

GENOCIDE LAW IN INDIA: AN ANALYSIS

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“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.”

- Arundhati Roy¹

Abstract

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 of in India time and again. India has failed to fulfil 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 that the acts have gone unpunished due to lack of evidence 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. This Paper basically throws light on the instances of Genocide committed and the response of the Indian legal regime towards such grotesque crime against humanity. In the end, this Paper wants to convey that it is not too late to correct the mistake and start enacting the laws for the prevention and punishment of genocidal acts.

Keywords: *Genocides, Conventions, International Criminal Court, Indian Penal Code, Riot, Crime*

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¹ The Algebra of Infinite Justice, (2002)

INTRODUCTION

The word Genocide is the combination of the two Greek words prefix ‘Geno’ which means Race or People and ‘caedo’ which, means an act of killing². As a whole it means act of killing of a particular race of people. The term is coined by Raphael Lemkin in his 1944 book, *Axis Rule in occupied Europe*. After the Holocaust, which had been perpetrated by Nazi Germany and prior to and during World War II, Raphael Lemkin campaigned for the universal acceptance of the laws and forbidding Genocide. After he campaigned, the UN General Assembly met for several times and finally, in 1948 adopted a Convention on Prevention and Punishment of the Crime of Genocide, which for the first time defined the term Genocide in a specific manner.

MEANING

Before 1944 the term ‘Genocide’ did not exist. It is a very specific term which refers to violent crimes committed against groups with the intent to destroy the existence of the group. Human rights, as laid out in the *United States Bill of Rights* or the *United Nations Universal Declaration of Human Rights*, 1948 the rights of individuals.

In 1948 the United Nations approved the *Convention on the Prevention and Punishment of the Crime of Genocide*. This Convention establishes ‘genocide’ as an international crime, which signatory nations “undertake to prevent and punish.” 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:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group and
- Forcibly transferring children of the group to another group.³

According to Article 3(a) of the Convention Genocide was made a punishable offence.

² Available at: <https://en.wikipedia.org/wiki/Genocide>; (Accessed on: 21.02.2020)

³ The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.

Thus it can be seen from the above definition that there are two essentials to the act of Genocide, firstly, the mental element, meaning the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”, and secondly, the physical element which includes five acts described in Article 2 of the convention. A crime must include both elements to be called ‘Genocide’.

CRIMES AGAINST HUMANITY

Among the crimes listed in the ICC Statute, “crimes against humanity” are among the most serious crimes of concern to the international community as a whole.⁴ “Crimes against humanity” is of specific importance, as this is a set of crimes which can be committed not only during war time but also during “peace” time. Crimes listed under this include murder, extermination, enslavement, torture, sexual violence, enforced disappearances and other inhuman acts of similar gravity. It includes the heinous crimes like those committed during Gujarat riots. This category of crimes under the ICC is distinguished from ordinary crimes defined under national penal laws in three ways:

- The acts constituting the crimes must have been committed as part of a widespread or systematic attack;
- They must be knowingly directed against a civilian population and
- They must have been committed pursuant to a “state or organizational policy”.

INTERNATIONAL COMMUNITIES’ COMMITMENT TO COMBAT GENOCIDE AND INDIA’S EFFORTS

The International Communities’ efforts with regards to combating the grotesque tragedies that take place on account of Genocides in various parts of the world include the Genocide Convention⁵ that has already been discussed before, followed by the *Geneva Conventions of 1949*⁶, *Additional Protocols to the Geneva Conventions, 1977*, *Rome Statute of the*

⁴ Article 7, Rome Statute of International Criminal Court, 1998

⁵ The Geneva Conventions and their Additional Protocols are international treaties that contain the most important rules limiting the barbarity of war. They protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war).

⁶ In 1949, an international conference of diplomats built on the earlier treaties for the protection of war victims, revising and updating them into four new conventions comprising 429 articles of law. These treaties, known as the Geneva Conventions of August 12, 1949, have been signed by almost every nation in the world. The

*International Criminal Court*⁸.

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

India ratified the *Genocide Convention* on August 27, 1959.⁹ It also ratified the *Geneva Conventions of 1949* on November 9, 1950¹⁰, but did not sign and has not yet become a party to *Additional Geneva Protocols of 1977*. It has also not signed and has not yet become a party to the *Rome Statute of the International Criminal Court*.

The Government of India is committed to enact a law for the prevention and punishment of Genocide under Article V of the *Genocide Convention 1948*¹¹ to which the country acceded in August 1959. Article 51(c) of the Indian Constitution, 1950 directs the state, *to foster respect for international law and treaty obligations*. Article 253 empowers the *parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention*. Moreover, Article 20 of the *International Covenant on Civil and Political Rights (ICCPR)*¹², which has been acceded to by India in 1979, binds the Indian State to prohibit by law “*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*.” However India has made no efforts to enact a national legislation in the form of a *Genocide Act* which would effectively criminalize

Additional Protocols of 1977 supplement the Geneva Conventions, Available at: <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079> (Accessed on: 22.02.2020).

⁷ The Rome Statute of the International Criminal Court (often referred to as the International Criminal Court Statute or the Rome Statute) is the treaty that established the International Criminal Court (ICC). It was adopted at a diplomatic conference in Rome on 17 July 1998 and it entered into force on 1 July 2002. As of October 2009, 110 states are party to the statute, and a further 38 states have signed but not ratified the treaty. Among other things, the statute establishes the court's functions, jurisdiction and structure, Available at: www.un.org/icc/ (Accessed on: 22.02.2020)

⁸ India ratified the Genocide Convention on August 27, 1959, Available at: www.un.org/documents/ga/docs/51/plenary/a51-422.html; (Accessed on: 22.02.2020)

⁹ The *Geneva Conventions* entered into force on 21 October 1950. *Ratification* grew steadily through the decades, Available at: www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions; (Accessed on 22.02.2020)

¹⁰ Article V of the Genocide Convention – The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III

¹¹ Article 20 of ICCPR

¹² *India- Genocide- Ideology and Policy Result in Gujarat Massacre*, Concerned Citizens Tribunal-Gujarat 2002, Available at: <http://www.hrsolidarity.net/mainfile.php/2002vol12no05/2237/> (Accessed on 20.02.2020)

the offence of Genocide. This willful abdication of state responsibility for more than four decades has seen the 1983 Nellie Massacre, the 1984 Anti-Sikh Riots and the 2002 Gujarat Massacre and the continuing struggle for justice within the inadequate conceptual frame of Indian law. Considering these facts it is a grave lapse on the part of the Government of India, which has, to date, not enacted any law in compliance with Article V of the *International Convention on the Prevention and Punishment of the Crime of Genocide, 1948*. India has signed the Genocide Convention in 1948 and ratified it in 1958. Under the Convention, a State that is signatory is bound to effectively act upon and legislate upon the intents of the legislation. So far, India has not enacted any law in compliance with the Convention.¹³

Since it acceded to the Convention in 1959, India has taken no steps to comply with the Convention's obligations by implementation of necessary changes in its domestic law. Prudence would demand that India should enact the necessary enabling legislation before it becomes party to a treaty, so that there is no time lag between undertaking of international treaty obligations and their domestic implementation where called for.¹⁴

NEED FOR GENOCIDE LAWS IN INDIA

In absence of specific legislation to punish Genocide lot of atrocities have been committed in India. There are eight stages of Genocide identified by G.H Stanton to understand and prevent its occurrence. 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 groups in India and time and again there have been reported communal clashes between these groups.¹⁵ 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.¹⁶ Dehumanization which is third stage of Genocide is prevalent among religious groups in

¹³ V. S. Mani, *Needed, A Law on Genocide*, The Hindu, 10.04.2002, Available at: <http://indianterrorism.bravepages.com/anti-muslim%20riots%209.html>; (Accessed on 20.02.2020)

¹⁴ *Ibid.*

¹⁵ 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>; (Accessed on 25.02.2020)

¹⁶ *Ibid.*

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.¹⁷ Further, attack on sacred centers of one religious community by the other 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 Orissa and the ethnic cleansing of the Kashmiri Pandits from the Valley. Due to these existing differences, the Genocide Watch classifies India in the fifth category of Genocide Polarization.

INDIAN PENAL LAWS AND GENOCIDE AS A CRIME

Genocide under Indian Penal Laws

There is a need for specific laws on genocide as the Indian Penal Code, 1860 is insufficient to deal with such acts of genocide. Section 300 of IPC says “*death is to be caused by an act of the accused with such intent or knowledge so as to cause such bodily injury which would likely cause death.*” Genocide, on the other hand, is not mere murder or mass murder. An accused of genocide can be made liable for the actual commission of the acts amounting to genocide under Article III of the 1948 Convention.

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

The only possible exception in terms of conceptualizing crimes against a collectivity is the *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* which provides a brilliant ethnography of crimes against members of a specific community by actually fifteen different ways in which SC/ ST are deprived of their rights. The listing of the *SC/ST (Prevention of Atrocities) Act, 1989* is a fairly accurate description of the kinds of

¹⁷ 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/>; (Accessed on 25.02.2020)

offences to which SC/ST communities are subject to in independent India. It describes what the *Rome Statute* might have called persecution.¹⁸

The history of the Scheduled *Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* can be traced back to Article 17 of the Constitution through which untouchability was abolished and its practice in any form forbidden.¹⁹

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

The one opportunity to take the question of mass crime seriously was the promise of the UPA Government to ‘enact a model comprehensive law to deal with communal violence’.²⁰ This promise was made in the Common Minimum Programme (CMP). The reason for this provision finding a place in the CMP was clearly the horrific communal violence in Gujarat in 2002 under the former National Democratic Alliance (NDA). To implement this promise, the United Progressive Alliance (UPA) introduced the *Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005*. Even prior to the introduction of the 2005 Bill, there were a series of Bills circulated by both the State and civil society which sought to deal with aspects of mass crimes.²¹ The Bill does not seriously consider any of the points made above and makes a mockery of any serious efforts to tackle State impunity for mass crimes.

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

The Government’s final version of the communal violence law empowers the Centre to take charge of an area where riots have broken out once it sends in Central Forces, if it finds the State Government concerned reluctant to act against the rioters. The new law still does not allow the Centre to send Armed Forces on its own to a riot-hit spot.²² But once a state has

¹⁸ People’s Union of Civil Liberties - Karnataka, *A study of kothi and hijra sex workers in Bangalore*, September 2003, Available at: <http://sangama.org/files/PUCL%20Report.pdf>; (Accessed on 20.02.2020).

¹⁹ The purpose of this Act is to prevent crimes against members of scheduled castes and scheduled tribes; and to provide for relief and rehabilitation of victims of such offences. Available at: www.hrw.org/reports/1999/india/India994-16.html; (Accessed on 22.02.2020).

²⁰ National Common Minimum Programme of the Government of India, May 2004.

²¹ Draft-The Communal Crimes Act, 2004 By Human Rights Law Network, Anhad, Jansangharsh Manch, Centre For Study Of Society And Secularism, The Prevention and Punishment of Genocide and Crimes against Humanity (Draft) Bill, 2004; The Prevention and Punishment of Genocide and Crimes against Humanity Bill 2004, Justices PB Sawant and Hosbet Suresh.

²² Alope Tikku, *Amended Law to Let Centre Take Charge in Riot-Hit States*, Hindustan Times New Delhi,

asked for Central Forces to quell violence, the Centre will have the right under certain circumstances of setting up a unified command, comprising these forces and the local police.

The *Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill*, however, says the Centre can declare an area “communally disturbed” and take direct charge only if the State concerned refuses to act against the violence being perpetrated to such an extent that the secular fabric of the country, or internal security, is endangered. To guard against political misuse, the law stipulates that the Centre must first draw the attention of the State Government to the deteriorating state of affairs, and set a deadline for it to take necessary steps to suppress the violence. Until now, Central Forces deployed in a state worked under the control of the local district administration. But henceforth, in special circumstances, it will work under the unified command, which will report to the Centre.

CONCLUSION

Genocide is considered as an international crime, for which the UN enacted the Convention on the Prevention and Punishment of the Crime of Genocide. This Convention has performed dual purposes, first to prevent Genocide and secondly, punish the group or individual who commits it. The second part is performing its duties well by punishing the State or group which commits Genocide. But the prevention of Genocide is not happening in a proper manner which leads to increase in genocidal incidents rapidly. To make it more effective, we have to make it stricter regulation.

International Court of Justice is restricted in its jurisdiction as without the consent of the State, it cannot start the proceedings against them. This sometimes causes hindrance in providing justice to the victims. Till today, 149 countries are the Members of the Convention but most of the countries have not made domestic laws for providing justice to their citizen. Genocide is a different kind of crime for which there is a need for separate legislation.

India ratified the Genocide Convention in the year 1959 but till today its legislators have enacted separate legislation for the same. If we see the heinous crimes committed in India got when it independence then there are a numbers of crimes committed therefore that can befall

17.03.2013, Available at: <http://www.hindustantimes.com/india-news/newdelhi/Amended-law-to-let-Centre-take-charge-in-riot-hit-states/Article1-519963.aspx>, (Accessed on 26.02.2020)

under the Genocide, but due to the non-presence of legislation all such crimes are treated under the regular provision, which mostly leave the accused free due to lack of evidence.

At the crux of it all, for an act to qualify as Genocide evidence needs to point to an intention to destroy and harm; it is a crime not computed in numbers of dead or harmed but in the intention and desire to commit it-, pre-planning, extent and thoroughness of the killings. India, like another country, is restricted by international law obligations to prevent and punish acts of Genocide. India's obligations are further strengthened by its participation in the Genocide Convention, in the drafting of which it had made a worthwhile contribution. The biggest problem with India is even thereafter is legislation on Genocide made, its implementation will still remain a concern due to corruption and our slow judicial system. This needs to be solved out as soon as possible.