

## STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL JUSTICE

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### **Abstract**

*A witness is an essential part of the criminal justice system to ensure that the actual culprit gets punished for the crime they committed, and in the words of Jeremy Bentham, we can say, Witness are eyes and ears of justice. However, if one closes their eyes and ears, it would become tough for that person to survive. Similarly, if all the witnesses turn hostile due to external threats, harassment, or intimidation, providing justice would become very difficult. In the present time, where every persons rights are protected and catered to, the rights of witnesses should also be seen and acknowledged. Like how victims are protected and secured, theres a requirement for legislation to protect the Witness. This article would detail the reasons for a witness turning hostile and end with suggesting remedies for the same.*

*Keywords: Victim, Witness, Hostile, Evidence, Crime*

### **Introduction**

The International Criminal Court (ICC) is an unparalleled ambition by the world community to provide the national governments help to bring to trial and punish individuals who are criminally responsible for the commission of the core crimes that is the crime of genocide, war crimes, crimes against humanity and aggression in circumstances when the nations they belong are unable or unwilling to bring them to justice.<sup>2</sup> There has been a massive cry for an independent criminal court at an international level to which states own responsibility to deal with such grave crimes to maintain international peace and security and protection of human rights. However, there has been a significant concern to states, i.e., the concept of state sovereignty, which prevents them from bringing the ICC to full function.

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<sup>2</sup> Dilip Lahiri, 'Should India continue to stay out of ICC?' (Observer Research Foundation, 24<sup>th</sup> November 2010) <<http://www.orfonline.org/research/should-india-continue-to-stay-out-of-icc/>> accessed on 1<sup>st</sup> July 2019.

The ICC as an institution represents a building which aims to deliver accountability and the rule of law irrespective of most of the powerful nations not supporting the Rome Statute. India, though one of the massive supporters during the drafting of the Rome Statute it is abstention to vote to bring the International Criminal Court to function speaks volumes of India's resistance towards the ICC. One of the few reasons highlighted was of how the ICC is superseding the State autonomy.

Sovereignty cannot be defined easily.<sup>3</sup> Essentially what sovereignty means is when nations act independently in full autonomy and self-determination without any obstruction from a higher authority. Thus, the theory of sovereignty means that states operate and have complete regulation over their matters inclusive of issues such as human right violation which are not governed by international law.<sup>4</sup> This loophole that the international law did not govern such issues was seized by the states as a protection tool to guard themselves when they abuse the human rights of their subjects. It is hence, imperative to understand the importance of the ICC because the court has jurisdiction over matters of serious crimes which amount to significant contravention of the human rights law as well as the international humanitarian law.<sup>5</sup>

Scholars around the world have showcased concerns that that concept of state sovereignty has been mislaid by states under the establishment of the ICC. Similarly, India argued that if ICC is provided with the jurisdiction over such crimes, then it encroaches upon its sovereignty. While it completely ignored the fundamental principle of 'Complementarity'<sup>6</sup> Which ensures that the International Criminal Court is, in fact, the court of last resort.

India believes in the obsolete outlook that state sovereignty must be absolute. The author of this paper believes that it is in direct contravention of the modern perspective that state sovereignty is a powerful instrument which the state possesses and that is should be under the checks laid under international law. India abstained when the draft statute for an international criminal court was voted in Rome because it observed how the ICC was in contravention to the Non-Aligned Movement (NAM's) view which India endorsed. India argued that the ICC

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<sup>3</sup> *ibid* 464.

<sup>4</sup> Banerjee R (n9) 464.

<sup>5</sup> The Rome Statute 1998, art 5.

<sup>6</sup> The Rome Statue 1998, art 17.

should be based on principles of complementarity, State sovereignty, and non-intervention in domestic affairs.<sup>7</sup>

India, in its opening statement in Rome, clarified that that only way to get support for the ICC is for the International Criminal Court to operate optionally rather than a universal or inherent jurisdiction. India further argued that such provisions would attract a large number of states which will add to the advantage of the court as state consent being the essential aspect of ICC jurisdiction.<sup>8</sup> India firmly believes in the principles of the UN Charter, notably the Principle of Complementarity. According to India, the principle of complementarity is that when a case is before the national courts, and it has been decided upon or when the accused is convicted or acquitted the ICC should not infer jurisdiction.<sup>9</sup> India also stated that the ICC could only enforce its jurisdiction in situations like in the former Yugoslavia and Rwanda.

The author of the paper agrees that the concept of state sovereignty is of utmost importance, but as already noted, India has to remember that the principle of complementarity constraints the jurisdiction of the court. Even though the Statute doesn't clearly mention what the contents of complementarity are, Article 17 of the Statute gives enough information on the issues it deals with and when the ICC will not have jurisdiction under the complementarity principle. It is important to remember that the ICC was premised on the notion that it will not obstruct the functioning of the domestic/national courts but will complement them in bringing justice. The jurisdiction of the ICC can be triggered only if the State is 'unwilling or unable' to do so and thus ample scope for non-interference and principle of sovereignty prevails.<sup>10</sup> Thus, the Statue does not give preference to the jurisdiction of the International Criminal Court against the national judicial mechanism.<sup>11</sup>

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<sup>7</sup> Banerjee R, 'Rome Statute and India: An Analysis of India's Attitude towards the International Criminal Court' (2011) 4 JEAIL <10.14330/jeail.2011.4.2.10> accessed June 24th, 2019

<sup>8</sup> Suzannah Linton, 'India and China Before, At, and After Rome' (2018) 16 Journal of International Criminal Justice 272.

<sup>9</sup> Dilip Lahiri, 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', 16 June 1998

<sup>10</sup> Anuradha Rajesh Saibaba, 'India and the International Criminal Court: Re-Invigorating and Re-Visiting the Non-Ratification Debate' (2011) 11 ISIL Y.B. Int'l Human. & Refugee L. 189, 191.

<sup>11</sup> B.C. Nirmal, 'Jurisdiction of the International Criminal Court' (2003) 3 ISIL Y.B. Int'l Human. & Refugee L. 116, 125.

India has positively argued that it has never reached the brink of Common Article 3 and has stated it is why it has overlooked the application of Common Article 3 in its domestic legislations irrespective of ratifying the 1949 Geneva Conventions and has even enacted Geneva Conventions Act 1960. Although, India argues that the application of Common Article 3 is irrelevant in the Indian scenario, specific episodes from India's recent history speak otherwise like:

### **The situation in India Administered Kashmir and North Eastern States**

The crisis in Kashmir dates back to 1947 before the British rule when Jammu & Kashmir was one of the largest states under the Indian subcontinent. The situation turned worse when the princely states under the Indian independence act, 1947 could choose to be independent or accede to either of the sovereigns India or Pakistan<sup>12</sup> It was the then ruler of Kashmir chose to accede to India and signed the Instrument of Accession to India.<sup>13</sup> This was led to an armed conflict between the two nations, India and Pakistan.

In 1948 the government of India brought this to the notice of the United Nations Security Council who took several steps to resolve the problems bypassing a few resolutions namely resolution 39, 47 and 122 all them to resolve and mediate the tensions between the two nations. The UNSC also took preventive measures such as to set up a ceasefire line which would consist of the military observers to keep an eye on the nations.

It was in 1972 when the Government of India tried to take matters in its hand and signed the Simla Agreement which offered “the establishment of durable peace in the sub-continent, so that both countries may henceforth devote their resources and energies to the pressing task of advancing the welfare of their peoples” and “resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them.”<sup>14</sup>

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<sup>12</sup> The Indian Independence Act 1947.

<sup>13</sup> OHCHR, ‘Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan’ (14<sup>th</sup> June 2018) <<https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf>> 8.

<sup>14</sup> *ibid* 10.

Kashmir today has the attention of the international community not merely because of the tension between the two nations but because of the human right violations that have been occurring since 1990 when India introduced legislation called the Armed Forces (Jammu and Kashmir) Special Powers Act (AFSPA).<sup>15</sup> This was enacted to administer India control over Kashmir. The Human Rights Watch reports<sup>16</sup> On hundreds of mass graves in Kashmir by security forces deployed by means of rape as a weapon to perpetrate atrocities and take revenge against the civilian population. Apart from the human right abuses Kashmir today has about 50,000 to 70,000 troops deployed which makes it the most militarized section of the world what this has led to is the military forces interfere in day to day life if the locals who have entirely lost their right to self-determination.

The continuous rift between India and Pakistan has led to more involvement of the armed forces to stabilize the situation, which in turn has led to human right violations. The situation of ceasefire violations leading to a large number to casualties and deaths occur even till today. Irrespective of such a scenario making Common Article 3 applicable to the situation in Kashmir the government of India still argues that it does not meet the threshold for application of Common Article 3.<sup>17</sup> This is because the Indian government believes this to be a domestic breach of the law and order situation and not as a non-international armed conflict.<sup>18</sup>

The Indian government considers this a domestic issue because non-international armed conflict is not mentioned under the purview of Common Article 3, and hence, the criteria for its application is treated to be high. Authors have argued that this attitude of hesitation to ratify to ICC, which can make an international probe into the issue is due to sovereignty debate.<sup>19</sup>

Another illustration that can be given in light of Kashmir and the North Eastern States comes from the amendment to the Armed Forces (Special Powers) Act, 1958 (from now on 'AFSPA'). The legislation introduced by the Indian government creates much curiosity because a few sections in the Act provide the armed forces with arbitrary power, for instance, it allows

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<sup>15</sup> The Armed Force (Jammu and Kashmir) Special Powers Act 1990.

<sup>16</sup> Human Rights Watch, 'India's Secret Army In Kashmir New Patterns Of Abuse Emerge In The Conflict' (Human Rights Watch 1996) <<https://www.hrw.org/legacy/reports/1996/India2.htm>> accessed 4<sup>th</sup> July 2019.

<sup>17</sup> Garima Tiwari, 'India's Hostility to Internationalize Criminal Justice-Calculative Strategy or Prejudiced Reluctance?' (June 2014) Vol. 1 European Scientific Journal 491,493.

<sup>18</sup> *ibid* 493.

<sup>19</sup> Robert Muggah, 'Internal Conflict and the International Community: Wars Without End? By Roderic Alley' (2005) 18 Journal of Refugee Studies.

security forces to “fire upon or otherwise use force, even to the causing of death.”<sup>20</sup> It further goes on to state how the armed forces will not face any criminal prosecution if this act has bound the orders.

The author argues that such a provision is a clear violation of human rights and lack of access to justice because this action of killing the civilians based on mere suspicion then becomes a ‘Sanctioned’ act on behalf of the government and the civilians are not allowed to take the matter to the court of justice. Further, such provisions also breach Common Article 3 because it prohibits the killings of civilians in a non-international armed conflict. The security forces have been accused of Rape, Murder and illegal detention, but no action has been taken against them because AFSPA provides for a virtual immunity<sup>21</sup> to the armed forces which prohibits the prosecution of security forces personnel unless the Government of India grants prior permission or “sanction” to prosecute.<sup>22</sup>

Both Kashmir and the AFSPA in the North Eastern State fess project the resistance showcased by India to ratify the ICC. The resistance is proven more when the Supreme Court of India, which is the highest court of the land upheld the constitutional validity of AFSPA in 1997.<sup>23</sup> The author submits that the act of the Supreme court in upholding the validity of AFSPA is politically motivated on behalf of the government to support its ‘high threshold’ argument that it made while arguing that Common Article 3 does not apply to India. However, the author wants to state that the threshold argument provided by the Indian delegation is a weak one because the Additional Protocol II Article 1(2) provides for a low threshold which India again has not ratified. Refusal to ratify such treaties only shows the fear on behalf of India that it would instantly come under the purview of the International Criminal Court for violations under Common Article 3 and the core crimes.<sup>24</sup>

The author would further want to highlight how the Indian government has taken its defiance to sign the ICC a little further. It was in December 2003 the delegates of the United States of

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<sup>20</sup> The Armed Forces (Special Powers) Act 1958.

<sup>21</sup> OHCHR (n24) 11.

<sup>22</sup> *ibid* 11.

<sup>23</sup> *ibid* 12.

<sup>24</sup> Garima Tiwari (n27) 493.

America and India signed an agreement which states that neither country will surrender persons of the other country to any international tribunal without that country's express consent.<sup>25</sup>

This agreement is also called the “Article 98 agreement” because it refers to the provision mentioned in the Rome Statute which prohibits the ICC from prosecuting someone located within an ICC member state if doing so would cause the member state to violate the terms of other bilateral or multilateral treaties to which it may be a party.<sup>26</sup> The author wants to submit that signing such an impunity agreement shows how India wants to avoid the ICC and its obligation towards the international community. India needs to focus on itself and has to be accountable for its actions. Irrespective of many arguments made for India to end this impunity agreement with the United States of America and to re-examine its decision on the ICC there have been no initiatives taken. However, surprisingly in July 2017, the Supreme Court of India directed the Central Bureau of Investigation to inspect into the purported crimes committed by the armed forces under the AFSPA in the state of Manipur.<sup>27</sup> The Union government reacted negatively to the results of the CBI and declined it, and yet again India reaffirmed its position on ICC.

The author of this paper submits that there are mislaid concerns about the ICC and how it affects the sovereignty. The author argues that the arguments provided on behalf of India that atrocities occurring in the country are of domestic in nature fails exceedingly. The author entirely agrees to the views of Dr. Usha Ramanathan, Law researcher that India still considers genocide a murder<sup>28</sup> Which is non-justifiable because India's criminal law does not include mass crimes, and hence, there is a burden on India to oblige to the International community and ratify to the International Criminal Court.

The author also agrees to the view of Phillipe Kirsch, Judge<sup>29</sup> The International Criminal Court who suggested that its time that India must join the ICC as it is the largest democracy and its

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<sup>25</sup> Ninan Koshy, ‘International Criminal Court and India’ (2004) Vol. 39, No. 24 Economic and Political Weekly <<https://www.jstor.org/stable/4415143>> accessed 3<sup>rd</sup> July 2019.

<sup>26</sup> Garima Tiwari (27) 493.

<sup>27</sup> Press Trust of India, ‘SC orders CBI probe into Manipur extra-judicial killings’ (The Hindu, 14<sup>th</sup> July 2017) <<https://www.thehindu.com/news/national/supreme-court-order-cbi-probe-into-manipur-extra-judicial-killings/article19276650.ece>> accessed 3<sup>rd</sup> July 2019.

<sup>28</sup> Press Trust of India, ‘India should join International Criminal Court: ICC Judge’ (Rediff.com, 10 December 2005) <<https://www.rediff.com/news/report/icc/20051210.htm>> accessed 3<sup>rd</sup> July 2019.

<sup>29</sup> *ibid.*

support would make the global court look stronger. He also underlined that India's domestic criminal law which is the Indian Penal Code, 1860 is extensive if it had to be used on a national level, but it misses out the grave crimes mentioned under international law which is problematic. One believes that this is the way forward because ratifying the ICC will also allow India to develop its national laws to deal with mass/grave crimes which are committed on its land. The author would hence submit that India must now drop its argument of sovereignty against ICC because India has been a party to International Court of Justice, World Trade Organisation to name a few and is subject to these India has not lost its sovereignty.

### **Impunity from grave crimes: The Punjab Experience**

*“The mass killings of Sikhs in Delhi and elsewhere in November 1984 were in fact ‘crimes against humanity’. They will continue to shock the collective conscience of society for a long time to come.”*<sup>30</sup> The 1984 Anti-Sikh Riots Amount To ‘Crimes Against Humanity’ the Delhi High Court observed.<sup>31</sup> India’s recent history can be composed into tales of impunity. The killings of the Sikhs in 1948 which operated over three days after the death of the then Prime Minister Indira Gandhi is the starting point. The events which began on 31<sup>st</sup> October 1948 could still be argued as a reaction to the killing of the Prime Minister by her two Sikh bodyguards but the attacks which followed post that as per the witnesses and testimonies which were concluded by the Nanavati Commission speak otherwise.<sup>32</sup>

The Report<sup>33</sup> States that the attacks of 1948 were a planned attack on the Sikh settlement it also further mentions that the killings of the Hindu's by the Sikhs provoked a series of ruthless killing against the Sikh to demonstrate a lesson.<sup>34</sup> The riots in early November 1984 killed

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<sup>30</sup> Devika, ‘1984 Sikh Riots Principal Offender Sajjan Kumar sentenced to life imprisonment for the crime against humanity’ (SCC Online, 17 December 2018) < <https://www.sconline.com/blog/post/2018/12/17/1984-sikh-riots-principle-offender-sajjan-kumar-sentenced-to-life-imprisonment-for-crime-against-humanity/>> accessed on 4<sup>th</sup> July 2019.

<sup>31</sup> Manu Sebastian, ‘1984 Anti-Sikh Riots Amount To ‘Crimes Against Humanity’, Observes Delhi HC’ (India Culture Forum, 19<sup>th</sup> December 2018) < <https://indianculturalforum.in/2018/12/19/1984-anti-sikh-riots-amount-to-crimes-against-humanity-observes-delhi-hc/>> accessed on 3<sup>rd</sup> July 2019.

<sup>32</sup> Ankita Guru, ‘Need For Law On Genocide In India: In The Light Of India’s Obligation To The Genocide Convention, 1948’ (2015) ResearchGate 2.

<sup>33</sup> The Government of India, ‘Justice Nanavati Commission Of Inquiry’ (2005) <[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)> accessed on 3 July 2019.

<sup>34</sup> *ibid.*



2,733 Sikhs in Delhi alone and nearly 3,350 all over the country, as per official figures. The Court noted that this was neither the first instance of mass killings nor the last.<sup>35</sup>

The commission report also added that the individuals who carried out the attacks and violence on the Sikh community were approached to instigate & accomplish such attacks. The report further added that there were also supply to weapons to the crowd to stimulate the attacks in order to erase the community.<sup>36</sup> The author of this paper would want to argue that the attacks which took place on the Sikh community was a planned attack and was not an isolated one. The perpetrator's assault on the Sikh settlement show that it was a coordinated attack, the design was laid to classify the shops and homes that belonged to the community which could make the attack easier on the Sikhs in order to eliminate them from Delhi.

The author would further want to state that the violence had a familiar pattern, which was that male members of the community were attacked by dragging them out of the house, beaten and burnt alive. A tyre was placed around their head and was burnt up using petrol.<sup>37</sup> The argues that the events that took place in Punjab were not merely riots but was genocide because the attacks were planned and targeted a particular population, i.e., the Sikh. This was a little easier to do because the Sikhs are easily identifiable due to their appearance a beard and more so a turban.<sup>38</sup>

According to historical evidence, police vans were assigned in the critical areas of the town before the violence began. When the local asked the police about the intent of so many police vans, the police officer replied: "A bhi to kuch nahin hai, par jald hi aap jaan jayenge"(There is nothing right now, but you will soon know). He also spotted the then superintendent of police who ordered his officers to hit the Sikhs.<sup>39</sup>

The attacks were confirmed to be in a systematic pattern which was observed in the killings.<sup>40</sup>

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<sup>35</sup> Manu Sebastian (n48)

<sup>36</sup> The Government of India, 'Justice Nanavati Commission Of Inquiry' (2005) <[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)> accessed on 3 July 2019.

<sup>37</sup> Ankita Guru (n11)

<sup>38</sup> *ibid* 11.

<sup>39</sup> Ranvir Nayar and Vrijendra, 'Anti-Sikh Riot in Bidar' (1988) 23 *Economic and Political Weekly* <<https://www.jstor.org/stable/4393984>> accessed on 4 July 2019.

<sup>40</sup> PÜCL & PÜDR, 'Who Are the Guilty? Causes and Impact of the Delhi Riots' (1984) 19 *Economic and Political Weekly* <<https://www.jstor.org/stable/4373787>> accessed on 4 July 2019.

The author would like to state that the Anti-Sikh violence of 1948 attracts the need and the application of Article 7 of the ICC. The definition of Crimes against humanity under article 7 states “crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act, referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health”.<sup>41</sup>

The author would further argue that the events that took place in 1948 amounts to crimes against humanity because it incorporates a contextual element to the crime that the perpetrator is contributing widespread or systemic attack targeting victims on the basis of identity which can be noticed in this case wherein the Sikh community was targeted in a systematic manner, based on religious grounds with the knowledge to eliminate the Sikh population.

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<sup>41</sup> The Rome Statue 1998, art 7.

This attack is one of the first attacks which took place in India, but the author would want to state that it was not the last. The riots of 1948 had left an unfinished agenda for justice<sup>42</sup> until the apex court of India observed that loopholes must be looked into by domestic law and such cases must be taken care of by the International Criminal Court. The court stated that neither “crimes against humanity” nor “genocide” is part of our domestic law of crime, and these loophole needs to be addressed urgently.<sup>43</sup> The apex court reversed the acquittal by the trial court of Sajjan Kumar, former Member of Parliament and sentenced him to imprisonment for life.<sup>44</sup>

The author agrees with the view of that the court that the anti-Sikh riots of 1984 answered the description of ‘crimes against humanity’ as the mass killings were engineered by political actors with the assistance of the law enforcement agencies. The author would like state based on the preceding discussion on the anti-Sikh riot to submit that arguments rendered in favour of not ratifying the ICC statute are not persuasive.

Further, the author submits that the riots of 1948 fall within the ambit of the definition of crimes against humanity because the events that occurred were not riots but a planned genocide. The author argues so because attacks were not merely a reaction the mob or unlawfully assembly, but it was organized by state officials who were directed mainly against the Sikh community in order to have a systematic execution pattern. Hence, this shows that this was not a case of section 146 of the Indian Penal Code, which discusses violence by the unlawful assembly.<sup>45</sup> The attacks were of a more extensive scale and were performed with an intention to destroy the Sikhs. The riots had planning, organization, preparation in order to exterminate the Sikhs this falls into the ambit of crimes against humanity and genocide which means that the ICC should have jurisdiction over such cases this also shows how the Indian judicial system needs reform and that the IPC irrespective of being extensive does not cover International crimes.

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<sup>42</sup> Usha Ramanathan, ‘India and the ICC’ (2005) 3 Journal of International Criminal Justice <<https://doi.org/10.1093/jicj/mqi055>> accessed on 4 July 2019.

<sup>43</sup> *State v. Sajjan Kumar* [2018] SCC OnLine Del 12930.

<sup>44</sup> Devika (n49)

<sup>45</sup> The Indian Penal Code 1860, s 146.

## **The Godhra Massacre**

A similar unfortunate incident like the 1948 riots took place in the state of Gujarat in the year 2002. The violence in Gujarat began after 58 people were killed; most of them being children and women. This occurred when a Muslim mob attacked two trains carrying Hindu activists who were returning from a campaign that they were earlier part of to build a Ram (Hindu deity) temple instead of a mosque which was destroyed in 1992 by Hindu Militants. The campaign to construct a temple continues to increase the violence between the two religious groups Hindu-Muslim in the country.<sup>46</sup>

Events between February 27- March 2, 2002, after three-day violence and killings by the Hindus it left hundreds and ten thousand homeless. The officials from the Indian government have confirmed that these attacks have led to about 850 people been killed in the state of Gujarat. However, the unofficial assessment states a number as soaring as 2000.<sup>47</sup> These attacks have been considered the worst religious bloodshed of the decade. While the state government officials stated that the violence in Gujarat was ‘spontaneous reaction’ to the atmosphere in Godhra. However, Smita Narula<sup>48</sup> Senior South Asia researcher for Human Rights Watch denies such arguments and has contended that the attacks against the Muslims were carefully set up with the support of the vast police cooperation with the assistance of officials from the Bhartiya Janata Party (BJP) which at that time had the majority in the state government.<sup>49</sup> The author agrees with the view of the senior researcher because while the attacks against Muslims shops and restaurants happened, the stores owned by Hindus continued to be untouched. The author of this paper believes that this is a crisis of impunity wherein the government who is in the majority is threatening the existence of the minority.

The author submits so because the attacks on the Muslims were a united attack by the Hindus in order to create the tension between the groups to protect the BJP's rule in the state. This was supported by various organizations such as Vishwa Hindu Parishad, the Bajrang Dal, the ruling BJP under the shadow of the RSS (Rashtriya Swayamsevak Sangh) who believe and follow

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<sup>46</sup> “We have no orders to save you” State Participation And Complicity In Communal Violence In Gujarat' (Human Rights Watch 2002) <<https://www.hrw.org/reports/2002/india/gujarat.pdf>> accessed 4 July 2019.

<sup>47</sup> *ibid* 4.

<sup>48</sup> Human Rights Watch, ‘India: Gujarat Officials Took Part in Anti-Muslim Violence’ (Human Rights Watch, 30 April 2002) < <https://www.hrw.org/news/2002/04/30/india-gujarat-officials-took-part-anti-muslim-violence>> accessed 4 July 2019.

<sup>49</sup> *ibid*.

what the majority of India's population is Hindu and thus the Muslims have no right to live in the country.<sup>50</sup> The role of the government and its officials in the riots have been imperative. They have planned and organized the attack with the help of the ministers. A few witnesses have affirmed that their calls to the police to protect/help them went futile because it wouldn't be answered or they have been provided with responses such as “We don't have any orders to save you”; “We cannot help you, we have orders from above”; “If you wish to live in Hindustan, learn to protect yourself” such cases would make it worse for help.<sup>51</sup>

Activists in relation to the Godhra case have argued that the Indian government could be brought under the International Criminal Court which involves the then Chief Minister of State, Narendra Modi who is now the Prime Minister of India. Prashant Bhushan, Indian lawyer, and human rights activist has stated that the reason why India is not keen on ratifying the ICC is that the head of state/ government could risk prosecution.<sup>52</sup> The author agrees with the views of the activist because in India the rich and those in power have influenced the judiciary and tried to get their way out of cases in which they have been involved, but they fear that the same would not be possible with the International Criminal Court. The author would further mention that the crimes that took place in Punjab (1984) and as well as in Gujarat (2002) though are separated by 18 years of history they have similar features such as they were not independent of people fighting from different religions, but it happened because state officials commissioned and omitted from doing their duties. The Gujarat carnage was one of the biggest.<sup>53</sup> The author would like to mention that the violations which occurred in 1948 were set up by the Indian National Congress (Political Party) and a political party also staged the 2002 riots but this time a different one, i.e., the Bhartiya Janata Party (BJP). In both the cases, politicians/ state officials were involved which attracts the provisions of the Rome Statute.<sup>54</sup>

In the opinion of the author, the way forward would only be when ICC is considered as an appropriate forum to bring human right violators in front of the court to provide justice to the

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<sup>50</sup> “We have no orders to save you” State Participation And Complicity In Communal Violence In Gujarat' (Human Rights Watch 2002) <<https://www.hrw.org/reports/2002/india/gujarat.pdf>> accessed 4 July 2019.

<sup>51</sup> Human Rights Watch (n67)

<sup>52</sup> Priya Esselborn, 'Activists explain why India is not keen on the ICC' (Deutsche Welle, 3 June 2010) <<https://www.dw.com/en/activists-explain-why-india-is-not-keen-on-the-icc/a-5646001>> accessed 5 July 2019.

<sup>53</sup> Harsh Mander, 'Conflict and Suffering: Survivors of Carnages in 1984 and 2002' (2010) 45 Economic and Political Weekly <<https://www.jstor.org/stable/20764389>> accessed 5 July 2019.

<sup>54</sup> *ibid* 65.

victims. The ICC is a powerful institution who can take complaints from individuals, non-governmental organizations, states, and the Security Council.<sup>55</sup> Though the Indian delegation argued that the power of referral by the security council would lead to a bias political advantage to the P5, the author rejects that argument and states that the court has a robust independent prosecutor who will look into the cases in a clear and unbiased manner.

In conclusion, One submits that although sovereignty is of utmost importance to a nation, arguments based on the same against the ratification of the Rome Statute in fear of prosecution for human rights violations is a weak argument to protect the government from being accountable. The author believes issues such as genocide and crimes against humanity is an international humanitarian concern and is not just a national one. Hence, in this regard, the International Criminal Court is groundbreaking because it has inherent international jurisdiction.<sup>56</sup> Furthermore, the author believes that sovereignty has never been a defense for grave mass crimes, and today, it is less a defense than ever.

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<sup>55</sup> The Hindu, 'Bringing barbarians to book' (India's National Magazine, 13<sup>th</sup> April 2002) <<https://frontline.thehindu.com/static/html/fl1908/19081290.htm>> accessed 5 July 2019.

<sup>56</sup> The Rome Statute 1998, art 21,22.

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