polarized country, where the bomb of holocaust is to explode time and again and the rest of the humanity except the offenders shall be put to shame again and again.*

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<sup>1</sup> Arundhati Roy, *The Algebra of Infinite Justice*, (2002).

<sup>2</sup> United States based advocacy group Sikhs for Justice have filed a petition before the United Nations Human Rights Commission in Geneva to launch investigation in the 1984 killings of Sikhs which should be considered as genocide and not rioting. The petition says it was a systematic killing of Sikhs with complicity and participation of government. See *Internationalising the 1984 riots*, The Hindu, available at <http://www.thehindu.com/opinion/op-ed/internationalising-the-1984-riots/article5415029.ece>, last seen on 15/4/2015.

## 1. UNDERSTANDING GENOCIDE AND OBLIGATION OF STATES TO PROTECT

### 1.1. *What is Genocide?*

The world had never seen as ugly a face of mankind as in the wake of the Second World War, when the Nazi's committed holocaust of the Jews on the orders of Adolf Hitler.<sup>3</sup> Winston Churchill remarked that the world was being faced with a crime without a name.<sup>4</sup> In 1944 the term 'genocide' was coined by Raphael Lemkin for the 'acts of barbarity' committed against the Jews.<sup>5</sup> The need for punishing these perpetrators of the gravest crimes against mankind led to the creation of the Nuremberg Tribunal. The Tribunal did not define the crime of genocide but made killings and persecution of civilians based on religious, racial and political identities punishable.<sup>6</sup> The term of 'genocide' was included in the indictment but not as a legal term.<sup>7</sup> This led to the UN General Assembly Resolution 96(I) in 1946 to adopt the Convention on the Prevention and Punishment of Genocide. The resolution affirmed that the crime of genocide is of international concern. The preamble to the convention adopted on 9<sup>th</sup> December, 1948 states that genocide is a crime under International law and should be condemned by the civilized world. It has wreaked havoc on humanity and has led to great losses and therefore international cooperation is sought to liberate mankind from such an 'odious scourge'.<sup>8</sup>

The Article II of the Genocide Convention defines the crime of genocide as:

Article II: In the present Convention, 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:

- i. Killing members of the group;

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<sup>3</sup> Dr Steve Paulsson, *A View of the Holocaust*, available at: [http://www.bbc.co.uk/history/worldwars/genocide/holocaust\\_overview\\_01.shtml](http://www.bbc.co.uk/history/worldwars/genocide/holocaust_overview_01.shtml), last seen on 15/4/2015.

<sup>4</sup> Leo Kuper, *Genocide, Its Political Use in Twentieth Century*, (1981).

<sup>5</sup> *Introductory note on Convention on the Prevention and Punishment of the Crime of Genocide*, *Audivisual Library of International Law*, available at <http://legal.un.org/avl/ha/cppcg/cppcg.html>, last seen on 15/4/2015.

<sup>6</sup> Ibid.

<sup>7</sup> *Origin of the term "Genocide"*, Holocaust, available at <http://www.ushmm.org/confront-genocide/defining-genocide>, last seen on 15/4/2015.

<sup>8</sup> Supra note 6.

- ii. 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;
- iii. Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.

The following acts are made punishable under the convention as prescribed under Article III.

Article III: The following acts shall be punishable:

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

This definition of genocide is also found in the charter of International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) under Article 4 and Article 2 respectively. The ICC Statute also defines the crime of genocide under Article 6 of the Roman Charter, 2002.

The essential element of the crime of genocide is the specific intent or 'dollar specialis' to destroy a targeted group in whole or in part. The specific intent is to bring the destruction of this target group through a systematic planned attack. The acts that constitute genocide like killing, murder, extermination are done with an underlying intention to bring about the destruction of the group.<sup>9</sup> A person might have an intention to

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<sup>9</sup> G.H.Stanton, *The Eight Stages of Genocide*: Stanton has formulated eight stages of genocide in order to infer the specific intent behind a genocide. These eight stages in an increasing order are: Classification, Symbolisation, Dehumanisation, Organisation, Polarisation, Preparation, Extermination and Denial: available at: <http://www.genocidewatch.org/genocide/8stagesofgenocide.htmlw>, last seen on 15/4/2015.

kill, murder, exterminate but unless such underlying intention is present to direct all these acts of offences towards commission of genocide, the specific intent cannot be proved. The ICTY in Jelisić Case<sup>10</sup> noted that it is the mens rea which gives genocide its speciality and distinguishes it from ordinary crime and other crimes against international humanitarian law. The ICTR also in the case of Akayesu<sup>11</sup> defines specific intent as constitutive element of the crime of genocide, which demands that the perpetrator clearly seeks to achieve through its acts the offence charged of. Since, it is difficult to prove this specific intention to commit genocide in absence of confessions the intention is inferred from the facts.<sup>12</sup>

The Convention punishes killing of the members of a group directly or actions leading to such deaths. Deliberate deprivation of means to sustain life and resources needed for survival which ultimately brings destruction of the group like restriction on food, shelter, clean water, widespread torture, rapes also amount to genocide. Prevention of births in the group by forced sterilization, castration etc. also amount to genocide as this leads to extinction of the particular group over a span of time. Therefore, commission of any of these acts under Article II with intention to destroy a national, religious, racial and ethnical group in whole or any part amounts to genocide.<sup>13</sup> The destruction of the group can be aimed at whole or in a particular geographical area or territory; region of a country and a municipality can also be characterized as genocide.<sup>14</sup>

## ***1.2. Obligation under the Convention on the States***

The Convention under Article V places an obligation on the parties to the convention to enact national legislation on genocide in accordance to their respective constitution to give effect to the provisions of the Convention and to effectively punish and attach penalty under domestic jurisdiction on persons guilty of genocide or the associated acts under Article II and III respectively.<sup>15</sup>

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<sup>10</sup> IT-95-10.

<sup>11</sup> ICTR-96-4-T.

<sup>12</sup> Ibid.

<sup>13</sup> *What Is Genocide?*, Genocide Watch, available at <http://www.genocidewatch.org/genocide/whatisit.html>, last seen on 15/4/2015.

<sup>14</sup> ICTY in Krstić case, IT-98-33-T, 2001.

<sup>15</sup> Article 5 of the Genocide Convention enshrines that “*The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the*

Article VI provides that the persons charged with genocide shall be tried by a competent tribunal of the State in whose territory the acts were committed and in cases where two contracting parties are involved by such international penal tribunal to whose jurisdiction both the parties submit themselves.<sup>16</sup>

The domestic prosecution of perpetrators of genocide has become the subject of International interest and not merely matters of national significance. Failures to enact national legislations on genocide have international impact. In April 1999, the Rwandan Mayor Fulgence Niyonteze could not be held liable for genocide when he was tried in Swiss courts as Switzerland did not recognise 'genocide' as a separate offence and had no national laws or legislations punishing the acts of genocide.<sup>17</sup>

Many states like United States have a domestic legislation or law for genocide. Under Chapter 50 A of the US Code Section 1091 defines the offence of genocide. It states that whoever, whether in time of peace or in time of war and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such kills members of that group; causes serious bodily injury to members of that group; causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques; subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part; imposes measures intended to prevent births within the group; or transfers by force children of the group to another group; or attempts to do so, shall be punished in case of death by death or life imprisonment and in other cases, to an imprisonment of not more than twenty years and with a fine or only with a fine of not more than \$1,000,000. The law also attaches penalty for direct and public incitement of genocide. The provision is applicable on persons committing genocide within the United States or

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*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 3”.*

<sup>16</sup> Article 6 of the Genocide Convention enshrines that “Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

<sup>17</sup> *Implementing the Genocide Convention in Domestic Law*, Prevent Genocide International (Human rights advocacy group working for prevention of genocide), available at <http://preventgenocide.org/law/domestic/index.htm#asia-pacific>, last seen on 15/4/2015.

on the nationals of the United States committing such offences elsewhere. Countries like Australia, Switzerland, and Bangladesh also have special Act implementing the ratified Convention of Genocide in their domestic laws.

India ratified the Genocide Convention on August 27<sup>th</sup>, 1959. The International Court of Justice (ICJ) in its Advisory Opinion on the Reservations to the Genocide Convention Case<sup>18</sup>, 1951 has ruled that the “principles underlying the Convention are principles which are recognized by the civilized nations as binding on the states, even without any treaty or conventional obligations”. The crimes like genocide, crimes against humanity and war crimes have become part of the general international law. The ICJ in the Barcelona Traction Case<sup>19</sup>, 1970 stated that “By their very nature, the outlawing of genocide, aggression, slavery and racial discrimination are concerns of all states”. All states have a legal interest in their protection and their prevention is therefore obligation against the entire world i.e. *erga omnes*.<sup>20</sup> Prof. V.S.Mani in his article on *Needed, a Law on Genocide*<sup>21</sup> states that India is bound by the general principles of International law and by its obligation as under the Genocide Convention to enact a national legislation on genocide. He draws four reasons as to why it has become absolutely important to enact a domestic law on genocide drawing a parallel analogy as to the reason for enacting laws on terrorism. He states that India as a member of the United Nations had a legal obligation to enact a specific law on terrorism, in accordance with the resolutions of the U.N. Security Council adopted in 2001. Second, terrorism as a special category of crime required a special law to deal with. Third, only a special enactment could have a deterrent effect on terrorism. Fourth, such a law was necessary to protect the territorial integrity and moral fabric of the country. For the same reasons a law to protect and prevent genocide should be immediately enacted in India. Firstly, as India is a party to the Genocide Convention and is bound by the obligation to prevent and punish genocide. Secondly, as per the obligations under the Convention India has a duty to enact necessary legislation to give effect to the provisions of the Convention and to provide for penalties to the

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<sup>18</sup> 1951 I.C.J. 15.

<sup>19</sup> Belgium v. Spain, 1970 I.C.J. 3.

<sup>20</sup> Prof. V.S Mani, *Needed, a law on genocide*, The Hindu, (10/04/2002), available at <http://www.thehindu.com/2002/04/10/stories/2002041000251000.htm>, last seen 15/4/2015.

<sup>21</sup> Ibid.

persons guilty of genocide. Thirdly, it has a duty to punish the perpetrators of genocide by creation of competent tribunals.<sup>22</sup>

In spite of ratifying the Convention in 1959 India has till date not enacted any law on genocide. It has failed to fulfill its obligation under Article 51(c) of the Indian Constitution which “fosters respect for international law and treaty obligations”. The non self executing treaties are to be made part of the domestic law by enacting laws by the national legislatures to meet the treaty obligation which India has failed to meet in respect of the Genocide Convention.

This failure implies that there can be no prosecution in domestic courts of India of any person accused of committing genocide, as Indian law does not recognize genocide as an offence. Therefore, persons accused of perpetrating genocide in India or Indian citizen committing genocide abroad cannot be tried by the national courts under the Convention. India not being a signatory to International Criminal Court also protects such perpetrators of genocide residing within its territory from the jurisdiction of the ICC. Therefore, the only remedy which could be obtained is by filing a case in some other country which recognizes universal jurisdiction over crimes of genocide. Like cases regarding 1984 and 2002 communal riots being filed in USA to be recognized as crime of genocide.<sup>23</sup>

## 2. NEED FOR GENOCIDE LAWS IN INDIA

In absence of specific legislation to punish genocide and acts of genocide lot of atrocities has been committed in India. There are eight stages of genocide identified by G.H Stanton to understand and prevent genocides. The first and second stages are that of Classification and Symbolization. The Indian Society itself is marred by various religious, cultural and ethnical differentiations. The most highlighted of all are the religious and ethnical differences. Our societies and life styles are easily identifiable by our religion which has strong bearing on our social lives. Hindus, Muslims, Christians and Sikhs are distinctly classified religious

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<sup>22</sup> Ibid.

<sup>23</sup> *US refuses to declare 1984 riots in India as genocide*, PTI, available at <http://www.ndtv.com/article/india/us-refuses-to-declare-1984-riots-in-india-as-genocide-349116>, last seen 15/4/2015.

groups in India and time and again there have been reported communal clashes between these groups.<sup>24</sup>

The Genocide Watch in its report on India states that India is a diverse country with polarization based upon religious, regional, caste and economic background.<sup>25</sup> Dehumanization which is third stage of genocide is prevalent among religious groups in India for political reasons. Hate speeches by leaders of RSS, VHP, Majlis-e-Ittehadul Muslimeen etc has been a common phenomenon in India further pushing us towards a polarized society with hatred brewing among religious groups.<sup>26</sup> Further, attack on sacred centres of one religious community by the others is seen as polarizing India into two distinct religious groups of Hindus and Muslims. Like the 1992 demolition of Babri Masjid to proclaim the birth place of Lord Rama by Hindus and the celebration of the kar sevaks after the demolition, fired communal riots in Bombay in 1992-93 between Muslims and Hindus.

India has a list of communal violence like that of the 2002 Hindu Muslim riots in Gujarat, the 2012 killings of Assamese Muslims, Killing of Christians in Odisha and the ethnic cleansing of the Kashmiri Pandits from the valley.<sup>27</sup> Due to these existing differences, the Genocide Watch classifies India in the fifth category of Genocide Polarisation.<sup>28</sup>

### **3. CASE STUDY ON THE 1984 KILLING OF THE SIKHS: A GENOCIDE**

#### ***3.1. Nanavati Commission and determination of events in the 1984 riots***

The Nanavati Commission Report, 2005 conducting investigation in the 1984 riots, in the wake of assassination of the then Prime Minister

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<sup>24</sup> Communal riots between Hindus and Muslims at time of partition in 1947, the killing of Sikhs in 1984, 2002 killings of Muslims in Gujarat.: available at <http://www.genocidewatch.org/india.html>, last seen on 15/04/2015.

<sup>25</sup> Ibid.

<sup>26</sup> Latest of such speeches came from Pravin Togadia inciting Hindu mobs to forcefully take over Muslim land as these cases shall go unpunished and also to use various force against them if necessary. Pravin Togadia under fire for hate-speech, RSS says he didn't say that, The Indian Express (21/04/2014), available at <http://indianexpress.com/article/india/india-others/prevent-sale-of-property-to-muslims-pravin-togadia/>, last seen 15/4/2015.

<sup>27</sup> Chapter II, Sri Krishna Commission Report on Demolition of Babri Masjid.

<sup>28</sup> G.H.Stanton, Genocide Watch: *India, Those Who Own the Past Own the Future.*

Indira Gandhi states that a large number of Sikhs were killed in these riots. The official record states that 2773 Sikhs were killed in Delhi between 31.10.1984 and 7.11.1984. The report suggests that in the riots that broke out after the death of Indira Gandhi the Sikhs were targeted, as she was assassinated by her Sikh body guards. During this period various gurudwaras in Delhi were attacked and Sikhs were killed on roads and by dragging out of their homes. The Nanavati Commission Report finds mention therein of the leaders of Congress like Kamal Nath, Jagdish Tytler and Sajjan Kumar against whom some witnesses had deposed. But such witnesses turned hostile later on and no cases were filed in the courts in most cases and some were disposed due to lack of evidences. The report suggests that the 1984 killing of the Sikhs was not an isolated communal riot but culmination of events taking place in Punjab since the 1981. The killing of Hindu's by Sikh separatists had triggered a revenge killing of the Sikh's to teach them a lesson.<sup>29</sup>

Though the initial outbreak of violence could be termed as spontaneous reaction of the people on killing of Indira Gandhi by two Sikh bodyguards but the events in the following days as inferred from the statement of the witnesses and evidences examined by the commission, shows it to be a planned attack on the Sikh and their settlements. Persons who carry out attacks and violence were contacted to carry out such attacks and the gradual supply of arms or weapons and substances like kerosene to the mob in the following days show an organized plan to eliminate Sikhs from their areas of settlement in Delhi.<sup>30</sup> Meetings were held, plans were laid down and instructions were given to identify Sikh shops and houses and to loot them. The killings had a common pattern in which the male Sikhs were taken out of the house, beaten and burnt alive. A tyre was placed around the head and burnt with kerosene, petrol or a white inflammable powder. There appeared to be a systematic pattern in these killings with the mob shouting anti-Sikh slogans. The evidences collected by the Commission showed involvement of local Congress leaders. Though the commission could not find enough evidences to prove the involvement of any big leaders and therefore could not suggest any action against them. Commission recommended the Government to take actions against Jagdish Tytler and Sajjan Kumar

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<sup>29</sup> Overall Consideration, Nanavati Commission Report (2005), available at: [http://www.mha.nic.in/hindi/sites/upload\\_files/mhahindi/files/pdf/Nanavati-I\\_eng.pdf](http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/Nanavati-I_eng.pdf), last seen on 15/4/2015.

<sup>30</sup> Ibid.

two Congress leaders against whom it found incriminating evidences of organizing the mob to kill Sikhs.<sup>31</sup>

### ***3.2. Not Riots but planned 'Sikh Genocide'***

The facts stated above point out that there was classification and symbolization of the Sikhs, as the violence was directed towards one particular religious group. The Sikhs could be easily identified because of their appearance and dressing, with a beard and a turban. There was dehumanization and polarization caused by anti-Sikh sentiments and revenge killings for what happened in Punjab. The killings were directed at Sikhs in particular and they were executed in a systematic pattern which shows planning and organization of the mob. Their houses and shops were identified and gurudwaras were attacked. The mass killings were not done as a spontaneous reaction of a mob or unlawful assembly but in execution of a common plan to eliminate the Sikhs systematically. This shows that it was not a case of rioting under Section 146 of the Indian Penal Code which merely says about use of violence by an unlawful assembly. But, an episode of genocide happened wherein the systematic elimination of Sikhs were carried out with an intention to destroy them in particular. There was Organisation, Planning and Preparation wherein the Sikhs were identified and targeted along with Extermination which amounts to the eight stages of Genocide as discussed earlier.<sup>32</sup> The extermination of the Sikhs carried out in such a way as to mutilate their bodies by burning, are manifestation of an intention of directing violence against the Sikhs. So, as to destroy them and reflects an extreme sense of hatred and revenge against this religious group.

The commission found congress leader like Sajjan Kumar and Jagdish Tytler involved in such violence as well as complacency and complicity of various police force officers who did not act and allowed such mob rioting to escalate. However, due to lack of evidences against Jagdish Tytler the C.B.I gave him a clean chit in 2009 due to insufficiency of evidences. However, recently the Delhi High Court has ordered CBI to

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<sup>31</sup> See supra note 26.

<sup>32</sup> G.H.Stanton, *The Eight Stages of Genocide*: Stanton has formulated eight stages of genocide in order to infer the specific intent behind genocide. These eight stages in an increasing order are: Classification, Symbolisation, Dehumanisation, Organisation, Polarisation, Preparation, Extermination and Denial, available at <http://www.genocidewatch.org/genocide/8stagesofgenocide.html>, last seen on 15/04/2015.

reinvestigate and open a case against him as there appears to be evidence which has not been examined. Witnesses who had filed affidavit before the Nanavati Commission and have testified against Tytler were asked by the court to be examined by the CBI.<sup>33</sup> Sajjan Kumar was acquitted in one of the cases filed against him while the rest three are still pending. In one of such cases he faces charges of murder, rioting and promoting hatred among communities which lead to the killing of six Sikhs.<sup>34</sup> It has been 30 years since the Sikh Genocide but the perpetrators have not been brought to justice yet. Various Non-Governmental Organisations have been working for the victims towards securing justice and to punish those responsible for instigating and organizing such mass killings of the Sikhs.<sup>35</sup>

#### 4. NEED FOR RECOGNIZING ACTS OF 'GENOCIDE' AND ENACTING A DOMESTIC LAW

##### *4.1. Effects of Denial of Recognition of Acts of Genocide*

Lack of a law on genocide makes it more difficult for the victims to get justice. These violence inflicted on a group is not seen as a larger picture to bring their destruction in whole or in part but as mere individual offences like murder under section 302 coupled with Criminal Conspiracy, Unlawful Assembly and Rioting if carried out by a mob of people. Lack of recognition of genocide as a crime makes it difficult to book the perpetrators for their acts of barbarity as they are booked for individual crimes like murder, rioting etc. which is often disposed of due to lack of evidences. As the *actus reus* of these crimes are not carried out

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<sup>33</sup> *Delhi court reopens 1984 riots case against Tytler*, The Hindustan Times (10/04/2013), available at <http://www.hindustantimes.com/india-news/newdelhi/delhi-court-reopens-1984-riots-case-against-tytler/article1-1040274.aspx>, last seen on 15/4/2015.

<sup>34</sup> *1984 Anti-Sikh Riots Case: SC rejects Sajjan Kumar's plea, asks him to face murder trial*, The Times of India (3/12/2013), available at <http://timesofindia.indiatimes.com/india/1984-anti-Sikh-riots-case-SC-rejects-Sajjan-Kumars-plea-asks-him-to-face-murder-trial/articleshow/26781065.cms>, last seen 15/4/2015.

<sup>35</sup> Amnesty International, Chaurasi Ki Na insaafi, Sikhs for Justice and other campaigns urge Government to bring to Justice the real perpetrators behind 1984 killings. The Sikhs for Justice and other interested human rights group have filed a petition before the UNHCR to initiate investigation in the 1984 killings of the Sikhs and to recognize it as genocide while the Indian government fails to bring to justice the perpetrators. Amnesty Campaign is available at <http://www.amnesty.org.in/action/detail/demand-justice-for-1984>, last seen on 15/4/2015.

by the actual perpetrators of the genocide but by low level rioters or local goons and due to lack of evidences it becomes difficult to show complicity of the high level perpetrators of genocide in each of the FIR registered cases. At most these high level perpetrators are charged only with inciting violence. Therefore, there is a need to introduce a national legislation on genocide and to establish a national tribunal in the wake of such genocidal killings in India. So that, persons who perform the *actus reus* of the genocide as well as the high level perpetrators on whose plans such genocides take place are charged with crime of genocide in furtherance of intention to cause destruction of a religious, racial, national or ethnical group and not with mere individual offences under the penal code. In absence of a domestic law on genocide, the punishment and charges leveled are those which are commonly used for other crimes which take place every day and as such, the barbarity of crimes like genocide evade punishment.

The ‘Denial’<sup>36</sup> of genocide has huge consequences. Denial harms the victims and their survivors.<sup>37</sup> The non-recognition of Armenian Genocide by the Turkish government is described as double killing by the survivors. Recognition of the crime of genocide is a healing closure to an open wound. Denial leads to crippling of victims into hardened revenge seekers without any chance of reconciliation.<sup>38</sup> Denial also harms the perpetrators and their successors.<sup>39</sup> G.H Stanton states that “studies by genocide scholars prove that the single best predictor of future genocide is denial of a past genocide coupled with impunity for its perpetrators. ‘Genocide Deniers’ are three times more likely to commit genocide again than other governments.”<sup>40</sup> Therefore, the cycle of killing and revenge between groups shall go on. Denial does not serves the purpose with which India ratified the Genocide Convention, i.e. “never again”; it shall continue to be “again and again” till denied.

The insufficiency of the Government to recognise such killings as genocide leaves the victims with no justice against the fate that befalls them. With no reparation of the victims, no restorative justice the cycle of revenge and killings continue. Mere compensation is not justice for the victims.

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<sup>36</sup> G.H.Stanton, *The Eight Stages of Genocide*. See supra note 33.

<sup>37</sup> G.H.Stanton, *The Cost of Denial*, available at <http://www.genocidewatch.org/aboutus/thecostofdenial.html>, last seen on 11/6/2015.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

#### ***4.2. Need for Domestic Law for Successful Prosecution of Perpetrators***

The author establishes herein below certain reasons as to why there is a need for a specific law on genocide and why it is insufficient to deal with such acts of genocide as one of the existing underlying offences under the Indian Penal Code, 1860.

Murder under Section 300 of the Indian Penal Code, requires for a successful conviction that death is to be caused by an act of the perpetrator with such intent or knowledge so as to cause such bodily injury which would likely cause death; or is imminently dangerous or is sufficient in ordinary course to cause death. Depending on the knowledge and likelihood component there is a fine distinction between culpable homicide and murder. Genocide on the other hand is not mere murder or mass murder.

Under the Indian Penal Code if death is caused by the acts of the offender, then he shall be convicted of murder, culpable homicide or attempt to murder. Whereas, genocide on the other hand, as recognized by G.H Stanton and mentioned hereinbefore, is a culmination of seven stages followed by denial. Each of these stages can bring culpability and the 'specific intent' to eliminate or cause damage to a particular social group is punishable as compared to 'mere intention or knowledge' that causes death in ordinary crimes. A perpetrator of Genocide under Article III of the 1948 Convention can be held liable for actual commission of acts amounting to genocide or for certain categories of acts, which are committed in preparation of the main offence of genocide. Such acts are conspiracy and incitement to commit genocide, attempt to commit genocide, and complicity in genocide. These conducts are cumulatively termed as 'inchoate offences'. These acts or conducts are deemed criminal without the actual crime being committed and for which the perpetrator may be prosecuted for the crime of genocide. What is necessary is therefore, the intent to destroy a protected group in whole or in part. Herein, lies the difference between ordinary crimes and acts of genocide.

The author further analyses certain reasons as to why individual cases filed by victims or their families and FIR's registered in each case of murder or death caused in a genocide makes it difficult to prosecute and convict perpetrators of genocidal acts under the Indian Penal Code:

- a) Lack of forthcoming eyewitnesses in each case makes it difficult to establish the actual high level perpetrators on whose command and complicity, the acts of murder and culpable homicide are caused by the low level perpetrators.

It also becomes difficult to establish the presence of such persons in an unlawful assembly or as the conspirators aiding and abetting each individual incident of crime that takes place during the entire duration of the genocide.

Allegations and witnesses for example deposed before the commissions investigating the 1984 riots to have seen certain congress leaders at scene of crime, but it is impossible to establish their presence in each of the registered cases and hence, conviction becomes difficult. Whereas, if the offence of genocide existed, once the 'specific intent' or 'dollar specialis' to attack a particular group would have been proved, involvement of such leaders/ individuals proven even in limited number of crime scenes and evidence of planning, organization, incitement and abetment against them existed pertaining to incidents during the duration of genocide, it would lead to conviction for genocide. Thus, leading to punishment for all unlawful acts and deaths are caused during the genocide and not on case to case basis. This means 'justice' in each case of victimization and suffering wreaked on the victims and not only for a few victims.

- b) Certain high level perpetrators who are not seen at the scene of crime may evade responsibility as there would be lack of direct evidences against them.
- c) Without a link being established between each of such acts which culminate in genocide it becomes difficult to book all the perpetrators who are part of the genocidal pogroms in part or more. And often they are charged of trifling individual offences of mischief, supplying arms, communal incitement etc.
- d) It is difficult to establish Civil Command Superiority as each of these offences are charged under different offences under the Indian Penal Code, 1860. The aider and abettor in pursuance of whose incitement the killings take place might differ from case to case basis. Therefore, tracing back to establish culpability to the hidden perpetrators becomes difficult.
- e) Since, conviction results in a very few cases and those are treated like ordinary murders, the repatriation and compensation is none or very few in such cases. Most of the victims are treated as victims of riots and are hardly repaired rehabilitated and reintegrated.

- f) Investigation by local government agencies is opposed to the idea of independent tribunals to be established for investigating acts of genocide under the 1948 Convention<sup>41</sup> which raise serious doubts on impartiality of the investigative agencies which are directly controlled by the state. The idea of establishment of such tribunals is also to provide speedy and adequate elements of justice. The classic example of denied justice is the 1984 Sikh riots in which the victims still await justice. The Bangladesh Tribunal to try perpetrators of 1971 war crimes, established in 2009 show that the importance of an independent tribunal is never lost or that it cannot be avoided in cases of genocide.
- g) No recognition of a wrong done to the whole community trivializes the sufferings and trifles the severity of act committed against them.

Following the 1984 Sikh Riots in individual cases where death had not been caused by act of perpetrators they were booked on trifling charges of Mischief (Section 427) punishable with only two years imprisonment; Mischief caused by fire or explosives (Section 436) punishable with imprisonment up to ten years; Promoting enmity between communities (Section 153A) and Statements inciting public mischief by inciting class or community to commit offence against each other (Section 505) both punishable with imprisonment up to three years; and rioting (Section 147) punishable with imprisonment up to two years.

But the crime of Genocide carries the same amount of punishment for genocide whether there is conspiracy, incitement, attempt or actual commission of genocide. Hence, the gravity of all acts whether underlying offence in the scheme of genocide is adequately punished.

The Krstic Case observed the importance of maintaining the stringent requirements to qualify an act as an act of genocide. But once these requirements of 'specific intention' are satisfied, the law must not shy away from referring to the crime committed by its proper name. The main purpose behind the United Nations General Assembly passing the Resolution 96(1) in 1946 was to recognize Lemkin's theory regarding genocide that genocide is an independent crime different from crimes against peace or war crimes and that both public and private individual could be punished and held accountable for their acts.<sup>42</sup> And part of

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<sup>41</sup> Art. 6, The Genocide Convention, 1948.

<sup>42</sup> Chapter II : *The Genocide Convention: The Travaux Préparatoires.*

India's obligation to the 1948 Convention, denial to recognise acts of genocide like the 1984 Sikh riots is failure to protect under the same.

### **5. DELIVERING JUSTICE: NOT RETRIBUTION BUT TRUTH AND RECONCILIATION NEEDED (SPECIAL TRIBUNALS)**

In cases of genocide, retribution is never the actual justice. Beyond prosecution for underlying offences and compensation to riot victims the present Indian legal system offers nothing more to the victims. Whereas, human rights Advocate Vrinda Grover in her opinion on the Communal Violence Bill, 2005 argues that in cases of communal violence there can only be "reparation which under international law connotes the obligation of the State and the entitlement of the victim, which is indicative of the reluctance of the State to discharge its responsibility." Reparations are effort to repair and restore to victims the damages suffered by them as a result of failure of the State's machinery in protecting them.<sup>43</sup> Genocides based on religion are different from communal violence or riots they are not one day episodes or outbreak of sudden violence these are not mere law and order situations but socio-political problems inherent in the fabric of the society.<sup>44</sup> To tackle such crimes and to bring justice to the victim reparation followed by restitution is necessary. Compensation not only for physical damages but also for emotional, psychological harms on victims have to be assessed. The rehabilitation of the victims should include medical, psychological and legal services to remedy the wrongs committed to the victims and alleviate their condition of life.<sup>45</sup> The most important of all remedy and the purpose of penal tribunals is to conduct the trial in cases of genocide and war crimes to bring the perpetrator and the victims of such crimes face to face, thus acknowledging accountability.<sup>46</sup> Also to extend an apology to the satisfaction of the victims by the perpetrators and the State for the wrong done to them and building confidence among communities by promising of non-

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<sup>43</sup> Clifton D' Rozario, *Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005 Some Reflections*, Alternative law Forum.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Summary of the high-level panel discussion dedicated to the sixty-fifth anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide, Report of the United Nations High Commissioner for Human Rights (30/06/2014), A/HRC/27/24.

occurrence of such crimes.<sup>47</sup> Retributive justice or mere penalization in such cases will not end the killings of one religious community by the others and the hatred between them. By refusing to recognise such incidents as genocide, we are also refusing to acknowledge the horrendous wrongs suffered by the targeted group. There is no forgiveness sought and none forgiven and the feelings of hatred and revenge continue to be engrained in the society.

As India continues to be a polarized society based on the socio-economic-religious factors, it is highly important that it fulfills its obligation to the Genocide Convention. A national law on genocide is the need of the hour to recognise the wrongs committed on one community by the other and for proper reparations there is a need for the establishment of specialized tribunals to try these cases. Independence of such tribunals is to be guaranteed from the state's interference. Concerned Citizens Tribunal Gujarat, a human rights advocacy group after the communal riots in 2002 has suggested that immediately a law should be passed on "mass violence and genocide", and vouched for the establishment of a Standing National Crimes Tribunal to deal with cases of genocides, mass violence, pogroms, riots etc. The Tribunal should be independent of the judicial mechanism for speedier disposal of complaints and should have independent investigating agency. It shall dispose such cases within fixed time and shall have the power to compensate and rehabilitate victims and their dependants. They also suggest reforms in the Police Act, 1861 giving more autonomy to police to handle such situations and prevent occurrence of genocide by freeing them from unnecessary political control.<sup>48</sup> India should fulfill its obligation to the Genocide Convention by taking steps towards prevention of genocide and spreading awareness about the same among its citizens rather than ignoring the existence of such a crime. In 2005, the United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights law and Serious Violations of International Humanitarian Law<sup>49</sup> and has suggested therein, the basic framework of remedies that the State should ensure is made available to the victims of grave human rights breaches like crimes of genocide. These remedies include

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<sup>47</sup> Ibid.

<sup>48</sup> Asian Human Rights Commission, available at <http://www.hrsolidarity.net/mainfile.php/2002vol12no05/2238/>, last seen on 15/4/2015.

<sup>49</sup> UN General Assembly Resolution 60/147 (16/12/2005).

reparation, restitution, compensation, rehabilitation and satisfaction. Satisfaction includes an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim and a public apology acknowledging the facts and acceptance of responsibility by the State and the perpetrators.<sup>50</sup>

Crimes of Genocide need to be first recognized and then dealt under the legal system separately. The usual remedy under the legal system that of retribution serves no purpose in such cases. Criminal prosecutions in cases of genocide do not guarantee non-recurrence of such acts. Lasting peace is not a guarantee thereafter. Reconciliation and establishment of Truth and Reconciliation Commissions are seen as important remedies which the domestic legal system in India evades from. Reconciliation requires saying the truth and acceptance of a past. "The kind of reconciliation that lets bygones be bygones is not true reconciliation. It is reconciliation at gunpoint and should not be confused with the real thing".<sup>51</sup> Tina Rosenberg, a journalist observes that only when the victims' sufferings have been acknowledged, then there is a chance of reconciliation. If the victim knows that the crimes would remain buried, there can hardly be any peace established.<sup>52</sup> Therefore, there is a need to recognise the 'acts of genocide' as a specific crime and not as other underlying offences. Remedy and justice needs to follow an alternate model in such cases. A Truth and Reconciliation Commission has often been suggested as the justice delivery institution in such cases of violence. Lalita Ramdas, penning her thoughts on the 1984 riots observes that there is a need for legislation on genocide which embodies the doctrine of command superiority and administration liability. She argues that a Truth and Reconciliation Commission is an alternate model to deliver justice; as the implementing authority i.e. the government can itself be one of the perpetrators often.<sup>53</sup> Hence, there exists a need to create such justice delivery systems independent of influence of the perpetrators and which serves justice in cases of 'genocide' different from the procedure followed for ordinary crimes.

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<sup>50</sup> Ibid.

<sup>51</sup> *Reconciliation After Violent Conflict-A Handbook*: International Institute For Democracy And Electoral Assistance, available at <http://www.un.org/en/peacebuilding/pbso/pdf/Reconciliation-After-Violent-Conflict-A-Handbook-Full-English-PDF.pdf>, last seen on 11/6/2015.

<sup>52</sup> Ibid

<sup>53</sup> Lalita Ramdas, *Thoughts on 1984: A Fragile Democracy*, Economic and Political Weekly 4108, 4111 (Sep. 17-23, 2005).

## 6. CONCLUSION

Since, there can be no retrospective effect of the genocide legislation. The least that can be done to assuage the feelings of the victims is to establish such commission or independent tribunals to accept and reconcile with what has happened. Though, the criminality of the offence of genocide cannot be achieved, the retributive justice might fail. But, the reconciliation and truth which are both elements of justice can lead to ground level assessing of situations and human resource development that sees the idea of 'us' together rather than fragmented communities. The establishment of a SIT by the Delhi Government is a step welcome towards investigating into 1984 incidents. But India fails to recognise the incidents as genocide, which foreign governments like the Californian Senate have done.<sup>54</sup>

India continues to evade its responsibility of recognizing the horrendous acts of genocide that were committed against its victims in 1984 riots and unless a law on genocide is passed which recognizes such horrors of the crimes of genocide, justice shall remain elusive to all future victims of a new 1984, 2002 and more in future without any deterrence.

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<sup>54</sup> *California Senate condemns 1984 anti-Sikh riot as 'genocide'*, The Economic Times, (May 1, 2015), available at [http://articles.economictimes.indiatimes.com/2015-05-01/news/61723683\\_1\\_law-enforcement-sikhs-resolution](http://articles.economictimes.indiatimes.com/2015-05-01/news/61723683_1_law-enforcement-sikhs-resolution), last seen on 11/6/2015.