

**Threatened Existence: A Feminist Analysis of the Genocide in Gujarat**  
**Report by the International Initiative for Justice (IIJ)**  
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**Chapter 9**  
**The Applicable Principles Of Responsibility**

The IIJ panel considered and applied the general principles of international law, governing the criminal responsibility of individuals, both State and non-State actors, to the documentation available about the pogrom, the on-going persecution and other violations in Gujarat. In addition, we looked at the responsibility of the State of India to provide reparations for violations under the principles of State responsibility, both for its participation in the commission of these crimes and for its failure to exercise due diligence in preventing and punishing them. These principles and the bases of the responsibility of the State to provide reparations to victims and to the community will be outlined in the following sections.

**9.1 Individual criminal responsibility**

The international principles were first codified and applied in the Nuremberg and Tokyo Charters and have since been developed by the ad hoc Tribunals and in the Rome Statute of the ICC. They engage individual, supervisory and collective responsibility of leaders as well as of those who carry out the attacks on the ground. Several principles are fundamental:

First, it is clear that no immunities exist for crimes of this dimension. One can hide behind immunity neither as head of State nor as an elected official.<sup>1</sup> There is likewise no legitimate claim of acting pursuant to superior orders because orders—such as the order not to save people—is manifestly illegal.<sup>2</sup> Commanders and superiors are responsible for the crimes committed by a person subject to their authority and control where they knew or should have known that such crimes were being committed or about to be committed and failed to take necessary and reasonable measures to repress or prevent the crimes or to submit the matter to competent authorities for investigation and prosecution.<sup>3</sup>

Second, individual responsibility extends to a wide range of participation including ordering, soliciting, or inducing the commission or attempt to commit a crime; aiding or abetting the crime including providing the means for its commission; contributing to the commission of a crime by a group of persons acting with a common purpose, with either the intention to further the crime or by the knowledge of the intention of the group to commit the crime. With respect to the crime of genocide, there is also a specific recognition in international law of the crime of directly and publicly inciting others to commit genocide. With respect to all these crimes, individuals can be responsible for acting alone or in concert with others.<sup>4</sup>

Under both treaties and customary law, officials and non-state actors are responsible for crimes against humanity and genocide. The State of Gujarat and India are responsible for all internationally recognized wrongful acts—including crimes and violations of human rights—

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<sup>1</sup> Rome Statute, Article 27.

<sup>2</sup> Rome Statute, Article 33.

<sup>3</sup>Rome Statute, Article 28. Note that article 28 contains slightly different standards for commanders and superiors, although this is not consistent with customary international law.

<sup>4</sup> See Article 25(2) and (3)(a)-(e); with respect to incitement to genocide, see Article 25(3)(e), Rome Statute.

committed by its officials in having incited, conspired, participated in or aided and abetted the pogrom against the Muslim people of Gujarat. The leaders of both Gujarat and India are also responsible for the harm inflicted by the mobs and other private parties, to the extent that State officials flouted their duty to exercise due diligence to prevent and control the violence. Likewise, they are responsible for their complicity in the failure to properly and impartially to investigate and prosecute crimes against the Muslim people. Finally, India's obligation to provide adequate reparations to the Muslim people for the harms inflicted on them is not one of charity, as the government has portrayed, but one that is legally owed.

It must also be noted that the principle of non-derogability precludes all justification urged by BJP officials, such as the contention that the massacre in Gujarat was a "natural" response to the Godhra incident, in which 56 Hindus died. Obviously, the desire for revenge (even if it was not whipped up on the unsubstantiated and self-serving assertion that Godhra was perpetrated by Muslims) cannot justify crimes against humanity; that would be to descend to the "law of the jungle." Nor does the claimed "inability" of BJP leaders of Gujarat to control the outbreak of violence acquit them of the responsibility to take necessary and reasonable preventive as well as punitive measures to stop and contain the violence. The facts found by numerous independent inquiries, and confirmed by the testimonies this panel heard, make it clear that the *Hindutva* forces, with the complicity of the State, had planned and prepared for an attack on the Muslim population in Gujarat. The Godhra incident provided the "excuse" and opportunity to inflame and then allow local populations to carry out the attack.

The information available from other reports, and the confirmation of many of their claims in the testimonies heard by the panel, make it clear that Gujarat State officials of the highest level acted together, conspired with and/or supported leaders and members of leading *Hindutva* organizations in the planning, orchestration, incitement, aiding and abetting, and active encouragement and promotion of the February-March 2002 attacks on Muslim people. Their conduct constitutes genocide and crimes against humanity as well as violations of human rights. For example, State officials undertook a census of Muslim properties, which was found in the hands of the ravaging mobs on February 28, 2002. State officials could have prevented these attacks by imposing of curfew and calling for calm after the Godhra train incident – obvious and tested steps to prevent and halt communal violence against the Muslim community.

In fact, when the Central government sent the army to Gujarat, the state government refused to deploy the soldiers until twenty-four hours after they arrived and only once the worst violence had ended.<sup>5</sup> Moreover, State officials knowingly incited, solicited and encouraged the violence by carrying out a public cavalcade of the bodies of the dead in Godhra; and they circulated and failed to counter false information about the incident (including the charge that Muslims had planned the attack on the *Sabarmati* Express and that a Hindu girl had been raped by Muslim men there). They knowingly permitted the violence to erupt and escalate by failing to enforce the curfew uniformly on all communities, as well as by instructing the police to take no measures to suppress Hindu mobs or to protect Muslim people and their properties. The fact that the police acted on orders "not to save them" implicates the highest leadership of the Gujarat State in the violence that ensued.

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<sup>5</sup> The Kashmir Times, March 9, 2002.

The facts demonstrate the continued collaboration and complicity of State and non-State actors in the on-going violence and persecution of the Muslim population of Gujarat. The systematic deprivation of justice (part of the ongoing persecution) further engenders responsibility on the part of State leaders for the crimes, as the impunity provided to offenders operates as public sanction and encouragement.

With respect to the ongoing persecution, the justice system is likewise insensitive to persistent threats given to Muslims and to the pervasive discrimination they are suffering. The State abets further persecution by celebrating as opposed to condemning the “Gujarat experiment.” While the documentation indicates that *Hindutva* organizations and their supporters are the explicit force behind these violations, the State’s failure to prevent or punish them constitutes encouragement and thus a continuing complicity in this ghastly joint venture.

From the documentation made available to the IJ panel, and all the other reports produced so far, the individual State officials responsible at the State and national level are Prime Minister Atal B. Vajpayee, Deputy Prime Minister and Home Minister L.K. Advani, Chief Minister Narendra Modi, Gujarat state Minister for Health Ashok Bhatt, Gujarat Minister for Home Gordhan Zadaphya, Chief Secretary Subha Rao, Home Secretary Ashok Narayan, Commissioner of Police (Ahmedabad) P.C. Pandey, Commissioner of Police (Vadodara) D.D. Tuteja and Superintendents of Police of all areas in Gujarat that suffered violence. These are individuals operating at the highest levels who are responsible under the principles of both superior or command responsibility and of varying degrees of direct and active involvement in the pogrom. Other lower level officials with authority over subordinates in different State institutions are likewise responsible while direct perpetrators with no control over others are responsible for being directly or indirectly involved in the actual perpetration of crimes.

In addition, the *Hindutva* leaders, their adherents, those organized to participate in the pogroms and in the on-going persecution, and those who simply joined in the crimes are liable individually, and jointly with others, and with State officials for their role in perpetrating crimes against humanity and genocide against the Muslim community. Given the nature of these religious organizations and their power to exercise effective control over their adherents, the *Hindutva* leaders should also be considered responsible for the acts of the mobs and Hindu persecutors, given their failure to take all necessary and reasonable steps to stop the violence and persecution.

Among the non-State individuals with superior or command responsibility are VHP International Secretary Praveen Togadia, Working President Ashok Singhal, All India Vice-President, Hareshbhai Bhatt, National Secretary, Surendra Jain, President of Gujarat unit of VHP, Keshavram Kashiram Shastri, and Joint Secretaries Jaideep Patel and Kaushik Mehta, other national level senior functionaries like V.H. Dalmia, B.P. Toshniwal, Moropant Pingle, Acharya Giriraj Kishor, RSS chief K. S. Sudarshan and spokesperson M. G. Vaidya, National Chairman of Bajrang Dal, Jaibhan Singh Pavaiyya and Regional Convenor, Prakash Ratnaparkhi. Again, like individual State officials, these are only names of the leaders of organizations who had superior or command responsibility. At the local level, other functionaries and members of the above organizations, who were directly involved in the pogrom are equally culpable.

## **9.2 State responsibility**

The principle of State responsibility for internationally recognized wrongful acts is a long-standing one. It also applies to any wrongful act regardless of whether the State had intent to commit such an act or whether the State did, at some point, seek to minimize or stop the wrongdoing. State responsibility applies whether the officials were acting within the scope of their authority or whether they committed unauthorized acts under the cover of their authority. It also applies to all persons who act as part of the administration of the State, including those who represent a subdivision of the State, and to private persons who act on behalf of the State.<sup>6</sup>

It is axiomatic that non-participation in crimes against humanity and genocide are unquestionably among the core obligations of the State. It is likewise a core obligation of the State under human rights law to exercise due diligence to prevent and punish the commission of such acts by others. In this context it is amply evident that the State of India is accountable for the acts of the Gujarat officials in planning, instigating, encouraging, promoting and aiding and abetting the horrific violence visited upon the Muslim community of Gujarat and in the continuing violence, persecution and violations suffered by the community. The State is also liable for the failure of those officials to exercise due diligence to prevent and punish these violations.

The failure of State officials to acknowledge their responsibility, denounce this atrocity and the genocidal project of which it is a part, prosecute its perpetrators, and provide full and fair reparations are continuing violations of international law. In addition, through its complicity and failure to provide protection to the Gujarati Muslim community, the State of India also violates myriad guarantees of international human rights law and is also subject to provide reparations in respect thereof. We cite then, the following continuing failures to discharge the obligation under the Indian Constitution and international law:

- i. *failure to acknowledge, investigate, and disclose the truth by full co-operation with inquiry commissions and by permitting thorough and impartial investigation of its own wrongdoing.*
- ii. *failure to prosecute and punish those criminally responsible including but not limited to those in leadership who participated in encouraging or promoting these crimes.*
- iii. *failure to provide reparations, in the form of a genuine apology and commitment to prevent recurrence, to the Muslim community of Gujarat as well as to those threatened as a result of the violence in Gujarat.*
- iv. *failure to provide reparations in the form of official fair compensation.*
- v. *failure to provide reparations in the form of restitution of survivors to their prior position.*
- vi. *failure to take measures to protect the integrity, well-being and dignity of the survivors.*
- vii. *failure to take necessary measures to prevent recurrence.*

In May 2002, the National Human Rights Commission issued its Report addressing the obligations of the State according to Indian law in the wake of the carnage and destruction in Gujarat. These recommendations have been completely ignored while the persecution of the Gujarati Muslims continues. Architects of the Gujarat pogrom remain immune and continue to carry their genocidal project to other regions of India.

Likewise international law imposes on the offending State a series of continuing obligations designed to redress the harm and prevent future occurrence. To date, neither the State of India nor the State of Gujarat have taken measures designed to satisfy these obligations.

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<sup>6</sup> See, e.g., UN Doc. A/CN.4/L.602/Rev.1, adopted by the Drafting Committee on second reading (26 July 2001).

### 9.3 Conclusion

We have assessed in chapter 6 the struggle of victims and survivors to obtain justice within national legal mechanisms, its inadequacies and with the biases of the very institutions of justice. Chapter 8 shows how crimes in Gujarat certainly amount, in and of themselves, to a widespread and systematic attack on the Muslim people of Gujarat and thus constitutes crimes against humanity. We also concluded in chapter 7 that the attack on the Muslim people of Gujarat and BJP officials' proclaimed intention to replicate the "Gujarat experiment" in other parts of India, illuminate the genocidal character of the *Hindutva* project. The fact that officials of the Central government and state government of Gujarat are among the leading advocates of *Hindutva*, and that they were complicit in the attack in Gujarat, aggravates the danger profoundly and enhances the necessity for stringent action against them. We consider it critical to name the pogrom in Gujarat both as a crime against humanity and as a key step in a genocidal project. In this context, Gujarat represents the first major enacting of systematically organized mass killing, rape, torture and destruction of property and the ability of the community to survive through the violence and on-going persecution.

The State of India has the first obligation and responsibility to bring the perpetrators to justice, to provide full and fair compensation and reparation to victims and survivors, and to take vigorous additional measures to prevent repetition. The complicity of State officials in the attack on the Muslim community of Gujarat both enhances these obligations and complicates their realization. India's failure to meet its obligations is a continuing violation of international law and demands that the international community exercise its authority to prevent the further development of this genocidal project and to bring justice to its victims. In the event of State failure, or demonstrable unwillingness on the part of the State to bring to justice perpetrators of international crimes, such individuals are subject to trial by other nations, exercising universal jurisdiction over genocide and crimes against humanity, as well as by a potential international authority.

Both genocide and crimes against humanity are codified in the Rome Statute of the International Criminal Court (ICC). We recognize that the ICC has no jurisdiction over the crimes committed in Gujarat, not only because India has not yet ratified the Rome Statute, but also because the Court was not yet in force when these events occurred and has no retroactive jurisdiction. However, the Rome Statute represents the minimal understanding of customary international law, with respect to crimes subject to universal jurisdiction, and are thus applicable to all nations, including India, irrespective of non-ratification of the Rome treaty. India's ratification of the Rome Treaty is nonetheless urgent to signal both its acceptance of international accountability and to deter further crimes. In the meantime, both State officials and private persons responsible for genocide, crimes against humanity and such universal offences as murder and torture should be held accountable under international standards.

It is our hope to underscore the urgent need for democratic forces in India to mobilize effectively to combat this threat, and for the world community to support that mobilization and engage its responsibility to monitor and prevent further violence. We urge for swift and immediate measures at every level, to prevent further crimes and to stop the genocidal *Hindutva* project by holding its leaders and accomplices—State officials, organizational leaders and perpetrators of individual crimes—accountable. We call for redress of individual victims

and the Muslim community as a whole, and for a cessation of the on-going persecution and fear that they daily experience.