Threatened Existence: A Feminist Analysis of the Genocide in Gujarat
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Chapter 6
Obstacles and Limitations of National Legal Remedies

The State is responsible for compensating the Muslims in Gujarat for the gruesome violence they experienced. This compensation needs to be in terms of both material receipts and access to justice. Chapter 4 presents the intensity and degree of complicity of State officials in greater detail, particularly the police and civil administrations, whose roles as State officials became secondary to their affiliation to the Hindu Right. It is evident that the State has failed to provide compensation in all respects. Instead of ensuring access to justice, systematic efforts have been made to scuttle the investigation and prosecution process right from its early stages, to justify the violence and to deny justice to victims and survivors. Added to these active efforts, are the inherent limitations of Indian laws and procedures to prosecute crimes of mass violence, which places severe obstacles in the process of obtaining justice.

6.1 Aid, Relief and Assistance or Reparation?

To use words of voluntary aid such as "assistance," "aid" and "relief"– as opposed to the language of obligation and entitlement – is clearly a State exercise to absolve itself of any responsibility and accountability to affected citizens. This stance of both the Central and State government is a far cry from the recognized terminology of "Reparation" under international law. Reparation is understood as the effort to repair damages suffered by victims as a result of State failure and normally includes restitution (restoration of victims to the circumstances before the violation), compensation (provision of any assessable damages, both material and emotional, for the physical, psychological, direct and indirect harm suffered by the victim), rehabilitation (provision of medical, psychological, legal and social services including education and training on the means to develop new livelihoods) and satisfaction (a public acknowledgement of the wrong and promises of non-repetition with steps to restore the confidence and relationship between and within communities and the State.[1] If the government does not accept any responsibility of what happened, reparation can only remain a distant dream.

Reparation in situations like the post-Godhra pogrom would not be made only for the death, harm or loss suffered by victims. It must also include measures to address the continuing sense of fear and anxiety victims experience; the trauma and psychological damage the victims, women and children experience, the loss of citizenship rights and the sense of betrayal the affected community experiences.

Of the four aspects of reparation, judiciary of both the High Court and Supreme Court of India recognize the right to compensation and have in a number of instances awarded compensation or interim compensation to the victims. In *P. Rathinam* v/s *Union of India and others*, where four police officers were involved in sexual assault on a woman, the Supreme Court accorded interim compensation (Rs. 20,000) to the woman concerned.[2] In *Gundalure*

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[1] The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, 4 December 2001, The Hague, The Netherlands, Pp.- 254-261.
[2] 1989 Supp. (2) SCC 716.

M.J. Cherian and others v/s *Union of India and others,*[3] the Supreme Court directed the Uttar Pradesh government to pay Rs.2,50,000 (approximately US$ 5000) as compensation to each of the two sisters who were sexually assaulted and acknowledged at the same time, that there were major lapses amounting to misconduct by the concerned police officer during investigation.

There have been precedents of the judiciary also holding the State responsible for not controlling situations of riot and protecting property of the people. In a case filed regarding the Coimbatore riots, the Madras High Court held that "There was total failure by the State to perform its mandatory duty, which would amount to culpable inaction. There has been deprivation of fundamental rights and the State is under a Constitutional and legal duty to compensate the victims." The Court directed the State of Tamil Nadu to pay compensation Rs 33,19,033/- as assessed and recommended by the collector to the victims of Coimbatore riots.[4] Similarly the Delhi High Court has also awarded Bhajan Kaur, a survivor of the anti-Sikh riots in Delhi in 1984, an "Increased compensation from Rs. 20,000 to Rs 200,000 to be given with interest i.e. Rs 3,50,000/-."[5]

There is thus no reason to believe why the Supreme Court would not take a cue from its own previous rulings and order appropriate interim relief to victims of the Gujarat pogrom, pending investigation of different cases, including those of sexual violence.

6.2 Shah and Nanavati Commission

The State in response to the victims demand for justice and for action against those responsible for the violence in Gujarat in February–March, 2002, established an Enquiry Commission under the National Human Rights Commission Act. Setting up an Enquiry Commission for widespread violations are often a means to delay prosecution, avoid responsibility and shield top public officials, politicians and other powerful individuals that are known to be involved. There are several problems with such Commissions. First, they take very long to complete their reports. Second, their findings are published as recommendations and are not mandatory in nature.

The experience of two prior situations where Enquiry Commissions were established (though not comparable to Gujarat events) are indicative of the problems and the ineffectiveness of these mechanisms. Eighteen years later, the Commission set up to investigate the anti-Sikh riots following the assassination of Indira Gandhi in 1984, has yet to submit a report. The Sri Krishna Commission, set up to look into the 1992-93 riots in Bombay following the demolition of the *Babri Masjid* in North India, submitted its report after seven years. The report indicted several individuals responsible for and complicit in the riots. It has been four years since the release of the report and no action has been taken against any of those indicted for fear of refreshing "old wounds." It would seem that as far as the State is concerned, Enquiry Commissions are a means to serve a dual purpose (neither of them being to serve justice): to immediately demonstrate that the matter is "being investigated" and to erase the events from public memory years later. Many of the perpetrators of both the riots mentioned above continue to enjoy complete impunity. Citizens, particularly those affected, are therefore not inclined to place confidence in such a mechanism.

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[3] 1995 Supp. (3) SCC 387.

[4] R.*Gandhi and others* v. *Union of India and another* AIR 1989 Mad 205.

[5] *Bhajan Kaur* v. *Delhi Administration* AIHC 1996 Del 5644.

There are other reasons that contribute to the lack of confidence in the Gujarat Commission as pointed out by Advocate Rehmat and Advocate Majeed from Baroda. Justice K.J. Shah had sentenced persons from the Muslim community to death when presiding over the TADA court in the matter of the Dabgarwad, Laliwal case and the Supreme Court had completely reversed the verdict and also questioned the reasoning of the TADA court.[6] His appointment as the Commissioner to investigate the Gujarat events was therefore opposed. The situation was remedied by appointing Justice Nanavati. Justice Nanavati has subsequently made inappropriate remarks about the case before the Commission while the investigation is still pending. Kartik**,** a lawyer from Ahmedabad appearing before the Commission said, "Investigation was wrong and police were changing (their story) as per political requirement and we will never see the truth and Justice Nanavati also knows that."

In May 2003, Justice Nanavati made another statement to the media absolving the Modi government and police officials of Gujarat of any responsibility in the post-Godhra violence. He said that the Commission had recorded no evidence that suggested the complicity of the Narendra Modi government or its police in the post-Godhra killings of Muslims.[7] The propriety of this public statement when the Commission is not even half-way through recording of testimonies, particularly about the region that was even in Nanavati's admission, worst affected (Ahmedabad) is highly questionable. It also leaves one wondering whether the appointment of Justice Nanavati remedied the perception of the Commission as a "saffron" body at all, or merely regularised it.

6.3 Biases in the Investigation and Prosecution

The whole criminal justice system works on the premise that any crime committed is an offence against the State, and that the burden of proof lies on the State or prosecution. The criminal justice system is also governed by the principle that the rights of the accused need to be protected. This principle checks and balances the power of authorities, particularly in cases where the accused come from marginalized sections of society, in a social system where the police and other repressive State agencies engage in violations of all sorts in seeking convictions. However, in the case of crimes *against* people from marginalised sections of society, *by* those with more power, this protection frequently helps in denying justice to the victims. It is obvious that in such a situation, because of the high level and wide complicity of the police and top officials in the State administration legal proceedings against many accused is a non-starter. Yet, the irony and expectation is that those very officials who were involved in the crimes will conduct the investigation and assist prosecution of the guilty.

The section of the legal community that has been representing survivors does not have confidence in the State's justice mechanisms. Anil, a lawyer from BO1 in Anand district, says in his testimony, "In courts 85% of judges are Brahmins or from other upper castes and *Hindutvavadis*. Also, public prosecutors are appointed by the State from among the RSS fold." Many reports including the one made by the National Human Rights Commission (NHRC) demanded that the Central Bureau of Investigations (CBI) investigate the Godhra and post-Godhra events. In fact, the Public Interest Litigations (PILs) filed in the Gujarat High Court and in the Supreme Court within six months, petitioned the Court on a number of issues including the need to transfer investigations of major cases to the Central Bureau of

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[6] Communalism Combat, 77-78 (2002) 110.

[7] Sunday Mid-Day, May 25, 2003.

Investigation (CBI). A year later, the investigations by CBI is one of the crucial measures that remain relevant, but the Supreme Court is yet to even hear the case.

> The police took long to make charge sheets, in some places they have still not done so although they have to do so within 90 days. If you don't submit a charge sheet the accused can go free. Even in very violent incidents people have been granted bail before being arrested. (Anil, lawyer, BO1 organization, Anand).

Where five functionaries of the Bajrang Dal, VHP and BJP were named in an FIR as instigators, four are free on bail and the fifth was never caught.[8]

One year later, when the panel visited Gujarat, charges were yet to be framed in major cases of the post-Godhra violence. Some of these cases were the Ode case (27 persons burnt alive) from Anand district, the Ghodsar case (14 persons killed) from Kheda district, the Naroda Patiya, Naroda Gaam (103 persons killed) and Chamanpura cases from Ahmedabad district.

While the cases of the violence against the Muslim community do not proceed, the very same people are victimized and harassed by the government on false charges. By September 2003, 240 persons were booked under POTA[9] in Gujarat alone. Out of these 240 persons, 239 persons are from Muslim community. No accused involved in any of the cases involving violence against Muslims have been booked under this Act. Some of the arrested are key witnesses and social workers like Moulana Hussain Umarji, relief Camp organizer at Godhra, clerics Mufti Abdul Kayum Mansuri and Maulvi Abdullahmian Yasinmian Sayeed and relief camp organizers from Shahpur and Dariyapur localities of old Ahmedabad.[10]

6.4 Applicable Laws

The sections of the Indian Penal Code (IPC) under which charges have been framed thus far are:

Ss 120 B Criminal Conspiracy
Ss 153 Wantonly giving provocation with intent to cause riot
Ss 302 Murder
Ss 307 Attempt to murder
Ss 323 Voluntarily causing hurt
Ss 324 Voluntarily causing hurt by dangerous weapons or means
Ss 365 Kidnapping or abducting with intent secretly and wrongfully to confine person
Ss 395 Dacoity
Ss 435 Mischief by fire or explosive substance with intent to cause damage

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[8] The Sunday Express[Mumbai], March 2, 2003.
[9] Prevention Of Terrorism Act, 2002 enacted on March 28, 2002. 'Terrorist acts' are defined so broad that anyone could be booked under it. The kind of organization that could be declared 'terrorist' is also broad and even human rights groups could be declared 'terrorist.' The alleged accused held under POTA are deprived of civil liberties and due process requirements otherwise guaranteed under Indian laws.
[10] Agence France Presse, New Delhi, September 15, 2003.

Ss 436 Mischief by fire or explosive substance with intent to destroy house
Ss 504 Intentional insult with intent to provoke breach of peace
Ss 506 Criminal Intimidation

From the testimonies presented before the panel, some violations certainly fall squarely under the above sections. Testimonies also suggest that other sections of the IPC were violated but no charges have been framed under them. Some of these sections are:

Ss 295 Injuring or defiling place of worship with intent to insult the religion
Ss 295A Deliberate and malicious acts, intended to outrage religious feelings
Ss 378 – 380 Theft & related offenses
Ss 403 & 404 Criminal misappropriation of property
Ss 505 Statements creating or promoting enmity, hatred or ill-will between classes

6.5 Limitations for Justice in Sexual Offences

It is appalling to note that despite the wide reporting of crimes of sexual violence in different reports on Gujarat, complaints have been filed in very few cases. Of these handful of cases, proceedings have not yet begun in some and one has been closed by the lower courts.[11] The existing laws of sexual offences that have been violated are:

Ss 375 & 376 Rape
Ss 354 Assault or criminal force to woman with intent to outrage her modesty[12]
Ss 509 Word, gesture or act intended to insult the modesty of a woman

Atrocities on pregnant women that a number of witnesses testified violates:

Ss 312 Causing miscarriage
Ss 313 Causing miscarriage without women's consent
Ss 314 Death caused by act with intent to cause miscarriage and w/out women's consent
Ss 315 Act done with intent to prevent child being born alive

Thus the broad kind of sexual offences committed in Gujarat that can be prosecuted under Indian laws are:

1. rape
2. outraging the modesty of a woman

However, the ways in which these laws are formulated do not reflect the reality of women's experiences of these issues. The biggest problem is that the definition of rape only includes assault in the form of penile penetration. All other forms of assault fall under "outrage of modesty," entailing a much milder punishment because the crime is understood to be much less grave. Prosecution of the crime of rape in "peacetime" shows how evidentiary requirements and procedures that allow for the defense to question the credibility of a woman based on patriarchal norms of morality and gender, contribute to deny justice to

[11] There is presently an appeal pending in the Supreme Court filed by the NHRC where retrial is being sought.
[12] Understanding of crimes of sexual crimes as 'outraging of modesty' is archaic. There is recognition in recent times that crimes of sexual nature are crimes because they are invasive violations of a woman's person and bodily integrity and not because they outrage women's modesty. Such recognition has translated to international laws in the recent exercise of codification of customary international laws in the Statute of the International Criminal Court. Indian laws on sexual offences need to be reformed to reflect the recent and more accurate understanding in international law of the manner women face and experience sexual violence.

women. In 1997-98, less than five per cent of rape cases disposed off by the Court ended in conviction. The Supreme Court has in its decision on *State of Punjab* v. *Gurmit Singh*[13] recognized the severity of the crime of rape; the limitations of the definition and the evidentiary requirements; and condemned the attitudes during investigation and prosecution of sexual crimes. However, these observations by the highest Court have not been translated into legislation that can effectively deal with the lacunae in the investigation and prosecution of crimes of sexual violence.

The serious limitation of laws to provide justice for crimes against women in non-conflict situations became highly exacerbated in situations of mass violence where sexual violence is targeted and used as a core strategy of destruction. Such situations make the overall environment in which violence is unleashed inherently coercive. Laws, criminal procedures and evidentiary requirements need to reflect a more nuanced understanding of the coerciveness of such circumstances in order to effectively investigate and prosecute crimes of sexual violence. At present however Indian laws are inadequate to effectively prosecute such crimes against women. The testimonies referred to in chapter 3 for example, where insertion and threats of insertion of objects into women's vaginas qualify only as acts only "to outrage modesty," punishment under Indian laws is also not severe.

Understandably then, lawyers working on sexual assault case with the existing legal system are very frustrated. Haleema, a lawyer, feminist and human rights activist from PO14 explained that they have to:

> Struggle to get the crime of rape prosecuted as against the crime of murder. There is a constant effort at prioritizing between the two–the debate being which is most strategic to push. It is often difficult for many in civil society groups to make an argument as to why is it important to deal with the crime of rape when rape is harder to prove, often lacks evidence, and murder has a higher punishment. Often the crimes of rape and murder happen together and there is a tendency for understanding rape as something that just happens to be part of the complaint. Moreover there is also a tendency of lawyers working on the cases to believe that rape is a private sexual act and so it cannot have happened in a public space. They don't see it as an act of violence.

Because of the inability or unwillingness of male lawyers to appreciate that rape is a crime comparable in its gravity to that of murder, witnesses are encouraged to give more emphasis on murder and leave rape out of their statements.

> Nafisa, a woman from PV2 village in Panchmahals district, testifying before the panel said that the police had done nothing about her case yet. She had filed a report with the police in which she had named five persons. She went to take the copy of the FIR the next day, but the police refused to acknowledge that she had recorded a statement the previous day. After waiting for three hours to collect a copy of the FIR, she noticed that the police had dropped the rape charge.
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> Ratilal Soma Rathod alias Bhavanisinh was repeatedly named by residents of Naroda Patiya who testified before the panel, as the one who was leading the mob and instigating men to commit acts of sexual violence against women. He is the accused

[13] AIR 1996 SC 1393.

in the only rape case registered for the area but has obtained bail for 'want of sufficient evidence.[14]

The requirement of forensic evidence is a particular barrier in the successful investigation and prosecution of the crime of rape. And the fact that, in situations of mass violence too, the requirement of forensic evidence is not waived guarantees impunity to those who plan and conduct pogroms. The acts of sexual violence are accordingly planned and perpetrated in a manner so as to destroy forensic evidence or at least make it extremely difficult to find.

> Girish, a legal activist from AO4 in Ahmedabad, informed the panel that in most cases of rape and gang rape, women were burnt alive to leave no traces of the evidence of sexual assault. In some cases, the evidence was actively destroyed. Taslima, an activist from AO3 organisation, testified that all kinds of active obstruction of legal process had taken place in cases of rapes. In AV13 village, one woman was gang raped and burnt. Her body was taken to a health centre in AV14. The doctor reported that she was gang raped by eleven people and burnt. Then men from VHP came there, took the post mortem report, tore it and threatened the doctor to keep his mouth shut. It was the doctor's student who had carried out the post mortem. The doctor does not talk about this case now.

The complicity of hospital administration as stated in section 4.6 also adds to the difficulty in gathering evidence required in prosecution of crimes of sexual violence. The post mortem form that hospitals are required to fill in the event of death have, as a matter of routine, two questions that could establish if the victim was subjected to sexual violence–injury to external genitalia and injury to internal sexual organs. Hanifa, from AA4 area in Ahmedabad declared to her father before her death that she was raped. The post mortem report given to her father stated that there was "no injury to external genitals" and "nad" (nothing abnormal detected) in response to the question on internal injury. (Girish, Lawyer, AO4organization, Ahmedabad). Thus in cases where the bodies were not fully burnt and the post mortem could have been performed, it is highly probable that the hospital authorities did not or were prevented (as evident from the testimony referred to in section 4.6) from looking specifically for evidence of violations of a sexual nature.

6.6 Inadequate Legislation

There are other critical aspects to victims testimonies that raise questions about the adequacy of Indian laws to address the incidents that took place all over the State of Gujarat. Many victims, from different regions of the State, testified that the police had said they had no orders to save the victims. The question therefore that arises is why the police want orders to perform their constitutionally mandatory duty of protecting citizens unless they had orders *not* to perform their duties? The order had to come from officials in positions of such authority and power so as to affect the fate of senior officers in the police ranks, in the event the orders were disobeyed. The order was clearly authoritative enough for it to be obeyed so thoroughly and consistently by the police and other organs of the State administration across Gujarat.

> Advocate Rehmat and Advocate Majeed from Baroda mentioned in their testimony that the Revenue Minister, Mr. Haren Pandya[15] said that the Chief Minister of the

[14] The Sunday Express, [Mumbai] March 2, 2003.
[15] On March 26, 2003 Mr. Haren Pandya was killed by an unidentified gunman.

State of Gujarat, Mr. Narendra Modi, had given police orders not to act. He was pressured to withdraw his statement and not given a party ticket again.

This is also confirmed in the Concerned Citizen's Tribunal–Gujarat 2002 report. Narendra Modi is therefore criminally responsible for the violence apart from conspiring, wantonly giving provocation, intentionally insulting with intent to provoke breach of peace and criminal intimidation as provided for in section 120B, 153, 504 and 506 of the IPC. He has criminal responsibility as an individual in a superior commanding position with knowledge or the obligation to know what was happening across the state of Gujarat and in his failure to prevent the pogrom. When an entire range of criminal acts take place in a widespread and systematic manner pursuant to a plan or a policy as in the case of Gujarat, the acts constitute crimes against humanity in international law. (Discussed in chapter 8)

Another aspect of the testimonies presented before the panel is the purposeful targeting of Muslims that was evident. Many victims asked their aggressors why they are being targeted and the response they got was that because they had the misfortune of being born a Muslim. The violence was targeted against the Muslim community and slogans and words used by the mobs as reported by the victims indicated the intention to destroy the community in every possible way. "*Maaro, Kaapo Baalo*" (beat, stab, burn), "Take her today as she may not be available tomorrow," "Will repeat Naroda Patiya (Naroda Patiya has become synonymous with complete destruction, killing, raping, burning and looting) here," "Why is he studying he will become terrorist in any case," are some of the slogans recounted by the victims.

As detailed earlier, a number of victims testified that the violence unleashed against the Muslim community was planned and implemented by leaders of the BJP, *Bajrang Dal* or VHP with an intent to destroy. In legal terms, this constitutes the crime of Genocide under the Convention on the Prevention and Elimination of the Crime of Genocide, 1948. (Details discussed in chapter 7)

There are no distinct provisions in the IPC or in other legislation which criminalize individuals who have the duty to protect citizens and have abdicated such obligations and actively participated in criminal activities. Moreover, much as some of the charges mentioned describe the criminal acts themselves they still do not adequately reflect the crime as a whole. There is no law in the IPC that captures the gravity of the crime that took place in Gujarat, as India has not legislated within its domestic legal system the crime of genocide and crimes against humanity, as codified in international law. But the lack of legislation nationally, on a specific crime recognized in international law, has not prevented India from applying international laws domestically or interpreting existing Indian laws in ways that outlaw the crime in question. The Supreme Court held in *Ktaer Abbas Habid Al Qutaifi* v *Union of India*[16] that where no construction of the domestic law is possible, Courts can give effect to international conventions and treaties by harmonious construction. Such construction has been made by Indian courts a number of times to outlaw the crime of Torture despite the fact that the "torture" is not defined in the Constitution or in other Indian penal laws.[17] Similar construction is necessary to outlaw the crime of genocide and crimes against humanity in the absence of specific legislation that does the job.

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[16] 1999 Supreme Court Unreported; Cited in Palok Basu, Laws Relating to Protection of Human Rights, (Allahabad: Modern Law Publishers, 2002) p. 532.

[17] *Ibid*.., p. 741.

The Gujarat State government and the Indian government, despite compelling and consistent testimony to the contrary, is representing the crimes in Gujarat as acts of individuals in spontaneous outburst to the Godhra train mishap, and not as acts constituting the heinous crime of genocide and crimes against humanity. In doing so, they are clearly violating international law as noted above and explained more fully in Chapters 7 & 8. In addition, the State government is also in violation of several other human rights treaties and conventions such as International Covenant on Economic, Social and Cultural Rights (failure to ensure these rights to the affected community), International Covenant on Civil and Political Rights (no protection of basic right to life, personal liberty and dignity), Convention on Elimination of all forms of Discrimination Against Women (gross violation of women's and girls' bodily integrity and rights), Convention on the Rights of Child (violence against children and children witness to crimes against their parents and other family members, suffering psychological trauma), and the Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief.

Finally and most critically, the governments both in Gandhinagar and New Delhi, shown total disregard for and committed gross violation of the guarantees of fundamental rights (to life, to personal liberty, to be free from discrimination, to social and cultural rights etc). to all citizens in the Indian Constitution. With the complete and total collapse of confidence the affected community has in the Shah-Nanavati Enquiry Commission, the Gujarat State government and the Gujarat High Court, the Supreme Court of India is the only institutions from whom the victims and survivors of the Gujarat pogrom have expectations of justice. Unless the Supreme Court acts immediately and decisively on justice related petitions relating to the Gujarat violence and orders measures that would provide justice and reparations to victims, holds the guilty accountable, restores the confidence and trust of the affected community and the credibility of Indian judiciary - one of the mainstays of democracy, is at serious risk.

6.7 Developments since June 2003

The pogrom in February-March 2002 was gruesome and the crime as a whole needs impartial investigation and prosecution. However, there were specific incidents of violence that attracted the attention of the NHRC because of their brutality and the nature of testimonial evidence available. As is evident from their report, the complicity of State officials and institutions in the pogrom did not escape the attention of the Commission. The Commission identified five incidents that could result in conviction if properly investigated. One such case is what has come to be known as the "Best Bakery Case."[18] In June 2003, 39 of the 73 prosecution witnesses turned hostile resulting in acquittal of the 21 individuals named as accused.[19] On inquiry it was found that Mr. Madhu Srivastava, the local BJP MLA, accompanied the witnesses to the Trial Court when they withdrew their statements.

These reports stirred the Commission to file a special leave petition requesting that the Supreme Court order the State of Gujarat to conduct a re-trial of the Best Bakery case.[20] The Gujarat government condemned the move of the Commission particularly when, they claim, they were themselves filing for a re-trial of the case. On September 12, 2003, the Supreme

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[18] Twelve persons were burnt alive in a bakery in Vadodara district and two were reported missing on March 1, 2002.

[19] http://www.rediff.com/news/2003/jun/27guj.htm

[20] http://www.rediff.com/news/2003/jul/31best.htm

Court passed a stinging comment on the process of justice in Gujarat calling the government's re-trial of the case an 'eyewash and asking the State to either provide justice or quit.'[21]

Both, the action of the Commission and the comment of the Supreme Court are indeed commendable and go some way to restore the confidence of the victims and reassure the citizens of the independence of Indian judiciary. However, there is a lot more that the Supreme Court can do to improve the overall health of the judicial system in the country. The Gujarat situation is one that calls for foresight and *suo moto* actions on part of the Supreme Court.

First, the Court needs to look into ways of interim implementation of the Justice Malimath Commission report on witness protection so that prosecution witnesses do not turn hostile for fear of life or due to other threats. Secondly, the complicity of Gujarat State officials in the pogrom is a well-established fact and therefore any expectation that these officials will incriminate themselves for the sake of justice is highly dubious. The acquittal in the Best Bakery case is evidence of this very obvious point. The judicial system allows for transfer of cases from one place to another if the accused fears that he/she would not get a fair trial in the Court with original jurisdiction. The rights of the accused are thus accorded high priority. There is a need to balance this approach to accommodate the rights of victims as well.[22] The petition by Zahira Shaikh requesting an order from the Supreme Court to transfer her case to another State must be seen in this context.[23]

Moreover, in the light that the events of Gujarat in February-March 2002 are international crimes of genocide and crimes against humanity (See Chapters 7 to 9), the Supreme Court or indeed the High Court of any other State in India must assume universal jurisdiction and apply international law to initiate a process to investigate and prosecute those responsible for these crimes with the help of the CBI. For without an independent and impartial authority leading the prosecution of the pogrom in Gujarat, justice will not be served.

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[21] http://in.rediff.com/news/2003/sep/12best.htm

[22] This is also in keeping with recent developments in international criminal law. The ICC statute has for example, included a number of provisions, which recognizes the rights and interests of the victims and allows for their legal representation and participation in the trial process.

[23] Zahira (name unchanged) is one of the witnesses in the Best Bakery case who turned hostile. She later left Gujarat and made known that she withdrew her original statement in Court because of threat and intimidation from Mr. Madhu Srivastava, the local BJP legislator.