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Front cover: *Pasquale Trento, with other masons, mounting a sculpture in Florence. Masons have a proud tradition of self-regulation and quality control in Florence. The guild of master stonemasons and wood-carvers* – Arte dei Maestri di Pietra e Legname – *was already listed in 1236 as one of the Intermediate Guilds. Ensuring rigorous quality control through strict supervision of the workshops, the guild not only existed for more than 500 years (until 1770, when several of its functions were assigned to the Florentine chamber of commerce), but it has contributed to the outstanding quality of contemporary masonry in Florence. Photograph: © CILRAP 2017.*

Back cover: *Section of the original lower-floor of the Basilica of Saints Cosmas and Damian in Rome which honours the memory of two brothers and physicians for the poor in Roman Syria. Its mosaics and other stonework influenced the Florentine guild of masons referred to in the frontpage caption, as its craftsmen and sponsors created a culture of excellence through competition and exacting quality control. Photograph: © CILRAP 2018.*

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Pre-Investigation and Accountability in India: Legal and Policy Roadblocks

Abraham Joseph*

Numerous mass crimes have happened in India over the course of its post-independence journey. These may be termed as 'riots', 'pogroms', 'mass violence', 'genocide' and so on, but irrespective of the nomenclature used, they can broadly be clubbed as 'mass crimes' committed against all accepted notions of human rights and dignity. It is argued that these mass crimes are not spontaneous eruptions of violence, but systematic and organised acts by non-State actors with the tacit backing and support of the State. In addition, the State, represented by the local State governments, seldom steps in to control or quell the violence enough; in fact, it is even perceived – at least from the perspective of victims – to be siding with the perpetrators. However, the Indian judiciary has played a pivotal role in the protection and enforcement of human rights and remains the final beacon of hope to hundreds and thousands of victims of mass crimes.

Meanwhile, the Indian legal framework is inadequate to deal with those mass crimes. There is no definition of mass crimes in Indian law, which means genocide and crimes against humanity are, strictly speaking, not punishable by law. While the Indian government claims that the Indian legal system has automatically absorbed international crimes for which India has accepted treaty obligations, this assertion is misplaced. Since India is a dualist country, a treaty obligation that India accepts does not automatically become a part of Indian law unless there is enabling legislation to give effect to the treaty obligation. Although the Supreme Court of India has emphatically claimed in *Vishakha* that treaty obligations become an integral part of the Indian legal ecosystem and can be given effect to even in the absence of a domestic legislation on the subject (provided it is

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consistent with the Indian Constitution and other legal provisions),[1] the courts in India have never tried reading 'mass crimes' into Indian law except where they qualify as murder, rape, grievous hurt and other related offences.

While the mass crimes referred to below may not necessarily amount to genocide or crimes against humanity, it is argued that India's refusal to define them as such considerably weakens its case that genocide and crimes against humanity have not happened in the country.[2] The burden to negate/disprove the commission of these crimes is on the State, which has assumed obligations under international law for this purpose.

Further, in India, the function of investigation is vested with the police, which is a State organ. There is no formal distinction between pre-investigation and investigation in its criminal procedural laws. Though there is a formal prosecution wing of the State, in reality there is no effective co-ordination between the police and prosecution at the investigative stage of the case. The police are more powerful than the prosecution. The prosecution team often does not have an independent voice, and even if it does, the police are free to disregard it. Although the prosecutor is required to be an independent voice of justice under Indian law, in many cases involving mass crimes, it has acted as the handmaiden of the State and of the defence. This is unfortunate to say the least.

That said, again, the Indian judiciary has played a commendable role in giving justice to the victims of mass crimes. This is most evident in cases involving the post-Godhra riots. Though the judiciary failed in handing out major convictions in the 1984 anti-Sikh pogrom, it should be attributed to the executive's failure in building up proper cases against the accused and its indulgence in the destruction of evidence, leaving the judiciary helpless.

In response, the suggestions advanced by the writer are as follows:

1. India should recognise the concept of 'mass crimes' under its domestic laws. This either requires an amendment to the Indian Penal Code, 1860, to incorporate the mass crimes or the enactment of special statutes that specifically punish these crimes.

[1] Supreme Court of India, *Vishaka and others v. State of Rajasthan and others*, Judgment, 13 August 1997, AIR 1997 SC 3011 (http://www.legal-tools.org/doc/3ff748/).

[2] It has been observed that the terms 'genocide' and 'crimes against humanity' are employed rather loosely in the Indian socio-political context.

2. The police ought to be safeguarded from political interference so that they can freely investigate cases. An independent apolitical body should manage the promotions, transfers and other service conditions of police officers.
3. The police and the prosecution should co-ordinate their affairs in a closer manner, instead of only namesake collaboration. In addition, steps should be taken to make the prosecution truly independent of the State governments. The prosecution should be given powers to conduct appropriate pre-investigations into cases (to ascertain whether there is appropriate material to initiate investigation into a case).
4. Strong quality oversight over the police are necessary to ensure that the lapses that happened in previous mass crimes cases are not repeated. This should involve the setting up of an Independent Police Accountability Board that acts as a quality control check on the police.
5. The need for sanction for prosecuting State officials[3] should be done away with to end the culture of impunity prevailing in the country.

5.1. Introduction

Impunity for mass crimes in India has long existed. This chapter analyzes the pre-investigation and investigation framework pertaining to mass crimes in India, as well as the legal and policy roadblocks facing the country in the effective dispensation of justice for mass crimes, specifically with respect to quality control aspects.

As alluded above, the Indian legal system makes no formal distinction between investigation and pre-investigation. The criminal procedural law does not expressly stipulate what is to be done prior to investigation. Section 154 of the Code of Criminal Procedure, 1973 stipulates that if the investigating officer is told, informed or aware about the commission of a cognizable offence, then he is required to proceed with the investigation of such case. However, despite Supreme Court rulings that there is no discretion available to an officer in such cases, the power of the police to investigate serious cases remains in practice discretionary.

[3] Code of Criminal Procedure, 1973, adopted 25 January 1974, entry into force 1 April 1974, Section 197 (http://www.legal-tools.org/doc/29b68e/).

The chapter is divided into three sections. Section 5.2. seeks to examine the concept of 'mass crimes' or 'core international crimes' in the Indian politico-legal scenario in light of the Nellie massacre (1983), the anti-Sikh riots (1984), the Hashimpura killings (1987), the Gujarat riots (2002) and the anti-Christian violence in Kandhamal, Orissa. While these instances of mass violence are not exhaustive, they represent the major human rights violations in the country. This section attempts to chronicle them and put them in perspective for a broader evaluation in the quality control of preliminary examinations. India's approach to international criminal law, especially the International Criminal Court ('ICC'), will be analysed as well. Section 5.3. will examine the meaning of the pre-investigation/investigation in Indian criminal procedural law, the responsibilities of law enforcement officials for investigation (which is common for both ordinary crimes and mass crimes), and the role of the prosecutor. The lacunae facing Indian law enforcement will be highlighted. Section 5.4. will conclude the chapter with suggestions.

5.2. India and Core International Crimes

Under Indian criminal law, while murder, rape, rioting, dacoity or armed robbery, theft and other crimes are defined and made punishable under the Indian Penal Code, 1860, there is no category of crimes known as 'mass crimes' or 'core international crimes'.

While India is not a signatory to the Rome Statute of the ICC and claims to have no obligation under it, it considers itself bound by customary principles of international law prohibiting and punishing mass crimes. In August 1959, it ratified the UN Convention on the Prevention and Punishment of the Crime of Genocide, 1948. In 1997, it signed the UN Convention against Torture but is yet to ratify it. The same is true for the International Convention for the Protection of All Persons from Enforced Disappearance.

However, India is a dualist country, meaning that all treaty commitments do not automatically become a part of Indian domestic law except incorporated by legislation. To start with, while India has ratified the Genocide Convention, 1948, there is no law giving effect to the provisions in India. While it has claimed that the provisions of the Convention have become a part of Indian domestic law by virtue of its ratification, there is no provision in Indian law that defines, let alone criminalizes genocide.

While there is a law in India that gives effect to the Geneva Conventions, 1949, it is applicable only in situations involving international armed conflicts.[4] In addition, Section 17 of the relevant Act specifically states that for any case to be filed, prior sanction of the central government is required. Given this, the law is of questionable effectiveness, if not designed to fail.

As regards the Convention against Torture, 1984, while India has signed the Convention, it has never ratified it and there is no law in the country that prohibits torture despite national and international calls and widespread prevalent of the practice in India. The Supreme Court of India has given guidelines in *D.K. Basu v. State of West Bengal*, pertaining to measures to be taken by the police to ensure that there is no violation of basic human rights of the persons in police custody.

Even if it could be argued that ratifications make treaties an integral part of Indian law, as stated by the Supreme Court in *Vishaka*, it is baffling that no such effort has ever been made by the Supreme Court to read international crimes accepted under the Rome Statute. The same is true for crimes recognized and accepted under customary international law.

5.2.1. India's Objection to the International Criminal Court

In fact, India remains one the staunchest opponents of the ICC. Viewing the ICC as a Western and Eurocentric institution that disregards the sovereignty of nations, India has steadfastly refused to sign or ratify the Rome Statute.[5] It has not been satisfied by the principle of complementarity, opining that its domestic legal system is strongly equipped to deal with mass crimes without the need to be a part of the ICC. Mass crimes as understood in international criminal law, according to the Indian government, are proscribed under domestic Indian law. Furthermore, India is concerned that the Rome Statute has not included the crime of terrorism, which it considers a grave shortcoming in the progressive codification of international criminal law.

India's latest direct encounter with the ICC was on June 2015, when Sudanese President Omar Al Bashir arrived in India. Though there was

4 Geneva Conventions Act, 1960, adopted 12 March 1960, entry into force 14 August 1961.

5 India has consistently expressed surprise as to how the international community can permit an international court to sit in judgment over alleged criminal acts committed by senior State officials.

international pressure on India not to host Al Bashir in the country or arrest him at the airport itself to be handed over the ICC, India's official position on the stand was not encouraging. As a country that is not signatory to the Rome Statute, the country does not have any obligations that may arise from the treaty. Since the obligation to arrest Al Bashir flows from the treaty, according to India, the country does not have any obligation in this regard.

5.2.2. India's Approach to International Law Obligations

Indeed, India's approach to international law and its obligations has been one marked by suspicion and distrust. The country has viewed any attempt by the global community to legislate (especially on matters of international criminal law and international human rights law) as an attempt to impede on the sovereignty of the country. Siddharth Varadarajan, founding editor of the leading Indian online news portal, *The Wire,* summarised India's approach to international law as one perennially marked by suspicion of international accountability and adjudicatory bodies with the sentiment running deep in the echelons of the Indian establishment.[6] This was contrasted with the jubilation in the event of the favourable provisional measure order obtained from the International Court of Justice in the case of Kulbhushan Jadhav, an Indian naval officer who is facing execution in Pakistan on account of alleged espionage activities.

Given this ideological background, it is not difficult to understand India's fear of international institutions and actors and its reluctance to accept mass crimes as understood in international law to be operationalized in Indian law. With this background, it is pertinent to examine certain instances of mass violence that happened in India and constitute 'mass crimes' as understood in International law. This part would contextualize a deeper assessment of pre-investigative roadblocks in the Indian legal system.

5.2.2.1. Nellie Massacre (1983)

On 18 February 1983, Assamese Tribesmen butchered close to 3,000 Bengali immigrants across 14 villages in Nellie, Assam, in an attack that lasted for around six hours. Violence first erupted on 1 February, pursuant

6 Siddharth Varadarajan, "Why International Law Matters, From Kulbhushan Jadhav to Kashmiri Human Shield", in *The Wire*, 22 May 2017 (http://www.legal-tools.org/doc/0b34bc/).

to the decision of the Indira Gandhi government to accord voting rights to about 4 million immigrants from Bangladesh in the ensuring elections. Assamese political groups were historically at the forefront of driving away all 'foreigners' from Assam and the movement objected to the 1983 elections. The Nellie massacre was the result of this indoctrination and the decision to hold elections in the State. In addition, scarcity of resources and politico-economic concerns were also among the causes of the brutal massacre.

By all accounts, the Nellie massacre qualifies as a crime against humanity, even genocide, since Muslims were the specific target. However, to date, not a single person has been convicted. The Tribhuvan Prasad Tewari Commission report states that drum-beating Assamese had assembled with deadly weapons with the intention of targeting Muslims of the Naigaon district. *Tehelka*, a news portal that had access to the report, states that Jahiruddin Ahmed, the duty officer of Naigon police station, informed the possibility of such an attack to the Armed Police Battalion stationed at Morigaon.[7] Shockingly, the Superintendent of Police[8] of Naigaon was kept in the dark.[9] This clearly shows a lapse in the functioning of the concerned official. The inability of subsequent central and State governments has ensured impunity. Strangely enough, the Tewari Commission report was more vocal about the distress caused to the native Assamese population because of the presence of allegedly illegal migrants from Bangladesh. The report officially continues to remain confidential. In 2004, a Japanese scholar, Makiko Kimura, was prevented from presenting a paper on the subject in Guwahati University, which arguably remains the most exhaustive account of the incident.

5.2.2.2. Anti-Sikh Riots (1984)

Following the tragic and shocking assassination of former Prime Minister Indira Gandhi on 31 October 1984 by her Sikh bodyguards, there were mass riots in New Delhi, against the Sikh community. Over 3,000 people are believed to have been killed, with independent estimates putting the figure at close to 8,000. It is believed that these riots were the work of loyalists of the deceased Prime Minister and the Indian National Congress

7 Around 70 km away from the site of the massacre.

8 Or District Police Chief.

9 The report states that Ahmed did not inform the SP as the latter was not available at the relevant time.

('Congress Party'). While a few lower level functionaries of the Congress Party were found guilty, no senior level leader has been found guilty so far. In addition, it is believed that there was close involvement of the government and its instrumentalities in the atrocities. Some of the prominent politicians involved in the carnage subsequently went on to become Members of Parliament and secured ministerial berths in the Union Council of Ministers. It has been a widely held view that the pre-investigation was botched due to the close nexus between the police and the ruling lawmakers.

Since 1984, no government has been successful in prosecuting the culpable individuals responsible for the mass carnage. The absence of a law on genocide or even law prohibiting targeted communal violence has compounded the woes of the victims. Today, the victims are running from pillar to post to get justice but to no avail. In fact, the absence of an independent prosecutor that could have held the police accountable for its acts of omission and commission was deeply felt.

Contextualizing the background of the violence is essential to understanding the carnage in its comprehensive sense. In the late 1970s and early 1980s, Sikh extremists and separatists launched a mass movement for the creation of an independent Sikh homeland known as 'Khalistan' in the north-western Indian State of Punjab. In response to the growing militancy, in 1984, the central government ordered the deployment of forces in the Golden Temple in the northern Punjab city of Amritsar to flush out militants in the temple in a military operation known as Operation Blue Star. The Golden Temple is regarded as the most sacred Sikh shrines and its defilement whipped up strong anti-establishment sentiments especially amongst the more radical adherents of the faith. Prime Minister Indira Gandhi's assassination followed. This resulted in a systematic pogrom against Sikhs in Delhi and numerous other cities with the blessing of sympathetic State agents.

Subsequent to the carnage, 587 first information reports ('FIRs')[10] were recorded for the mass violence that resulted in 2,733 deaths (as per official records). Of the total, the police ordered the closure of 241 cases[11]

[10] "1984 anti-Sikh riots: Government recommends SIT to LG", in *Times of India*, 7 February 2014 (http://www.legal-tools.org/doc/7aa8f9/).

[11] "HS Phoolka Writes Open Letter to Union Law Minister Demanding SIT for 1984 Cases", in *Sikh24*, 31 May 2014 (http://www.legal-tools.org/doc/9388ed/).

without investigation, citing lack of evidence in what was a major blow for the victims.[12] The dubious role of the Delhi police, which is under the supervision of the central government, was severely criticised by various civil society organizations and lawyers. Shockingly, a particular official of the Delhi police told the Nanavati Commission about a conspiracy to register all murders under Section 304[13] instead of 302.[14]

General, vague, and omnibus type of FIRs combining numerous incidents that took place were filed instead of separate ones. In 2005, the Justice G.T. Nanavati Commission appointed by the central government ordered the reopening of four of the closed cases in a widely welcomed measure. The Manmohan Singh government, in a historic move, apologised for the role of the Congress Party in the violence in 2005. However, the real test of justice would be the ability to provide justice to the victims of impunity and enacting a law on genocide.

5.2.2.2.1. Official Inquiry Commissions: A Saga of Failure

Numerous commissions have meticulously examined and investigated various aspects of the 1984 carnage. Despite their notable findings, not a single law enforcement official has been found guilty for acts of omission or commission. The only individuals found guilty were low-level political functionaries who were merely the foot soldiers. This should naturally open up questions pertaining to the country's role in dealing with cases of impunity. In addition to State commissions, independent private fact-finding bodies have applied themselves to the scale of the mass violence and blamed the law enforcement and top functionaries of the ruling party.

The central government constituted 10 different commissions and committees to analyse and investigate the anti-Sikh carnage. However, none of the commissions was instrumental in holding the guilty accountable. This is especially true of high-level perpetrators who were politically influential. The first commission headed by Ved Marwah, a former Indian Police Service officer, was prevented from completing its mandate on the ground that a judicial investigation under the leadership of a Supreme Court judge, Justice Ranganath Misra, was formed.

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12 It is unlikely that this would have been the situation if India had an independent prosecution machinery that is independent of the executive and the police.

13 Culpable homicide not amounting to murder.

14 Murder.

The Misra commission, which submitted its report in 1986,[15] failure for lack of transparency. Its proceedings were in camera, the media was not allowed to report. Victims' lawyers were prevented from attending or examination of the witnesses, contrary to the canons of natural justice. In addition, victims' representatives were denied copies of affidavits. 'Anti-social elements' were held responsible for the riots without much clarity. It stated that many of the rioters belonged to lower ranks of Congress Party or were sympathizers, but concluded that neither the Congress Party nor any of its office-bearers had any role in the riots. In addition, the Misra commission recommended the formation of distinct committees to further investigate various aspects of the carnage.

The Ahuja committee fixed the death toll at 2,733, a conservative estimate believed to be much less than the actual figures. The joint committee comprising Justices Kapoor and Mittal ended in deadlock with both members unable to agree on a common line of action with reference to the scope of the committee. Kapoor argued that the committee was essentially administrative in nature without the power to indict police officials. Mittal disagreed with the reasoning, and went on to recommend further enquiries against 72 Delhi police officials. Interestingly, she suggested that departmental enquiry would not suffice and actions against the suspect officials would be required to meet the ends of justice.

The Jain-Banerjee committee was significant in its determination that FIRs should be lodged against certain suspect politicians. However, judicial interventions to stall the registration of the FIRs effectively destroyed the significant recommendations of the committee.

The Poti-Rosha, Jain-Aggarwal and the Ranjit S. Narula committees recommended the registration of FIRs against senior Congress Party politicians but subsequent executive inaction paralysed the good work of the committees.

The Nanavati commission, while significant in its determination that the carnage was organised and hinting at the involvement of powerful forces, did not move forward beyond an extent. Much to the disappointment of civil society activists, the committee failed to allocate responsibility to the actual leaders responsible.

[15] Misra Commission Report, August 1986 (http://www.legal-tools.org/doc/e7d847/).

To conclude, while numerous commissions were appointed as fact-finding institutions, they were not able to play a significant role. While it would be premature to blame the commissions for their ineffectiveness, it is submitted that the Commissions of Inquiry Act, which is the legal basis for creating commissions of inquiry, has severe shortcomings. It is suggested that India should have a permanent full-time truth and reconciliation commission that effectively goes about the function of collecting evidence and advancing the cause of transitional justice in the wake of tragedies like 1984.

5.2.2.2.2. Civil Society Investigations and Findings

Numerous reports and investigations by civil society groups, activists and eyewitness accounts have shown that the 1984 carnage could not have happened without the complicity of the State.[16]

First, shortly after the carnage, a fact-finding team organized by two prominent Indian human rights organizations, the People's Union for Democratic Rights and the People's Union for Civil Liberties, published a report on its investigation into the cause of the Delhi riots, "Who Are the Guilty?".[17] The conclusion pointed to a well-organized conspiracy by top leaders of the Congress Party and officials of the Delhi administration.

Second, in January 1985, the nongovernmental organization Citizens for Democracy investigated the riots and concluded that the violence were not spontaneous but organized by members of the Congress Party. The report's conclusion was vocal in its determination that incitement of majoritarian passions lay at the root of the carnage.

Third, in 2004, Ensaaf (meaning 'justice'), a Sikh rights organization, released "Twenty Years of Impunity",[18] which documented the role played by the Congress Party in the 1984 violence. Abuse of State machinery and the macabre details of the carnage was highlighted in the report. The report received wide press coverage.

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16 India has a very vibrant civil society, which has been at the forefront of activism in the aftermath of mass crimes. Their activism has in no measure contributed to an awareness of the need to end impunity for mass crimes.

17 PUDR and PUCL, *Who Are the Guilty?*, November 1984 (http://www.legal-tools.org/doc/d9b7c8/).

18 Jaskaran Kaur, *Twenty Years of Impunity: The November 1984 Pogroms of Sikhs in India*, Ensaaf, 2006 (http://www.legal-tools.org/doc/f83b22/).

5.2.2.3. Hashimpura Killings (1987)

The brutal massacre of 42 young Muslim men by the Uttar Pradesh Provincial Armed Constabulary on 22 May 1987 sent shock waves across the country. Vibhuti Narain Rai, a senior police officer, penned a book holding top officials of the administration and the police accountable. Rai was the Superintendent of Police of Ghaziabad, where Hashimpura is located, and was the first to uncover the communally minded role of the Uttar Pradesh Provincial Armed Constabulary.

The cold-blooded murders took place in a remote location of Ghaziabad district on the night of 22 May 1987 when nearby Meerut was witnessing communal violence. According to Rai, it was the biggest case of custodial killings since Independence and the Crime Investigation Department which was tasked with the responsibility to identify the culprits ended up siding with the perpetrators. Close to 30 years later, all the accused were acquitted for lack of evidence and Platoon Commander Surendra Pal Singh, the principal leader of the carnage, was no longer alive.

In addition, Rai mentions that the role of the Army was a gross violation of laws and breach of their official responsibilities. May 2018 marks the thirty-first anniversary of the gruesome killings.

5.2.2.4. Mass Crimes in Gujarat: Godhra and its Aftermath

Godhra is a name that will be etched in Indian public memory forever. A small sleepy town in Panchmahal District of Eastern Gujarat, the State that gifted India and the world Mahatma Gandhi, hit international headlines on 27 February 2002 for a violent incident that left several Hindu Karsevaks charred to death.[19] According to the official version, a large mob of local Ganchi Muslims attacked the train pelting it with stones and setting a coach on fire, resulting in the deaths of 59 occupants of the train, many of whom were hapless women and infants. The Sabarmati Express, coming from Varanasi to Ahmedabad via Godhra Junction, had a large assembly of Hindu Karsewaks returning to Ahmedabad from Ayodhya after conducting a ceremony for the construction of a Ram temple at Ayodhya on the site of the demolished Babri Mosque.[20]

[19] Religious volunteers.

[20] The Hindu right of which the Karsewaks constitute an integral part ardently believe that the Mosque was constructed by the Mughal emperor Babur after demolishing a Hindu

The incident sparked off the arguably the worst communal violence witnessed in independent India.

The diabolical attack was pre-planned by local Muslim shopkeepers who lived in the surrounding areas with the aid of an inflammable liquid believed to be petrol, which was poured on the floor of the train coach before igniting it with fire. The key conspirators were Islamic clergymen and local politicians drawn from the Ghanchi Muslim community aided by foreign intelligence agencies. This version was subsequently accepted by the Nanavati-Shah commission appointed by the State government to study the incident. Despite strong assertions by the government, a counter-version of the incident has existed.

According to alternate version substantiated by the Justice Umesh Chandra Banerjee Commission set up by the central government, there was an altercation beginning with the molestation of Muslim girl followed by a fight in the coach between the Karsewaks and a Muslim tea vendor, which led to a mob pillaging the train. This version also controversially claimed that the fire was accidental and used as a ruse to instigate the communal riots that followed. According to this version, the inferno was allegedly executed by the train's occupants themselves.

However, the death of 59 innocent people is mainly attributed to the version supported by the State.

Following the burning of the coach, Hindu outfits called for a State-wide bandh or general strike on 28 February 2002 with a controversial 'parading of the burnt bodies' in Ahmedabad City. Provocative speeches with rabid communal insinuations followed vigorously. It led to co-ordinated and systematic attacks on Muslim houses and business establishments by frenzied mobs. The mobs also allegedly raped and tortured many females of the minority community. In Ahmedabad, two organised mass murders took place: one in Naroda Patiya and another at Gulbarg Society, a Muslim majority residential area.

5.2.2.4.1. Naroda Patiya Massacre

The Naroda Patiya massacre resulted in the death of 97 Muslims including 36 women, 35 children and 26 men. Maya Kodnani, a prominent Bharatiya Janata Party leader and Babu Bajrangi of the Bajrang Dal, a funda-

Temple which stood in its place. This mosque was demolished by Hindu zealots on 6 December 1992 leading to widespread violence in the country.

mentalist Hindu faction of the broader Sangh Parivar, allegedly led the attack. The massacre of the women was particularly said to be more gruesome with sexual violence against them. Kodnani and Bajrangi where convicted and sentenced to long prison terms. These sentences cemented the role of the judiciary as a protector and defender of civil liberties.

5.2.2.4.2. Gulbarg Society Massacre

Gulbarg Society saw its 35 Muslim residents being burnt alive; the victims included Ehsan Jafri, a former Congress Party Member of Parliament. Zakiya Jafri, his widow, alleged that Jafri had made frantic calls prior to his killing to the Chief Minister's office for assistance but received no help as the mob continued to burn and pillage the society despite the presence of police. She later alleged the State of complicity with the rioters especially implicating the Chief Minister of Gujarat. Gulbarg Society also had 31 missing residents who were later taken to be dead taking the body count to 69.

By the evening of 28 February, curfew was ordered in 27 towns and cities of Gujarat to control the disturbances with the deployment of Rapid Action Force in Godhra. However, by and large, the deployment of armed forces was delayed.

5.2.2.4.3. Best Bakery Case

In Vadodara, a frenzied mob attacked Best Bakery, a small Muslim-owned bakery in the city where the owner and the workers of the bakery which included 11 Muslims and three Hindus were burnt alive. The police filed a case on the basis of the information given by a 19-year-old eye witness, Zaheera Sheikh. Zaheera Sheik's case rose in prominence on account of witness intimidation and harassment. The case on this account had to be shifted out of Gujarat and was tried in Maharashtra.

5.2.2.4.4. Bilkis Bano's Case

One of the most brutal of all cases during the Gujarat Riots, the horrific gang rape of Bilkis Bano and murder of her relatives including her baby shocked the conscience of an entire nation. The appeal judgment of the case was delivered in May 2017 in which the Bombay High Court commendably found police officials and doctors acquitted by the lower courts guilty, though refusing to award the death sentence to any of the accused. While the judgment was a landmark one, it was criticized by the writer as

not adopting international jurisprudential standards in its reasoning.[21] Like the Best Bakery case, Bilkis Bano's case was shifted outside Gujarat (to Maharashtra) for the purposes of ensuring a fair trial for the victims.

5.2.2.4.5. Conclusion

There have been strong allegations that high-level perpetrators have not been held accountable for the riots that followed the Godhra carnage. It is well known that the law and order machinery in Gujarat failed to protect the minority community and no major official has been held accountable for the same. Even two prominent politicians who were punished with imprisonment post-conviction, Maya Kodnani and Babu Bajrangi, are frequently released from prison on whimsical medical grounds to escape the rigours of incarceration. Such measures by the pliable State government have fully eroded the near non-existent confidence of the victims despite the commendable role of the judiciary in bringing the perpetrators to justice.

5.2.2.5. Violence in Orissa against Christians

In August 2008, at least 39 Christians were killed and 232 churches were destroyed in massive violence that followed the killing of Vishva Hindu Parishad leader Swami Laxmananda Saraswati in Kandhamal in Odisha. A large majority of those who perpetrated the violence are still at large and yet to face justice. Prior to Kandhamal, Christians have been targeted in Dangs (Gujarat) and Jhabua (Madhya Pradesh). The brutal murder of Graham Staines and his two children by Hindu fundamentalists in Odisha evoked an international outcry in January 1999. The murder in many regards was symbolic of the power enjoyed by fringe Hindu groups in the country. Animosity between the majority Hindu community in India and the minority Christian community in India has fundamentally been on the issue of 'anti-conversion laws'. Sections of the Hindu right wing Bharatiya Janata Party have accused the Christian community of engaging in conversions of indigenous tribes and other low caste Hindus to Christianity. Odisha was one of the first provinces in the country to enact an anti-

[21] Abraham Joseph, "Indian State Practice on Mass Crimes Jurisprudence: An International Law perspective on Bilkis Bano's Judgement", in *Modern Diplomacy*, 14 May 2017 (http://www.legal-tools.org/doc/7f8ba6/).

conversion law.[22] The logic of such an enactment being to stop the conversion of people from Hinduism to Christianity.

According to a team of the Odisha State chapter of the All India Christian Council, the hard-line Hindutva groups were responsible for the ghastly acts of violence that rocked Kandhamal. Around 50 Christians were brutally killed and 730 houses as well as 95 churches were attacked. A large number of Christians were displaced and forced to seek shelter in relief camps. Even the killing of Laksmananda that was used as a justification for attacks against Christians was suspected to be carried out by Maoists. The Kandhamal violence resulted in Naveen Patnaik, the Chief Minister of Odisha severing all ties with the right wing Bharatiya Janata Party. Patnaik termed the violence as one which aroused international condemnation. The gang rape of a nun in September 2008 considerably weakened Christian-Hindu relations in Orissa. While a Central Bureau of Investigation ('CBI') enquiry for the same was demanded, the Supreme Court turned down such a request. The violence in Orissa was condemned internationally forcing the National Human Rights Commission to seek a report from the Odisha government. The United States Commission on International Religious Freedom demanded that Indian authorities take immediate steps to prevent the escalation of violence. The European Union was also at the forefront of condemning the violence and requiring India to take necessary action to deal with the situation. On 29 June 2010, Manoj Pradhan, a Bharatiya Janata Party Member of the Legislative Assembly was found guilty of the murder of Parikhita Dighal, a Christian.

To conclude, Christians and other civil society groups that were at the forefront demanding justice for the victims were dissatisfied with the role played by the local police during the Kandhamal violence. Calls for a CBI inquiry should be viewed in this aspect. This is more serious given the fact that the majority of the victims were Christians who have systematically been subjected to violence, intimidation and harassment by Hindu extremists. However, what distinguishes Kandhamal and other acts of systematic violence against Christians in the State from the 1984 Anti-Sikh Pogrom and the 2002 Gujarat violence was the relatively pro-active role played by the government in ensuring justice for the victims. The attacks against minorities in 1984 and 2002 by private mobs was to an

[22] Orissa Freedom of Religion Act, 1967, adopted and entry into force 9 January 1968 (http://www.legal-tools.org/doc/0400a4/).

extent aided by a pliant State that sought to politically benefit from the situation.

5.2.3. Conclusion

It can be concluded that mass crimes in India have happened at regular intervals. The official response to these acts has not satisfied the victims and civil society groups. The police have either been hapless onlookers to instances of mass violence or active participants in the carnages. Police culpability in the 1984 anti-Sikh riots, the 2002 Gujarat riots and Kandhamal violence was strongly suspected and pointed out by commissions and civil society groups as well. As regards Hashimpura, the carnage was one that was the handiwork of communal police officials alone. Eighty-five percent of the Indian police comprises of the Constabulary who constitute the lowest rungs of the police establishment in each of the States. Fourteen percent comprises lower level officials like the Sub-Inspectors and Inspectors. Officials of the rank of Assistant Superintendent of Police and above (who are Indian Police Service officials) comprise just 1% of the total police force. Most of the lower level officials are extremely vulnerable to communal propaganda. The refusal/unwillingness of the Indian State to define 'genocide' and 'crimes against humanity' has weakened the case of the State that such crimes do not happen. A remarkable attempt was made to legislate on 'communal violence' through a bill known as the Communal Violence Bill, 2011. However, this bill was riddled with controversies and ultimately did not see the light of the day.[23] Efforts are underway to enact a law punishing mob lynching as well.[24] For the law enforcement, any pre-investigative determination of mass crimes is not possible such offences are not defined in Indian law. While focusing on the issue of mass crimes, it is submitted that the failure of the law enforcement, apart from other reasons is due to the absence of an independent prosecution machinery that can carry out pre-investigation of mass crimes (elaborated in greater detail in Sections 5.3. and 5.4. below).

[23] Section 3, Clause (c) of the bill read as follows: ""Communal and targeted violence" means and includes any act or series of acts, whether spontaneous or planned, resulting in injury or harm to the person and or property, knowingly directed against any person by virtue of his or her membership of any group, which destroys the secular fabric of the nation".

[24] Draft of the Protection from Lynching Act, 2017, 7 July 2017 (http://www.legal-tools.org/doc/f0b548/) ('Manav Suraksha Kanoon', 'MASUKA').

5.3. Pre-Investigation/Investigation in Indian Criminal Procedural Law

This section will analyse the role of the police and the prosecutor in the mass crime investigative framework in India. Specific emphasis will be placed on the issue of 'quality control' to understand how police-prosecutor relations can be improved to strengthen the 'pre-investigative' phase. This part of the problem will highlight the below mentioned 'problems' in detail.

5.3.1. The Pre-Investigative/Investigative Framework in India

As mentioned earlier, there is no concept of pre-investigation in India. Indian criminal procedural law only makes a mention of investigation and there is no formal distinction between investigation and pre-investigation.[25] The relevant clause states that 'investigation' includes all the proceedings under the Code of Criminal Procedure for the collection of evidence conducted by a police officer or by any other person (other than a magistrate) who is authorized by a magistrate.[26] According to the Supreme Court of India, the term investigation comprises the following:[27]

1. The need for the investigating officer to proceed to the spot/scene of the crime.
2. Ascertainment of the facts and circumstances of the case in question.
3. Discovery and arrest of the suspect.
4. Collection of evidence relating to the commission of the offence which may consist of:
5. Examination of various persons including the accused and recording of their statements in writing if deemed necessary.
6. Search and seizure of items/objects from the scene of the crime necessary at the time of trial.
7. Formation of an opinion as to whether on the materials collected there is a case to place the accused before a magistrate for trial and

[25] Code of Criminal Procedure, 1973, Section 2, Clause (h), see *supra* note 3.

[26] The relevant law in India is the Code of Criminal Procedure, 1973. All matters pertaining to procedural criminal law generally are contained in this enactment. See *ibid*.

[27] Supreme Court of India, *H.N. Rishbud and Inder Singh v. the State of Delhi (and Connected Appeals)*, Judgment, 14 December 1954, AIR 1955 SC 196 (http://www.legal-tools.org/doc/cc9551/).

if so taking the necessary steps for the same by filing a charge-sheet under Section 173 of the Code of Criminal Procedure.

The principal agency entrusted with the responsibility to investigate offences is the police. Wide powers and responsibilities are entrusted for this purpose some of which are as follows:

1. To require attendance of persons acquainted with the facts and circumstances of a case.[28]
2. To examine witness and record their statements.[29]

In this context, it is important to mention that Indian law makes a distinction between cognizable and non-cognizable cases. This distinction demarcates the power of the police in respect of criminal investigations. In all cognizable cases, police officers have the power, duty and responsibility to investigate; this is not true in the case of non-cognizable cases. An offence is cognizable if it is shown as such in the First Schedule of the Code of Criminal Procedure. For these offences, a police officer can arrest without warrant. In addition, for these categories of cases, the police can directly start investigation without the need for a direction by the magistrate. Cognizable cases are the more serious cases as opposed to the non-cognizable ones, which are minor in nature. Thus, for the purposes of this chapter which is concerned with mass crimes, only cognizable cases are relevant as all major crimes in India are regarded as cognizable offences.

5.3.2. Police in India

In India, the police force is the State instrumentality for the prevention, detection and investigation of crimes. Policing is a State subject, which means that every State government has its own police force which directly answerable to them. The State government decides the strength of the force. However, the most senior members of the force are members of the Indian Police Service who are recruited by a central agency known as the Union Public Service Commission to provide leadership to the respective State police forces. The head of the State police is the Director General of Police who invariably is the most senior Indian Police Service officer of the State Cadre. The Police Act, 1861, enacted by the British, is the law

[28] Code of Criminal Procedure, 1973, Section 160, see *supra* note 3.

[29] *Ibid*., Section 161. It should be mentioned here that the discretion of the officer to record or not to record statements is discretionary. There is a thus a strong chance that such a power may be misused by the law enforcement for their own reasons.

that governs various aspects of policing, though there are some ancillary laws on the subject as well.

The logic of the Police Act, 1861 was to give maximum powers to the police officers to crush any potential rebellion against the imperial State. The Delhi Special Police Establishment Act, 1946, which provides for the constitution of a Special Force in Delhi for the investigation of specific offences in the Union Territories and States with their concurrence, is significant in this regard. The CBI, which is the creation of the Delhi Special Police Establishment Act, 1946, is the premier central investigating body in India. Most mass crimes have seen investigation by the CBI given its image as an impartial and reliable investigative agency. In addition, the judiciary has on many occasions directly ordered investigation by the CBI in highly sensitive cases or those involving serious human rights violations. However, in recent times, the CBI has been subjected to severe criticism because of interference by the central government, which exercises significant control over the body. The Code of Criminal Procedure confers powers on the police like the power to arrest, search, seize and so on. Broader powers are entrusted to those in charge of police stations, who are usually known as Station House Officers. Police officers above the rank of Station House Officer are automatically vested with powers to investigate cases. The Supreme Court in *Prakash Singh v. Union of India*[30] laid down a series of guidelines with the aim of reforming the police set up in the country as is widely viewed as the most significant aspect in police reforms in the country.

Problems facing pre-investigation in India can be summarized to the following points:

1. *Excessive discretion*: The police are given wide discretion to investigate crimes. Thus, they may investigate or may not depending on various circumstances. In most cases, this authority is abused. In addition, the obligation to investigate only the most serious cases (cognizable cases) results in the police trying to categorize even the more serious offences as non-cognizable. The lackadaisical approach of the lower level constabulary is mainly because of their need to report the progress of the case to their superior officials and internal departmental requirements of speedy progress.

[30] Supreme Court of India, *Prakash Singh and others v. Union of India and others*, Judgment, 22 September 2006, (2006) 8 SCC 1 (http://www.legal-tools.org/doc/a66652/).

2. *Politicization of the police*: The police in India is heavily politicized. Policing is a State subject (as opposed to a Union subject) which means that individual States regulate their law enforcements. The Indian Police Act, 1861 regulates the functioning of the police. However, the law is archaic and is not in tune with modern ideas. Heavy politicization of the police implies that politicians and their goons (who in most cases are directly or indirectly responsible for mass crimes) are seldom brought before the law and punished. Only the lower level functionaries are prosecuted if at all. This is clearly evidenced from the various commissions that enquired into the 1984 anti-Sikh riots. A large number of impunity cases in India go unprosecuted since there is political pressure on the police not to investigate cases. Making the police independent of the executive would be great measure and this would require clubbing the prosecution with the police under a meaningful arrangement. Interestingly, the Supreme Court is now directly asking the police to directly report on the investigative progress of grave cases. However, such instances are rare and few but the trend is a welcome one.
3. *No formal distinction between pre-investigation and investigation*: In India, there is no formal distinction made between pre-investigation and investigation in the Code of Criminal Procedure, 1973. Despite the same, pre-investigation is essential in every legal system to determine the important cases from the non-important one. Pre-investigation, thus understood in the Indian context, refers to the process of collecting/assessing information and determining if there is sufficient material for a full-fledged probe. The absence of a mass crimes law has strengthened the impunity framework in the country. The law enforcement is unable to investigate or charge sheet mass crimes in India because of the absence of a law. This stage (pre-investigation) is very crucial in the Indian context, given the near absolute powers of the police to decide whether to proceed with a case or not. No authority in India can technically interfere with the police at this stage. The prosecutor or the Court have no role at this stage. Though technically, the police may co-ordinate with the prosecutor at the pre-investigative stage, this seldom happens. If the police decide not to investigate a case, then they file a final report indicating the need to close the case. This is known as a closure report. The Magistrate examining the Closure Report has

two options: *Firstly*, accept the closure report and close the case as recommended by the police. *Secondly*, direct a fresh investigation to the police, if they are of the opinion that a closure report has been filed despite sufficient material to proceed with a trial. In certain rare instances, they may refuse to exercise either of the two options and directly admit the case for trial.[31] However, if the police find sufficient material to proceed with the case, they will file a Charge sheet as required Section 173 of the Code of Criminal Procedure, 1973. Even here, the prosecutor has no role. While the police have every right to consult the prosecutor and seek his advice at every stage of the investigation, this happens only at the discretion of the police. The Investigative Officer works under the direct supervision of the district Superintendent of police who mainly controls the investigation.

4. *Police-prosecutor relations*: The Public Prosecutor or Assistant Public Prosecutor is the person responsible for conducting cases on behalf of the State. This applies at the trial and appellate levels as well. While in many countries in the world, the prosecution is given a key role at the pre-investigation and investigation stage, in India, the prosecutor practically appears only at the post- investigative or trial stage of a case. As mentioned earlier, there is hardly any co-operation between the police and the prosecution. This was primarily due to an amendment in the Code of Criminal Procedure, 1973 that separated the police from the prosecutor. It is important that the police and prosecution work together and deal with cases as police officers in many instances may not be well versed with the law. The prosecutor in reality has no independence even he actually comes into the picture at the trial stage of the case. Though he is supposed to represent the State as an officer of the court and conduct the case in a fair, transparent and unbiased manner, in reality he functions as a wing of the police (albeit in a subordinate position). Thus, while on paper the police and prosecution are separate, in practice they function as one once the trial begins. An evaluation of the Indian criminal trial process would show that the prosecutors in reality do not lock horns with the police as they are at the mercy of the State

[31] The sensational Aarushi Talwar murder case was one such instance where the Magistrate refused to accept the Closure Report filed by the CBI and directed the initiation of a trial concluding the existence of sufficient evidence against the parents of the victim.

governments that appoint them. It is an open secret that their appointment is often questionable and secured by corrupt means. It is suggested that a better mechanism may be to give the prosecutor an independent role in evaluating the report of the police. Since, this is currently not the scheme in India; Indian lawmakers are unlikely to accept the change since they would lose control over the police. In addition, there is no point in giving the prosecutor independence to evaluate police records, if the prosecutor would be subjected to the same level of political interference like the police. All Supreme Court judgments including in *Sheo Nandand Paswan* on the question of the nature and role of the prosecutor have time and again clarified that the prosecution is an independent agency from the government.[32] However, the reality is something different and the government heavily influences the prosecutors. In addition, the Indian police are unlikely to accept a prosecutor sitting in judgment over them. However, strict quality control requires that an independent prosecutor and independent police function together in the examination of cases. This would radically alter the pre-investigative stage of investigations and lead to qualitative improvements.

5. *Role of the CBI*: In fact, in the CBI, the investigative arm of the agency and the prosecuting arm of the agency work together. The CBI investigates most serious cases in India. However, in India, the CBI is often referred to as the 'caged parrot' as it is seldom allowed to function independently. It is under the administrative control of the Union government based in Delhi who often use it to settle political scores against rivals. A Quality control of the CBI would require making it independent of the Union government and perhaps directly under the control of the Supreme Court of India (if possible). Since, the executive is culpable in most massive human rights violations cases, expecting the CBI to be independent under present circumstances is difficult. The political abuse of the CBI is one of the biggest quality restraints facing Indian law enforcement today. However, despite these shortcomings, the CBI has a sound reputation among the Indian public and sensational cases are entrusted to the CBI as a final measure.

[32] Supreme Court of India, *Sheo Nandan Paswan v. State of Bihar and others*, Judgment, 20 December 1986, AIR 1987 SC 877 (http://www.legal-tools.org/doc/9035e4/).

6. *Sanction for prosecution and good faith exception*: In India, Section 197 of the Code of Criminal Procedure, 1973 provides immunity to police and other government officials from prosecution. Sanction to prosecute these officials is required from the central government. This is the main reason why law-enforcement officials are hardly ever punished for acts of impunity committed by them. In addition, there is a good faith exception provided in the Indian Penal Code, 1860 that exempts any act performed by a Public servant in good faith from punishment. All crimes committed by the law enforcement which are protected by the good faith exception are exempt from punishment. Thus, quality control at any stage of the investigative framework in India cannot happen until Section 197, IPC is removed or severely curtailed, and the police-prosecutor teams have a greater joint role to play in pre-investigative matters. All this would require compulsory political non-interference in the pre-investigative phase.

5.4. Suggestions and Conclusions

The first imperative for the Indian State to deal with mass crimes is to effectively incorporate them into Indian law. This could be done through three routes: (i) adding internationally accepted mass crimes in the Indian Penal Code, 1860; (ii) amending the Geneva Conventions Act, 1960 to remove Section 17 of the Act, which requires prior sanction of the central government before a case can be registered under its provisions and taking out the 'international armed conflict' requirement from the ambit of the law; and (iii) enacting an independent mass crimes legislation that defines proscribes and punishes the crimes that India has agreed to prohibit under its treaty obligations and those prohibited under customary international law. Any change in the law or a new law should strive to incorporate communal violence as a specific crime within its ambit. Since international criminal law does not define 'communal violence', it can exist as a subset of crimes against humanity. Needless to mention, since India has assumed obligations under the Genocide Convention, 1948, the obligation under Article 5 of the Convention, that is, to enact a specific legislation on the subject, is an imperative that should be complied with.[33]

[33] It is submitted that by the author that the obligations to prevent and punish the crime of genocide is an independent obligation under customary international law as specifically stated by the ICTY in *Krstić*.

Inquiry commissions in India have proved to be a failure. While there is no broad public debate in the country now, it is suggested that instead of having temporary inquiry commissions, it is better to have a permanent truth and reconciliation commission that would institutionalize the process of truth telling, dialogue and interaction between the various stakeholders. This institution essentially should function alongside the police but should have judicial members as such as members.

Police reforms in India urgently need to focus on abolishing Section 197 from the Code of Criminal Procedure, 1973. A strong and effective witness protection programme is the need of the hour to prevent threat and harm to witness. Zahira Shiek's case highlights the importance of witness protection, which is so very crucial in cases involving mass crimes. Police-prosecution co-ordinations should become a reality in India. It is time for Indian lawmakers to seriously ponder on separating pre-investigation from investigation in India. This change would be for the better in India.

Last but not the least, it is extremely important to ensure that the police are free from political pressure and bias. An Independent Police Accountability Board can be constituted in each State that ensures that human rights are not violated. Police officers found guilty for mass crimes should be punished under the proposed mass crime laws while providing safeguards for honest and diligent officers. India needs to go a long way in the fight against impunity. Recognizing the importance of pre-investigation and affording a great role for international criminal law, especially the ICC should be the first steps in this direction.

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Quality Control in Preliminary Examination: Volume 1

Morten Bergsmo and Carsten Stahn (editors)

This is the first of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book does not specifically recommend that prosecutorial discretion in this phase should be further regulated, but that its exercise should be more vigilantly assessed. It promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

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