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**MASS VIOLENCE AGAINST
THE SIKH PEOPLE IN INDIA:
THE EVENTS OF NOVEMBER 1984**

**A Case of Genocide and
Crimes Against Humanity**

Issued

November 2019

Updated

October 2022

<http://www.globaldiligence.com>

Global Diligence LLP Kemp House,
152 City Road London EC1V 2NX UK

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'I have no hesitation in apologizing not only to the Sikh community but the whole Indian nation because what took place in 1984 is the negation of the concept of nationhood and what is enshrined in our constitution.'

– Manmohan Singh, August 2005¹

I. INTRODUCTION

1. The Sikhs are a minority religious community in India that forms a bare majority only in the northern state of Punjab.² Since independence they have suffered oppression at the hands of the Indian government in Delhi. Increasing militancy in the face of such oppression led to a brutal crackdown in Amritsar—the seat of Sikh spiritual and cultural life—in June 1984, which in turn led to the assassination of Indira Gandhi, India's then-Prime Minister, on 31 October of the same year. In response to the assassination, senior Congress Party officials and Indian police organized and executed massacres of Sikhs in Delhi and other parts of the country. From 1 to 3 November, 'an estimated 8000 Sikhs, possibly more, would be slaughtered by rampaging mobs in the world's largest democracy'³ Some estimates put the figure as high as 30,000.⁴ Mass rapes and other forms of sexual violence accompanied the killings. Dozens of Sikh temples (*gurdwaras*) and homes were destroyed, and thousands of Sikhs were displaced.⁵ At the time, the Indian authorities explained the violence as a spontaneous reaction to the tragic loss of a much-loved prime minister. However, the 'evidence points to a

¹ Prime Minister of India from 2004 to 2014.

² 'Protecting the Killers: A Policy of Impunity in Punjab, India', Human Rights Watch & Ensaaf, Volume 19, No 14(C), October 2007, p 4 ('The religious minority community of Sikhs represents two percent of India's population, and 60 percent of the population in the northern Indian state of Punjab.')

³ Pav Singh, *1984: India's Guilty Secret* (Kashi House 2017), p xix.

⁴ See, e.g., 1503 Petition to Office of the UN High Commissioner for Human Rights, filed by Sikhs for Justice, 1 November 2013.

⁵ Jaskaran Kaur, 'Twenty Years of Impunity: The November 1984 Pogroms of Sikhs in India', Ensaaf, 2nd Edition, October 2006, pp 33, 70 *et seq.*

government-orchestrated [...] massacre unleashed by politicians' and 'covered up with the help of the police, judiciary, and sections of the media'.⁶

2. This document, after setting out the relevant factual and legal groundwork, argues that there is '*a reasonable basis to believe*' that the events described herein may amount to genocide and that certain individual perpetrators, and perhaps the Indian state, should be held to account. In addition or in the alternative, the same events may be characterized as crimes against humanity. While this document is not intended for presentation to any particular court of law, it is aimed at convincing a hypothetical international prosecutor to conduct a preliminary review of the available evidence with a view towards bringing appropriate charges. Accordingly, the evidentiary standard applied throughout is the one applicable to a so-called 'communication' filed before the International Criminal Court (ICC)⁷ – namely, whether there is '*a reasonable basis to believe*' that the alleged crimes have been committed.⁸
3. The factual support for the legal analysis contained herein is based primarily on the detailed and independent scholarship of Jaskaran Kaur and Pav Singh. In producing their separate works, Ms Kaur, a US-based lawyer and co-founder of Ensaaf,⁹ and Mr Singh, a UK-based author and journalist,¹⁰ drew on a number of sources – crucially, but not limited to, hundreds of detailed affidavits previously submitted to Indian government commissions of inquiry.¹¹ This and

⁶ Singh, *op cit*, pp xix–xx.

⁷ A 'communication', essentially a complaint, is the mechanism by which any individual, group, or organization may send information on alleged or potential crimes to the Office of the Prosecutor of the ICC pursuant to Article 15 of the Rome Statute.

⁸ *Nb.* This 'is the lowest evidentiary standard provided for in the [Rome] Statute'. Case No ICC-01/09, 'Decision Pursuant to Article 15 the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', Public Document, Pre-Trial Chamber II, 31 March 2010 ('Kenya PTC'), para 27. 'This is logical given that the nature of this early stage of the proceedings is confined to a preliminary examination. Thus, the information available to the Prosecutor is neither expected to be "comprehensive" nor "conclusive", if compared to evidence gathered during the investigation.' *Ibid.*

⁹ See <https://ensaaf.org>.

¹⁰ See <http://siyahi.in/authors/pav-singh/>.

¹¹ Kaur, *op cit*, p 6 ('We have received 6000 pages of Misra Commission documents. This report draws on: the papers and proceedings from the Misra Commission and Nanavati Commission (initiated in May 2000), including approximately 1100 Misra affidavits in English, Punjabi and Hindi, as well as 200 affidavits filed before the Nanavati Commission; the written arguments,

other evidence¹²—much of which is presented and variously characterized below—is in no way meant to be ‘comprehensive’ or ‘conclusive’.¹³ Rather, this document simply serves as the basis for a more detailed investigation by an independent prosecutor.

II. RELEVANT FACTS

A. Background: Laying the Groundwork

1. *India’s History of Sikh Oppression in Punjab*

4. The Sikhs of Punjab made a major contribution to—and consequently paid a heavy price for—India’s independence struggle.¹⁴ In recognition, Mohandas Gandhi declared that, ‘in the future, the Congress shall accept no constitution which does not meet with the satisfaction of the Sikhs’.¹⁵ Congress Party leader and India’s first prime minister, Jawaharlal Nehru, made a similar promise: ‘The brave Sikhs of Punjab are entitled to special consideration. I see nothing wrong in an area set up in the north of India wherein the Sikhs can also experience the glow of freedom.’¹⁶

replies, and applications submitted by parties; interrogatories and responses; First Information Reports (FIR) prepared by police; testimony before the Nanavati Commission; records from relief camps; and technical orders of the Misra Commission. FN19 The Misra Commission affidavits provide details on crimes suffered by victims and information on perpetrators directly involved. These affidavits are particularly significant given the lack of accurate police and government records and the subsequent destruction of evidence, as explained later in this report. The police records lack required information and, in fact, conceal and manipulate facts as related by survivors. Additionally, legal papers from the 1984 cases demonstrate the paucity of information, resulting from police manipulation of investigations and the lax manner in which prosecutors pursued evidence.’); Singh, *op cit*, p xxiv (‘In this book, I have attempted to join a series of obscured and murky dots by making extensive use of often harrowing victim testimonies, official accounts, eyewitness statements, and media reports.’)

¹² See, e.g., ‘Protecting the Killers: A Policy of Impunity in Punjab, India’, Human Rights Watch & Ensaaf, Volume 19, No 14(C), October 2007; ‘India: No Justice for 1984 Anti-Sikh Bloodshed: Failure to Prosecute “Organized Carnage” Shows Need for Police Reforms, Communal Violence Law’, Human Rights Watch, 29 October 2014; ‘*Chaurasi Ki Nainsaafi*: the Continuing Injustice for the 1984 Sikh Massacre’, Amnesty International, 31 October 2017.

¹³ Kenya PTC Decision, para 27.

¹⁴ Singh, *op cit*, p 63 (‘By the end of the colonial period, approximately 70% of Indians martyred for freedom, 70% of those hung and 80% of those sentenced to life imprisonment by the British Raj were Sikhs.’)

¹⁵ The Lahore Session of the Congress Party, 31 December 1929.

¹⁶ Jawahar Lal Nehru, Lahore Bulletin, 9 January 1930, in ‘South Asia: fourth report of session 2006 - 07, report, together with formal minutes, oral and written evidence Great Britain: Parliament: House of Commons: Foreign Affairs Committee’, 2007, p 113 .

5. During ensuing negotiations, Sikh representatives called for an independent state or, failing that, a Sikh-controlled province within an Indian Union.¹⁷ However, the plan for a decentralized federal successor to the British Raj was rejected by Nehru, while the Muslim League demanded independence for Muslim-majority areas. Lending their support to Congress (to prevent becoming a minority within a Pakistani-controlled Punjab), Sikh representatives relied on party leaders' assurances of Sikh autonomy within the new Indian state.¹⁸ Partition occurred along a line that bisected the Punjab,¹⁹ with the capital Lahore and arguably the majority of fertile territory falling on the Pakistani side in exchange for an Indian route to Kashmir.²⁰ The outcome left millions of people on the wrong side of the religious divide. Violence and mass population movement ensued, resulting widespread death and sexual violence²¹ – a tragedy that may have been avoided if a secular and multicultural Punjab had been granted self-governance. Sikh alienation by 'the central government began soon after partition as Indian leaders failed to honor early promises'²²

6. In response, 'Punjabis engaged in civil disobedience to agitate for statehood for Punjabi-speaking people – Punjabi Suba – but the media projected this campaign as a demand for a separate Sikh state'.²³ In September 1966, with the Punjab Reorganization Act, 'the central government truncated the state of Punjab' to create two new Hindi-speaking states of Haryana and Himachal Pradesh. Although this made Sikhs the majority in Punjab, it decreased the

¹⁷ Jeffrey Shaw & Timothy Demmy, *War and Religion: An Encyclopedia of Faith and Conflict* (ABC-CLIO 2017), p 375.

¹⁸ James Minahan, *Ethnic Group's of South Asia and the Pacific: An Encyclopedia* (ABC-CLIO 2012), p 292.

¹⁹ Anthony Read & David JP Fisher, *The Proudest Day: India's Long Road to Independence* (Norton 1998), p 483; PR Chari, *Making Borders Irrelevant*, in 'Building Bridges: Strengthening Physical, Emotional and Economic Linkages in South Asia', IPCS Conference Report 2012.

²⁰ Andrew Roberts, *Eminent Churchillians* (Simon & Schuster 1994), p 128.

²¹ Kaur, *op cit*, p 9 (Sikhs 'suffered greatly in the 1947 partition of the two countries, as hundreds of thousands of people were killed and over 700,000 Sikhs migrated from Western Punjab, in Pakistan, to Eastern Punjab, in India.')

²² Kaur, *op cit*, p 9.

²³ Kaur, *op cit*, p 9.

state's representation in parliament. 'This loss of land figured prominently in subsequent campaigns against the central government.'²⁴

7. In June 1975, 'Punjab's relationship with the Center was further strained when Prime Minister Indira Gandhi declared [a state of emergency] [...] in reaction to a High Court judgment debarring her from elected office'.²⁵

After Gandhi suspended the constitution, jailed political opponents, and implemented severe censorship, the Akali Dal, the Sikh political party, organized the first public protest on July 9, 1975. Over 40,000 Sikhs were jailed in the "Save Democracy" movement as [...] Sikh activists defied the ban on protests and courted arrest.²⁶

The state of emergency ended in March 1977 when Gandhi called for elections, leading to her defeat.²⁷

8. In October 1977, 'the Akali Dal formally released [...] the Anandpur Sahib Resolution (ASR) [...], representing [its] grievances with the Center'.²⁸ The ASR—perceived as secessionist by the Congress Party—affirmed the principle of decentralization of powers; endorsed 'the principle of state autonomy in keeping with the concept of federalism'; and highlighted Sikh territorial, economic, cultural, and religious grievances.²⁹ These included: 'economic deprivation brought on by the lack of large-scale industrial development; the diversion of 75% of Punjab's river waters; [...] the implementation of a ceiling for recruitment of Sikhs in the Army; [...] the truncation of Punjab and the transfer of [its] capital Chandigarh to the Union; and [...] Article 25 of the Indian Constitution defining Sikhs as Hindus'.³⁰

²⁴ Kaur, *op cit*, p 9.

²⁵ Kaur, *op cit*, p 9.

²⁶ Kaur, *op cit*, p 10.

²⁷ Kaur, *op cit*, p 10.

²⁸ Kaur, *op cit*, p 10.

²⁹ Kaur, *op cit*, p 10.

³⁰ Kaur, *op cit*, p 10.

2. Increasing Militancy

9. Punjab in the 1980s ‘witnessed a decade-long insurgency by Sikh militants, fueled by failed attempts at procuring greater autonomy’.³¹ The Indian government responded with force, leading to numerous allegations of human rights violations.³² Amid ‘fitful negotiations’ between the Akali Dal and the Congress Party—during which the former’s demands were labeled ‘communist’ or ‘separatist’ by the latter—the early 1980s ‘saw the rise of a charismatic religious leader Sant Jarnail Singh Bhindrawale’.³³ Despite intense disagreement among chroniclers of this period, the Indian government ‘justified its subsequent policies in order to counter Sant Bhindrawale and the violence he allegedly initiated’.³⁴
10. In 1982, the Akali Dal ‘launched the Dharam Yudh Morcha—advocating for the transfer of Chandigarh to Punjab, reallocation of river waters, and the implementation of the ASR, among other demands’. In the weeks to follow, ‘the police arrested over 36,000 Akali Dal activists and preventatively detained at least 2500 Sikhs’.³⁵
11. On 31 May 1984, the Akali Dal announced plans to for a public agitation—‘intended to block the transport of grains, water, and power supplies from Punjab’—to be launched on 3 June from the Harmandir Sahib (Golden Temple) complex in Amritsar, the center of Sikh religious and political life.³⁶ While the government would later characterize such ‘communal and extremist’ action as providing ‘respectable cover for subversive and anti-national forces’,³⁷ its

³¹ ‘Protecting the Killers: A Policy of Impunity in Punjab, India’, Human Rights Watch & Ensaaf, Volume 19, No 14(C), October 2007, p 10. *Nb.* Certain Sikh extremists ‘were responsible for [...] human rights abuses during the violent separatist struggle for an independent Khalistan’. *Ibid.*

³² ‘Protecting the Killers: A Policy of Impunity in Punjab, India’, Human Rights Watch & Ensaaf, Volume 19, No 14(C), October 2007, p 11.

³³ Kaur, *op cit*, pp 10–11.

³⁴ Kaur, *op cit*, p 11.

³⁵ Kaur, *op cit*, p 11.

³⁶ Kaur, *op cit*, p 12.

³⁷ Kaur, *op cit*, p 12.

immediate response was to deploy '100,000 troops in Punjab, setting the stage for Operation Blue Star'.³⁸

3. Operation Blue Star and the Assassination of Indira Gandhi

12. On 4 June 1984, the Indian Army raided the Golden Temple complex – where scores of militants including Sant Bhindrawale had retreated³⁹ – along with 41 other gurdwaras in Punjab. 'The indiscriminate use of force [by the Indian Army] led to heavy damages to the Harmandir Sahib complex which caused tremendous outrage among Sikhs, many of whom did not support the militant campaign for a separate Khalistan.'⁴⁰ According to an eyewitness 'the militants did not fire any shots from inside the complex'.⁴¹ And five days prior to the massacre, President Zail Singh, a Sikh, had assured 'religious leaders in the complex that the Army would not attack it'.⁴²

13. The siege was particularly bloody. Eyewitnesses reported seeing corpses of Sikhs 'who had been shot at point-blank range, with their hands tied behind their backs'. The bodies included those of 'Sikh children, women, and elderly men'. One Sikh witness, who protested to a major upon seeing 'soldiers lining up young Sikhs for point-blank execution', had his turban torn off his head before being ordered to 'either flee or join the "array of martyrs"'.⁴³ While the official death count referred to 83 army personnel and 493 'terrorists', military sources admitted to over 1000 Sikh deaths, whereas eyewitnesses 'cited figures ranging from 4000 to 8000 people killed, mostly pilgrims'.⁴⁴ Human Rights Watch reported that up to 6000 Sikhs were detained in the aftermath.⁴⁵ The

³⁸ Kaur, *op cit*, p 12.

³⁹ Kaur, *op cit*, p 12 ('In May 1982, after the Indian government banned several Sikh militant organizations, some of the organizations based their activities from the Harmandir Sahib complex.')

⁴⁰ 'Protecting the Killers: A Policy of Impunity in Punjab, India', Human Rights Watch & Ensaaf, Volume 19, No 14(C), October 2007, p 11.

⁴¹ Kaur, *op cit*, p 13.

⁴² Kaur, *op cit*, p 12; for further details of the attack, *see ibid*, pp 13–14.

⁴³ Kaur, *op cit*, p 16.

⁴⁴ Kaur, *op cit*, p 16.

⁴⁵ Kaur, *op cit*, p 20.

Army finally withdrew from the Harmandir Sahib complex in late September 1984, 'after protracted negotiations between Mrs Gandhi, President Zail Singh, and Sikh religious leaders'.⁴⁶

14. On 31 October 31, 'as Indian Prime Minister Indira Gandhi walked through her grounds for an interview with actor Peter Ustinov, two of her [Sikh] bodyguards, Beant Singh and Satwant Singh, raised their guns as if to salute her and shot her'.⁴⁷ She died that evening, setting in motion the mass crimes that would follow shortly thereafter.

B. A Coordinated Policy of Destruction

1. Patterns of Violence: Three Days in November

a. Spontaneous Violence Quickly Gives Way to Organized Bloodshed

15. In the immediate wake of Indira Gandhi's assassination, anti-Sikh violence was spontaneous and relatively contained:

While waiting to hear news of Mrs Gandhi's physical condition on October 31, the group in front of the [the hospital] quickly slipped from shock to revenge, chanting angry slogans such as *'Khoon ka Badla Khoon Se'*, or 'Blood for Blood'. When President Giani Zail Singh, himself a Sikh, arrived at [the hospital] around 5:20 pm, 15 to 20 people stoned his car and made him the first target of their call for revenge. The affidavits show that the violence on October 31, however, *remained confined to the areas around the [hospital], and did not result in the deaths of Sikhs* Placing blame on the entire Sikh community, mobs assaulted Sikhs, pulled them out of cars and off buses, and burned their turbans, *but no assailant killed a Sikh. Many people reported that their neighborhoods were peaceful on October 31.*⁴⁸

⁴⁶ Kaur, *op cit*, p 21 ('A few days later, on October 1, the Army re-entered the complex, took over again, and arrested 300 Sikhs, after Sikhs shouted secessionist slogans and made speeches against the Sikh religious leadership. On October 5, the Indian Government extended its direct rule over Punjab for another six months. Indian Home Secretary MMK Wali justified the extension because of the re-entry of "separatist militants" into Harmandir Sahib. He stated that 450 "hardcore" militants remained active in Punjab. The security forces did not begin to withdraw again until October 8.')

⁴⁷ Kaur, *op cit*, p 4; 'Protecting the Killers: A Policy of Impunity in Punjab, India', Human Rights Watch & Ensaaf, Volume 19, No 14(C), October 2007, p 11.

⁴⁸ Kaur, *op cit*, p 27 (emphasis added).

However, in the days to come, the violence was anything but spontaneous.

16. The evidence suggests that from 1 November—‘senior politicians and police officers orchestrated pogroms of Sikhs in various cities across India, killing at least 2733 Sikhs in Delhi alone’.⁴⁹ A Congress Party line was quickly advanced to explain the violence: a spontaneous uprising of grief over the assassination. And the media was deployed to spread anti-Sikh propaganda consistent with the official line.⁵⁰ False rumors were spread;⁵¹ the police fell under party direction;⁵² and the army was deliberately sidelined.⁵³ By 4 November, at least 8000 Sikhs had been killed throughout India and an unknown number brutalized, including masses of women and girls who were violently raped.⁵⁴
17. The following sub-sections set out the various patterns of anti-Sikh violence—from planning to perpetration. For evidentiary reasons, many of the events described below occurred in Delhi; Kanpur, Uttar Pradesh; and Bokaro, Bihar.⁵⁵ However, Sikhs throughout the country were targeted.⁵⁶

⁴⁹ ‘Protecting the Killers: A Policy of Impunity in Punjab, India’, Human Rights Watch & Ensaaf, Volume 19, No 14(C), October 2007, p 11; *see also* Kaur, *op cit*, p 4 (‘Beginning roughly 18 hours after the Hindustan Times and Indian Express first announced Mrs Gandhi’s assassination, the Congress party and Indian police unleashed a nightmare of organized violence against the Sikh community, supported and encouraged by the Delhi and Central governments. [...] The violence, allegedly motivated out of grief over Mrs Gandhi’s assassination, continued unabated for at least four days, and intermittently for the rest of the week.’)

⁵⁰ Kaur, *op cit*, p 23 (‘Minimizing and mischaracterizing the November massacres, reporters maintained that Sikhs had reacted ambivalently to the assassination of Indira Gandhi, creating “understandable resentment.” Communal and government portrayals also de-legitimized Sikh demands and experiences of oppression in Punjab, allowing people to characterize Sikhs as “a people with a chip on their shoulders” and refer to the “Sikh problem” as “essentially psychological.” Reporters and politicians made predictions based on their false stereotypes and communal perception of the conflict in Punjab. The news reports during and after the November 1984 massacres made constant references to the likelihood of a backlash against Hindus in Punjab. This never occurred.’)

⁵¹ Kaur, *op cit*, p 5 (‘As the violence continued methodically and systematically over the next days, Congress politicians and policemen spread two more false rumors: the Sikhs had poisoned the water supply and Sikhs in Punjab were killing Hindus on Delhi-bound trains.’)

⁵² Kaur, *op cit*, p 5 (‘Government officials continued to deny the extent of violence against Sikhs, while police officers and political leaders simultaneously directed the organized slaughtering of Sikhs.’)

⁵³ Kaur, *op cit*, p 5 (‘The Army, called into Delhi 24 hours after the violence had begun, could not begin to effectively counter the violence until November 3 because of the Delhi administration’s refusal to cooperate.’)

⁵⁴ Singh, *op cit*, p xix.

⁵⁵ Kaur, *op cit*, p 5 (‘The documentary evidence focuses on these areas because the government-appointed commissions and committees that examined these massacres included only these areas

b. The Plan is Hatched

18. During the night of 31 October, initially spontaneous violence was systematically channeled into something far more organized and far more sinister:

Congress party officials met with their local support networks—people who participated in rallies and election drives—to: **identify the residences and properties of Sikhs through government-issued voter or ration lists; distribute weapons, kerosene, and incendiary chemicals; exhort non-Sikhs to kill Sikhs and loot and burn their properties; and plan the time of attack.** That night, they floated the first [false] rumor that Sikhs had celebrated the assassination of Indira Gandhi, dancing and distributing sweets, conditioning Indians for the violence to follow.⁵⁷

A bystander had earlier witnessed Delhi's senior Congress leadership—including HKL Bhagat, Lalit Maken, Sajjan Kumar, and Dharam Dass Shastri—leaving the hospital around 4 pm. According to President Zail Singh, the group had decided on a slogan for their plans: 'Blood for blood'.⁵⁸ The same evening, a clandestine meeting took place, this time at the home of HKL Bhagat (the minister of information and broadcasting). Senior police officers were also in attendance.⁵⁹ According to a junior officer, it was decided that officials 'down the line [were] to let the killings take place and then erase all traces of the

in their terms of reference. Although a common pattern followed throughout India, the Central government has not conducted any inquiry into the nature and extent of violence outside of Delhi, Bokaro, and Kanpur and the linkages between the violence in different areas. In Bokaro, at least 72 Sikhs were killed, and in Kanpur, around 127 Sikhs were massacred. In Delhi, the official figure is of 2733 deaths, leaving over 1300 widows and 4000 orphans. Over 50,000 Sikhs also left Delhi after the massacres.'

⁵⁶ See para 28, *infra*; Singh, *op cit*, *Index*, pp 262–263.

⁵⁷ Kaur, *op cit*, p 4 (emphasis added).

⁵⁸ Singh, *op cit*, p 55 ('According to Tarlochan Singh, the president's press secretary, Zail Singh had discovered that a meeting of Congress leaders – including Arun Nehru, HKL Bhagat, and Jagdish Tytler—had taken place on 31 October, prior to Rajiv Gandhi's arrival at the hospital [...]. It is believed that the official go-ahead for the plan was given at this meeting, with 'blood for blood' chosen as the rallying cry.')

⁵⁹ Singh, *op cit*, p 12.

crime'.⁶⁰ At another meeting near Trilokpuri colony, at the home of local Congress Party leader Rampal Saroj, instructions were given to the other leaders present: 'the entire Sikh community had to be taught a lesson'.⁶¹

19. The following morning, execution of the plan ensued, following an obvious pattern:

[O]n November 1 between 8 and 10 am, assailants simultaneously attacked Sikhs throughout the country, **shouting slogans of extermination**. The gangs often first attacked the Sikh gurdwara in the particular neighborhood. After desecrating the Sikh scriptural canon, Sri Guru Granth Sahib, by urinating on or burning them, burning down the gurdwara, and attacking symbols of the Sikh faith, the mob attacked the properties of Sikhs and the Sikhs themselves. **Organized transportation, sometimes provided using state-owned buses and railways, brought assailants to where Sikhs lived**. The behavior of policemen surpassed inaction, and often amounted to participation and instigation. If the Sikhs gathered and defended themselves, the **police disarmed the Sikhs** and sent them to their individual houses, making them easier targets for death squads. **Congress party leaders led, directed and encouraged gangs of assailants, and participated in the massacres themselves.**⁶²

The specifics of these various components are discussed in greater detail below.

20. The successful execution of the plan 'was entirely dependent on ensuring the logistical support for those who would carry out the killings was in place beforehand'; and the synchronization of the plan's 'various components could not have been possible without significant advance planning'.⁶³ According to the Nanavati Commission (discussed below): 'But for the backing and help of influential and resourceful persons, killing of Sikhs so swiftly and in large

⁶⁰ Singh, *op cit*, p 56 (citing Shoorveer Singh Tyagi, Station House Officer in charge of Kalyanpuri police station).

⁶¹ Singh, *op cit*, p 56.

⁶² Kaur, *op cit*, p 5 (emphasis added).

⁶³ Singh, *op cit*, p 59 ('India's infrastructure and bureaucracy is often disorganized at the best of times, but in November 1984, it somehow swung into action almost immediately.')

numbers could not have happened. The systematic manner in which the Sikhs were thus killed indicates that the attacks on them were organized.⁶⁴

c. Identification and Tracking

21. A crucial factor in the coordinated effort was the attackers' precise knowledge of various Sikh locations. This was no accident.⁶⁵ Accounts present an impressive level of precision.⁶⁶ Stature and position were no comfort, as the mobs attacked Sikhs regardless of their ranks.⁶⁷ Lists were checked and scrupulously double-checked.⁶⁸

⁶⁴ Singh, *op cit*, p 59 (quoting the Nanavati Commission).

⁶⁵ Kaur, *op cit*, p 30 ('In addition to distributing weapons during [...] meetings, Congress party officials also provided assailants with voter, school registration, and ration lists – generated in advance with the particulars of each Sikh resident in the various neighborhoods. In many neighborhoods, the assailants marked the houses of Sikhs on October 31, the night before the initiation of the massacres. The lists provided precise information on the location of Sikh houses and businesses, necessary to distinguish the targets among unmarked residences in diverse neighborhoods. Because many of the assailants were Jats and Gujjars from neighboring villages, and locals from the Scheduled Castes, among others, they were illiterate; Congress leaders provided the necessary help in reading the lists. These lists allowed the assailants, led by Congress leaders and neighbors, to accurately pinpoint the location of any Sikh, and surpass the mere slaughter of Sikhs in the streets.')

⁶⁶ Kaur, *op cit*, p 30 ('Aunkar S Bindra was the only Sikh in a house of seven tenants in Cooperative Colony, Bokaro. When the mob came to kill him on November 1, his landlady insisted that no Sikh lived in the house. The mob however pointed to exactly where he stayed. Similarly, when one of GB Singh's military friends came to rescue him from Safdarjung Enclave in Delhi, a mob asked the driver why he was protecting the house of a Sikh. The driver replied that he did not know any Sikhs lived there, but the mob answered with precision: "We know Col Jagjit Singh lives [here]. Mr GB Singh the gentleman with one arm stays downstairs."')

⁶⁷ Kaur, *op cit*, pp 30–31 ('A relief camp on Palam Road, for example, served survivors who worked for the defense services. Captain Manmohan Singh, a highly decorated officer for his gallantry in the Indo-Pak war of 1971, was attacked persistently by a mob, starting at 9:30 am on November 1. The mob refused to relent despite Captain Manmohan Singh's informing them he was a retired Air Force Officer. At 2:30 pm, two Delhi Transportation Company (DTC) buses brought more assailants to his house. By 4 pm, Captain Manmohan Singh faced a four to five thousand strong mob. The assailants broke into his house and attacked him and his family with iron rods. Only then did Captain Manmohan Singh fire his gun, forcing the mob away. The mob persisted, climbing onto the roof of the neighbor's house and throwing petrol bombs at Captain Manmohan Singh and his family. When the assailants tried to enter his house again, the Captain fired into the air. At 8:30 pm, police personnel asked Captain Manmohan Singh and his family to surrender, promising them protection. The police subsequently charged him with three murders, failing to take any action against the mob.')

⁶⁸ Kaur, *op cit*, p 31 ('The mobs did not just kill Sikhs who came their way, but used the lists in an organized manner to track Sikhs killed. Amar Singh of Yamuna Vihar, Delhi, escaped by having two Hindu boys he knew declare that he was dead and drag his body through the street. Later, however, 15 to 18 persons came to his neighbor's house, asking for his dead body. Amar Singh, hiding in the bathroom of his neighbor's house, overheard their conversation. His neighbor told the group that unknown persons had taken his body away. One person in the mob showed the list

Just as in the Rwandan genocide ten years later – where Hutu militias were provided with carefully-prepared lists of Tutsis – **the killers went from door to door, working their way down the lists.** Sikh gurdwaras voter records were used to identify Sikh homes and businesses. To ensure none were missed, school registers, ration lists, and electoral rolls were used for cross-referencing. Crucially, on the preceding night of 31 October, **Sikh homes had been carefully identified by ‘surveyors’.** One witness saw as many as twenty-five people involved in this operation: ‘They were carrying a list showing the houses in which Sikhs were staying. I saw them put marks on the houses of Sikhs.’ One was seen operating in a market town, going ‘from door to door of Sikh houses marking them with an “S”, ready for the arson, looting and murder’.⁶⁹

Those Sikhs who were not targeted in their homes were easily identified by their distinctive turbans and beards.⁷⁰

d. Slogans of Extermination

22. The angry slogan heard outside of the hospital on the night of the assassination was co-opted by the organizers and consistently heard throughout the carnage:

‘Khoon Ka Badla Khoon’ or **‘Blood for Blood’** began at [the hospital] and reverberated across India through the state-owned TV service **Doordarshan.** Ranjit Singh Narula, retired Chief Justice of the Punjab and Haryana High Court, watched local television on the morning of November 1, amazed at how the crowd outside [the prime minister’s residence], where Mrs Gandhi’s body lay, chanted *‘Khoon Ka Badla Khoon’* and *‘Sardar Qaum Ke Ghaddar’*, or ‘[Sikhs] are the Nation’s Traitors’ while the large number of government officials observed without taking any action to stop the inflammatory slogans. This continued on TV the whole day. Even the new Prime Minister Rajiv Gandhi did not stop the chanting mobs. When Shanti Bhushan, former law minister and senior advocate of the Supreme Court, tuned into Doordarshan, he saw Prime Minister Rajiv Gandhi passively listening to the slogans. Throughout the carnage, [...] Doordarshan continued to focus on [the prime minister’s residence] and the chanting crowds, showing no coverage of the massacres of

to the neighbor and said, “Look, Amar Singh’s name has not been struck off from the list so his dead body has not been taken away.” The group then searched the neighbor’s house, luckily failing to find Amar Singh.’)

⁶⁹ Singh, *op cit*, p 18 (emphasis added).

⁷⁰ Kaur, *op cit*, p 31.

Sikhs. Television viewers abroad watched in horror, but tight controls within India prevented any coverage.⁷¹

Nearly every account of the violence refers to angry mobs shouting slogans to kill Sikhs.⁷² At one point on 1 November, 'a forty-second segment of [TV] footage showed the "blood for blood" slogan being repeated eighteen times'.⁷³ Yet '[n]ot one image of the looting and [burning], let alone of the killing, was ever shown on TV'.⁷⁴

23. Radio was little better: '[B]roadcasts aired on the state-owned All India Radio emphasized how Indira Gandhi's killers had been Sikhs. Initial reports on both television and radio painted the attack as an "exchange of fire", giving the erroneous impression that there was fighting between two communities.'⁷⁵ Given the general population's high rate of illiteracy, the 'potential impact of this kind of skewed reporting was significant'.⁷⁶

24. The official footage of Rajiv Gandhi's first speech as prime minister is telling:

In a calm, emotionless voice, he said India had lost a great leader. Someone who was not just his mother but the mother of the country, or words to that effect. Then he stopped and stared sadly at the camera while Doordarshan showed shots of HKL Bhagat and his supporters beating their chests and shouting, '*Khoon ka badla khoon se lenge.*' **Blood will be avenged with blood.**⁷⁷

The message of India's state-owned broadcaster was clear.

⁷¹ Kaur, *op cit*, p 31-32; Singh, *op cit*, p 13 (emphasis added) ('Meanwhile, scenes were broadcast on the state's Doordarshan TV channel of Mrs Gandhi's corpse alongside the continuous naming of the assassins and, significantly, an emphasis on their faith. In a clear incitement, the predetermined chilling phrase, 'blood for blood', was aired and repeated over state-controlled airwaves.') *Nb.* *Sardar* is an honorific synonymous with Sikhs. *Ibid*, p xxiii.

⁷² Kaur, *op cit*, p 32 ('Other slogans often heard were: "Maar Deo Salon Ko," or "Kill the Bastards"; "Sikhon do mar do aur loot lo," or "Kill the Sikhs and rob them"; and "Sardar Koi Bhi Nahin Bachne Pai," or "Don't let any [Sikhs] escape."')

⁷³ Singh, *op cit*, p 90.

⁷⁴ Singh, *op cit*, p 91.

⁷⁵ Singh, *op cit*, p 91 ('Audiences nationally for Doordarshan and All India Radio at the time were around 250 million and 35 million respectively.')

⁷⁶ Singh, *op cit*, p 91.

⁷⁷ Singh, *op cit*, pp 116-117 (citing Tavleen Singh).

e. Anti-Sikh Rumors

25. A number of rumors spread by Congress Party leaders and the police quickly caught on and served as false but animating narratives (in addition to the assassination) for the violence.⁷⁸ These included Sikh plans to poison Delhi's drinking water;⁷⁹ Sikhs killing Hindus in Punjab and sending corpses to Delhi by train;⁸⁰ Sikh plans to attack Hindus in Delhi;⁸¹ and Sikhs disturbing sweets to celebrate the assassination.⁸² In addition to the police, Congress Party leaders, medical doctors, and 'Prime Minister Rajiv Gandhi himself gave substance to these rumors'.⁸³

f. Mob Attacks on Sikh Persons, Property, Dignity, and Articles of Faith

⁷⁸ Kaur, *op cit*, p 32 ('In addition to the assassination of Mrs Gandhi, rumors served to justify the subsequent attacks on Sikhs, to continue to motivate the killers, and to raise the guards of passive Indians against Sikhs. Numerous deponents testified to seeing police traveling through neighborhoods spreading rumors.');

Singh, *op cit*, p 12.

⁷⁹ Kaur, *op cit*, p 32 ('In Mangolpuri, New Delhi, a police van came to G block and announced that Sikhs had poisoned Delhi's drinking supply the evening of November 1. Lalita Ramdas, a volunteer with Nagrik Ekta Manch who coordinated a relief camp after the massacres started, received a call from her friend Sarita about the same rumor also broadcast by the police in her neighborhood. She wanted to ascertain the truth of it, and finally a correspondent from Hindustan Times confirmed the lack of truth in the police's announcement. Poonam Muttreja, of Munirka Enclave, New Delhi, heard the following announcement on a public address system the morning of November 1 at 2:30 am: "*Aap ke pani mein jahar mila dian gaya hain, kripya pani nahin pee jaeey*" ("Your water supply has been poisoned. Please do not drink the water.") When she ran to her balcony, she saw what looked like a police jeep exit the colony.')

⁸⁰ Kaur, *op cit*, p 33 ('In Shahdra, New Delhi, police spread rumors of Punjabi Sikhs killing Hindus and sending trains to Delhi filled with Hindu bodies [...]. In reality, trains were arriving with bodies of dead Sikhs [...].');

Singh, *op cit*, p 15 ('By 2 November, as trains began to arrive into Delhi overflowing with the bodies of dead Sikhs, rumors were spread claiming Hindu us had been killed in Punjab and it was their corpses that lay on the Jhelum Express.')

⁸¹ Kaur, *op cit*, p 33 ('V Khosla described how another false rumor was spread in New Friends Colony that Sikhs had gathered in a Gurdwara on Ring Road, armed themselves, and planned to attack Hindus in the colony. Khosla moved his children outside the colony.')

⁸² Kaur, *op cit*, p 33 ('Aseem Srivastava, the Masters student at Delhi School of Economics, testified about the impact of rumors about celebrating Sikhs: "This rumor, which ultimately proved to be entirely unfounded, succeeded in whipping up considerable Anti-Sikh feeling in our locality, even amongst the so-called educated people. At this point I consider it obligatory on my part to say that I did not see any Sikh distributing sweets to celebrate Mrs Gandhi's assassination or dead bodies of Hindus arriving in Delhi in trains."')

⁸³ Kaur, *op cit*, p 33 ('When Subedar Balwant Singh took his injured son to the hospital after a mob attacked them near Sagarapur, New Delhi on November 1, a doctor refused to give his son a glass of water, using the excuse that Sikhs had poisoned the entire supply. Balwant Singh went and fetched the water for his son himself. In Nand Nagari, Dayal Singh heard Congress leader Narang repeat the rumor regarding the train full of Hindu bodies. Prime Minister Rajiv Gandhi justified the murders, telling prominent Indian journalist MJ Akbar that the killings were only extensive in those areas where the Sikhs had celebrated the assassination of his mother by distributing sweets.')

26. On the morning of 1 November, 'organized mobs were transported in buses from outside Delhi and began descending on Sikh neighborhoods'; they were equipped with all manner of weapons including 'firearms, iron rods, knives, clubs, and an abundant supply of kerosene' as well as '[s]acks of white phosphorous powder'.⁸⁴

After attacking the neighborhood gurdwaras, the mobs used lathis [iron-bound bamboo sticks] and bricks to physically attack houses. After entering the house or scaring the inhabitants into coming outside, the mobs beat Sikhs with iron rods and used inflammable powder and kerosene to set them on fire and burn them to death. They also used the powder and kerosene to burn their property. Some groups used crude explosives to kill Sikhs hidden inside rooms. According to the Delhi Sikh Gurdwara Management Committee's submissions to the Misra Commission, **the mobs used the kerosene to burn Sikhs alive, burn them while unconscious, and burn their dead bodies in bulk. The majority of the victims were burned alive.**⁸⁵

The use of phosphorous during attacks—its precise identity unknown at the time—was widely reported.⁸⁶ Unlike kerosene and the other crude weapons, phosphorous would not have been readily available to the general public.⁸⁷

27. Before killing some of their victims, 'the mobs humiliated them and inflicted specific acts of cruelty'.⁸⁸ In addition to attacks on gurdwaras, the mobs

⁸⁴ Singh, *op cit*, p 17.

⁸⁵ Kaur, *op cit*, pp 33–34 (emphasis added).

⁸⁶ Kaur, *op cit*, p 38 ('One witness noted how, "using an inflammable chemical powder, the mob killed her husband, son, neighbor, two brothers, two nephews, and two brothers-in-law all in front of her".'); Singh, *op cit*, p 22 ('Peter Ustinov, who had earlier been planning to interview the prime minister, would later recall that the air was full of a stench reminiscent of the Blitz. Germany's raids over London during the Second World War had released bombs containing the chemical agent phosphorous. He was not far from the truth—in many areas, the murder squads had used the phosphorous that had been supplied to them to incinerate their victims. A highly inflammable agent, it quickly burnt the human flesh down to the bone.')

⁸⁷ Kaur, *op cit*, p 29 ('According to late journalist Ivan Fera, a senior official in the Home Ministry also claimed that subsequent investigations of burned businesses demonstrated the use of a combustible chemical substance, whose provision required large-scale coordination. In its written arguments to the Misra Commission, the Delhi Sikh Gurdwara Management Committee (DSGMC) identified 70 affidavits citing the use of a highly inflammable chemical substance. Eyewitness accounts confirm the use of a chemical substance, in addition to kerosene oil, as well.')

purposefully defiled articles of the Sikh faith—including the hair and clothing of Sikh men,⁸⁹ scriptural cannon, and portraits of Sikh gurus.⁹⁰ A repeated, and particularly brutal, method of killing was so-called ‘necklacing’, whereby ‘a rubber tire filled with fuel [was] placed over [the] victim’s chest and arms before being set aflame’.⁹¹ Equally gruesome, a journalist ‘reported that some Sikh children were “castrated and their genitals stuffed into the mouths of their mothers and sisters”’.⁹² Other victims were decapitated.⁹³ Notably, the mobs acted deliberately and patiently, ‘comfortable in the police protection’;⁹⁴ and they appeared to take pleasure in their dark tasks.⁹⁵

⁸⁸ Kaur, *op cit*, p 34 (‘Assailants repeatedly gouged Satnam Singh’s eyes with huge needles, before setting him on fire. On November 3, pacifist leader Swami Agnivesh toured Trilokpuri, one of the worst affected areas: “The carnage was mind boggling. Half burnt bodies were still lying scattered. Some had been mutilated by gorging their eyes. Some had smoldering tires around their necks. The houses had been completely destroyed and burnt.” In his statement to the Nanavati Commission, Swami Agnivesh described how he saw about half a dozen bodies lying in the muddy water of Yamuna River. Another survivor described how she saw the heads of her two dead nephews separated from their bodies and kept in eating plates.’)

⁸⁹ Singh, *op cit*, p 21 (‘As gangs swarmed into Sikh houses, they often began their barbaric violence with a calculated physical and psychological gesture: the severing of male victim’s hair. [...] The act of effectively “scalping” their victims was intended to inflict maximum suffering and humiliation.’)

⁹⁰ Kaur, *op cit*, pp 34–35 (‘Assailants forcibly cut the hair of Sikh men—kept unshorn by Sikhs according to religious discipline—humiliating them before killing them. When Baljit Singh’s grandfather arrived at his uncle’s house in Kanpur, the mob had stripped him of the uniform of an initiated Sikh, articles that must always remain on a Sikh’s body. John Elliott, a Financial Times reporter, met two elderly Sikhs in their 60s and 70s at a Delhi gurdwara, who had been assaulted—the gangs had also cut their hair. They defiled the Sikh scriptural canon Sri Guru Granth Sahib by urinating on it or by lighting it on fire with cigarettes. As Balwant Singh, Grant hi of Gurdwara of BC Block in Shalimar Bagh, New Delhi, said to historians and activists Uma Chakravarti and Nandita Haksar, describing the pain of that desecration: “We don’t mind so much for ourselves. I could have been martyred ... I don’t mind the fact that my house was looted. After all it was the Parmatma [God] who gave it to me. But what I could not bear was that [H]e who had given everything to me should himself be trampled upon by the looters, that [H]e should be insulted and defiled with urine.” The gangs defiled portraits of the Gurus hanging in Sikh houses, taunting the Sikhs to call their Gurus to save their lives now.’)

⁹¹ Singh, *op cit*, p 22.

⁹² Singh, *op cit*, p 22 (citing veteran Indian journalist, Pranay Gupte).

⁹³ Singh, *op cit*, p 22.

⁹⁴ Kaur, *op cit*, p 36 (‘As Madhu Kishwar, founder and editor of Manushi, wrote in “Gangster Rule”: “Many eyewitnesses confirm that the attackers were not so much a frenzied mob as a set of men who had a task to perform and went about it in an unhurried manner, as if certain that they need not fear intervention by the police or anyone else. When their initial attacks were repulsed, they retired temporarily but returned again and again in waves until they had done exactly what they meant to do—killed the men and boys, raped women, looted property, and burnt houses. This is noteworthy because in ordinary, more spontaneous riots, the number of people injured is usually observed to be far higher than the number killed.”’)

⁹⁵ Kaur, *op cit*, p 37 (‘Instead of being overwhelmed by sorrow from the death of their leader Mrs Gandhi, as the police and government claimed, or exhibiting signs of coercion or social pressure, witnesses like ND Pancholi, General Secretary of Citizens for Democracy, saw the mobs dancing,

28. Documented massacres took place in and around Delhi at Connaught Place; Gurdwara Rakab Ganj, Gurdwara Sis Ganj, Gurdwara Pul Bangash, other gurdwaras; Nangloi and Tughlakabad railway stations;⁹⁶ as well as some 50 distinct locations countrywide—from Assam to Yamuna Vihar.⁹⁷ The massacre at Trilokpuri Colony in Delhi is emblematic of the violence.⁹⁸ And beyond Sikh neighborhoods:

‘India’s sprawling railway network became an easy hunting ground for murderers [...]. According to records obtained from the railway authorities, there were at least **forty-six unauthorized train stoppages in the first two days of November. Once stopped, Sikhs were identified, dragged out and executed**, their bodies left on the platform or thrown onto the tracks.’⁹⁹

Even Sikhs in the armed forces came under attack—‘their proud military tradition and years of distinguished service for the motherland failing to shield them from the fury of the murderous attack’.¹⁰⁰

g. Sexual Violence

29. Rape was a ‘central element of the violence from the onset’,¹⁰¹ a ‘defining feature’.¹⁰²

laughing merrily as Sikhs burned to death. Aseem Shrivastava, the Masters student from Delhi School of Economics, said the mob “seemed to be jubilant that ‘at last the Sikhs were being taught a lesson.’” Madan Lal Khurana, senior leader of the Bharatiya Janata Party (BJP) who later served as Chief Minister of Delhi, saw the mob playing drums in one or two places while people in the mob danced’)

⁹⁶ Singh, *op cit*, pp 13–14, 18–19, 32, 76, 85, 109–111, 145, 171, 180.

⁹⁷ Singh, *op cit*, *Index*, pp 262–263.

⁹⁸ Singh, *op cit*, pp 23–25 (for a detailed description).

⁹⁹ Singh, *op cit*, pp 32–33 (emphasis added).

¹⁰⁰ Singh, *op cit*, pp 85–87.

¹⁰¹ Singh, *op cit*, p 35.

¹⁰² Kaur, *op cit*, p 37 (‘In Manushi, Madhu Kishwar highlighted the story of Gurdip Kaur, a survivor of the massacre in Trilokpuri. The mob killed Gurdip Kaur’s husband and three sons. They raped her in front of her youngest son and then, after he had witnessed the devastation of his mother, they killed him. According to Gurdip Kaur, most of the Sikh women in Trilokpuri suffered gang rape, from nine and ten year old girls to 80-year old women. In several cases, elderly women were raped in front of their families. The rapists then either took the women home with them, or left them naked in the streets.’)

Cases were reported of women being stripped and **raped while their husbands and sons were forced to watch**. Children were often present while their mothers and sisters were being repeatedly brutalized. Some of the **sexual violence was committed in the presence of the still smoldering corpses of murdered family members**.¹⁰³

Sexual violence was committed upon threat of death,¹⁰⁴ and included gang rape¹⁰⁵ and sexual slavery.¹⁰⁶ Gang rapes 'were efficiently organized and planned', and much of the sexual violence 'was carried out on the instructions of local Congress leaders'.¹⁰⁷ Even elderly women were not spared.¹⁰⁸ As in nearly all such cases, the purpose was to 'inflict maximum humiliation in order to completely destroy the victims' morale'.¹⁰⁹ Given the cultural stigma associated with sexual violence in India, it is believed that the vast number of cases went unreported.

Several factors contributed to the underreporting of rape. First, societal shame silenced the victims. As Gurdip Kaur told Kishwar, 'The unmarried girls will have to stay unmarried all their lives if they admit that they have been dishonored. No one would marry such a girl'.

¹⁰³ Singh, *op cit*, pp 35–36 (emphasis added).

¹⁰⁴ Kaur, *op cit*, p 37 ('On November 1, after a day of killings, 150 to 200 women took refuge in a park in Trilokpuri while their male family members hid from view. That night, assailants came and, shining flashlights in their faces, took women to shanties. Tehmi Devi described how assailants raped her and threatened to kill her if she screamed. They tore off her clothes and stabbed her in the leg.')

¹⁰⁵ Kaur, *op cit*, p 38 ('One victim reported that ten men raped her. [...] Dr HK Bovenanker, the Medical Officer in charge of Guru Nanak Hospital, Shanti Nagar, Kanpur, went to a relief camp on November 2 with Dr H Bhatia. There they saw at least 12 to 13 cases of gang rape of young girls between the ages of 16 and 20.')

¹⁰⁶ Kaur, *op cit*, p 38 ('Padmi Kaur, from Sultanpuri, narrated the brutal experiences of her family on November 1: "After some time the mob arrived, broke open our door and came inside. They caught hold of my daughter Maina Kaur forcibly and started tearing her clothes. In her self-defence my daughter also tore their clothes and also hit them. They tried to criminally assault my daughter. My husband begged them to let her go. They mob said they would kill him " *Kohyibhi Sikh ka bacha nahin bachega*" (No Sikh son would be spared). They broke the hands and feet of my daughter and kidnapped her. They confined her in their homes for three days." [...] On November 7, the local police recovered six girls from the village of Chilla Gaon, who had been abducted from Trilokpuri.')

¹⁰⁷ Singh, *op cit*, p 36; *ibid*, pp 37–38; Jaskaran Kaur, 'Twenty Years of Impunity: The November 1984 Pogroms of Sikhs in India', *Ensaaf*, 2nd Edition, October 2006, p 38 ('Victims reported that a Congress block leader had directed the rapists. [...] They had been raped on the instructions of Shiv Mangal Singh, a Congress leader.')

¹⁰⁸ Singh, *op cit*, p 38 ('Elderly women were also subjected to sexual assaults in front of their families, especially in Trilokpuri. In Nand Nagri, an eighty-year-old woman informed a social worker that she had been raped.')

¹⁰⁹ Singh, *op cit*, p 38.

Survivors used euphemistic language to describe what happened. Sarabjeet Singh saw his pregnant wife stripped naked in the middle of the road and 'dishonored'. After the mob also dishonored his sister-in-law, they poured acid on the bodies of the two women. Second, doctors intimidated women from getting a medical examination and registering complaints. Third, in India, rape cases are medico-legal cases that require special evidentiary procedures which doctors in relief camps could not follow. These doctors failed to refer women to competent hospitals. Fourth, the majority of the investigating officers of the Misra Commission were probably men and failed to elicit the personal testimonies from victims.¹¹⁰

Such factors would have been well known to the assailants, adding an additional level of trauma to the sexual assaults.

h. Delayed Deployment of the Army

30. Crucially, the Delhi administration 'permitted the massacres to continue for several days by delaying the calling in of the Army, and then [...] purposefully fail[ing] to deploy the Army where violence continued'.¹¹¹

The order to call the Army into Delhi was issued at 2:30 pm on November 1, and on November 2 for Bokaro. Subash Tandon, **the Commissioner of Police, delayed calling for the need of armed forces**, insisting that he first patrol the area even though reports of killings had flooded the police control room. Tandon, however, continued to insist even until November 3 that only between 15 to 20 people had died.¹¹²

India's president, Giani Zail Singh, a Sikh and technically the Supreme Commander of the Armed Forces was reportedly hopeless 'in exerting any authority to counter the massacres'.¹¹³ Singh's suggestion to his frustrated

¹¹⁰ Kaur, *op cit*, pp 38–39.

¹¹¹ Kaur, *op cit*, p 66; Singh, *op cit*, p 81 ('As the fourth largest army in the world, and with its headquarters in Delhi, India's army was more than capable of dealing with the failing law and order situation compounded by a complicit police force. India retains clear operational procedures in times of civil unrest. Curfews are declared and military units deployed as the situation demands – nowhere are such standards more keenly adopted than in the nation's capital.')

¹¹² Kaur, *op cit*, p 66 (emphasis added).

¹¹³ Kaur, *op cit*, p 66 ('Rajya Sabha MP Khushwant Singh called Giani Zail Singh: "I said, 'What do I do, the mob is here?' And he said, 'Why don't you leave the house and go somewhere else and stay with a Hindu friend.' I said, 'Is this the best the president of the republic can do?' And he said, 'I'm afraid

associates to contact Home Minister PV Narasimha Rao was met with indifference.¹¹⁴ And when a senior army officer 'suggested the establishment of a joint control room, Rao stated that he would decide that issue when the army arrived, contrary to the normal procedure of establishing a joint control room prior to [its] arrival'.¹¹⁵ When the Delhi administration finally called for the army on the afternoon of 1 November, 'it did not provide civil assistance [...], and troops remained lost in Delhi streets'.¹¹⁶ The order for the appointment of an executive magistrate 'who would attach himself to the army and give the required orders to act was not issued until November 3'.¹¹⁷

31. In addition to the lack of civilian administrative guidance (exacerbated by the failure to provide a joint control room),¹¹⁸ the administration also interfered in the strength and subsequent deployment of troops:

at this moment, yes.'" Early morning November 1, Lt-Gen (Retd) JS Aurora went with Air Chief Marshall (Retd) Arjan Singh, former diplomat Gurbachan Singh, and Brig (Retd) Sukhjot Singh, all Sikhs, to meet Giani Zail Singh and press him to call in the armed forces. To their surprise, despite being the Supreme Commander, the President replied, "I do not have powers to intervene." The President himself did not know whether the Army was going to be called in, stating that he did not have access to Home Minister PV Narasimha Rao. Instead, he asked Lt-Gen (Retd) JS Aurora to contact the Home Minister.'

¹¹⁴ Kaur, *op cit*, p 66 ('After repeated failed attempts to contact the Home Minister and assertions that he was busy in meetings, Lt-Gen Aurora, IK Gujral –who later became Prime Minister, and Patwant Singh went to the Home Minister's residence and found him available. The Home Minister was utterly indifferent to the violence in Delhi. '); Singh, *op cit*, p 82 ('By the evening of 31 October it became increasingly apparent to South Delhi's deputy commissioner of police, Chander Prakash, that the use of military force would be necessary. The additional commissioner of police, Gautam Kaul (a cousin of the prime minister) refused the recommendation on the grounds that "a meeting had already taken place sometime earlier in the prime minister's house, where the home minister was also present, and a decision had been taken not to impose curfew and call out the army at that stage". That same evening, Home Minister PV Narasimha Rao (who would himself become prime minister in the early 1990s) appeared "indifferent" according to two senior lawyers who urged him in person to act to prevent a looming massacre. The home minister left them with an uninspiring assurance that he would be "looking into this matter". The next day an opposition MP rang both the home minister and Shiv Shankar, a minister in the new cabinet who was also a confidant of the Gandhi family, to inform them of the increasingly worrying situation and the need for a military response. The ministers reassured the caller that the army would be summoned imminently and that a curfew was to be imposed.')

¹¹⁵ Kaur, *op cit*, p 66.

¹¹⁶ Kaur, *op cit*, p 67.

¹¹⁷ Kaur, *op cit*, p 67.

¹¹⁸ Kaur, *op cit*, p 67 ('*Who Are the Guilty?*', the People's Union for Civil Rights (PUCL)/People's Union for Democratic Rights (PUDR) report on the November 1984 massacres, described the need for a joint control room: "An essential ingredient for successful joint army-civilian administration operation is the setting up of a joint control room. [...] Yet from October 31 to November 4 [...] no effort was made to set up a joint control room. The Commissioner of Police was operating from his

kill them,' the police thus isolated them for attack by the mobs.¹³⁹ Additionally, officers instructed their subordinates to arrest Sikhs acting in self-defense.¹⁴⁰

The actions of the most senior officer, **Commissioner of Police Subhash Tandon, reflect this policy of disarming Sikhs.** When Tandon arrived at Rakab Ganj Gurdwara, where Kaul had earlier allowed the mob to attack by stepping aside, the mob had already burned alive two Sikhs. Tandon did not touch a single member of the mob or try to ascertain responsibility for the burning deaths of the two Sikhs. Instead, Tandon chose to arrest a Sikh who possessed a licensed firearm. Similarly, on November 1, Tandon arrested two Sikhs who fired in self-defense from inside Motia Khan gurdwara, located in central Delhi. Tandon charged them with attempted murder although none of the assailants suffered any injuries. Again, **he acted as if blind to the mob of assailants before him.** The mob subsequently burned down the gurdwara.¹⁴¹

The police 'spent the first day after the assassination disarming Sikhs of any weapons that they could use to defend themselves—even those legally owned'.¹⁴²

37. Beyond neutralizing Sikhs, 'police officers actively instigated and participated in the looting and killing, also making promises of impunity' to assailants.¹⁴³
Examples:

Santokh Singh described how a mob of 5000 to 6000 people, led by prominent Congress leader Panna Lal Pradhan, attacked the Sikhs in Hari Nagar Ashram, New Delhi on the morning of November 1. **The [Deputy Commissioner of Police], SHO Ishwar Singh, Ved Prakash, Head Constable Mohinder Singh,** and 50 other constables reached the scene. Using loudspeakers, they **instructed the mob to kill every Sikh**

¹³⁹ Kaur, *op cit*, p 47 ('After reassuring the residents of Guru Nanak Nagar in Bokaro Steel City of their protection, the police went towards the section of the colony where the poor dairy -men lived. Five to ten minutes after their jeep went there, a gang of assailants came from that side and, aware that the Sikhs were now isolated, attacked them.')

¹⁴⁰ Kaur, *op cit*, p 48 ('Harbans Singh was the Sub Inspector of Yamuna Puri police station. When he entered the wireless room, he noticed that all messages relaying that Sikhs were defending themselves were accompanied by directions to the police to take action against the Sikhs. For example, he heard the message: "Sikhs carrying kirpans are moving in Anand Nagar area." The instructions came: "Send force to arrest them immediately." No instructions accompanied messages stating that gangs of assailants were killing Sikhs.')

¹⁴¹ Kaur, *op cit*, p 49 (emphasis added).

¹⁴² Singh, *op cit*, p 73.

¹⁴³ Kaur, *op cit*, p 49.

and burn their properties. The senior officers then **instructed the policemen to participate**. When the curfew order was announced at 6:45 pm the police declared they would not enforce it against non-Sikhs. They also repeated the rumor regarding dead Hindu bodies arriving in trains from Punjab and fired rounds at the Sikhs, although no one was hit.

Three jeeps of policemen fired on Sohan Singh and his family, as Sohan Singh attempted to resist the attacking mob.

When the assailants attacked Chinti Devi's house in Bokaro Steel City on the morning of November 1, a uniformed and **armed police officer accompanied the assailants**. The police officer **fired four rounds** at her elder son when he tried to defend himself with his kirpan against the mob as it chased him. The son fell, hit by the police officer's bullets. The mob then used his kirpan to chop off his head. The mob also killed her husband and dumped their bodies in fields, where they were traced six days later.

When Bhoop Singh Tyagi, Youth Congress President of the area—who attended a meeting led by MP and Minister HKL Bhagat on October 31—led assailants in an attack on Shakarpur's Sikh residents, four police officials from PS Shakarpur joined him. This **gang, including the police, killed Harbhajan Singh's father, brother, and a neighbor** who was sheltering with them.

Ravinder Singh told the Nanavati Commission that then SHO JC Sharma and other policemen lathi-charged Sikhs in Tilak Nagar on November 2. Then, 'without any reason [...] [they] entered our houses, dragged us out and starting beating us'. He discussed how the **police took the Sikh men to Tilak Nagar police station, tied their hands, and beat them again**. The police broke the arm of one of Ravinder Singh's brothers, and beat the other brother Tarminder Singh with an iron chain. After the beatings, the police **filed false charges against the Sikh men** and they were sent to Tihar Jail.¹⁴⁴

The police also 'undertook reconnaissance to pinpoint Sikhs in hiding, coaxing them out on the pretext of offering protection'.¹⁴⁵ Some killers 'were heard to brag that' the police were with them.¹⁴⁶ Following the first wave of violence,

¹⁴⁴ Kaur, *op cit*, pp 49–50 (emphasis added); Singh, *op cit*, p 74 ('In this vein, some policemen went even further, taking an active role in the killings.')

¹⁴⁵ Singh, *op cit*, p 72.

¹⁴⁶ Singh, *op cit*, p 74.

‘police attached themselves to roaming death squads in the hunt to chase down as many surviving Sikhs as possible’.¹⁴⁷

c. Manipulation of Records and Investigations

38. Police officers ‘systematically and thoroughly manipulated or destroyed the potential opportunities for gathering evidence of the perpetrators and crimes’. They refused to record information regarding attacks; performed casual investigations, if at all; and falsified records.¹⁴⁸ Specifically, with respect to First Information Reports (FIRs), the police: ‘refused to record FIRs; recorded omnibus FIRs; refused to list certain names in the FIRs given by victims as the perpetrators of the violence; filed FIRs under reduced charges; and generally edited and falsified FIRs’.¹⁴⁹

Numerous deponents from areas such as Kiran Gardens, Sarai Rohilla, Hari Nagar Ashram, and Shastri Nagar, for example, stated that the **police would not record their reports**. When Gurcharan Singh, the granthi of Gurdwara Singh Sabha in Sarai Rohilla went to the police station to describe how the Railway Protection Force had shot and killed five to six Sikhs on November 1 in order to aid the attacking mob, the police officer refused to record his FIR, stating ‘such things happened with numerous other Sikhs also’. Baljit Singh of Gandhi Nagar, Kanpur was told by the officer who refused to register his FIR that he should be happy that he had survived. Sham Singh was detained for five days for insisting on filing an FIR; he was released only when he signed a report written by the police that he did not read.¹⁵⁰

¹⁴⁷ Singh, *op cit*, p 74.

¹⁴⁸ Kaur, *op cit*.

¹⁴⁹ Kaur, *op cit*, p 51 (‘Section 154 of the Indian Code of Criminal Procedure (CCrP) mandates that police officers record all information about a cognizable offence, given orally or in writing, and obtain the signature of the person providing the information. This section mandates that police officers record FIRs, or First Information Reports. The failure to register these reports undermines the prosecution of cases. Although FIRs are not considered to be substantive evidence, they are used to corroborate or contradict the complainant, as warranted by Sections 157 or 145 of the Evidence Act. They also form the basis for further investigation. The police carefully recorded FIRs for murders of non-Sikhs during the massacres.’)

¹⁵⁰ Kaur, *op cit*, p 51 (emphasis added).

Much of the duplicity was directed at protecting fellow officers and political leaders.¹⁵¹ Additionally, 'senior officers [...] closed or manipulated their wireless log books and ordered their subordinates not to record wireless messages of attacks'.¹⁵² Thirty years later, these facts would emerge.¹⁵³

d. Sufficient Force and Knowledge

39. In their defense, the police claimed to have had insufficient force to control the mob.¹⁵⁴ However, 'wherever police did take a stand, the mob dispersed'.¹⁵⁵ Their knowledge of violence at the time is undisputable. Police 'received repeated calls and faxes requesting help and they witnessed the violence themselves'.¹⁵⁶ Senior officers 'actively disabled policemen who tried to counter the violence';¹⁵⁷ 'refused army assistance in controlling the carnage';¹⁵⁸ and

¹⁵¹ Kaur, *op cit*, p 53.

¹⁵² Kaur, *op cit*, p 56.

¹⁵³ Singh, *op cit*, pp 71-72 ('On 21 April 2014, Indian media company Cobrapost aired an undercover investigative report, "Chapter 84", which featured the unwitting confessions of eight former Delhi police officers snared in a sting operation. Several of them had been responsible for a number of the capital's police stations during the massacres in November 1984. They described how the police force willingly colluded with the Congress government of the day to 'teach the Sikh's a lesson'. [...] The policemen [...] emphasized how they had acted on orders from above. The police were commanded not to file First Information Reports [...]. Logbooks were subsequently amended to obscure evidence of inaction by senior officers [...]. Prevented from taking action against perpetrators or to protect victims, they were instead to assist in the covering up of crimes, which included the removal of mutilated Sikh corpses from where they were killed and dumping them elsewhere.')

¹⁵⁴ Kaur, *op cit*, p 57.

¹⁵⁵ Kaur, *op cit*, p 57.

¹⁵⁶ Kaur, *op cit*, p 57 ('In Durgapura, in the midst of at least a dozen dead bodies lying on the ground in a 100 meter radius, DCP East Sewa Dass brazenly told *Indian Express* reporter Monish Sanjay Suri that only two people had died there and then proceeded to justify their deaths: "Mr Sewa Dass said a bunch of Sikhs from the gurdwara had attacked an innocent crowd outside, killing a girl. So naturally, he said, they hit back and one Sikh had been killed. He said Sikhs had fortified themselves at Durgapura gurdwara." Suri had just visited the gurdwara and had met frightened Sikh refugees and knew the DCP was lying. He saw bodies lying all around and was told by refugees that many more had been removed in anticipation of the Prime Minister's visit.')

¹⁵⁷ Kaur, *op cit*, pp 57-58 ('First, they rendered them ineffective by not arming them. Second, Additional Commissioner of Police HC Jatav transferred police officers who attempted to counter the violence. Importantly, police officers still had room to refuse participation in the massacres – the only punishment they suffered was transfer. Jatav transferred ACP Kewal Singh and SHO/Inspector Gurmail Singh, both Sikhs, the night of October 31 from their posts at PS Subzi Mandi, allegedly because someone had threatened to burn down the police station because he resented the activities of those officers. Jatav also accused the Sikh officers of abandoning their duty during the riots, despite evidence that ACP Kewal Singh had asked for shoot-at-sight orders while actively fighting the violence. They were the only two officers who took preventive action

‘actively engaged in covering [it] up’.¹⁵⁹ Under superior orders, ‘they refused to hand over dead bodies to surviving family members, aware of the potential significance of the physical evidence’.¹⁶⁰

e. The Use of the Railway and Buses

40. Like the police, ‘the Railway Protection Force (RPF) supported and participated in mob attacks’.¹⁶¹ The RPF allowed gangs of assailants to board trains, forcibly remove Sikhs, and kill them—while the police looked on in approving silence.¹⁶²

Starting November 1, mobs started forcing unauthorized stoppages of Delhi-bound trains, boarding trains and burning alive Sikh passengers. These stoppages occurred in at least 46 places. No inquiry, however, was conducted into these stoppages. On November 2, at Tughlakad, for example, the [RPF] explained the stoppage of two trains as due to ‘defective signals’. A mob of 1000 people, ready for the stoppage, boarded the train and killed eight to nine Sikhs. The Special Occurrence Report filed by the RPF, however, merely states that the mob ‘even went to the extent of assaulting the

on October 31 itself, arresting 90 people, recovering looted property, and registering a criminal case. Jatav personally supervised the handing over of their responsibilities to their replacements.’)

¹⁵⁸ Kaur, *op cit*, p 58 (‘After the mob attacked his house on November 1, the Central Industrial Security Force (CISF) rescued Aunkar Singh Bindra and took him to the SP’s office in Sector I of Bokaro Steel City. Another 500 to 600 victims were there. At this office, Bindra met DIG Srivastava whom he knew well. Bindra requested the DIG to send officers to protect his house, but the DIG claimed that he lacked sufficient force to help. At the same time, a wireless message came through a portable set in the same room where the victims were sitting. Bindra testified to the contents of the message and the DIG’s response: [indicating that no Army assistance was needed].’)

¹⁵⁹ Kaur, *op cit*, p 57 (‘Senior officers purposefully disabled effective and conscientious policemen; and police officers refused offers of support from the Army.’)

¹⁶⁰ Kaur, *op cit*, pp 58–59 (‘On November 2, the East District Control Room sent a wireless message, indicating police attempts to quietly remove bodies: “Deputy Comm’r of Police/East be told to remove eight dead bodies lying in Vinod Nagar.” Giani Zail Singh, President of India, called senior BJP leader Madan Lal Khurana and asked for his help in recovering the dead body of a distant relative. Khurana was shocked that the President himself did not have the power to do that. When Khurana went to the Patel Nagar police station and conveyed the request to ACP Ram Murthy, Murthy replied that he had received orders not to handover bodies to relatives. He did , however, allow the family to come to the electric crematorium for the cremation. Smitu Kothari described seeing, with four other friends, [several vehicles] completely filled with Sikh bodies at police station Kalyanpuri.’); Singh, *op cit*, p 78 (‘[P]olicemen collaborated in the concealment of the number of dead.’)

¹⁶¹ Kaur, *op cit*, p 59.

¹⁶² Kaur, *op cit*, p 37. *Nb.* An annexure filed by the Railway Protection Force, in response to interrogatories from the Misra Commission, reports 46 unauthorized stoppages between stations by gangs of assailants. *Ibid*, p 37 (See Appendix IV).

traveling passengers of one community'. **Despite the extent of the violence on the trains, the RPF, Northern Railway did not make a single arrest** and the Railway Administration only recorded two FIRs.¹⁶³

Trains were also used 'to transport mobs to neighborhoods in Delhi'.¹⁶⁴ And in several cases, 'Delhi Transportation Company (DTC) buses transported assailants directly to where Sikhs lived'.¹⁶⁵

3. The Role of Congress Party Leaders

41. In addition to the initial planning meetings on 31 October, starting on the morning of November 1, Congress Party leaders and workers led and participated in the systematic and methodical massacres of Sikhs.¹⁶⁶ Based on the various activities described above, it is more than plausible to suggest that 'the systematic and methodical nature of the violence necessitated pre-planning'.¹⁶⁷ Such planning 'was so methodical that the Congress party was

¹⁶³ Kaur, *op cit*, p 59 (emphasis added).

¹⁶⁴ Kaur, *op cit*, p 60 (citing Gurbachan Singh's affidavit). *Nb.* 'The Fire Brigade did not respond to calls for help, claiming they did not have instructions to save Sikhs; they also maintained that they did not have sufficient supplies to help.' *Ibid*, p 60 ('According to the Delhi Fire Services, arson in Delhi continued until November 5, 1984. The fire brigade only reached four gurdwaras out of the over 170 attacked. They did not reach the heavily impacted areas of Mangolpuri, Sultanpuri, Nangloi, Palam Colony, and Delhi Cantonment, and only once reached Trilokpuri. When Purshottam Pandey called the Fire Brigade to save a Sikh-owned factory in Dadanagar, Kanpur, they replied that they did not have diesel and could not help. When the fire spread to the wall of a neighboring Hindu factory, belonging to Ashok Masale, the Brigade came and controlled the fire in that factory. The Sikh's factory burned down, but the Hindu's factory was saved. When S Bansal, the Fire Officer of Bokaro Steel Plant, came to St. Xavier's School relief camp, Aunkar S Bindra asked him why firefighting vehicles had not been sent. Bansal replied that DIG Srivastava had requisitioned all the vehicles under his control, leaving him with no capabilities to answer distress calls. Bindra confirmed that he had seen three firefighting vehicles lying idle in the compound of the SP's office.')

¹⁶⁵ Kaur, *op cit*, p 65 ('Satbir Singh, a Youth Congress leader, brought buses filled with people from Ber Sarai and took them to Sri Guru Harkrishan Public School in Munirka. The mob then burned the school building, looted it, and attacked Sikhs all night. Numerous survivors also deposed about armed mobs arriving in trains and buses that delivered them straight to the survivors' neighborhoods.')

¹⁶⁶ Kaur, *op cit*, p 64 ('The systematic killing did not start until the day after Indira Gandhi's assassination, showing that Congress party officials used the night of October 31 to implement their plans.')

¹⁶⁷ Kaur, *op cit*, p 63 ('In his discussion of the "infrastructure" of terror, Kothari describes how Congress often mobilized well-developed networks of local gang leaders for political rallies, for "storm trooping into courts and commissions of inquiry," and for intimidation and violence. The Congress

able to effectively utilize many aspects of the state machinery and apparatus to carry out or facilitate the massacres'.¹⁶⁸ Notable figures named repeatedly by deponents include Congress Party leaders such as Arun Nehru, HKL Bhagat, Sajjan Kumar, Jagdish Tytler, Dharam Dass Shastri, Kamal Nath, Narasimha Rao, and Lalit Maken.¹⁶⁹ At the time of writing, only three of these individuals are still alive.

a. The Case Against Sajjan Kumar

42. In 1984, **Sajjan Kumar** was an MP representing Mangolpuri in North East Delhi. He was named by several survivors 'as presiding over the pogroms in a number of Delhi suburbs'.¹⁷⁰ Specifically:
- a. During the night of October 31 and morning of November 1, Congress Party leaders met with local supporters to implement their plan and distribute weapons and money. **Sajjan Kumar** and Lalit Maken distributed 100 Rupees and a bottle of liquor to each assailant. Jagjit Singh of Kiran Garden witnessed a meeting near his house around 8 am where **Sajjan Kumar** distributed iron rods from a parked truck to about 120 people. **Sajjan Kumar** instructed the mob to attack Sikhs, kill them, and loot and burn their property.¹⁷¹
 - b. On 31 October, while **Sajjan Kumar's** men canvassed homes in West Sagarpur, South West Delhi, they checked the ration cards of Sikh families. The following morning, the local gurdwara and Sikh-owned shops were burnt down before Sikh residents came under attack.¹⁷²
 - c. On the morning of November 1, **Sajjan Kumar** was identified near the following Delhi areas: Palam Colony around 6:30 to 7 am; Kiran Gardens around 8 to 8:30 am; and Sultanpuri around 8:30 to 9 am. Raj Kumar of Palam Colony, a Hindu, saw a jeep coming towards him, followed by people on scooters, motorcycles, and foot. **Sajjan Kumar**, whom he recognized from previous visits to Palam Colony, sat in the passenger seat of the jeep. The people following the jeep told Kumar they were going to a

leaders used these same networks to gather assailants from the resettlement colonies for the Sikh massacres of November 1984.)

¹⁶⁸ Kaur, *op cit*, p 65.

¹⁶⁹ Kaur, *op cit* ('Appendix VII lists some of the Congress leaders identified as leading gangs during the carnage.');

Singh, *op cit*, pp 102-113.

¹⁷⁰ Singh, *op cit*, p 107.

¹⁷¹ Kaur, *op cit*, p 27.

¹⁷² Singh, *op cit*, p 107.

meeting at Mangolpuri. By the time Kumar reached the meeting, **Sajjan Kumar** had started speaking. Although Kumar could not hear **Sajjan Kumar**, he heard the mob's replies to **Sajjan Kumar's** calls: '*Sardaroo Ko Mar Do*' ('Kill the Sardars'); '*Indira Gandhi Hamari Ma Hai – Aur Inihoo Ne Ushey Mara Hai*' ('Indira Gandhi is our Mother, and These People Have Killed Her').¹⁷³

- d. On 1 November at Nangloi, not far from his constituency, **Sajjan Kumar** was seen inciting a crowd to attack Sikh homes. According to witness Gurbachan Singh: 'About ten police officials were also present at the spot and they were encouraging the mob to kill us. I saw **Sajjan Kumar**, the then Congress MP of our area, standing amongst the mob and he was directing the mob to attack us with more and more force and kill us.' After witnessing the killing of his father and two other members of his wife's family, Singh tried to report the murders at the local police station two days later. He was 'made to fill out a pre-formatted FIR. In the blank next to who led the mob, the word "unknown" had been written'. **Sajjan Kumar's** name was not entered into police records.¹⁷⁴
- e. Moti Singh witnessed **Sajjan Kumar's** meeting at a park in Sultanpuri. Having served in the Congress party for 15 to 20 years, Singh recognized many of the attendees, including Kumar's personal assistant Jai Chand Jamadar. From the roof of his house, Singh heard **Sajjan Kumar** say: 'Whoever kills the sons of the snakes, I will reward them. Whoever kills Roshan Singh [son of Moti Singh] and Bagh Singh will get 5000 rupees each and 1000 rupees each for killing any other Sikhs. You can collect these prizes on November 3 from my personal assistant Jai Chand Jamadar.'¹⁷⁵
- f. In a park Sultanpuri, adjacent to Mangolpuri where over 400 Sikhs were killed, Cham Kaur witnessed an early morning meeting led by **Sajjan Kumar** and Congress leader Brahmanand Gupta. **Sajjan Kumar** instructed the crowd to kill Sikhs, and to loot and burn their properties. Jatan Kaur witnessed the same meeting and also heard **Sajjan Kumar's** instructions. On November 2, when a mob attacked her house, she recognized Gupta—who had provided the kerosene—leading the mob.¹⁷⁶ **Sajjan Kumar** was next spotted the following day personally directing mobs.¹⁷⁷
- g. On 1 November, Joginder Singh recognized **Sajjan Kumar** and other Congress leaders among a group of murderers as they dragged his cousin and other Sikhs from their homes: '**Sajjan** was laughing and ordering the mob to search for Sikhs and kill them,' he recalled. 'I was a clean-shaven Sikh so they were unaware of the fact that I am a Sikh.' During the attack,

¹⁷³ Kaur, *op cit*, p 27–28.

¹⁷⁴ Singh, *op cit*, pp 107–108.

¹⁷⁵ Kaur, *op cit*, p 28.

¹⁷⁶ Kaur, *op cit*, p 29.

¹⁷⁷ Singh, *op cit*, p 107 ('Cham Kaur heard **Sajjan Kumar** address a gathering of local residents: "Sikhs had killed Mrs Gandhi; therefore, you kill them, loot their goods and burn them alive".')

Sajjan Kumar kicked Kamla Kaur aside as she begged him to spare her husband and son. **Sajjan Kumar** was also accused by Bhagwani Bai of orchestrating the deaths of her sons, who were burnt in front of her under **Sajjan Kumar's** orders.¹⁷⁸

- h. Congress leader Balwan Khokhar convinced Sampuran Kaur's husband, Nirmal Singh, to assist him on the pretext of mediating with an attacking mob. As they approached the mob, **Sajjan Kumar** arrived in his jeep and told Khokhar to 'start killing'. Khokhar handed Singh to the mob, saying, 'Take this Sardar. Finish him and then finish the remaining Sardars.' The mob tied Singh with a rope and his turban and beat him viciously. As a police jeep waited nearby, the assailants poured kerosene on him. Singh was burnt to death.¹⁷⁹
- i. On 2 November, **Sajjan Kumar** was seen in a police jeep in Palam, South West Delhi announcing: 'No Sikh should live. If anyone gives shelter to Sikh families, their houses will be burnt.' That evening he was seen in nearby Raj Nagar inciting the attackers to 'kill more Sikhs'. At least 340 Sikhs were killed in Raj Nagar, an area covered by Delhi Cantonment police station. However, according to police diary entries: 'end of the day 1st and 2nd of November: all clear, nothing to report'.¹⁸⁰

Despite this evidence, **Sajjan Kumar** has managed to evade justice.

b. The Case Against Jagdish Tytler

- 43. Three decades on from the massacres, **Jagdish Tytler**—MP for the Delhi Sadar constituency, a close associate of Sanjay Gandhi, and an active member of the Congress Party's youth organization—was specifically named in a WikiLeaks American Embassy cable as having 'played a particularly grotesque role, competing with local Congress Party leaders to see which wards could shed more Sikh blood'. Jasbir Singh heard **Jagdish Tytler** rebuke his men for not having killed enough Sikhs:

Because of you, I am ashamed to look at Sajjan Kumar's constituency in the north or HKL Bhagat's constituency in the east. Colony after

¹⁷⁸ Singh, *op cit*, p 107; Kaur, *op cit*, p 63 ('On November 1, MP **Sajjan Kumar** killed both of Bhagwani Bai's sons in front of her. Kamla Kaur of Sultanpuri begged MP **Sajjan Kumar** to spare her family from the assailants. He kicked her aside as the mob killed her family, including her husband and son.')

¹⁷⁹ Kaur, *op cit*, p 63.

¹⁸⁰ Singh, *op cit*, p 108.

colony of Sikhs has been destroyed but in my area so few Sikhs have been killed. I had promised that maximum Sikhs would be killed in my colony.¹⁸¹

44. **Jagdish Tytler** was also seen on the morning of 1 November by Surinder Singh, a Sikh *granthi* (scripture reader) of the Pul Bangash Gurdwara in North Delhi. According to Singh: 'Some people in the mob were carrying flags of Congress. They were raising slogans like 'We will take revenge', 'Sikhs are traitors', 'Kill! Burn!' Five to six policemen were also with the mob.' On **Jagdish Tytler's** command, a crowd armed with staffs and iron rods set fire to the gurdwara and killed three Sikhs inside.¹⁸²
45. A few days later, **Jagdish Tytler** entered the office of police commissioner, Subbash Tandon as he was engaged in a press briefing with Indian and foreign journalists. Tandon had just categorically denied the allegation that Congress MPs had tried to get their men, who had been jailed on suspicion of committing acts of violence, released. It was just after he finished stating that he had never received any calls or visits by any politicians when **Jagdish Tytler** arrived: 'What is this Mr Tandon? You still have not done what I asked you to do?'¹⁸³

c. The Case Against Kamal Nath

46. Another Congress Party official who publicly demonstrated his authority over the police was **Kamal Nath** (MP for the constituency of Chhindwara in the central state of Madhya Pradesh and also closely tied to the Gandhi family). On 1 November, **Kamal Nath** was accused of leading an armed mob that laid siege to Gurdwara Rakab Ganj, a major shrine in the heart of New Delhi. Mukhitar Singh clearly saw **Kamal Nath** and other Congress men at the head of the mob. According to Singh, the police fired several rounds at those inside the gurdwara after receiving instructions from **Kamal Nath**. A crime reporter for

¹⁸¹ Singh, *op cit*, pp 108-109.

¹⁸² Singh, *op cit*, p 109.

¹⁸³ Singh, *op cit*, p 109 ('According to one of the journalists present, the incident left the commissioner speechless and them in no doubt about Congress interference in police work.')

The Indian Express, Sanjay Suri, also saw **Kamal Nath** standing near the front of the crowd. As the police stood by (including additional commissioner of police Gautam Kaul), it was clear to Suri that the management of the crowd had been left to **Kamal Nath**—‘when he signaled, the crowd listened’.¹⁸⁴

C. Commissions and Cover-Up

1. Initial Obstruction

47. On 4 November 1984, ‘Delhi police officials claimed to have arrested 1809 people on charges of looting, rioting, and arson. Despite the killings occurring throughout Delhi, no arrests had been made for murder. Within a few days, the police released all but around 60 of the people arrested. In January 1985, the Home Minister claimed that 4579 suspects were arrested in Delhi. India’s Information Minister stated that there had been a total of 30 convictions, and 14 police officers had been punished for dereliction of duty. Some 642 of 707 criminal cases ended in acquittals or were “cancelled” because the state allegedly could not trace the accused.’¹⁸⁵ A post-mortem analysis of 137 representative judgments revealed only eight convictions for murder, with two of those overturned on appeal.¹⁸⁶ Effective prosecutions were precluded for a number of reasons: lapses in police investigations, delays in filing cases, failure to identify witnesses and investigate claims, deliberate misrecording of witness statements, and other failures to comply with legal procedures.¹⁸⁷ Ultimately, early ‘efforts to hold the organizers of the carnage accountable through the judicial system failed, primarily because of the initial destruction of evidence by

¹⁸⁴ Singh, *op cit*, pp 110–111 (‘This level of control led Suri to conclude that they were Congress party workers who accepted him as their leader.’); Kaur, *op cit*, p 46 (‘Even senior officers offered no protection to Sikhs when present during mob attacks. When *Indian Express* reporter Monish Sanjay Suri went to Gurdwara Rakab Ganj around 4 pm on November 1, he saw Additional Commissioner of Police Gautam Kaul standing on one side as Congress leader Kamal Nath controlled a mob of 4000 people. When the group charged the gurdwara gate where Kaul stood, Kaul merely stepped to the side. The gang burned several Sikhs alive during the attack.’)

¹⁸⁵ Kaur, *op cit*, p 97.

¹⁸⁶ Kaur, *op cit*, p 97.

¹⁸⁷ Kaur, *op cit*, p 97.

the police, subsequent harassment of potential witnesses, and government and political interference in the initiation of cases'.¹⁸⁸

2. *The Aborted Marwah Investigation*

48. On 26 November 1984, 'two leading national civil rights organizations, the People's Union for Democratic Rights (PUDR) and the People's Union for Civil Liberties (PUCL), filed a writ petition in Delhi High Court against the Delhi and Indian administrations, calling for the appointment of a Commission of Inquiry, led by the Central Bureau of Investigation (CBI). The petitioners also asked for protection for survivors from harassment by perpetrators involved in the massacres. SS Jog, then Commissioner of Police, responded that the Delhi police had already instituted an independent investigation into the massacres, registered a 'large number of cases', and arrested 'a number of persons'.¹⁸⁹ One day prior, 'Ved Marwah, Assistant Commissioner of Police, had been nominated to lead this investigation. Because of the promise of the Marwah investigation, the Delhi High Court dismissed the PUDR and PUCL petition.'¹⁹⁰ The Marwah hearings, which began in 1985, 'were closed to the media for alleged security reasons'.¹⁹¹ 'Early on, attempts were made to halt Marwah's investigation in the High Court by several police officers',¹⁹² following the establishment of the Misra Commission in April 1985 (see below). The 'Delhi High Court enjoined the Marwah report [...] from publication', as it reportedly included testimony from police officers regarding superior orders related to the massacres.¹⁹³ Unsurprisingly, the Delhi Administration did not appeal the

¹⁸⁸ Kaur, *op cit*, p 81.

¹⁸⁹ Kaur, *op cit*, p 81.

¹⁹⁰ Kaur, *op cit*, p 81.

¹⁹¹ Kaur, *op cit*, p 95.

¹⁹² Singh, *op cit*, p 78.

¹⁹³ Kaur, *op cit*, p 82 ('Retired Chief Justice Ranjit S Narula testified that he learned that police officers had told Marwah about orders received from their senior officers to cover up or participate in the massacres, and Marwah had recorded these comments during his examination of the officers. When the officers later submitted their written statements to him, they did not include these comments, although Marwah's personal notes still had the incriminating information. After Marwah made comments to the press, DCP East, Sewa Dass, and DCP South, Chander Prakash, both from areas with high Sikh casualties, filed suit to stay Marwah's investigation. They argued that the Misra Commission had already been established on the same subject, and Marwah's

injunction. According to Marwah it was 'due to political pressure as the report would have been an embarrassment for the Congress government'.¹⁹⁴

3. *The Misra Commission of Inquiry*

49. On 26 April 1985, the Misra Commission was established.¹⁹⁵ The arguments submitted on behalf of the Delhi Administration:

portray a consistent and disturbing pattern of exonerating the police and perpetrators, and distorting and concealing facts by blaming Sikhs as deserving the massacres, by arguing that: they allegedly celebrated the assassination of Indira Gandhi; they allegedly attacked first; and some Sikhs, in general, had an anti-national character that further antagonized the mob. The police also claimed to lack sufficient force to protect the Sikhs from violence.¹⁹⁶

In support of the party line that the massacres had been spontaneous (and thus not organized by Congress), the Delhi Administration submitted a number of spurious arguments.¹⁹⁷ The Commission's report, released in August 1986, 'exonerated senior police officers and politicians by placing the blame on the subordinate ranks of the police', with the 'strongest charge leveled against' them being one of indifference: 'Whether it be RPF, Govt Railway Police, or

report would damage the reputations of the police officers, among other arguments. Justice MK Chawla issued an interim injunction against publishing the report, praising the performance of the police during the Sikh massacres, and falsely describing the organized killings as "riots": [...] Marwah's crucial handwritten notes were later destroyed, allegedly because of instructions from higher authorities. The officers' written statements, devoid of the incriminating statements, were handed to the Misra Commission. Thus, both the PUDR/PUCL petition and the Marwah inquiry were quashed.'

¹⁹⁴ Singh, *op cit*, p 79.

¹⁹⁵ Kaur, *op cit*, p 81 ('On April 26, 1985, bowing to pressure and hoping to bring some resolution to issues in Punjab, Rajiv Gandhi appointed a Commission of Inquiry, under Section 3 of the Commission of Inquiry Act, 1952, to be led by Ranganath Misra, a justice of the Supreme Court.')

¹⁹⁶ Kaur, *op cit*, p 84.

¹⁹⁷ Kaur, *op cit*, p 85 ((a) Sudden assassination and charged atmosphere created by the assassination of the Prime Minister [...] Indira Gandhi. (b) Simmering discontent/resentment against the Sikh community due to acts of commission and omission overt and covert. (c) Time factor being too short to organize or to make planning. (d) Common pattern of allegation to the effect that the mob had lathis and iron rods in their hands especially when it is known that the Sikhs are armed with kirpans, had the violence been organized the mob would have been armed with deadly weapons. Organized violence always have [sic] an objective to be achieved and for achieving an objective the violence always persists and does not stop after three days. (e) The persons who have been arrested do not belong to one particular section of the society. They are members of public at large. '); see *ibid*, pp 85 *et seq* (refuting administration lies, distortions, cover-up, etc).

Delhi Police, all appear to have become indifferent within the Union Territory [of Delhi].’ According to the Commission, ‘there was no definite evidence of police leading or instigating mobs’,¹⁹⁸ and it ‘concluded that the massacres were spontaneous, and not organized, blaming them on the “lower strata” of society’.¹⁹⁹ Among other shortcomings, key evidence had been ignored.²⁰⁰

4. Subsequent Committees

50. Between 1987 and 1994, six government-appointed committees based, in some measure, on the recommendations of the Misra Commission – the Jain-Banerjee Committee, the Ahooja Committee, the Kapur-Mittal Committee, the Poti-Rosha Committee, the Jain-Aggrawal Committee, and the Narula Committee – arrived at various conclusions, with four of them finding reason to proceed with the prosecution of Sajjan Kumar and others:
- a. The Jain-Banerjee Committee recommended the police to a criminal case against, among others, Saijan Kumar and Brahmanand Gupta, one of the suppliers of kerosene during the massacres and leader of assailants. However, Gupta managed to quash any proceedings by 1989.²⁰¹

¹⁹⁸ Kaur, *op cit*, p 88.

¹⁹⁹ Kaur, *op cit*, p 89; *see ibid*, pp 89 *et seq* (refuting the report’s findings). *Nb.* ‘Justice Misra was rewarded for his whitewashing of the massacres of 1984. After serving as Chair of this commission, he was appointed as Chief Justice of the Supreme Court of India. After retiring from that position, Misra served as the first chair of the National Human Rights Commission, and then went on to represent the Congress Party itself in the Rajya Sabha, or upper house of the national parliament.’ *Ibid*, p 93.

²⁰⁰ Singh, *op cit*, p 133 (‘When examining the role of the Congress Party, the majority of its members under examination [by the Misra Commission] were found innocent of any involvement in the violence. [...] [The] Delhi Sikh Gurdwara Prabhandak Committee, which had managerial responsibilities for the capital’s gurdwaras [...] handed over a list naming thirteen Congress MPs and workers – including Bhagat, Kumar, Shastri, and several Congress councilors – which [...] provided additional details such as the names of witnesses and what they had seen. But Misra failed to take this information into account and withheld the names. On the other hand, outrageously, the names and addresses of witnesses who testified against senior Congress leaders and police officers were shared with the anti-victim groups and lawyers despite warnings from human rights organizations. These disclosures led to victim intimidation and threats.’)

²⁰¹ Kaur, *op cit*, p 93 (‘Gupta filed a petition in the Delhi High Court to stay the functioning of the Committee, and on November 24, 1987, the Court issued an injunction to the Committee, preventing it from recommending the registration of any new cases, and directed that no cases should be registered on its orders. The final order issued in October 1989 upheld the injunction, quashing the Jain-Banerjee Committee.’); Singh, *op cit*, p 135 (‘In August 1987, the committee recommended that a number of cases should be registered against former Congress minister Sajjan Kumar for allegedly leading a mob that killed Navin Singh in Sultanpuri. However, in December

- b. The Ahooja Committee, tasked with determining an official number of deaths in Delhi alone, set the number at 2733.²⁰²
- c. The Kapur-Mittal Committee split and issued separate reports. Mittal's report—released on 28 February 1990—'contradicted the Misra Commission's findings that senior officers were not informed' and 'showed how senior police officers tampered with their logbooks; how police instigated and led mobs; and how they solicited false statements by victims to protect local Congress leaders'.²⁰³
- d. In March 1990, the Poti-Rosha Committee again recommended filing a case against Sajjan Kumar,²⁰⁴ 'this time for allegedly leading a mob that killed Anwar Kaur's husband'.²⁰⁵ 'When a team from the Central Bureau of Investigation (CBI) went to Kumar's house to arrest him, he locked the officials in a room until his lawyer obtained anticipatory bail for him.'²⁰⁶ 'The team made frantic calls of help but the Delhi police failed to intervene. Soon after, the perceived threat led Poti and Rosha to decline a renewal of their tenure.'²⁰⁷
- e. The findings of the Jain-Aggarwal Committee—submitted on 30 June 1993—recommended 'forty-eight cases to be registered, including against Congress politicians HKL Bhagat, Sajjan Kumar, Dharam Dass Shastri, and Jagdish Tytler'. Ultimately, testimony naming Bhagat and Kumar was 'discarded outright'.²⁰⁸

1987, one of his co-accused, Brahmanand Gupta, filed a petition in the Delhi High Court and obtained a stay against the Committee's recommendation, which the government did not oppose. [...] [T]he High Court upheld Gupta's petition in October 1989. The presiding judge in the case, Yogeshwar Dayal, had in 1984 dismissed the original petition requesting the setting up of an independent inquiry into the massacres.)

²⁰² Kaur, *op cit*, p 93.

²⁰³ Kaur, *op cit*, p 94 ('Justice Dalip Kapur gave no findings because the Committee did not have the power to summon police officials; whereas Kusum Lata Mittal did an extensive appraisal of almost every police station impacted by the carnage. She reviewed FIRs, police diaries, affidavits filed before her committee and the Misra Commission, and documents from Marwah's inquiry. For each police station, she discussed the patterns of violence, the number of preventative and other arrests, the number of deaths, and the content of different affidavits and FIRs filed. It took the Committee one year to gain access to the Misra Commission documents, although Mittal had to receive clearance from the government in order to quote or publish any of the records from the Misra Commission.')

²⁰⁴ Kaur, *op cit*, p 93 ('On March 22, 1990, the Delhi Administration reconstituted a new Poti-Rosha Committee with similar terms of reference. This Committee began with an extensive analysis of the injunction and determined that it merely had recommendatory powers, and could not conduct any investigations or accept fresh allegations.')

²⁰⁵ Singh, *op cit*, p 137.

²⁰⁶ Kaur, *op cit*, p 93.

²⁰⁷ Singh, *op cit*, p 137.

²⁰⁸ Singh, *op cit*, pp 137-138 ('The Delhi Administration ostensibly accepted all of the recommendations made by the Jain-Aggarwal Committee, which required all the affidavits filed by victims to be transcribed verbatim into First Information Reports (FIRs). Sajjan Kumar's was the first case to be registered in September 1990 based on the affidavit of Anwar Kaur. The CBI

- f. In December 1993, the Narula Committee once again recommended registering cases against HKL Bhagat and Sajjan Kumar; and once again they were delayed²⁰⁹ and ultimately dismissed.²¹⁰

By the turn of the Twenty-First Century, not a single Congress leader had faced justice.

5. *The Nanavati Commission of Inquiry*

51. With ‘the collapse of the case against HKL Bhagat, the continuing state of impunity for [...] Sajjan Kumar and Jagdish Tytler, and a change in government’, the National Democratic Alliance (NDA) set up a new commission in May 2000 to investigate ‘whether any authorities or individuals were responsible’.²¹¹ The Nanavati Commission heard testimony against Sajjan Kumar regarding ‘his involvement in the massacres at Mangolpuri and Sultanpuri’ and took the view that it constituted ‘credible material’ demonstrating that he was ‘probably involved as alleged’. A fresh CBI investigation against him finally made it to court in 2012. However, in spite of the evidence against him—and his five co-defendants being convicted—Sajjan

completed its inquiry and drafted the charge sheet in March 1992. The Home Minister even declared in parliament that the charge sheet against Kumar was ready. The CBI had only to file it in court so that the trial could begin but it departed from standard procedure and instead referred the case to the Home Ministry for approval. By this time, however, a new Congress government was in power with Prime Minister PV Narasimha Rao, who had been the home minister in 1984, at the helm. The central government sat on the case for two years before it was decided in 1994 that it did not fall under its jurisdiction. The case was transferred to the Delhi Administration. [It was decided] to proceed with only eight cases – these were regarded as the weakest, being mostly based on hearsay. Not one of them mentioned any direct evidence against the accused Congress leaders.’)

²⁰⁹ Singh, *op cit*, p 139 (‘[The] cases were passed on to Rao’s government, which delayed them for two years before deciding that the issue actually fell under the remit of the Delhi Administration. The CBI finally filed the charge sheet against Kumar in December 1994. But it took them a further five years—a total of fifteen years after the massacres had occurred—to record the statements of witnesses. Two of the witnesses testified seeing Kumar addressing a meeting where he incited people to kill Sikhs but their testimony was recorded incorrectly in court. The session judge [...] gave priority to Kumar’s own witnesses who were two police officers, despite accusations that the police had falsified FIRs.’)

²¹⁰ Singh, *op cit*, p 139 (In December 2002, the first case against Kumar was dismissed.)

²¹¹ Singh, *op cit*, p 141.

Kumar was acquitted.²¹² While the commission found ‘credible evidence against [...] Jagdish Tytler to the effect that very probably he had a hand in organizing attacks on Sikhs’, a subsequent investigation determined that the witness statements against him were ‘inconsistent, unreliable, and unworthy of credit’.²¹³ And, despite evidence against Kamal Nath as to his role in leading the attack at Gurdwara Rakab Gangi coupled with the commission’s finding that his own testimony had been ‘vague’ and ‘not consistent with the evidence’, Nanavati declined to conclude that Nath had instigated the mob.²¹⁴

²¹² Singh, *op cit*, pp 143–144 (Notably, the CBI prosecutor claimed ‘the massacres were a result of a conspiracy of terrifying proportion with the complicity of police and patronage of local MP Sajjan Kumar’.); *ibid*, pp 178–179 (‘In 2013, Kumar was acquitted of murdering five Sikhs in 1984, a decision that met with strident protests [...]. An appeal against the 2013 acquittal is currently underway.’)

²¹³ Singh, *op cit*, pp 143–144 (‘The Commission’s recommendation was based on ‘the evidence of several witnesses who testified that Jagdish Tytler led mobs and complained to them that fewer Sikhs had been killed in his constituency than elsewhere’.); *ibid*, pp 179–180 (‘The CBI was ordered to reopen the case in April 2013 by a Delhi court. A former joint director of the CBI, Mr M Narayanan, who was involved in the investigations but retired soon after they had been closed, claimed there was “sufficient evidence” to continue the probe. He insinuated that the CBI had come under pressure not to indict Tytler after he personally presented investigating officers with a copy of the Doordarshan television footage purportedly showing him at Teen Murti House at the time of the attacks. But Narayanan stressed that these were “not credible reasons to close the case, since Mr Tytler could have slipped out of Teen Murti at any time, unnoticed by the TV cameras”. A further twist in the case against Tytler came in 2013 when an Indian arms dealer, Abishek Verma, deposed before the CBI that Tytler had in 2008 “boasted of having met the Prime Minister [Manmohan Singh] who in turn would ask Director/CBI to get the investigation conducted in his favor”. He also stated that Tytler had paid hefty sums to one of the key prosecution witnesses and facilitated his son’s resettlement abroad. Tytler had been referred to by Manmohan Singh in his 2005 apology as a “valued colleague”. The investigation is still pending.’)

²¹⁴ Singh, *op cit*, p 178 (‘In the case of Kamal Nath, only one witness, Mukhtiar Singh, testified to him having led an armed mob that attacked Sikhs at Gurdwara Rakab Ganj on the morning of 1 November, resulting in two being burnt to death. Others such as the journalist Sanjay Suri had seen Nath “controlling” the crowd in the aftermath of the killings. Nath’s defense was that he was merely visiting the gurdwara to investigate the agitation and to placate the mob. [...] The Commission found Nath’s testimony to be “vague” and “not consistent with the evidence” – it also thought it “a little strange” that he left without telling police officers, with whom he was seen standing for some time. The contradictions were justified by the Commission on the grounds that the matters under discussion had occurred twenty years earlier, so “he was not able to give more details”. Nanavati said that it would not be ‘proper’ to reach the conclusion that Nath had in any way “instigated the mob”.’)

D. Lasting Impact: Impunity for Some, Continued Suffering for Others

52. Today, Sajjan Kumar, Jagdish Tytler, and Kamal Nath remain senior figures in the Indian National Congress Party.²¹⁵ Yet, while these men continue to enjoy the impunity attendant to their political status, the Tilak Vihar neighborhood of New Delhi—the so-called ‘Widow Colony’—‘still houses thousands of Sikh women, who were forced to bear mass rape and witness the hacking, burning and murder of their husbands, fathers and sons and who are still calling for justice against the perpetrators’.²¹⁶ Women from colony—where over 1000 survivors were living as of 1989—have previously recounted ‘stories of carnage [...] overwhelming both in the extent of loss and brutality of death’:

‘They tell how two men’s hair was tied together before they were set ablaze, and the taunts of killers that greeted the dying men’s desperate attempt to douse the flames: “Don’t they dance well!” [...]’

‘The women re-enact being told at knifepoint: “We will cut off your breasts and send them to Punjab! You have killed our mother, Indira!” Saduri Kaur, 60, who saw her three sons killed, leaving her 18 grandchildren, is consumed with anxiety that no one will marry her eight granddaughters because she has no money for dowries. She is barely able to keep them alive.’ [...]

Many women took government jobs after the carnage, becoming the primary breadwinners in the family, leaving their children unattended. [...] [M]any of the children dropped out of school and engaged in petty crime, drugs, and gambling. Besides growing up without fathers, the manner in which their fathers were killed strongly impacted the children. [...] [S]urvivors placed little faith in the Indian government or in the idea of justice.

After twenty years of impunity for perpetrators of the carnage, survivors have expressed feelings of injustice and hopelessness. Prem Kaur, who lost her husband and son in the November carnage, and has appealed the High Court’s acquittal of MP Sajjan Kumar, expressed her frustration at the Congress Party’s nomination of Sajjan

²¹⁵ *Nb.* Sajjan Kumar is currently an MP for the Outer Delhi constituency. Jagdish Tytler remains a senior political figure. Kamal Nath is currently an MP for the Chhindwara constituency of Madhya Pradesh.

²¹⁶ General Assembly of Pennsylvania, House Resolution 1160, 15 October 2018, p 2. *Nb.* The House of Representatives ‘condemn[ed] the November 1984 anti-Sikh violence in India as genocide’. *Ibid*, p 3.

Kumar for elections: 'It's wrong he got a ticket. How can he be given a ticket? What can one person do! I gave my statement against Sajjan Kumar in court. Nothing matters. What can one person like me do, what can I say?'²¹⁷

It may be noted that, recently, state legislatures in the USA and Canada have condemned the state-sponsored violence against the Sikhs in 1984 as 'genocide'.²¹⁸

III. RELEVANT LAW

A. The Genocide Convention

53. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention' or 'Convention')²¹⁹ sets out the now universally-accepted legal definition of acts amounting to genocide under international law:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) killing members of the group; (b) causing serious

²¹⁷ Kaur, *op cit*, p 121.

²¹⁸ See, e.g., **State of Connecticut, USA**, Public Act No 18-60, 1 June 2018 ('The Governor shall proclaim November thirtieth of each year to be Sikh Genocide Remembrance Day to **remember the lives lost on November 30, 1984, during the Sikh Genocide**. Suitable exercises may be held in the State Capitol and elsewhere as the Governor designates for the observance of the day.') (emphasis added); **General Assembly of Pennsylvania**, House Resolution 1160, 15 October 2018 ('[...] Recognizing the state-sponsored violence that targeted Sikhs across India in 1984 is an important and historic step towards justice, accountability and reconciliation, which should be an example to other governments; therefore be it RESOLVED, That the House of Representatives *condemn the November 1984 anti-Sikh violence in India as genocide.*') (emphasis added); **California State Assembly**, Concurrent Resolution 34, 16 April 2015 ('WHEREAS, November 2014 marked the 30 year anniversary of the **horrific anti-Sikh pogroms**, which claimed the lives of thousands of Sikhs throughout India in the first week of November 1984; and [...] WHEREAS, Sikh women, many of whom lost their husbands, sons, and fathers during the pogroms, were **gang raped and sexually assaulted** by the attackers; and [...] WHEREAS, Eyewitnesses, journalists, and human rights activists have compiled **evidence showing that government and law enforcement officials organized, participated in, and failed to intervene to prevent the killings** through direct and indirect means [...].') (emphasis added); **Legislative Assembly of Ontario**, Canada, Private Members Bill Introduced by Harinder Malhi, 7 April 2017 (The Bill which passed 34-5, referred to the 1984 massacres as genocide. Ms Malhi MP stated during the debate: 'The ensuing destruction and loss of life, including the massacres in November 1984, marked one of the darkest chapters of the later 20th century for the Sikh community. Simply put, as recognized by many leading international human rights organizations, **the 1984 genocide of Sikhs was a series of acts of genocide directed against Sikhs in India** that had an effect on Sikhs around the world.')

²¹⁹ Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.²²⁰

In terms of potential liability, '[t]he following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide'.²²¹ Moreover, '[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.²²²

54. The status of any alleged perpetrators is immaterial: 'Persons committing genocide or any of the other acts enumerated in Article III [of the Convention] shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals.'²²³

55. According to the Convention, the International Court of Justice ('ICJ' or 'Court') shall be competent to adjudicate '[d]isputes between the Contracting Parties relating to the interpretation, application, or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III.'²²⁴

²²⁰ Genocide Convention, Article II.

²²¹ Genocide Convention, Article III.

²²² Genocide Convention, Article I; *see also* Article V ('The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.') and Article VI ('Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.')

²²³ Genocide Convention, Article IV.

²²⁴ Genocide Convention, Article IX.

B. Individual Criminal Liability for Genocide

1. Definition

105. Under international criminal law – as developed by the ICTY, ICTR, and ICC – the definition of genocide is identical to the one set out in the Convention.²²⁵ This is because the crime of genocide is firmly established as a peremptory norm of international law (*jus cogens*) from which no derogation is permitted.²²⁶ The punishable acts (forms of participation) are also defined identically by the ICTY and ICTR,²²⁷ although slightly differently by the ICC.²²⁸ Conceptually, genocide may be understood as an aggravated crime against humanity uniquely defined by its specific intent requirement. Genocide may be committed in time of war or peace; a nexus to an armed conflict is not an element of the crime.²²⁹

2. The Mental Element (*Mens Rea*)

a. Specific Intent

56. As above, an individual perpetrator of genocide must commit one of the enumerated prohibited acts ‘with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such’. This specific intent (or *dolus specialis*) requires that the perpetrator must have clearly intended that his actions would result in the destruction, in whole or in part, of a protected group.²³⁰

[F]or any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of

²²⁵ See ICTY Statute, Article 4(2); ICTR Statute, Article 2(2); Rome Statute, Article 6.

²²⁶ *Nb.* India ratified the Genocide Convention in 1959.

²²⁷ See ICTY Statute, Article 4(3); ICTR Statute, Article 2(3).

²²⁸ See Rome Statute, Articles 6, 25.

²²⁹ *Prosecutor v Nchamihigo*, ICTR-2001-63-A, Judgment, 18 March 2010, para 363.

²³⁰ *Prosecutor v Rutaganda*, ICTR-96-3-T, Judgment, 6 December 1999, para 59.

his being a member of a national, ethnical, racial, or religious group. The victim of the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone.²³¹

Genocidal intent must be present at the moment the acts are committed, but does not need to have been formed prior to committing the acts.²³²

57. Motive is not an element of genocide.²³³ Evidence that an accused was acting in furtherance of a personal goal (such as vengeance, material gain, or political/business advantage), may explain his motivations but does not preclude a finding of specific intent.²³⁴ Similarly, the fact that an accused took pleasure in killings does not detract in any way from his intent to perform such killings.²³⁵
58. Direct evidence of genocidal intent will rarely exist.²³⁶ In its absence, the *mens rea* may be inferred from the totality of the circumstantial evidence: ‘all of the evidence taken together’.²³⁷ Factors relevant to the determination include:
- a. *evidence related to an accused*: including various forms of communication to show the possible formation of intent, including discrete words and utterances by the accused, and evidence tending to show that the accused ordered attacks on the targeted group;²³⁸

²³¹ *Rutaganda* Trial Judgment, para 60 (emphasis added).

²³² *Prosecutor v Simba*, ICTR-01-76-A, Judgment, 27 November 2007, para 266 (‘The inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent.’); *but see Prosecutor v Kayishema and Ruzindana*, ICTR-95-I-A, Judgment, 1 June 2001, para 91.

²³³ *Simba* Appeal Judgment, paras 88, 269.

²³⁴ *Kayishema* Appeal Judgment, para 161; *Prosecutor v Jelisić*, IT-95-10-A, Judgment, 5 July 2001, para 49.

²³⁵ *Jelisić* Appeal Judgment, 5 July 2001, para 71.

²³⁶ *Kayishema* Appeal Judgment, para 159 (‘[E]xplicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials.’)

²³⁷ *Prosecutor v Karadžić*, IT-95-5/18-T, Judgment, 24 March 2016, paras 550, 2592; *Prosecutor v Popović et al.*, IT-05-88-A, Judgment, 30 January 2015, para 468; *Prosecutor v Hategekimana*, ICTR-00-55-A, Judgment, 8 May 2012, para 133.

²³⁸ *Kayishema* Appeal Judgment, para 148; *Prosecutor v Jelisić*, IT-95-10-T, Judgment, 14 December 1999, para. 75; *Prosecutor v Bagilishema*, ICTR-95-1A-T, Judgment, 7 June 2001, para 63; *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para 728; *Rutaganda* Trial Judgment, para 399; *Prosecutor v Gacumbitsi*, ICTR-2001-64-T, Judgment, 17 June 2004, para 259.

- b. *evidence related to others*: the words and deeds of others acting with or at the behest of the accused;²³⁹
- c. *contextual evidence in the form of plans, policies, and preparation*: the existence of a genocidal plan or policy is not a legal requirement but proof of such plan has been considered relevant to establishing intent.²⁴⁰ The existence of such plan or policy may be inferred from various indicia: government involvement in attacks;²⁴¹ the involvement of public officials or soldiers carrying out the attacks;²⁴² existence of execution lists targeting the protected group; the dissemination of extremist ideology; the screening and selection of victims on the basis of their membership in the protected group.²⁴³
- d. *contextual evidence in the form of modus operandi*: where acts of a consistent character have been systematically directed against a protected group.²⁴⁴
- e. *evidence of breadth and scale*: the breadth and scale of attacks, as well as whether or not the attacks were widespread, are relevant to an inference on the formation of intent.²⁴⁵ In some instances, one particularly brutal attack, targeting several thousand members of a group, can indicate the existence of intent.²⁴⁶
- f. *other factors*: such as whether bodily injuries were extensive, whether property belonging to members of the targeted group was targeted, whether derogatory language was used by an accused or by others against members of the targeted group.²⁴⁷

The inquiry should not be compartmentalized by considering separately whether there was specific intent to destroy a protected group through each of

²³⁹ *Prosecutor v Niyitegeka*, ICTR-96-14-T, Judgment, 16 May 2003, paras 413, 419.

²⁴⁰ *Jelisić Appeal Judgment*, para 48; *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, para 94.

²⁴¹ *Prosecutor v Krstić*, IT-98-33-A, Judgment, 19 April 2004, para 35; *Kayishema Trial Judgment*, paras 309–312.

²⁴² *Kayishema Trial Judgment*, para 536; *Niyitegeka Trial Judgment*, para 414; *Prosecutor v Kamuhanda*, ICTR-95-54A-T, Judgment, 22 January 2005, para 644.

²⁴³ *Kayishema Appeal Judgment*, para 139; *Prosecutor v Rutaganda*, ICTR-96-30-A, 26 May 2003, para 525 ('[M]aking anti-Tutsi utterances or being affiliated to an extremist anti-Tutsi group is not a *sine qua non* for establishing *dolus specialis*. [...] [E]stablishing such a fact may, nonetheless, facilitate proof of specific intent.')

²⁴⁴ *Jelisić Appeal Judgment*, para 47; *Akayesu Trial Judgment*, para 523; *Kayishema Trial Judgment*, paras 93, 289, 534–535, 537; *Prosecutor v Muhimana*, ICTR-95-1B-T, Judgment, 28 April 2005, para 496.

²⁴⁵ *Krstić Appeal Judgment*, para 35; ICTR, *Gacumbitsi Trial Judgment*, para 258; *Prosecutor v Kamuhanda Trial Judgment*, para 629; *Akayesu Trial Judgment*, para 730; *Muhimana Trial Judgment*, paras 496, 498, 516; *Prosecutor v Ntakirutimana et al*, ICTR-96-10/ICTR-96-17-T, Judgment, 21 February 2003, para 785.

²⁴⁶ *Prosecutor v Nindabahizi*, ICTR-2001-71-T, Judgment and Sentence, 15 July 2004, para 461.

²⁴⁷ *Muhimana Trial Judgment*, para 496; *Akayesu Trial Judgment*, para 728.

the alleged acts.²⁴⁸ Again, *the existence of genocidal intent must be based on the totality of the evidence.*²⁴⁹

59. A finding that genocide occurred cannot be made in the abstract. The inclusion of genocidal intent as an element of the crime means that an assessment of whether genocide occurs necessarily involves an assessment of whether *a particular perpetrator or group of perpetrators* possessed the specific intent to destroy a protected group, in whole or in part, at the relevant moment in time. The determinative factor therefore is the acts and conduct of the accused persons themselves, or the acts and conduct of others acting at their behest. The genocidal intent of an accused 'should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action'.²⁵⁰

b. To Destroy

60. The specific intent of genocide is not simply to harm the group, to discriminate against the group, or even to commit discriminatory killings within the group. Rather, the mental aim must be 'to destroy' the protected group.²⁵¹ Actual destruction is not required, only the intention to carry it out; yet the former may be inferential evidence of the latter.²⁵² Destruction is understood to mean physical or biological annihilation, rather than the disbandment or expulsion of the group. Other forms, such as attacks on cultural characteristics, do not constitute genocide if they are not related to the physical or biological destruction of the group.²⁵³

²⁴⁸ *Prosecutor v Stakić*, IT-97-24-A, Judgment, 22 March 2006, para 55.

²⁴⁹ *Stakić Appeal Judgment*, para 55.

²⁵⁰ *Bağışlışema Trial Judgment*, para 63.

²⁵¹ *Prosecutor v Stakić*, IT-97-24-T, Judgment, 31 July 2003, para 519.

²⁵² *Prosecutor v Mpambara*, ICTR-01-65-T, Judgment, 11 September 2006, para 8 ('The *actus reus* of genocide does not require the actual destruction of a substantial part of the group; the commission of even a single instance of one of the prohibited acts is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group.')

²⁵³ *Prosecutor v Krstić*, IT-98-33-T, Judgment, 2 August 2001, para 580; ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of Genocide, Bosnia Herzegovina v Yugoslavia (Serbia and Montenegro), Judgment, 27 February 2007 ('ICJ Bosnia Judgment'), para 344.

c. In Whole or In Part

61. The intention to destroy the entire group is unnecessary. The partial destruction of the group (for example, destruction in a certain geographical location) suffices, when a substantial part of the group—a portion sufficiently large to impact the group as a whole—has been targeted.²⁵⁴ Factors relevant to whether the targeted part of the group meets this threshold include its numeric size (both absolute and relative) and the prominence of the targeted individuals within it.²⁵⁵

62. The intent to destroy a group:

even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group [...] they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.²⁵⁶

The essential determination—whether the targeted portion of the group is ‘substantial enough’²⁵⁷—involves a number of considerations:

The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. **In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration.** If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.²⁵⁸

²⁵⁴ ICJ Bosnia Judgment, para 198.

²⁵⁵ *Krstić* Appeal Judgment, paras 12–14.

²⁵⁶ *Krstić* Trial Judgment, para 590; *Krstić* Appeal Judgment, paras 19, 22.

²⁵⁷ *Krstić* Appeal Judgment, para 12; *Kayishema* Trial Judgment, para 96; *Bagilishema* Trial Judgment, para 64 (‘the intention to destroy must target at least a substantial part of the group’); *Prosecutor v Semanza*, ICTR-97-20-T, Judgment and Sentence, 15 May 2003, para 316.

²⁵⁸ *Krstić* Appeal Judgment, para 12.

Such considerations ‘are neither exhaustive nor dispositive’, but rather ‘useful guidelines’ whose applicability and relative weight ‘will vary depending on the circumstances of a particular case’.²⁵⁹ Notably, the ‘intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him’.²⁶⁰ And while ‘this factor alone will not indicate whether the targeted group is substantial, it can—in combination with other factors—inform the analysis’.²⁶¹ There is no numeric threshold.²⁶²

63. In this regard, the findings of the ICTY Appeals Chamber with respect to the genocide in Srebrenica are instructive. In the *Krstić* case—the first to judicially recognize that particular massacre (and cited with approval by the International Court of Justice²⁶³)—the Trial Chamber correctly determined that the accused ‘had the intent to kill the Srebrenica Bosnian Muslim men of military age’ and, from such intent, further ‘shared the genocidal intent of some members of the [Serbian military] to destroy a substantial part of the targeted group, the Bosnian Muslims of Srebrenica’.²⁶⁴ It was determined that some seven to eight thousand Bosnian Muslim men were killed in Srebrenica—a group that ‘was emblematic of the Bosnian Muslims in general’.²⁶⁵

²⁵⁹ *Krstić* Appeal Judgment, para 13.

²⁶⁰ *Krstić* Appeal Judgment, para 13; *Krstić* Trial Judgment, para 590 (‘part’ can be defined geographically, such as a specific identity located in a particular location).

²⁶¹ *Krstić* Appeal Judgment, para 13. *Nb.* ‘The historical examples of genocide [...] suggest that the area of the perpetrators’ activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country’s borders.’ *Ibid.*

²⁶² *Semanza* Trial Judgment, para 316; *Stakić* Trial Judgment, para 522; *Prosecutor v Nindabahizi*, ICTR-01-71-A, Judgment, 16 January 2007, para 135 (‘[T]here need not be a large number of victims to enter a genocide conviction.’)

²⁶³ See para 79, *infra*.

²⁶⁴ *Krstić* Appeal Judgment, para 21; see *ibid*, para 22 (‘The Trial Chamber should have expressed its reasoning more carefully. As explained above, however, the Trial Chamber’s overall discussion makes clear that it identified the Bosnian Muslims of Srebrenica as the substantial part in this case.’); para 23 (‘The Trial Chamber’s determination of the substantial part of the protected group was correct. The Defence’s appeal on this issue is dismissed.’)

²⁶⁵ *Krstić* Appeal Judgment, para 28 (emphasis added) (‘The Trial Chamber was also entitled to consider the long-term impact that the elimination of seven to eight thousand men from Srebrenica would have on the survival of that community.’); para 37 (‘By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide.’)

d. A National, Ethnical, Racial, or Religious Group

64. The Convention and various international criminal law (ICL) statutes do not define these groups. While definitions have emerged from international jurisprudence,²⁶⁶ the legal doctrine is inconsistent. A practice has emerged of making a case-by-case assessment that combines the objective particulars of a given social or historical context, and the subjective perceptions of the perpetrator.²⁶⁷ Thus, it must be proven either that the victim belonged to the targeted group or that the perpetrator held such belief.²⁶⁸

e. As Such

65. The words 'as such' emphasize the intent to destroy the protected group as a separate and distinct entity, rather than an individual. In a case of genocide, victims are chosen by reason of their membership of the group for which destruction is sought, as opposed to being targeted as individuals.²⁶⁹ The two key words were used instead of including a requirement of motive in the Genocide Convention.²⁷⁰ The ICTR has stated that the term 'has been

²⁶⁶ See, e.g., *Akayesu* Trial Judgment, para 512 (*National group*: 'a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties'); para 513 (*Ethnic group*: 'a group whose members share a common language or culture'); para 515 (*Racial group*: a group 'based on the hereditary physical traits often identified with a geographic region, irrespective of linguistic, cultural, national or religious factors'); para 514 (*Religious groups*: a group 'whose members share the same religion, denomination or mode of worship').

²⁶⁷ *Bagilishema* Trial Judgment, para 65; *Prosecutor v Brđanin*, IT-99-36-T, Judgment, 1 December 2004, para 684.

²⁶⁸ *Muhimana* Trial Judgment, para 500; *Prosecutor v Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, para 813.

²⁶⁹ *Krstić* Appeal Judgment, paras 12–14.

²⁷⁰ *Niyitegeka* Appeal Judgment, para 49 ('[D]uring the drafting of the Genocide Convention, the delegates debated whether to include the element of motive in the definition of the crime of genocide. After extensive discussion, the words "as such" were introduced into the draft document to replace an explicit reference to motives made in an earlier draft. Venezuela, the author of this amendment, stated that "an enumeration of motives was useless and even dangerous, as such a restrictive enumeration would be a powerful weapon in the hands of the guilty parties and would help them to avoid being charged with genocide. Their defenders would maintain that the crimes had been committed for other reasons than those listed in article II." The Venezuelan delegate continued that "it was sufficient to indicate that intent was a constituent factor of the crime". He observed that replacing the statement of motives with the words "as such" should meet the views of those who wanted to retain the statement, noting that motives were implicitly included in the words "as such".')

interpreted to mean that the prohibited act must be committed against a person based on that person's membership in a specific group and specifically because the person belonged to this group, such that the real victim is not merely the person but the group itself'.²⁷¹ In this way, genocide differs from the crime against humanity of persecution, in which the perpetrator chooses his or her victims because they belong to a specific group but does not necessarily seek to destroy the group itself.²⁷²

3. *The Underlying Crimes (Actus Reus)*

66. The underlying prohibited acts, or *actus reus*, of genocide relevant to this inquiry are: (a) killing members of the group and (b) causing serious bodily or mental harm to members of the group.²⁷³ The ICC requires that such conduct took place 'in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect [the] destruction'.²⁷⁴ This precludes isolated criminal acts from falling within the definition of genocide. The ICTY rejected such a requirement, as it does not form part of customary international law.²⁷⁵

a. Killing Members of the Group

67. The material elements of killing in the context of genocide are equivalent to the elements of murder.²⁷⁶ The crime of murder requires proof of the following elements: (a) the death of the victim; (b) an act or omission by the perpetrator that caused the victim's death; and (c) the commission of such act or omission

²⁷¹ *Prosecutor v Muvunyi*, ICTR-00-55A-T, Judgment and Sentence, para 485.

²⁷² *Jelisić* Trial Judgment, para 79.

²⁷³ Genocide Convention, Article II; ICTY Statute, Article 4(2); ICTR Statute, Article 2(2). *Nb.* Also included are '(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group'. However, for purposes of this document, only the first two will be discussed herein.

²⁷⁴ International Criminal Court, *Elements of Crimes* (The Hague, 2011), Article 6(a), para 4.

²⁷⁵ *Krstić* Appeal Judgment, para 224; *Jelisić* Trial Judgment, para 100. *Nb.* This distinction is factually irrelevant here as the physical acts described above 'were committed in the context of a manifest pattern of similar conduct'.

²⁷⁶ *Kayishema* Appeal Judgment, para 151.

with the intent to kill the victim or to willfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death.²⁷⁷

b. Causing Serious Bodily or Mental Harm to Members of the Group

68. The bodily or mental harm caused ‘must be of such a serious nature as to contribute or tend to contribute to the destruction of the group’, and the ‘acts causing such harm may include torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs’.²⁷⁸ Such harm must be inflicted intentionally.²⁷⁹ With respect to rape and other forms of sexual violence, the Trial Chamber in the *Akayesu* case was the first to make the determination:

Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even [...] one of the worst ways of inflicting harm on the victim as [...] she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public [...] and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families, and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.²⁸⁰

As the Trial Chamber put it: ‘Sexual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit of the will to live and of life itself’.²⁸¹ Subsequently, the *Rutaganda*, *Musema*, *Gacumbitsi* and *Muhimana* cases all made similar findings on acts of rape and sexual violence as underlying acts of genocide.²⁸²

²⁷⁷ *Prosecutor v Ratko Mladić*, IT-09-92-T, Judgment (Volume III of V), 22 November 2017, para 3050.

²⁷⁸ *Mladić* Trial Judgment (Volume III of V), para 3434; *see also* ICC Elements of Crimes, Article 6(b).

²⁷⁹ *Mladić* Trial Judgment (Volume III of V), para 3434; *see also* ICC Elements of Crimes, Article 6(b).

²⁸⁰ *Akayesu* Trial Judgment, para 731 (upheld on appeal).

²⁸¹ *Akayesu* Trial Judgment, para 732 (upheld on appeal).

²⁸² *Rutaganda* Trial Judgment, para 51 (‘For the purposes of interpreting Article 2(2)(b) of the Statute, the Chamber understands the words “serious bodily or mental harm” to include acts of bodily or

4. Forms of Participation (Punishable Acts)

69. Under the Convention and the various ICL statutes, '[t]he following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide'.²⁸³
- a. Committing genocide is not limited to direct and physical perpetration; other acts may constitute participation in the *actus reus* of the crime. The question of whether an accused acts with his own hands (for example, when killing people) is not the only relevant criterion.²⁸⁴ In theory, the failure to act coupled with approving presence may amount to a culpable omission.²⁸⁵
- b. The crime of conspiracy to commit genocide, an inchoate crime, is an agreement between two or more individuals to commit the crime. Conspiracy to commit genocide is punishable even if it fails to produce a result, that is, even if the substantive offence has not actually been perpetrated.²⁸⁶

mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution.');

Prosecutor v Musema, ICTR-96-13-T, Judgment and Sentence, para 156 (same); *Gacumbitsi* Trial Judgment, para 291 (same); *Muhimana* Trial Judgment, para 502 (same).

²⁸³ Genocide Convention, Article III; ICTY Statute, Article 4(3); ICTR Statute, Article 2(3).

²⁸⁴ *Prosecutor v Seromba*, ICTR-2001-66-A, Judgment, 12 March 2008, para 161 (citing *Gacumbitsi* Appeal Judgment, para 60; *Ndindabahizi* Appeal Judgment, para 123).

²⁸⁵ *Prosecutor v Nzabirinda*, ICTR-01-77-T, Sentencing Judgment, 23 February 2007 (Joseph Nzabirinda, a political organizer with 'obvious moral authority over the population of his *secteur*', was convicted of murder as a crime against humanity (aiding and abetting) as an accomplice by omission or 'approving spectator' for his attendance at several pacification meetings where killers were present and his presence in the vicinity of the following systematic deadly attacks against Tutsis.); *ibid*, para 5, 17 ('With respect to criminal responsibility incurred through omission, a person's mere presence at the crime scene may constitute aiding and abetting where it is demonstrated that his presence had a significant encouraging effect on the principal offender, particularly if the individual standing by was the superior of the principal offender or was otherwise in a position of authority. In such circumstances, an omission to act may constitute the *actus reus* of aiding and abetting, provided that the failure to act had a decisive effect on the commission of the crime. This form of criminal responsibility "is derived not from the omission alone, but from the omission combined with the choice to be present".'); para 18 ('Unlike other forms of aiding and abetting, "criminal responsibility as an 'approving spectator' does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct".'); paras 33, 35; *Prosecutor v Rutaganira*, ICTR-95-1C-T, Judgment and Sentence, 14 March 2005, paras 67 *et seq* (Vincent Rutaganira, a local politician, was convicted of extermination as a crime against humanity for having, by omission, aided and abetted the massacre of thousands of Tutsis who had taken refuge in a church.)

²⁸⁶ *Prosecutor v Nahimana, Barayagwiza, and Ngeze*, ICTR-99-52-A, Judgment, 28 November 2007, para 894; *Musema* Trial Judgment, para 194.

- c. Direct and public incitement to commit genocide consists of ‘directly provoking the perpetrator(s) to commit genocide’, by way of an overt means of communication.²⁸⁷ The incitement must be both public and direct.²⁸⁸ There is no need to prove the expected result.²⁸⁹ This particular *crime* differs from the *mode of liability* of ‘instigation’.²⁹⁰
- d. The crime of attempt to commit genocide, like the crime of direct and public incitement to commit genocide, is an inchoate offence.²⁹¹ It has not been charged or adjudicated at the ICTY or ICTR.
- e. Complicity to commit genocide refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide.²⁹² Practical assistance can include identifying people belonging to the group to be killed, transporting victims to execution sites, and providing forces, ammunition and logistical support to the executioners.²⁹³ A person cannot be convicted of both genocide and complicity in genocide in respect of the same act because he cannot be both the principal perpetrator and accomplice at the same time.²⁹⁴

²⁸⁷ *Akayesu* Trial Judgment, para 559 (This includes: ‘speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, or offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.’)

²⁸⁸ *Nahimana* Appeal Judgment, para 700; *Akayesu* Trial Judgment, paras 557–558.

²⁸⁹ *Akayesu* Trial Judgment, para 562.

²⁹⁰ *Nahimana* Appeal Judgment, paras 678–679 (Whereas ‘instigation’ is a mode of liability from which criminal responsibility follows only if the instigation in fact substantially contributed to the crime, direct and public incitement to commit genocide—by contrast—is itself a crime, and it is not necessary to demonstrate that it in fact substantially contributed to the commission of acts of genocide. The second difference is that incitement to commit genocide must have been direct and public, whereas instigation need not be.); *Nahimana* Appeal Judgment, para 502 (The particular activity must substantially contribute to the commission of acts of genocide in order to find that such activity ‘instigated the commission of acts of genocide’; they need not have been a precondition for those acts; there must be a link.)

²⁹¹ *Nahimana* Appeal Judgment, para 720.

²⁹² *Semanza* Trial Judgment, para 395.

²⁹³ *Ntakirutimana* Trial Judgment, paras 789, 791, 829.

²⁹⁴ *Akayesu* Trial Judgment, paras 532, 700; *Musema* Trial Judgment, para 175; *Nahimana* Trial Judgment, para 1056. *Nb.* Due in part to the vagueness and ambiguity of the meaning of complicity there has been confusion between complicity to commit genocide and aiding and abetting genocide. The ICTY Appeals Chamber has dealt with the relationship between complicity in genocide and aiding and abetting genocide as a form of individual criminal responsibility, holding that the terms ‘complicity’ and ‘accomplice’ may encompass conduct that is broader than that of aiding and abetting. Thus, complicity encompasses aiding and abetting genocide as a form of individual criminal responsibility. *Krstić* Appeal Judgment, paras 138–139; see also *Prosecutor v Ntakirutimana et al*, ICTR-96-10-A/ICTR-96-17-A, Judgment, 13 December 2004, para 371. The *Krstić* Appeals Chamber held that when complicity in genocide is charged for conduct broader than aiding and abetting, proof that the accomplice had the specific intent to destroy a protected group is required. *Krstić* Appeal Judgment, paras 140–142.

The applicable forms of participation are discussed in greater detail below with respect to the alleged perpetrators identified herein.

5. *Modes of Liability*

70. ICL recognizes a number of modes of liability applying to genocide (as well as other international crimes), namely: committing (direct perpetration); planning; instigating; ordering; joint criminal enterprise (as a form of commission); aiding and abetting in the planning, preparation, or execution of a crime; superior/command responsibility; co-perpetration (joint perpetration); indirect perpetration; and indirect co-perpetration.²⁹⁵
71. The issue of specific intent makes charging an accused for genocide under the doctrine of superior responsibility potentially difficult. The issue is whether the superior himself must have had the necessary genocidal intent, or if he must merely have known that his subordinates possessed such intent. Jurisprudence at the ICTY and ICTR seems to indicate that the latter will suffice.²⁹⁶ The Rome Statute may permit an even lower level of *mens rea* in that it allows for commanders to be held liable for genocide committed by their subordinates when the commander had no real knowledge of the crime.²⁹⁷ However, this is yet to be tested and applied in the case law of the ICC. In terms of effective control, '[c]ivilian leaders need not be vested with prerogatives similar to those

²⁹⁵ *Nb.* The ICC adopted Article 2 of the Genocide Convention as its definition of genocide. However, it is notable that the drafters of the ICC Statute did not elect to include the terms of Article 3 of the Genocide Convention, which sets out five acts of participation above. Instead, the forms of participation which attract individual criminal responsibility for this offence are the same as those set out for all other offences under the ICC Statute and enumerated in Article 25 ('Individual Criminal Responsibility') of the Statute, including Article 25(3)(e). Moreover, Article 33(2) establishes that superior orders can never be a defense to this crime. Given that specific intent may be inferred from circumstantial evidence, an accused may be charged for genocide under a theory of JCE as long as the facts from which the state of mind are to be inferred are clearly pleaded. *Simba* Appeal Judgment, para 264; *Blaskic* Appeal Judgment, para 219; see also *Prosecutor v Brđanin*, IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, para 5. If it has not been so established, the accused might not be convicted as a principle perpetrator of genocide but may be convicted of having aided and abetted genocide. *Krstić* Appeal Judgment, paras 134–144.

²⁹⁶ *Krstić* Trial Judgment, paras 647–652; *Brđanin* Trial Judgment, para 719; *Prosecutor v Blagojevic*, IT-02-60-T, Judgment, 17 January 2005, para 686.

²⁹⁷ Rome Statute, Article 18.

of military commanders in order to incur [...] responsibility under Article 6(3) of the Statute'.²⁹⁸

72. As with the potential forms of participation, the applicable modes of liability are discussed in greater detail below with respect to the identified perpetrators.

C. State Responsibility for Genocide

73. In the case of *Bosnia and Herzegovina v Serbia and Montenegro*, the ICJ confirmed that contracting parties to the Genocide Convention could commit genocide, and that the Court could make such determinations pursuant to its jurisdiction under Article IX of the Convention.²⁹⁹

1. Interpretations of the Genocide Convention

a. Jurisdiction Under Article IX

74. While the Court expressly limited its jurisdiction to disputes related to the crime of genocide,³⁰⁰ it specifically adopted by reference the rules of general international law relating to both treaty interpretation and state responsibility for wrongful acts.³⁰¹ Additionally, the ICJ made fulsome reference to—and at

²⁹⁸ *Nahimana* Appeal Judgment, para 785 ('It suffices that the superior had effective control of his subordinates, that is, that he had the material capacity to prevent or punish the criminal conduct of subordinates. For the same reasons, it does not have to be established that the civilian superior was vested with "excessive powers" similar to those of public authorities. Moreover, the Appeals Chamber cannot accept the argument that superior responsibility under Article 6(3) of the Statute requires a direct and individualized superior-subordinate relationship.')

²⁹⁹ ICJ *Bosnia* Judgment. *Nb.* Other applications alleging genocide against contracting parties have been filed before the ICJ, but only the *Bosnia* Case has arrived at a final judgment. *See, e.g.,* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v Serbia*).

³⁰⁰ ICJ *Bosnia* Judgment, para 147 ('The jurisdiction of the Court in this case is based solely on Article IX of the Convention. [...] [I]t follows that the Court may rule only on the disputes between the Parties to which that provision refers. [...] It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.')

³⁰¹ ICJ *Bosnia* Judgment, para 149 ('[...] it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will

times specifically adopted – jurisprudence of international criminal tribunals.³⁰² Crucially, the ICJ held that it is competent to adjudicate questions of state liability for genocide.³⁰³ (To date, the Court has not ruled on the question of whether specific reservations to Article IX of the Convention are incompatible with its object and purpose.³⁰⁴)

b. Obligations Imposed on the Contracting Parties

75. According to the ICJ, in addition to the contracting parties' 'direct obligation to prevent genocide',³⁰⁵ they are 'under an obligation, by virtue of the Convention, not to commit genocide themselves'.³⁰⁶ As the Court put it: 'the obligation to prevent genocide necessarily implies the prohibition of the commission of

have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.')

³⁰² See, e.g., ICJ Bosnia Judgment, paras 188, 198–201.

³⁰³ ICJ Bosnia Judgment, para 152 ('In particular a dispute "exists" about whether the only obligations of the Contracting Parties for the breach of which they may be held responsible under the Convention are to legislate, and to prosecute or extradite, or whether the obligations extend to the obligation not to commit genocide and the other acts enumerated in Article III. That dispute "exists" and was left by the Court for resolution at the merits stage. In these circumstances, and taking into account the positions of the Parties, the Court will determine at this stage whether the obligations of the Parties under the Convention do so extend. That is to say, the Court will decide "the meaning and legal scope" of several provisions of the Convention, including Article IX with its reference to "the responsibility of a State for genocide or any of the other acts enumerated in Article III".')

³⁰⁴ Several contracting parties have made such reservations, including India.

³⁰⁵ ICJ Bosnia Judgment, para 165.

³⁰⁶ ICJ Bosnia Judgment, para 166; see *ibid* ('It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention. [...] Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention. Under Article I, the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law.')

genocide'.³⁰⁷ More specifically, states 'are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them'.³⁰⁸ Such obligation applies equally to all 'acts enumerated in Article III'.³⁰⁹ In short, 'if an organ of the state, or a person or group whose acts are legally attributable to the state, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that state is incurred'.³¹⁰

c. State Liability in the Absence of Previously-Adjudicated Individual Criminal Responsibility

76. While the proven existence of genocide, as defined by the Convention, is a *sine qua non* for state liability,³¹¹ such 'responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one'.³¹² The ICJ itself is fully competent to undertake the initial task of determining whether 'genocide or the other acts enumerated in Article III have been committed' through the application of 'the standard of proof appropriate to charges of exceptional gravity'.³¹³

d. Intent to Commit Genocide

77. As noted in greater detail above, what sets genocide apart from other crimes against humanity³¹⁴ is its unique *mens rea*. According to the Court:

³⁰⁷ ICJ Bosnia Judgment, para 166.

³⁰⁸ ICJ Bosnia Judgment, para 167.

³⁰⁹ ICJ Bosnia Judgment, para 167.

³¹⁰ ICJ Bosnia Judgment, para 179. *But see ibid*, para 170 ('The Court observes that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature.')

³¹¹ ICJ Bosnia Judgment, para 180 ('The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph (b), and complicity under Article III, paragraph (e); and [...] for purposes of the obligation to prevent genocide.')

³¹² ICJ Bosnia Judgment, para 182.

³¹³ ICJ Bosnia Judgment, para 181.

³¹⁴ *Nb.* Strictly speaking, genocide is an *aggravated* crime against humanity.

It is not enough to establish [...] that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. [...] It is not enough that the members of the group are targeted because they belong to that group, that is, because the perpetrator has a discriminatory intent. Something more is required. The [prohibited] acts [...] must be done with intent to destroy the group as such in whole or in part. The words 'as such' emphasize that intent to destroy the protected group.³¹⁵

Relying on ICTY jurisprudence, the ICJ highlighted the subtle distinction between the *mens rea* for genocide and that for persecution (as a crime against humanity).³¹⁶ As the ICTY put it: 'from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. [...] [W]hen persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.'³¹⁷

e. The Protected Group

78. According to the Court, 'it is necessary to have in mind the identity of the group against which genocide may be considered to have been committed'³¹⁸ Such group:

³¹⁵ ICJ Bosnia Judgment, para 187.

³¹⁶ ICJ Bosnia Judgment, para 188 ('The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the [ICTY] did in the *Kupreskić et al* case: "the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. [...]".') (citing IT-95-16-T, Judgment, 14 January 2000, para 636).

³¹⁷ ICJ Bosnia Judgment, para 188

³¹⁸ ICJ Bosnia Judgment, para 191.

must have particular positive characteristics—national, ethnical, racial, or religious—and not the lack of them. The intent must also relate to the group ‘as such’. That means that the crime requires an intent to destroy a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not.³¹⁹

In short, the targeted group ‘must in law be defined positively’.³²⁰

79. In cases where *a part* of a protected group is targeted, ‘that part must be significant enough for its destruction to have an impact on the group as a whole’.³²¹ In making this determination, the ICJ articulated three key criteria to be considered:
- a. *Substantiality*: ‘In the first place, the intent must be to destroy at least a substantial part of the particular group.’³²²
 - b. *Opportunity*: ‘Second, [...] genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the [International Law Commission], “it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe”. The area of the perpetrator’s activity and control are to be considered.’³²³
 - c. *Quality*: The ICJ relied on the ‘carefully measured terms’ of the Appeals Chamber in the *Krstić* case:

³¹⁹ ICJ Bosnia Judgment, para 193.

³²⁰ ICJ Bosnia Judgment, para 196; *see also ibid*, para 194 (‘The drafting history of the Convention confirms that a positive definition must be used.’); para 195 (‘The Court observes that the ICTY Appeals Chamber in the *Stakić* case (IT-97-24-A, Judgment, 22 March 2006, paras 20–28) also came to the conclusion that the group must be defined positively, essentially for the same reasons as the Court has given.’)

³²¹ ICJ Bosnia Judgment, para 193.

³²² ICJ Bosnia Judgment, para 198; *see ibid* (‘That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić* Appeal Judgment, paras 8–11 and the cases of *Kayishema*, *Byilishema*, and *Semanza* there referred to; and *Yearbook of the International Law Commission*, 1996, Vol II, Part Two, p 45, para 8 of the Commentary to Article 17.)

³²³ ICJ Bosnia Judgment, para 199. *Nb.* ‘As the ICTY Appeals Chamber has said [...] the opportunity available to the perpetrators is significant (*Krstić* Appeal Judgment, para 13). This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide (*Stakić*, IT- 97-24-T, Judgment, 31 July 2003, para 523).’ *Ibid*.

The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the ICTY Statute which exactly reproduces Article II of the Convention].³²⁴

This third qualitative criterion, however, 'cannot stand alone'.³²⁵

According to the Court, the foregoing 'list of criteria is not exhaustive'.³²⁶ And, while 'the substantiality criterion is 'an essential starting point',³²⁷ 'critical',³²⁸ and merits 'priority',³²⁹ '[m]uch will depend on the Court's assessment of [...] all other relevant factors in any particular case'.³³⁰

80. Finally, 'the proscribed action [must] be [taken] against members of the "group"', however it is ultimately defined.³³¹

2. Burden, Standard, and Methods of Proof

81. As to the burden of proof before the ICJ, 'the applicant must establish its case and [...] a party asserting a fact must establish it'.³³² Regarding the standard, pursuant to settled principles of public international law, 'claims against a state involving charges of exceptional gravity must be proved by evidence that is fully conclusive'.³³³ With respect to claims of genocide under Article III, the ICJ

³²⁴ ICJ Bosnia Judgment, para 200.

³²⁵ ICJ Bosnia Judgment, para 200.

³²⁶ ICJ Bosnia Judgment, para 201. *Nb.* The criteria 'are essentially those stated by the Appeals Chamber in the *Krstić* case'. *Ibid.*

³²⁷ ICJ Bosnia Judgment, para 200.

³²⁸ ICJ Bosnia Judgment, para 201.

³²⁹ ICJ Bosnia Judgment, para 201.

³³⁰ ICJ Bosnia Judgment, para 201.

³³¹ ICJ Bosnia Judgment, para 193.

³³² ICJ Bosnia Judgment, para 204.

³³³ ICJ Bosnia Judgment, para 209 (citing *Corfu Channel (United Kingdom v Albania), Judgment, ICJ Reports 1949*, p 17).

must 'be fully convinced' of the allegations based on acts that 'have been clearly established'.³³⁴ Given the gravity of such claims, 'the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation'.³³⁵ As to methods of proof, the ICJ will accept direct, indirect, and opinion testimony. The accuracy, weight, and/or significance of any such testimony will be at the discretion of the Court.³³⁶ Documentary reports of an official or independent nature will also be admissible:

Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).³³⁷

Ultimately, 'the Court may take into account any statements made by either party that appear to bear upon the matters in issue'.³³⁸

3. The Test of Responsibility

82. Preliminarily, the facts presented must be examined against the following two-pronged test: 'first, whether the alleged atrocities occurred; secondly, [...] whether the facts establish the existence of an intent, on the part of the perpetrators of those atrocities, to destroy, in whole or in part, a defined group (*dolus specialis*)'.³³⁹ Once a genocide has been established, certain additional questions must be considered:

³³⁴ ICJ Bosnia Judgment, para 209.

³³⁵ ICJ Bosnia Judgment, para 210.

³³⁶ See ICJ Bosnia Judgment, para 226 ('In some cases the account represents the speaker's own knowledge of the fact to be determined or evaluated. In other cases the account may set out the speaker's opinion or understanding of events after they have occurred and in some cases the account will not be based on direct observation but may be hearsay. In fact the Parties rarely disagreed about the authenticity of such material but rather about whether it was being accurately presented (for instance with contention that passages were being taken out of context) and what weight or significance should be given to it.')

³³⁷ ICJ Bosnia Judgment, para 227.

³³⁸ ICJ Bosnia Judgment, para 378.

³³⁹ ICJ Bosnia Judgment, para 242.

First, it needs to be determined whether the acts of genocide could be attributed to the respondent under the rules of customary international law of state responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable [...] to the Respondent. Second, the Court will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the respondent under those same rules of state responsibility: that is to say, the acts referred to in Article III, paragraphs (b) to (e), one of these being complicity in genocide. Finally, it will be for the Court to rule on the issue as to whether the respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.³⁴⁰

For each potential mode of state liability, the ICJ has established a discrete standard based on customary international law. These are considered in turn.

a. Acts of State

83. According to the ICJ, 'the conduct of any state organ is to be considered an act of the state under international law, and therefore gives rise to the responsibility of the state if it constitutes a breach of an international obligation of the state'.³⁴¹ The rule, one of customary international law, is reflected in the International Law Commission's Articles on State Responsibility:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.³⁴²

The crucial element here is a relationship of *complete dependence* between the perpetrator(s) and the state itself. Whether 'persons, groups of persons, or

³⁴⁰ ICJ Bosnia Judgment, para 385.

³⁴¹ ICJ Bosnia Judgment, para 385.

³⁴² ILC, Articles on State Responsibility, Article 4 (Conduct of Organs of a State).

entities may, for purposes of international responsibility, be *equated with state organs*³⁴³ will depend on both *de jure* and *de facto* evaluations.³⁴⁴

b. Attribution of Conduct to the State

84. Slightly less strict, the Court defined the applicable rule as follows: ‘The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.’³⁴⁵ Notably, this differs from the question (raised in the preceding paragraph) of ‘whether a person or entity may be equated with a state organ even if not having that status under internal law’:³⁴⁶

[I]n this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of ‘complete dependence’ on the respondent state; it has to be proved that they acted in accordance with that state’s instructions or under its ‘effective control’. It must however be shown that this ‘effective control’ was exercised, or that the state’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.’³⁴⁷

Accordingly, genocide will be attributable to a state ‘if and to the extent that the physical acts [...] committed by organs or persons other than the State’s own

³⁴³ ICJ Bosnia Judgment, para 392 (emphasis added).

³⁴⁴ *Ibid* (‘[A]ccording to the Court’s jurisprudence, persons, groups of persons, or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups, or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.’)

³⁴⁵ ICJ Bosnia Judgment, para 400 (quoting ILC Articles on State Responsibility).

³⁴⁶ ICJ Bosnia Judgment, para 398.

³⁴⁷ ICJ Bosnia Judgment, para 398.

agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control'.³⁴⁸

c. State Complicity

85. According to the Court, complicity involves 'the provision of means to enable or facilitate the commission of the crime'.³⁴⁹ Drawing a parallel to the customary notion of 'aid or assistance',³⁵⁰ the ICJ adopted the following test: 'A state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that state does so with knowledge of the circumstances of the internationally wrongful act and (b) the act would be internationally wrongful if committed by that state.'³⁵¹ In other words, in order to determine whether a state 'is responsible for "complicity in genocide" [...] [the Court] must examine whether organs of the respondent state, or persons acting on its instructions or under its direction or effective control, furnished "aid or assistance" in the commission of the genocide'.³⁵² For such liability to attach, such organ or person must have 'acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator'.³⁵³

d. State Failure to Prevent

86. First of all, the obligation to prevent genocide is separate and distinct from the state's duty to punish (or to seek to punish) any perpetrators.³⁵⁴ Secondly:

³⁴⁸ ICJ Bosnia Judgment, para 401.

³⁴⁹ ICJ Bosnia Judgment, para 419.

³⁵⁰ ICJ Bosnia Judgment, para 419 ('In this respect, it is noteworthy that, although "complicity", as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the "aid or assistance" furnished by one State for the commission of a wrongful act by another State'.)

³⁵¹ ICJ Bosnia Judgment, para 420 (quoting ICL Articles on State Responsibility).

³⁵² ICJ Bosnia Judgment, para 420.

³⁵³ ICJ Bosnia Judgment, para 421.

³⁵⁴ ICJ Bosnia Judgment, para 427 ('The obligation on each contracting State to prevent genocide [...] is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond [...] reference to the competent organs of the United

[T]he obligation [...] is one of conduct and not one of result, in the sense that a state cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of states parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible.³⁵⁵

According to the Court, '[i]n this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance'.³⁵⁶ The following parameters are relevant:

The first, which varies greatly from one state to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the state concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that state and the main actors in the events. The state's capacity to influence must also be assessed by legal criteria, since it is clear that every state may only act within the limits permitted by international law; seen thus, a state's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the state whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide.³⁵⁷

Finally, while 'a state can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed',³⁵⁸ its 'obligation to prevent, and the corresponding duty to act, arise at the instant that the state learns of, or should normally have learned of, the existence of a serious risk that

Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring [...].')

³⁵⁵ ICJ Bosnia Judgment, para 430; *see ibid* ('A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.')

³⁵⁶ ICJ Bosnia Judgment, para 430.

³⁵⁷ ICJ Bosnia Judgment, para 430.

³⁵⁸ ICJ Bosnia Judgment, para 431; *see ibid* (It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. [...] This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act.)

genocide will be committed'.³⁵⁹ Certainty, on the part of the state, is not required.³⁶⁰

e. State Failure to Punish

87. Simply put, the Convention 'obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction' over the crime of genocide.³⁶¹

D. Crimes Against Humanity

88. As noted above, genocide is essentially an aggravated crime against humanity uniquely defined by its specific intent requirement. Where such intent is absent—or unable to be proven—the same conduct of the alleged perpetrators may nevertheless be correctly characterized as various crimes against humanity.

1. Chapeaux Elements

89. Under customary international law—and as defined by ICL jurisprudence (with certain peculiarities)—a crime against humanity is defined as any of the following acts (among others) when committed as part of *a widespread and systematic attack directed against any civilian population*, with knowledge of the attack: murder; extermination; torture; rape, sexual slavery, or other forms of

³⁵⁹ ICJ Bosnia Judgment, para 431; *see ibid* (From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harboring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.)

³⁶⁰ ICJ Bosnia Judgment, para 432 ('[A] State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.')

³⁶¹ ICJ Bosnia Judgment, para 442. *Nb.* Because the ICJ was not confronted with such a situation in the Bosnia Case, it did not expand further on this requirement. In that case, the crimes were not carried out in the respondent's territory. While other questions arose with respect to the failure to punish, these are irrelevant to the instant case. *See ibid*, paras 439 *et seq.*

sexual violence; persecution on political, racial, national, ethnic, cultural, or religious grounds; or other inhumane acts.³⁶² An ‘attack’ on a civilian population—a separate and distinct concept from that of an armed conflict—is not limited to the use of force, but encompasses any mistreatment of the civilian population as set out in the preceding list.³⁶³

90. ‘Widespread’ generally connotes a quantitative and geographic element, relating to the number of targeted persons, the multiplicity of victims, the frequency of acts, and/or the attacks occurring in different locations.³⁶⁴ ‘Systematic’ refers to the organized nature of the acts of violence and the improbability of their random occurrence.³⁶⁵ Patterns of crimes, or the ‘non-accidental repetition of similar criminal conduct on a regular basis’, are seen as a common expression of a systematic occurrence.³⁶⁶ An attack will be

³⁶² Rome Statute, Article 7 (the most expansive definition); ICTR Statute, Article 3 (the ICTR Statute requires all underlying acts to have been committed ‘on national, political, ethnic, racial, or religious grounds’); ICTY Statute, Article 5 (the ICTY Statute requires a nexus to an armed conflict); see also *Mladić* Trial Judgment (Volume III of V), para 3023 (‘The general elements for the applicability of Article 5 of the Statute are: (i) there was an attack; (ii) the attack was widespread or systematic; (iii) the attack was directed against a civilian population; (iv) the acts of the perpetrator were part of the attack; and (v) the perpetrator knew that there was, at the time of his or her acts, a widespread or systematic attack directed against a civilian population and that his or her acts were part of that attack.’) (citing *Kunarac et al* Appeal Judgment, para 85).

³⁶³ *Mladić* Trial Judgment (Volume III of V), para 3024 (citing *Tadić* Appeal Judgment, para 251; *Kunarac et al* Appeal Judgment, para 86; *Prosecutor v Kordić and Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004, para 666).

³⁶⁴ *Mladić* Trial Judgment (Volume III of V), para 3025 (citing *Kunarac et al* Appeal Judgment, para 94; *Blaskić* Appeal Judgment, para 101; *Kordić and Čerkez* Appeal Judgment, paras 94, 666; *Nahimana* Appeal Judgment, para 920); *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, para 394; *Kordić and Čerkez* Appeal Judgment, para 94; *Prosecutor v Blagojević and Jokić*, IT-02-60-T, Judgment, 17 January 2005, paras 545–546; A/51/10, Report of the International Law Commission on the work of its forty-eighth session, 6 May–26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No 10, at p 47 (using the phrase ‘on a large scale’ instead of widespread); *Akayesu* Trial Judgment, para 580; *Kayishema* Trial Judgment, para 123; *Prosecutor v Mrksić*, IT-95-13/1-T, Judgment, 27 September, 2007, para 437; *Prosecutor v Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, 16 December 2011, para 265 (where the crimes were insufficient because, *inter alia*, they had been committed and scattered over a 6-month period); *Prosecutor v Ruto*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para 177.

³⁶⁵ *Mladić* Trial Judgment (Volume III of V), 22 November 2017, para 3025 (citing *Kunarac et al* Appeal Judgment, para 94; *Blaskić* Appeal Judgment, para 101; *Kordić and Čerkez* Appeal Judgment, paras 94, 666; *Nahimana* Appeal Judgment, para 920); *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 14 October 2008, para 394; *Prosecutor v Ruto*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para 179.

³⁶⁶ *Prosecutor v Kunarac et al*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, para 94.

systematic, for example, when ‘the perpetrators employed similar means and methods to attack the different locations’.³⁶⁷ The existence of a plan or policy can be indicative of the systematic character of the attack but it is not a distinct legal element.³⁶⁸

91. ‘Directed against’ indicates that it is the civilian population that is the primary object of the attack. The attack need not be directed against the civilian population of an entire area. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to demonstrate that the attack was in fact directed against a ‘population’, rather than a limited and randomly selected number of individuals.³⁶⁹ The perpetrator must know that there is a widespread or systematic attack against a civilian population and that his or her acts are part of that attack. The perpetrator does not need to have detailed knowledge of the attack or share the purpose of it.³⁷⁰

2. *Underlying Crimes*

a. Murder

92. Murder is defined under international law as the unlawful and intentional killing of a human being.³⁷¹ The death of the victim must result from an act or omission of the perpetrator, who possessed the intent to kill, or the intent to

³⁶⁷ *Prosecutor v Ntaganda*, ICC-01/04-02/06-36-Red, Decision on the Prosecutor's Application under Article 58, 14 July 2012, para 31.

³⁶⁸ *Mladić* Trial Judgment (Volume III of V), 22 November 2017, para 3025 (citing *Kunarac et al* Appeal Judgment, paras 98, 101; *Blaskić* Appeal Judgment, para 120; *Nahimana* Appeal Judgment, para 922); *Akayesu* Trial Judgment, para 580; *Kayishema* Trial Judgment, para 123.

³⁶⁹ *Mladić* Trial Judgment (Volume III of V), para 3026 (citing *Kunarac et al* Appeal Judgment, paras 90, 91; *Blaskić* Appeal Judgment, para 105; *Kordić and Čerkez* Appeal Judgment, para 95; *Stakić* Appeal Judgment, para 247.)

³⁷⁰ *Mladić* Trial Judgment (Volume III of V), para 3029 (citing *Tadić* Appeal Judgment, paras 248, 252; *Kunarac* Appeal Judgment, paras 99, 102–103; *Blaskić* Appeal Judgment, paras 124, 126; *Kordić and Čerkez* Appeal Judgment, paras 99–100).

³⁷¹ ICC Elements of Crime, Article 7(1)(a); *Akayesu* Trial Judgment, para 589.

cause serious bodily harm which the perpetrator should reasonably have known might lead to death.³⁷²

b. Extermination

93. Extermination is murder on a large scale,³⁷³ requiring an element of ‘mass destruction’.³⁷⁴ Such destruction does not suggest a minimum number of killings;³⁷⁵ the determination should be made on a case-by-case basis.³⁷⁶ While extermination must be collective and not simply directed towards individuals, unlike genocide, it does not require an intent to destroy a group or part of a group.³⁷⁷ Evidence may be established through an accumulation of separate and unrelated incidents or on an aggregated basis.³⁷⁸ Victims need not be described with precision.³⁷⁹ No proof of a plan or policy is required,³⁸⁰ but the existence of such may be important evidence that the attack was widespread or systematic.³⁸¹ Knowledge of ‘a vast scheme of collective murder’ is not required.³⁸²

c. Torture

94. Torture is the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of a perpetrator.³⁸³ A severe degree of pain and suffering must be reached in order for a criminal

³⁷² *Prosecutor v Kvočka et al*, IT-98-30/1-A, Judgment, 28 February 2005, para 259.

³⁷³ ICC Elements of Crimes, Article 7(1)(b) (‘1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population. 2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population. [...]’); *Stakić* Appeal Judgment, para 259; *Kayishema* Trial Judgment, para 147.

³⁷⁴ *Ntakirutimana* Appeal Judgment, para 516.

³⁷⁵ *Stakić* Appeal Judgment, paras 260–261; *Ntakirutimana* Appeal Judgment, para 516; *Kamuhanda* Trial Judgment, para 692; *Kajelijeli* Trial Judgment, para 891; *Bagilishema* Trial Judgment, para 87; *Kayishema* Trial Judgment, para 142.

³⁷⁶ *Kayishema* Trial Judgment, para 145.

³⁷⁷ *Brđanin* Trial Judgment, para 390.

³⁷⁸ *Brđanin* Trial Judgment, para 391; *Krstić* Trial Judgment, para 501.

³⁷⁹ *Ntakirutimana* Appeal Judgment, paras 518–519.

³⁸⁰ *Gacumbitsi* Appeal Judgment, para 84.

³⁸¹ *Brđanin* Trial Judgment, para 394; *Krstić* Appeal Judgment, para 225.

³⁸² *Stakić* Appeal Judgment, para 259.

³⁸³ ICC Statute, Article 7(2)(e).

act to amount to an act of torture.³⁸⁴ The perpetrator must have intended the conduct and that the victim endured severe pain or suffering.³⁸⁵

d. Rape, Sexual Slavery, and Other Acts of Sexual Violence

95. Rape is an act by which ‘the perpetrator invaded the body of a person by conduct resulting in penetration of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body’.³⁸⁶ This invasion must be ‘committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent’.³⁸⁷
96. Sexual slavery is a particularly serious form of enslavement. As well as exercising any or all of the powers attaching to the right of ownership over the victim, the perpetrator must also cause the victim to engage in one or more acts of a sexual nature.³⁸⁸
97. Crimes against humanity also encompass other acts of sexual violence of comparable gravity. This covers cases where the perpetrator committed an act of a sexual nature or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive

³⁸⁴ A/RES/39/46, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1; *Prosecutor v Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, para 193.

³⁸⁵ *Prosecutor v Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, para 194.

³⁸⁶ ICC Elements of Crimes, Article 7(1)(g)-1, para 1.

³⁸⁷ ICC Elements of Crimes, Article 7(1)(g)-1, para 2.

³⁸⁸ ICC Elements of Crimes, Article 7(1)(g)-2, para 2.

environment or such person's or persons' incapacity to give genuine consent.³⁸⁹ The conduct must be of comparable gravity to rape and sexual slavery.

e. Persecution

98. Persecution is a gross or blatant denial, *on discriminatory grounds*, of a fundamental right of the same level of gravity as other crimes against humanity.³⁹⁰ It is uniquely characterized by the requirement of discriminatory intent: the perpetrator must have acted with the intent to harm the victim because he or she belonged to a particular group.³⁹¹ The ICTY and ICTR prohibit persecution on political, racial, or religious grounds,³⁹² whereas the ICC includes national, ethnic, cultural, gender, or other grounds 'universally recognized as impermissible under international law'.³⁹³ Evidence of discriminatory intent may be inferred contextually, with relevant factors including 'the general attitude of the alleged perpetrator as demonstrated by his behavior', for example, the use of derogatory language in relation to a particular group (even where such usage is commonplace)³⁹⁴ or the fact that the acts were only inflicted on members of one group.³⁹⁵

³⁸⁹ ICC Elements of Crimes, Article 7(1)(g)-6, para 1.

³⁹⁰ ICC Statute, Article 7(2)(g); *Prosecutor v Kupreskic et al*, IT-95-16-T, Judgment, 14 January 2000, para 621.

³⁹¹ *Karadžić* Trial Judgment, para 500.

³⁹² ICTY Statute, Article 5(h); ICTR Statute, Article 3(h).

³⁹³ ICC Statute, Article 7(2)(g). *Nb.* Under the ICC Statute, persecution can only be prosecuted in connection with any other crime within the jurisdiction of the Court. ICC Statute, Article 7(1)(h). For this reason, persecution is an 'umbrella' crime requiring that particular acts or omissions that already constitute crimes in themselves amount to persecution (for example, persecution through rape or persecution through torture). *Prosecutor v Stanisic and Zupljanin*, IT-08-91-T, Judgment, 27 March 2013, para 67; *Prosecutor v Kupreskic et al.*, IT-95-16-A, Judgment, para 98. In considering the gravity threshold, acts should not be considered in isolation but examined in context and with consideration of cumulative effect. *Prosecutor v Kupreskic et al*, IT-95-16-A Judgment, 23 October 2001, para 615; *Popović* Appeal Judgment, para 766.

³⁹⁴ *Popović* Appeal Judgment, para 713.

³⁹⁵ *Prosecutor v Kvočka et al*, IT-98-30/1-A, Judgment, 28 February 2005, para 366.

f. Other Inhumane Acts

99. Other inhumane acts include those crimes against humanity that are not otherwise specified in ICL statutes but are of comparable seriousness.³⁹⁶ The act or omission must cause serious mental or physical suffering or injury or amount to a serious attack on human dignity and must be done or omitted deliberately.³⁹⁷ Examples of other inhumane acts³⁹⁸ have largely been codified by the Rome Statute.

3. Modes of Liability

100. The modes of liability applicable to crimes against humanity are the same as those discussed above with respect to genocide.³⁹⁹

IV. ARGUMENT

101. As discussed below, there is '*a reasonable basis to believe*' that the mass crimes committed *in Delhi itself* amount to the international crimes of genocide and crimes against humanity. The number of Sikhs killed or raped in such a short period of time, the careful planning and brutal perpetration, and the emblematic character of the victim group in Delhi are key factors in reaching this conclusion. These crimes may attract both individual and state responsibility. The mass crimes committed in other areas are no less horrific but may not satisfy all the legal elements of genocide. However, there is '*a reasonable basis to believe*' that the crimes committed throughout India (both inside and outside Delhi) amount to

³⁹⁶ ICC Statute, Article 7(1)(k) ('Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.');

ICC Elements of Crimes, Article 7(1)(k) ('1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act. 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. 3. The perpetrator was aware of the factual circumstances that established the character of the act.')

³⁹⁷ *Kordić and Čerkez* Appeal Judgment, para 117; *Galić* Trial Judgment, para 152; *Naletilić* Trial Judgment, para 247; *Kayishema* Trial Judgment, paras 150-151, 154; *Akayesu* Trial Judgment, para 585.

³⁹⁸ See, e.g., *Akayesu* Trial Judgment, para 697 (forced undressing of women in coercive and humiliating circumstances); *Simić* Trial Judgment, para 78 (beatings); *Stakić* Appeal Judgment, para 317 (forcible transfer).

³⁹⁹ See paras 70-71, *supra*.

crimes against humanity. This analysis is arranged as follows: (a) the genocidal acts committed in Delhi; (b) the individual criminal responsibility for genocide in Delhi; (c) the individual criminal responsibility for crimes against humanity throughout India; and (d) the Indian state responsibility for genocide.

A. Genocidal Acts Were Committed Against the Sikh Population of Delhi in November 1984

102. The analysis in this section is relevant to both individual criminal liability for genocide under ICL case law, as well as state responsibility for genocide pursuant to the jurisprudence of the ICJ.
103. It is important to emphasize that (a) genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area,⁴⁰⁰ and (b) the *actual destruction* of the whole or ‘substantial part’ of the protected group (in this case, Sikhs in Delhi) is unnecessary to prove either the specific intent or the *actus reus* for genocide. International case law makes clear that the perpetrators’ success in destroying the protected group—in whole or in part—is always ‘limited by the opportunity presented’ to them.⁴⁰¹ And ‘the commission of *even a single instance* of one of the prohibited acts is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group’.⁴⁰² In fact, once the specific intent is established, a perpetrator could incur liability for ‘attempt to commit genocide’ in circumstances where he is prevented from carrying out any prohibited act.
104. Accordingly, for the purposes of this analysis, it is unnecessary to reach a conclusion as to whether the total number of actual victims amounts to a substantial part of the total population of Sikhs in Delhi. It is the intended number of victims that matters.

⁴⁰⁰ See para 79, *supra*

⁴⁰¹ See para 62, *supra*.

⁴⁰² *Prosecutor v Mpambara*, ICTR-01-65-T, Judgment, 11 September 2006, para 8 (emphasis added).

1. The Evidence Demonstrates a Specific Intent to Destroy a Substantial Part of the Sikh Population of Delhi As Such

a. The Sikhs Are a Protected Group

105. The Sikh population, as described, is undoubtedly a religious group and therefore protected under the Genocide Convention.

b. There Was a Specific Intent to Destroy Members of the Group

106. As in nearly all cases of genocide, there is no single ‘smoking gun’ to prove genocidal intent. However, the totality of the available circumstantial evidence is compelling. A thorough assessment of the following factors provides ‘*a reasonable basis to believe*’ that certain perpetrators possessed the requisite specific intent at the time of their commission of various prohibited acts.

i. Evidence Related to Potential Perpetrators

107. The various forms of communication, including the discrete words and deeds, attributable to Sajjan Kumar, Jagdish Tytler, and Kamal Nath—in particular, that these three men ordered, incited, and otherwise participated in the destruction of the Sikh group in Delhi—provide a starting point for the circumstantial evidence of genocidal intent.⁴⁰³

ii. Evidence Related to Others

108. Likewise, the words and deeds of other Congress Party leaders and police officials acting along with or at the behest of the three potential perpetrators—including Arun Nehru, HKL Bhagat, Dharam Dass Shastri, Narasimha Rao, Lalit Maken, Gautan Kaul, and Subbash Tandon—bolster the claim of specific intent.⁴⁰⁴

⁴⁰³ See paras 42 *et seq*, *supra*.

⁴⁰⁴ See paras 34 *et seq* (re police) and 41 *et seq* (re Congress Party), *supra*.

iii. Contextual Evidence of Plans, Policies, and Preparation

109. While the existence of a specific genocidal plan or policy is not a legal requirement, proof of such a plan or policy is highly relevant to establishing intent. In this case, the existence of such a plan or policy may be inferred from an number of factors set out above:

- a. high-level meetings;
- b. political party involvement in attacks;
- c. police involvement in attacks;
- d. effective disabling of the army;
- e. existence of execution lists;
- f. screening and selection of victims;
- g. dissemination of extremist rumors;
- h. mischaracterization of the one-sided massacres as a justified response to 'riots';
- i. brutality of the attacks;
- j. coordination of transportation, including the use of buses and trains to facilitate attacks;
- k. distribution of weapons including the provision of expensive materials not available to the general public;
- l. rewards of alcohol and cash to assailants;
- m. skewed media coverage by state-controlled broadcasters;
- n. common derogatory slogans;
- o. systematic and thorough cover-up; and
- p. post-facto political pressure to stymie the work of various commissions and committees.⁴⁰⁵

Each of these elements—and, *a fortiori*, all of them in concert—required a level of coordination suggestive of involvement and planning at the most senior levels.

⁴⁰⁵ See Section II, *supra*.

Notably, the authorities' disablement of the Indian military (particularly the Sikh regiments) was a crucial part of the plan and allowed the massacres to continue within Delhi.⁴⁰⁶ For example, AS Brar, then Brigadier General Staff and also a Sikh, told the Nanavati Commission that he had 3000 troops and did not receive any instructions despite his 'repeated inquiries with the Headquarters in Delhi because of "distress" calls continuously made to his office'.⁴⁰⁷

iv. Contextual Evidence of Modus Operandi

110. In this case, violent acts of a consistent character and pattern were systematically directed against the victims: cruel, humiliating, and degrading treatment as a prelude to killing; destruction of Sikh homes, places of worship, and desecration of religious objects; and brutal sexual violence aimed at further dehumanization.⁴⁰⁸ Attacks on Sikh religious characteristics were closely related to the physically destructive acts committed against their collective personality. One particularly brutal attack, the emblematic massacre at the Trilokpuri Colony, is further evidence of the existence of genocidal intent.⁴⁰⁹

v. Scale and Intensity of the Crimes

111. While thankfully the perpetrators did not fully achieve their criminal purpose, the scale and intensity of the underlying crimes is evidence that they intended to destroy a substantial part of the overall Sikh population in Delhi. According to the official figures, 2733 Sikhs were killed in the capital in just a few days. Even applying the conservative 'official' figure, the intensity of the killings – almost 1000 civilians per day – is both shocking and telling. *In addition* to those killed, an unknown number (likely in the thousands) became victims of other genocidal acts, such as brutal rapes and other forms of sexual violence aimed at destroying the group.

⁴⁰⁶ See paras 30–32, *supra*.

⁴⁰⁷ See n 121, *supra*.

⁴⁰⁸ See paras 26 *et seq*, *supra*.

⁴⁰⁹ See para 28, *supra*.

112. Furthermore, had the Indian army not been deployed when it was, the evidence suggests that certain perpetrators would have continued their genocidal acts with further abandon, perhaps at the rate of 1000 victims per day. While there is no numeric threshold required by the jurisprudence, the Srebrenica massacre of 7000 to 8000 men and boys provides a useful and persuasive analogy.⁴¹⁰ Even if the *actual number* of victims does not amount to a ‘substantial part’ of the Sikh group in Delhi, that is not for lack of intent and, therefore, does not preclude liability for genocide.

vi. Emblematic Nature of the Sub-Group

113. The Sikhs of Delhi were emblematic of the overall group of Indian Sikhs. Being the capital city of India, Delhi represents the heart of India’s political and civic life. If the population of a protected group is destroyed in a state’s capital, it carries a symbolism that resonates across the entire country for decades to come, threatening the entire group’s long-term existence in that state. Therefore, in addition to the number of Sikh victims in Delhi, and the intensity of the violence, that group’s prominence within the overall population of Indian Sikhs is highly relevant to a finding that the particular ‘part’ that was targeted for destruction, qualifies as ‘substantial’.

2. The Evidence Demonstrates that Underlying Acts Were Committed

114. It is incontrovertible that the Sikhs of Delhi were in fact killed, sexually violated, and otherwise physically and mentally injured within the meaning of the Convention and ICL Statutes.⁴¹¹ In addition to the murders, Sikh women and girls suffered rape and other forms of sexual violence on a massive scale. The evidence suggests that the victims of sexual violence were subjected to public humiliation, mutilated, and violated multiple times by multiple assailants—often

⁴¹⁰ See ICTY case law, *supra*.

⁴¹¹ See paras 26 *et seq*, *supra*.

in public. Such acts, which resulted in physical and psychological suffering, were an 'integral part of the process of destruction'.⁴¹² For the reasons stated above, it is thought that many of the crimes of sexual violence have not been accurately reported.⁴¹³ There is a '*reasonable basis to believe*' that the *actus reus* elements of genocide are satisfied.

3. Conclusion

115. The attacks were widespread, systematic, and extensive—to a degree that could not have been spontaneous.⁴¹⁴ This was not a case of targeting individual Sikhs. *The Sikh religious group itself was the target.* Based on all the available evidence, not only was there was an intent to destroy a significant part the Sikh population, as such, many were so destroyed or otherwise harmed in the process. Accordingly, there is '*a reasonable basis to believe*' that genocidal acts were committed against the Sikh population of Delhi in November 1984.

B. A Number of Indian Individuals Are Criminally Liable for Genocide

116. As discussed above, most of the potentially culpable perpetrators have died. The remaining targets are those previously identified by the various commissions and committees but who have—for obviously political reasons—evaded justice thus far. For the purposes of this document, three such individuals are considered. It is submitted that they each engaged in the behavior described and characterized below with the intent to destroy a significant part of the Sikh population of Delhi, as such, in November 1984.

117. Regarding **Sajjan Kumar**, then-Congress Party MP for Mangolpuri in North East Delhi, the evidence is comprehensive, consistent, and compelling:

⁴¹² See para 68, *supra*.

⁴¹³ See para 29, *supra*.

⁴¹⁴ See para 28, *supra*.

- a. On the afternoon and evening of 31 October, Kumar convened with senior Congress Party leaders at meetings where a genocidal plan was likely hatched.
- b. On the night of 31 October and early morning of 1 November, Kumar and Congress Trade Union Leader and Metropolitan Councilor Lalit Maken paid 100 Rupees and distributed a bottle of liquor to each assailant. Jagjit Singh of Kiran Garden witnessed a meeting near his house around 8 am where Sajjan Kumar distributed iron rods from a parked truck to about 120 people. The MP instructed the mob to attack Sikhs, kill them, and loot and burn their properties.
- c. On 31 October, Kumar's men canvassed homes in West Sagarpur, South West Delhi, to collect fifteen rupees from each household towards the construction of a new road. At the same time they also checked the ration cards of Sikh families. Come the morning, the local gurdwara and Sikh-owned shops were burnt down before Sikh residents themselves also came under attack.
- d. On the morning of 1 November 1, Kumar addressed a meeting at Mangolpuri, where the mob responded to his calls with: "Sardaroo Ko Mar Do," [Kill the Sardars] "Indira Gandhi Hamari Ma Hai— Aur Inihoo Ne Ushey Mara Hai" [Indira Gandhi is our Mother, and These People Have Killed Her].
- e. On 1 November at Nangloi, Kumar was seen inciting the crowd to attack Sikh homes. A witness saw him, the Congress MP of his area, standing amongst the mob and directing the mob to attack with more and more force and kill. He then witnessed the killing of his father and two other members of his wife's family.
- f. Kumar addressed a meeting at a park in Sultanpuri: 'Whoever kills the sons of the snakes, I will reward them. Whoever kills Roshan Singh [son of Moti Singh] and Bagh Singh will get 5000 rupees each and 1000 rupees each for killing any other Sikhs. You can collect these prizes on November 3 from my personal assistant.'
- g. On 2 November, also in Sultanpuri (same meeting?), Kumar instructed the crowd to kill Sikhs, and to loot and burn their properties. 'Sikhs had killed Mrs Gandhi; therefore, you kill them, loot their goods and burn them alive'.
- h. On 3 November, Kumar personally directed mobs and was heavily involved in the violence; was among murderers as they dragged Sikhs from their homes: 'Sajjan was laughing and ordering the mob to search for Sikhs and kill them.' During the attack, Kumar kicked a woman aside as she begged him to spare her husband and son; the mob killed them. He also orchestrated the deaths of her two sons, who were burnt in front of her under his orders.

- i. Sajjan Kumar instructed a man to 'start killing'; the man then handed a Sikh to a mob that beat him and burned him to death.
- j. On 2 November, Kumar was seen in a police jeep in Palam, South West Delhi announcing: 'No Sikh should live. If anyone gives shelter to Sikh families, their houses will be burnt.' That evening he was seen in nearby Raj Nagar inciting the attackers to 'kill more Sikhs'. At least 340 Sikhs were killed in Raj Nagar.

Accordingly, there is '*a reasonable basis to believe*' that **Sajjan Kumar**: participated in the formation of a genocidal plan; instructed men under his authority to collect information that was used to identify and target Sikhs; distributed money, liquor, and weapons to assailants; instructed mobs to kill, loot, and burn (at times with promises of rewards); and directly participated in killing through both his physical acts and his approving presence at crime scenes.

118. Regarding, **Jagdish Tytler**, then-Congress Party MP for Delhi Sadar constituency:

- a. Tytler was specifically named in a WikiLeaks American Embassy cable as having played a particularly grotesque role, competing with local Congress Party leaders to see which wards could shed more Sikh blood. Addressing his men: 'Because of you, I am ashamed to look at Sajjan Kumar's constituency in the north or HKL Bhagat's constituency in the east. Colony after colony of Sikhs has been destroyed but in my area so few Sikhs have been killed. I had promised that maximum Sikhs would be killed in my colony.'
- b. Tytler was seen on the morning of 1 November at Pul Bangash Gurdwara in North Delhi, in control of a crowd armed with staffs and iron rods. On his command, they set fire to the building and killed three Sikhs inside: 'He incited the mob to burn the gurdwara and kill the Sikhs. Some people in the mob were carrying flags of Congress. They were raising slogans like 'We will take revenge', 'Sikhs are traitors', 'Kill! Burn!' Five to six policemen were also with the mob.'
- c. A few days later, Tytler reprimanded police commissioner Subbash Tandon in front of the press: 'What is this Mr Tandon? You still have not done what I asked you to do?'

Accordingly, there is *'a reasonable basis to believe'* that **Jagdish Tytler**: chastised men under his authority for failing to kill a sufficient number of Sikhs in his constituency; personally led an armed mob in acts of killing; publically reprimanded a police official for failing to commit sufficient acts of violence.

119. **Kamal Nath**, then-Congress Party MP for Chhindwara (Madhya Pradesh State) and a man with close ties to the Gandhi family, made a public show of his sway over the police. On 1 November 1984, Nath led an armed mob that laid siege to Gurdwara Rakab Ganj, a major shrine in the heart of New Delhi where Sikhs were burned to death. The police fired several rounds at those inside the gurdwara after receiving instructions from Nath, while the additional commissioner of police, Gautam Kaul, approvingly stood by. According to a witness, when Nath signaled, the crowd listened, leaving the witness to conclude that the mob accepted him as their leader. Accordingly, there is *'a reasonable basis to believe'* that **Kamal Nath** personally led an armed mob in acts of killing.
120. As all three figures were prominent political leaders (Congress Party MPs) with obvious authority and influence within their constituencies, their individual criminal liability – encompassing forms of commission and modes of liability – is most appropriately analogized to the following individuals convicted of genocide by the ICTR and ICTY:
- a. Jean-Paul Akayesu, a local political leader, was convicted of **genocide** (ordering, instigating, aiding and abetting) for murder and acts of serious bodily and mental harm and **direct and public incitement to commit genocide** for failing to prevent the killing and raping of Tutsis in his area; witnessing killings by men under his authority; ordering killings ('we now have to hunt them and kill all of them') and rapes; and giving inflammatory public speeches.⁴¹⁵
 - b. Jean-Bosco Barayagwiza, a media executive, was convicted of **genocide** (instigating) for publications and broadcasts explicitly calling for the

⁴¹⁵ *Akayesu* Trial Judgment, paras 93, 255, 258, 268, 313, 452, 674 (affirmed on appeal).

extermination of Tutsis which substantially contributed to acts of genocide and the use of slogans calling for such extermination.⁴¹⁶

- c. Ferdinand Nahimana, a media founder and ideologist, was convicted of **direct and public incitement to commit genocide** (command responsibility) for his failure to prevent or punish inflammatory broadcasts.⁴¹⁷
- d. Simon Bikindi, a composer, singer, and important cultural figure, was convicted of **direct and public incitement to commit genocide** for broadcasting that the Hutus should exterminate the Tutsis, whom he referred to as snakes.⁴¹⁸
- e. Sylvestre Gacumbitsi, a local political leader, was convicted of **genocide** (planning, instigating, ordering, committing, aiding and abetting) for murder and **genocide** (instigating) for acts of serious bodily harm for instructing officials at a meeting to incite Hutus to kill Tutsis; distributing weapons along with policemen; meeting with military and militia leaders; visiting areas to determine whether officials had carried out his orders not to allow Tutsis to flee; addressing a crowd with similar instructions; addressing another crowd urging Hutus to arm themselves and participate in the fight against the enemy (such attacks were carried out).⁴¹⁹
- f. Juvenal Kajelijeli, a militia leader and local politician, was convicted of **genocide** (ordering, instigating, aiding and abetting) and **direct and public incitement to commit genocide** for directing mobs to massacre Tutsis and playing an instrumental role in the transportation and arming of mobs.⁴²⁰
- g. Jean Kambanda, a former prime minister with control over senior civil servants and military officers, was convicted of **genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and complicity in genocide** for encouraging the population to murder Tutsis and moderate Hutus, including at a large rally, other public meetings, and in the media; ordering roadblocks to identify Tutsis and moderate Hutus; distributing arms and ammunition to groups he knew would massacre them; and failing to prevent subordinates from committing crimes.⁴²¹
- h. Emmanuel Ndindabahizi, a political leader, was convicted of **genocide** (instigating and aiding and abetting) for transporting attackers; distributing weapons and money; and urging attackers to kill Tutsis, resulting in deaths.⁴²²

⁴¹⁶ *Nahimana* Appeal Judgment, paras 502, 503, 513, 539.

⁴¹⁷ *Nahimana* Appeal Judgment, paras 822, 834, 857.

⁴¹⁸ *Prosecutor v Bikindi*, ICTR-01-72-A, Judgment, 18 March 2010, paras 3, 50 *et seq.*

⁴¹⁹ *Gacumbitsi* Trial Judgment, paras 271 *et seq.* (affirmed on appeal).

⁴²⁰ *Prosecutor v Kajelijeli*, ICTR-98-44-A, Judgment, 23 May 2005, para 3.

⁴²¹ *Prosecutor v Kambanda*, ICTR-97-23-S, Judgment and Sentence, 4 September 1998, para 44.

⁴²² *Ndindabahizi* Trial Judgment, para 463, 464 ('By his words, the Accused is guilty of instigating genocide. By his acts of material assistance, including the distribution of weapons and the

- i. Georges Ruggiu, a journalist and broadcaster for a Hutu-controlled radio station, was convicted of **direct and public incitement to commit genocide** for publicly instructing the population to ‘go to work’ (meaning kill Tutsis and moderate Hutus) and other discriminatory and threatening statements, knowing that such broadcasts supported the political plan to kill Tutsis.⁴²³
- j. Georges Rutaganda, a militia leader, was convicted of **genocide** for distributing weapons to killers; directing men under his control to kill; and participating in attacks which resulted in deaths.⁴²⁴
- k. Laurent Semanza, a local political leader, was convicted of **genocide** and **complicity in genocide** for providing substantial assistance to the principal attackers by bringing them and their weapons to the crime scenes.⁴²⁵
- l. Radovan Karadžić, a Bosnian Serb political leader and president of Republika Srpska, was convicted of **genocide** (planning, instigating, ordering, aiding and abetting) for the killing of, and acts of serious bodily and mental harm against, Bosnian Muslim men and boys in Srebrenica and **direct and public incitement to commit genocide** for statements (‘All those who are down there, they should be killed.’); separating the women, spreading fear among the civilian population, and failing to punish the perpetrators.⁴²⁶
- m. Biljana Plavšić, a Bosnian Serb political leader, was convicted of **genocide** (aiding and abetting) for killing and acts of serious bodily and mental harm and **direct and public incitement to commit genocide** for public praise of killings; failing to prevent killings; and witnessing killings under her authority without acting.⁴²⁷
- n. Momcilo Krajisnik, a Bosnian Serb political leader, was convicted of **genocide** (aiding and abetting) for killing and acts of serious bodily and mental harm and **direct and public incitement to commit genocide** for public praise of killings; failing to prevent killings; and witnessing killings under his authority without acting.⁴²⁸

transportation of attackers, in conjunction with his words of encouragement, the Accused is guilty of aiding and abetting genocide.’), 472.

⁴²³ *Prosecutor v Ruggiu*, ICTR-97-32-T, Judgment and Sentence, 1 June 2000, para 13 (‘The Tribunal held, in [...] [Akayesu], that the crime of genocide is so serious that the direct and public incitement to commit genocide must be punished as such, even if the incitement failed to produce the result expected by the perpetrator.’)

⁴²⁴ *Rutaganda Appeal Judgment*, para 5.

⁴²⁵ *Prosecutor v Semanza*, ICTR-97-20-A, Judgment, 20 May 2005, paras 225, 432.

⁴²⁶ *Prosecutor v Radovan Karadžić*, IT-95-5/18-T, Judgment, 24 March 2016, paras 2, 4, 5, 1565–1567, 5600, 5831, 5848, 5849.

⁴²⁷ *Prosecutor v Biljana Plavšić*, IT-00-39&40/1-S, Sentencing Judgment, 27 February 2003, paras 11, 13, 18, 55, 127.

⁴²⁸ *Prosecutor v Krajisnik*, IT-00-39-T, Judgment, 27 September 2006, 1119–1123; *Prosecutor v Krajisnik*, IT-00-39-A, Judgment, 17 March 2009 (sentence reduced on appeal).

Accordingly, by way of analogy, there is ‘a reasonable basis to believe’ that Sajjan Kumar, Jagdish Tytler, and Kamal Nath may be guilty of genocide, direct and public incitement to commit genocide, complicity in genocide, and conspiracy to commit genocide. Articulation of the precise forms of commission and modes of liability is properly assessed upon a thorough ‘preliminary examination’ of all available evidence by a competent prosecutorial authority (and is beyond the scope of this document). Suffice it to say, there is more than enough to get started.

C. Additionally, or Alternatively, a Number of Indian Individuals Are Liable for Crimes Against Humanity

121. Based on the same set of facts, there was undoubtedly a widespread and systematic attack against multiple segments of India’s Sikh population from 1 to 4 November 1984. And the men identified above clearly acted with knowledge of such an attack. As noted, the pogroms were large-scale in nature, occurring frequently in distinct locations across Delhi and the rest of the country and claiming the lives of at least 8000 civilian victims as well as an unknown number (likely in the thousands) of victims who were tortured, sexually abused, and/or otherwise gravely injured. And despite discredited Congress Party protestations of spontaneous violence, the evidence points to a highly organized attempt at wholesale destruction and the utter improbability of its random occurrence—based, in large part, on the recurring patterns of similar conduct, means, and methods described above.
122. With regard to the underlying crimes against humanity of murder, extermination, torture, rape and other forms of sexual violence, and other inhumane acts, there is no question that such criminal acts were committed against thousands of members of the Sikh civilian population of Delhi and other parts of India. As to persecution—which, like genocide, includes a particular discriminatory *mens rea*—there is every reason to believe that the alleged perpetrators in this case

intended to harm their victims based on their adherence to the Sikh faith. As noted above, the same analysis applicable to the specific intent requirement for genocide applies here with equal, if not greater, force.

123. Accordingly, based on the same acts and conduct laid out above in Section IV.B, there is '*a reasonable basis to believe*' that Sajjan Kumar, Jagdish Tytler, and Kamal Nath may be guilty of crimes against humanity.

D. India Has Incurred State Responsibility for Genocide

124. Based on the preceding analysis in Section IV.A, the ICJ has both the jurisdiction and the competence to address India's state responsibility for genocide—even in the absence of any previously-adjudicated international criminal liability. Pursuant to its treaty and *jus cogens* obligations, India is obliged to prevent genocide, refrain from committing genocidal acts, and punish any perpetrators of genocide within its territory. Regarding the ICJ's standards of responsibility, India is arguably liable under all five recognized tests, namely, (a) acts of state (b) attribution of conduct to the state (c) state complicity (d) state failure to prevent (e) state failure to punish.⁴²⁹

125. To the extent that genocidal acts were **committed by members of Indian state** legislative and executive organs—in this case, the Congress Party and/or the Indian Police Service (including the Railway Protection Force)—such conduct would give rise to the responsibility of the Indian state as such.⁴³⁰ In both a *de jure* and *de facto* sense, the party and the police may be said to have been in a relationship of 'complete dependence' with the state at the time of the events in question.⁴³¹

126. To the extent that genocidal acts were committed by mobs of private Indian citizens (as described above) who were not themselves part of any state

⁴²⁹ See paras 82-87, *supra*.

⁴³⁰ See para 83, *supra*.

⁴³¹ See para 83, *supra*.

organ(s), their conduct may nevertheless be **attributed to the Indian state** where such mobs acted ‘on the instructions of, or under the direction or control of, [the] state in carrying out the conduct’ – in other words, under the ‘effective control’ of state organs, such as the Congress Party and/or the Indian Police Service.⁴³² The facts of this case support such a claim.

127. To the extent that genocidal acts were committed by mobs of private Indian citizens (as described above) who were provided with the ‘means to enable or facilitate the commission of the crime’ by state organs—such as the Congress Party and/or the Indian Police Service—the **Indian state may be said to have been complicit** for knowingly ‘aiding or assisting’ in the commission of an internationally wrongful act.⁴³³ Again, the facts of this case support such a claim.

128. Finally, based on the facts set out herein—notably, the participation of the Indian Police Service in crimes and cover-ups; the failure of the Congress Party to employ the army at the crucial early stages of the violence; and the mockery of justice demonstrated by the various government commissions and committees over the course of more than 20 years—there can be no question that the Indian state **failed in its obligation to prevent the crime of genocide and to punish** those responsible for it.⁴³⁴

⁴³² See para 84, *supra*.

⁴³³ See para 85, *supra*.

⁴³⁴ See paras 86–87, *supra*.

V. CONCLUSION

129. For all of the foregoing reasons, there is *'a reasonable basis to believe'* that:

- a. genocidal acts were committed against the Sikh population of Delhi in November 1984;
- b. crimes against humanity were committed against the Sikh population of Delhi and other parts of India during the same period;
- c. a number of Indian individuals are criminally liable for such acts; and
- d. India itself has incurred state responsibility for genocide.

While the Indian earth certainly shook in the days following the death of Indira Gandhi,⁴³⁵ the men responsible for those deadly tremors have evaded justice for too long.



Richard J Rogers
Partner,
Global Diligence LLP



Andrew Ianuzzi
Counsel,
Global Diligence LLP

London, UK
1 November 2018

⁴³⁵ 'After the assassination of his mother, [Rajiv Gandhi] achieved notoriety for responding to the massacres with: "When a big tree falls, the earth shakes."' Kaur, *op cit*, p 73.