

# Accountability for mass violence

Examining the State's record

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## Preface

Contemporary India has a troubled history of sporadic blood-letting in gruesome episodes of mass violence which targets men, women and sometimes children because of their religious identity. The Indian Constitution unequivocally guarantees equal legal rights, equal protection and security to religious minorities. However, the Indian State's record of actually upholding the assurances in the secular democratic Constitution has been mixed. This study tries to map, understand and evaluate how effectively the State in free India has secured justice for victims of mass communal violence. It does so by relying primarily on the State's own records relating to four major episodes of mass communal violence, using the powerful democratic instrument of the Right to Information Act 2005. In this way, it tries to hold up the mirror to governments, public authorities and institutions, to human rights workers and to survivors themselves.

Since Independence, India has seen scores of group attacks on people targeted because of their religious identity<sup>1</sup>. Such violence is described in South Asia as communal violence. While there is insufficient rigorous research on numbers of people killed in religious massacres, one estimate suggests that 25,628 lives have been lost (including 1005 in police firings)<sup>2</sup>. The media has regularly reported on this violence, citizens' groups have documented grave abuses and State complicity in violence, and government-appointed commissions of inquiry have gathered extensive evidence on it from victims, perpetrators and officials. Despite this, it has been remarkably difficult to hold perpetrators and State authorities accountable for committing, encouraging, aiding or enabling (including through deliberate inaction) such violence.

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<sup>1</sup> A.A. Engineer, *Communal Riots after Independence: A Comprehensive Account* (Delhi: Shipra, 2004).

<sup>2</sup> B. Rajeshwari, *Communal Riots in India: A Chronology (1947-2003)* (Delhi: Institute of Peace and Conflict Studies, 2004).

Many of those who are engaged with this study have experience of working directly with survivors of mass communal violence, and learning from the narratives and experience of victim survivors. There is also a fairly large body of information - reports of judicial commissions, investigations by civil rights groups, academic research and journalism - available on episodes of mass communal violence. All of these suggest a recurring pattern of structural injustice and impunity leading up to, during and in the aftermath of such mass violence. These lay out the broad hypothesis of this study, which we tried to test against the State's own records.

The study does not investigate the build-up and prevention of episodes of mass communal violence. It focusses on the access of victims to protection, justice and reparation after communal violence. In summary our hypothesis is that the Indian State has failed, in very large measure, to prosecute perpetrators, to account for its own failures, to compensate victims, and to tell citizens about what it did or did not do. We seek in this study to verify this hypothesis, by excavating the State's own records.

There are many related questions which this forensic examination of public records connected with the conduct of various State institutions during and after major episodes of mass communal violence seeks answers to. What leads to this recurring failure to secure justice in successive religious massacres? What is the nature of the State's failure, the extent and contours of this failure, the areas where it recurs and the areas where it is unique to or particularly pronounced after certain episodes of mass communal violence. Citizen human rights groups, victim groups and researchers have documented many episodes of mass violence. However, we believe that in anatomizing the State's response to mass violence, the extraction of official records from the conventional determined secrecy of public institutions, and their careful scrutiny and analysis would perhaps add another dimension both to the chronicling of and efforts to prevent the recurrence of such violence.

International law lays down that States owe victims of gross human rights violations reparation<sup>3</sup>, and reparation includes (1) access to justice in the form of criminal

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<sup>3</sup> UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International*

prosecution, (2) access to truth, and (3) material and non-material restitution. The Indian State has failed victims of mass violence on all these counts. We felt that the State's failure to make its own performance public was tied to its multiple failures to make reparations.

In this spirit, we thought it important to examine the official record, to analyse what it reveals about how the Indian State responded to episodes of mass violence. We look in particular at (a) the State's efforts to prosecute people responsible for mass violence, (b) the State's attempts to hold complicit or remiss public officials accountable and (c) the State's measures to compensate victims of mass violence.

All governments tend to work in a culture of secrecy. This tendency to withhold official information from public inspection is aggravated when the State is itself subject to intense scrutiny for the performance of its duties. Arguably the most significant administrative reform in India since Independence to deepen democracy has been the passage of a very progressive and strong Right to Information law in 2005. This has legally created duties of public officials at every level to share most official information and documents with any citizen who seeks these, and in fact to actively place in the public domain a lot of information even when it is not specifically sought. This law has spurred an enormous amount of civic action, mainly to interrogate the financial probity of official actions. This current study seeks to extend this scrutiny consciously to official actions to protect the life and property of citizens in major episodes of targeted mass communal violence. Unlike the largest volume of right to information activism which has enquired into public corruption, this seeks to place the spotlight for public examination on public action to secure protection and justice for all citizens regardless of their religious identity. It interrogates all institutions of justice – the civil magistracy, the police, and the courts. It strives to examine, in the final analysis, the success of the executive and judicial arms of governments to uphold the pledges of the secular democratic Constitution of India.

This study was made possible by a study grant from IDRC. We are in particular very grateful to Navsharan Kaur, who supported, encouraged and guided us through this very difficult research effort, with her characteristic warmth, faith, intelligence, and insights.

This research involved the filing and dogged legal pursuit of 770 applications under the Right to Information to seven state governments and the central government during the course of one year. Almost without exception, these applications were strenuously resisted in the offices in which they were filed, and had to be pursued in appeals. There was some real bewilderment, confusion and gaps of official capacity in dealing with the applications. Some records were reported to have been routinely destroyed, others were difficult to locate, and applications were frequently shuttle-cocked from office to office. As a result of these exertions, we finally were able to gather in the period of one year information from various public authorities; many RTI applications are still pending for disposal in various State and Central Commissions. We intend to pursue these Right to Information applications beyond the period of this study, and to place all these records in the public domain, for use by other researchers, chroniclers and human rights workers, because we feel these records are in themselves part of the right to truth of all survivors, and an essential key to prevent future recurrence of such institutional injustice and impunity.

All of this, and the painstaking analysis of replies received in diverse languages and often in inscrutable bureaucratese, and the preparation of this detailed report of this offbeat study, all within one year, was possible because of the very special dedication and industry of an extraordinarily fine group of young researchers. This team of peers was coordinated with outstanding calibre, talent and integrity by Surabhi Chopra, a legal academic based in Hong Kong. She was supported closely by Pritarani Jha who admirably co-leads Nyayagrah, a community based effort at mass legal action among the survivors of the Gujarat communal carnage of 2002. They were aided by two other law researchers, Anubha Rastogi who took a break for this study from her career in human rights law practice, and Suroor Mander who was a law student as well as worked with homeless children during the time of the research. And the enormous challenge of keeping track of hundreds of Right to

Information applications was possible because of the efforts of Right to Information activist Rekha Koli.

I feel deeply privileged to have been associated with a youthful team with such high commitment to justice and truth, and the talent, industry and cheerful dedication to pursue this in an intense year of research. It is they who contributed to whatever is of value in this study.

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## I. Introduction<sup>4</sup>

This study investigates the State's record in the aftermath of what we describe as 'mass communal violence'. Below, we lay out the scope and method of our inquiry. In Section A, we discuss what we mean by communal violence and mass violence. In Section B, we describe the sources of information upon which we relied, and discuss our focus on the information contained in official records. In Section C, we explain how and why we chose the four episodes of mass communal violence that this study looks at. In Section D, we explain the three dimensions of the State's performance that we examined.

### A. Defining mass communal violence

#### 1. Communal violence

This study looks at violence where the victims are targeted because they were known or are presumed to belong to a particular religious community. Such violence which targets people specifically because of their religious identity is commonly referred to as 'communal violence'<sup>5</sup> in India, and in the course of the study, we frequently refer to it as such.

#### 2. Defining mass violence

Mass violence has proved difficult to define precisely. We use the term to describe an instance or episode where a large number of people are violently attacked and are killed, injured, displaced from their homes, or suffer financial loss as a result of attacks on their homes, possessions and businesses, or are reduced to living in fear. Many victims of mass violence suffer multiple types of harm. Mass violence

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<sup>4</sup> Researched and written by Surabhi Chopra

<sup>5</sup> For a discussion of the term "communalism" in the Indian context, see A. Vanaik, *The Furies of Indian Communalism: Religion, Modernity and Secularization* (London: Verso, 1997) 33-34.

encompasses massacres – the violent killing of large numbers of people – but includes violence other than murder as well. Having said that, the episodes of mass violence covered in this study *are* massacres, in that in each of these, significant numbers of people were killed. We do not look specifically at genocidal violence, where the avowed motive of organisers and participants is the intent to destroy, in whole or in part, the targeted group<sup>6</sup>. We look at violence where people were targeted because of their religious persuasion, which includes but is not restricted to genocidal violence. In this sense, this is a study of ‘mass communal violence’.

### 3. The question of numbers

When studying mass violence, questions about numbers are the elephant in the room. Does mass violence imply a certain number of fatalities amongst the targeted group? Is the number of perpetrators important? Coster, for instance, argues that mass killing by a single killer is not massacre<sup>7</sup>. Mass violence, as we use it, implies a large number of victims relative to the local context, who suffer various types of harm individually and simultaneously; it also implies a significant number of direct perpetrators. However, rather than pinning down a minimum amount of harm, we have relied on a more commonsense idea of scale when identifying episodes as mass violence. The episodes we examine, including mass violence in Gujarat in 2002, Bhagalpur in 1989, Delhi in 1984, and Nellie in 1983, will not challenge any reasonable reader’s understanding of mass violence<sup>8</sup>.

Rather than focusing entirely on the number of fatalities, we identified two features of mass violence that we considered most salient. The first is that violence unfolds within readily identifiable spatial and temporal limits. Violence is inflicted within a

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<sup>6</sup> Article 2, UN General Assembly, Prevention and Punishment of the Crime of Genocide, 9 December 1948, A/RES/260, available at: <http://www.unhcr.org/refworld/docid/3b00f0873.html> [accessed 8 January 2012].

<sup>7</sup> W. Coster in M. Levene, “Introduction,” in *The Massacre in History*, eds. M. Levene, and P. Roberts (New York: Berghahn Books, 1999), 6.

<sup>8</sup> Other episodes we considered looking at, such as the violence in Marad in 2002, involved fewer deaths, but considerable displacement and property damage. A mention of the body count may not shock the reader, but when we considered the impact of this episode in the round and in its context, we felt it should be treated as mass violence, and the State’s reaction to it should be evaluated in this light.

relatively concentrated span of time, and within a limited, though not defined, geographical area. The second is what Levene identifies as a 'critical ingredient of massacre':

The relationship at the point of delivery between those killing and those being killed. A massacre is when a group of...people lacking in self defence, at least at that moment, are killed – usually by another group...who have the physical means, the power, with which to undertake the killing without physical danger to themselves<sup>9</sup>.

We have examined four episodes of mass violence where, by and large, victims were outnumbered, unarmed, and lacked the wherewithal to escape violence.

We were influenced by the definition of Crimes against Humanity in Article 7 of the Statute of the International Criminal Court, which provides that crimes against humanity may be committed either as part of a 'widespread' or 'systematic' attack against a civilian population. Thus, while identity based violence on a large scale clearly falls into the category of mass violence, relatively smaller scale attacks also fall into this category where the violence is planned, directed, primarily one-sided, and where the State fails to step in and make serious attempts to control violence.

We have generally avoided describing such violence as a 'riot'. While in its original meaning, a riot describes violent public disorder involving a group or crowd, to the Indian ear, the words 'communal riot' tends to suggest a more or less spontaneous, and a more or less equally matched, clash between two groups. This term erases the role of the State in enabling such violence to occur, and the role of political groups in inciting the violence and manufacturing tension between religious communities. It is for this reason that we believe that the term 'communal riot' does not accurately describe the character of mass communal violence which we investigate in this study.

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<sup>9</sup> M. Levene, "Introduction," in *The Massacre in History*, eds. M. Levene, and P. Roberts (New York: Berghahn Books, 1999), 5.

#### 4. What we do not do

This study does not focus on the State's actions in the build-up to mass communal violence, but on its occurrence and aftermath. We also do not examine why or how these episodes of mass violence took place. This exclusion was the necessary outcome of the principal methodology of this study - of excavating and examining official records. State records - except possibly intelligence reports which are exempted from Right to Information disclosure - will not typically capture the slow build-up to violence, the creation and cultivation of hatred between religious communities, the processes of ghettoisation and structural discrimination that accompany it. Similarly, the mechanics of the actual violence, its planning and preparation also belong to the informal, rather than formal, public sphere. We restrict ourselves instead to State actions which can be assessed directly from officially mandated public records.

#### Examining the State's record through the State's records

#### 5. Why do official records matter?

As discussed earlier, this study tries to understand and evaluate the State's performance in providing victims of mass violence access to justice by relying primarily on the State's own records.

The massacres we look at in this study represent a serious failure by the State to perform one of its most basic duties - protecting all citizens, regardless of their religious or other identities, from physical (and psychological) harm. Therefore, we would argue that the State's response to such failure, what it did or did not do in response to mass violence, is important information in itself, and that citizens should be able to examine. This information reveals the extent to which, after failing in its basic duty to protect citizens from violence, the State failed to perform its other core duty - punishing perpetrators of violence; and extending reparations and assistance to victim survivors to rebuild their lives with restored social relations and credible assurance of non-recurrence.



Beyond the basic facts that official records reveal, we hypothesized that sifting through records on different episodes of violence could help to identify specific points of weakness in government systems, laws, rules, processes and institutions. That the State fails is clear. We began this study hoping that the State's records would help to better understand the nature and specific details of the State's failure.

In the aftermath of violence against minorities, individuals and groups have documented the State's failures and the victims' suffering, and these efforts have been invaluable in efforts to hold the State accountable. These reports also make an important contribution to the historical record, and towards ensuring that a religious massacre is not erased from public memory and history. However, we felt strongly that the historical record is partial unless it includes official records. And by official records, we mean not the public statements of press officers or elected officials, which generally aim to protect individuals holding high political office, and mollify or undermine critics. We mean, instead, the multiple, often intersecting records generated by public authorities tasked with responding to violence and responding to victims of violence.

Records generated by State agencies are an important part of the historical record in their own right. They can also serve to correct public perception, where the government's public statements are at odds with what its agencies and officials actually did on the ground. Thus, these records can reveal failures that governments may try to conceal through polished public statements.

Where an official record resorts to euphemism, and aims to obscure, it conceals factual information but telegraphs the public authority's efforts to hide its failures. When witness statements by scores of victims have several paragraphs in common, as after the Nelle massacre, this hints at a coordinated effort to conceal what actually happened to each individual. Whether documents produced for external consumption are easy to fathom or opaque, easily available or elusive, tells us something about the extent to which a public body wants to ease the survivor's recovery. When official records never leave the confines of State institutions, when they are withheld from victims and the public at large, they testify to practical

recourse being withheld from victims, as well as the lack of a principled accounting for why mass violence occurs.

## 6. A note on the State

So far, and in the chapters that follow, we refer frequently to 'the State' - the 'State's' actions, failures, accountability or lack thereof. We use 'the State' as formulaic shorthand for the spectrum of official entities that are engaged in some way during and after mass violence. Through the report we will attempt to refer specifically to the different governments, Central and state, and within them the particular public authority or public official or institution seized of the issue under discussion. The State in our description in the pages of this report includes within itself institutions and authorities like the executive magistracy, police, prosecution, judges and courts. More fundamentally, however, while we use the convenient shorthand of referring to the State, we recognize that this describes what Abrams refers to as 'an ensemble of institutionalized political power'<sup>10</sup>, comprising different entities with varied responsibilities, powers, agendas, priorities, institutional cultures and influence, which often compete and conflict with one another.

## 7. Sources of information

### a) Generated by the State

We draw primarily upon material generated by State processes, administrative, judicial, and legislative, and by State-appointed Commissions of Inquiry. This includes, inter alia, administrative records, reports by Commissions of Inquiry and Action Taken Reports tabled by state governments on the findings of some of these Commissions, court judgments, materials placed before trial and appeal courts, reports by national and State commissions on human rights, minorities, and women, and Parliamentary and legislative assembly debates.

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<sup>10</sup> P. Abrams, "Notes on the Difficulty of Studying the State," *Journal of Historical Sociology* 1, no.1 (1988): 58-89, doi: 10.1111/j.1467-6443.1988.tb00004.x.

Some of this material, such as Supreme Court and High Court judgments, is already in the public domain. We sought other information under the Right to Information Act 2005 ('Right to Information Act'). Some material is ostensibly in the public domain, so applying for it under the Right to Information Act seemed moot, but has, in fact, been extremely difficult to access. Parliamentary and state legislative assembly debates in particular fall into this category of material where we faced practical logistical difficulties. While publicly available in theory, Parliamentary debates are available online only from 2004 onwards; older debates are available in the Parliament library, but gaining access to the library is cumbersome. Assembly debates for Assam, Delhi, Bihar and Gujarat are not available online. The national Parliament library does not have a comprehensive collection of State Assembly debates.

It follows from our reliance on official material that the depth of our research on each massacre depended upon how much material Central and state Governments created on it, how much of this material various public authorities retained over time, and how much material public authorities actually disclosed to us. Chapter 2 discusses in more depth our experience of trying to extract information on mass violence using the Right to Information Act, the problems we faced and the strategies we used. More generally, we believe that understanding the State's role during mass violence and its response to victims of such violence depends upon reportage and commentary by independent observers, but also on access to uncensored archival evidence that scholars can evaluate. An important question this research forced us to confront was whether, in India, such access exists. While not completely negative, our experience was sobering.

b) Generated by non-State actors

We have also drawn upon civil society reports and academic work on the massacres studied, and to a lesser extent, journalistic accounts. This material is referenced, and we use it to interrogate any marked differences between official record and the findings of civil society reports, as well as to fill in detail that the official record leaves out. Relatively recent violence, such as in Gujarat in 2002, unfolded before television cameras, and has been covered and debated in the media ever since. A

large number of citizen's groups visited Gujarat in the immediate aftermath of violence in 2002, and documented what they saw. Older massacres, in Nellie in 1983 and in Bhagalpur in 1989, are not documented anywhere near so comprehensively by journalists, human rights groups and academics. The 1984 anti-Sikh violence in Delhi in the aftermath of the Prime Minister's assassination is the exception - its particular context and location meant that there was more media and civil society coverage at the time, and in the years that followed.

#### 8. What about the victims?

We have not done field research amongst survivors of mass violence in 1983, 1984, 1989 and 2002. Team members have visited massacre sites and interacted with survivors, and families of victims in Nellie and Delhi during the course of the study, but not in their capacity as researchers. However, the impressions they formed during these visits have inevitably influenced them, and how they approached the material gathered during the study. Similarly, we have spoken at length with lawyers and activists advocating for victims of these massacres, but not formally interviewed them. Where we refer to a fact or opinion we learned from them, we identify this explicitly.

In Gujarat, the Centre for Equity Studies has worked with survivors of mass violence in Gujarat for several years, through a programme called Nyayagraha. Since Nyayagraha is intensely engaged in Gujarat in excavating records under Right to Information as part of efforts to secure justice for the victim survivors, we could not artificially separate the seeking of official records from our on-going engagement with victim perspectives and narratives. In this sense, the Gujarat chapter stands on a slightly different footing from the rest of the study. We have tried, as far as possible, to identify and reference information about events or individuals that comes exclusively from Nyayagraha's work. The first-hand experience of Nyayagraha lawyers and community justice workers in Gujarat shaped our understanding of the aftermath of massacre, particularly in Gujarat, and shaped the Right to Information questions we asked.

The central focus of this particular study was on official records, and not on victim narratives. That said, there are limits to what we can learn from official records, limits to how acutely we read the records and very clear limits to how far we understand the gap between what is recorded and what actually plays out when a victim of violence interacts with the police, or the local health centre, the courts, or the district headquarters where he or she applies for compensation. While sensible to these limits, we felt strongly that analyzing the official account without analyzing the survivor's lived experience was a worthwhile endeavour. Much of the existing commentary and analysis of these four episodes of mass violence, but also mass violence in India more generally, focuses on survivors in the immediate aftermath of violence. Some academic analyses rely heavily on media coverage of religious violence<sup>11</sup>. However, we did not find much material that scrutinized the State's own records in any depth. We believe that this is a significant gap, and this study is a small attempt to bridge this. The Centre for Equity Studies hopes to build upon this study in the future, combining what the official record reveals with field research and victim support services amongst survivors of mass violence.

#### B. Which episodes of mass violence?

As mentioned earlier, this study looks at four massacres since 1980. There have been many episodes of religious mass violence since Independence, and we debated how to choose which episodes to study. This is not a choice that lends itself easily to a traditional social science method such as random sampling. It is difficult to get reliable information about mass violence. State records are not public (and, given the subject matter, need to be carefully interrogated). Official statistics, to the extent they exist, are unreliable. Varshney points out, for example, that government statistics on communal violence seem to be inconsistent<sup>12</sup>. State governments often provide data on communal 'incidents', not communal 'riots' or 'violence', but do not use a standard definition of that term. So for example, a large 'riot' might contain forty

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<sup>11</sup> See for example, A. Varshney, *Ethnic Conflict and Civic Life: Hindus and Muslims in India* (New Haven: Yale University Press, 2002).

<sup>12</sup> *Ibid.*, 89-90.

'incidents' according to official statistics, but be regarded as a single episode by the media or by those affected<sup>13</sup>. In addition, different State governments appear to adopt different definitions of a communal incident, and Varshney notes that some States seem to adopt a narrow definition, while others include a wider range of situations within the ambit of that term.

There are very few academic accounts that survey a large number of episodes of mass violence. Most accounts focus on violence in a particular region, or violence between or against particular communities<sup>14</sup>. One of the few attempts to comprehensively document communal violence involving Hindus and Muslims since 1947 relied on English language newspapers for its information, and limits itself to documenting deaths, properties destroyed, and locations of violence<sup>15</sup>. Moreover, as the authors acknowledge, this information is refracted through the errors and biases of the reporters who originally covered these events. So, it is difficult to come by a comprehensive account of a range of episodes of mass violence. Media reports can be unreliable, not least because identity-based violence is typically described as a 'riot', which can refer to a clash between different groups, but is also used to describe targeted attacks by one group on another, and where the targeted groups sustains the vast majority of personal and material harm. For our purposes, we could not securely rely upon material that potentially conflated these two types of violence.

Were a reliable catalogue of mass violence available, we suspect that an objective criterion for choosing which episodes to study would still have eluded us. We would have been reluctant to sift by body count, since we chose to focus on whether violence was systematic as much as on whether it was widespread. While deaths and property damage could be used as a proxy for whether violence was systematic and targeted, this would involve subjective judgments. In light of this, we chose to be unabashedly subjective about which episodes of mass violence we have looked at.

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<sup>13</sup> Ibid.

<sup>14</sup> See for example, Varshney, *Ethnic Conflict and Civic Life*; P. Brass, *The Production of Hindu-Muslim Violence in Contemporary India*, (Seattle: University of Washington Press, 2003).

<sup>15</sup> A. A. Engineer, *Communal Riots After Independence: A Comprehensive Account* (Delhi: Shipra, 2004).

Since we are focusing on the State's response to mass violence, and we are relying heavily on the State's own records, we feel strongly that these subjective choices do not prevent us from fairly evaluating the State's performance and identifying systemic points of weakness.

In our choices, we tried to make sure we included episodes of mass violence that took place in different parts of India, at different times after 1980, under different political regimes. Accessing official records before 1980 would have been very difficult. The authors of this study have varying degrees of connection to the four episodes we finally chose to focus on (after extended and passionate debate). Two team members have worked intensively for many years with survivors of the 2002 violence in Gujarat. One member of the research team has visited and interacted with survivors of violence in Nellie before this study began. One member of the team has interacted with survivors of the violence against Sikhs in Delhi in 1984. In Bhagalpur, none of us had any previous work experience or personal connections, but one member had documented a case study there of a survivor's long fight for justice.

Beyond this subjective engagement, we explain our rationale for choosing each of the four episodes of mass violence we chose finally to examine as part of this study.

#### 1. Nellie 1983

The Nellie massacre in February 1983 needs to be understood in the context of violence across Assam in 1983, and the anti-immigrant agitation from 1979 to 1984. It was by far the biggest violent episode during the agitation, and one of the most extreme and gruesome instances of communal violence in India since Independence<sup>16</sup>. Official estimates say that 1800 people were killed during the Nellie violence, in the course of one morning; unofficial estimates put the number of deaths

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<sup>16</sup> "Communal violence in Ahmedabad, Gujarat on 18 September, 1969 left an estimated 512 people dead and 561 people injured. Unofficial estimates of those killed and injured were higher. Communal violence between Hindus and Muslims in Meenakshipuram, Tamil Nadu in June 1982 left 876 Muslims and 150 Hindus dead." A. A. Engineer, *Communal Riots after Independence: A Comprehensive Account* (Delhi: Shipra, 2004), 65.

at 3300. The scale of destruction made this a compelling episode to study. Complete and formal immunity for perpetrators also made it a necessary choice. In 1985, as a result of the Assam Accord, the State Government dropped cases against those charged with violent crimes during the Assam agitation, including those charged with offences in relation to the Nellie massacre. This was in effect, a complete amnesty, and may in part be why Nellie seems, to an extent, a forgotten episode of mass violence<sup>17</sup> despite its scale. Victims of the Nellie massacre have received, over the years, far less compensation than victims of, for example, the 1984 anti-Sikh violence.

## 2. Delhi 1984

On October 31, Prime Minister Indira Gandhi's Sikh bodyguards shot and killed her. In the three days following her assassination, Sikhs were attacked across Delhi; 3000 people were killed, and large numbers of Sikh homes and businesses destroyed. These attacks were not limited to Delhi. However, the toll on people and property was highest in Delhi, the national capital which (unlike, say, Nellie in Assam) was well served with police forces and communications infrastructure, hosted the Army's headquarters, as well as the head offices of major newspapers. The scale of the 1984 violence, which targeted poorer Sikhs with the greatest virulence, but unusually, did not spare middle-class and rich Sikh neighbourhoods, make it important to study. The fact that such extreme violence unspooled in a city where the means to control it undoubtedly existed pointed to a substantial degree of State support for the attackers. In the years that followed, many survivors testified before several commissions and committees of inquiry, but relatively few trials against perpetrators were litigated. Political functionaries from the Congress known to have participated in the violence have enjoyed substantial protection - Sajjan Kumar and Jagdish Tytler, for example, were nominated as candidates in Delhi in the most recent Parliamentary elections before public protest forced them to withdraw. The official record on the 1984 anti-Sikh violence was likely to offer a perspective on how

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<sup>17</sup> The Nellie massacres, as well as other episodes of violence in Assam in 1983, are not mentioned in an otherwise detailed account of communal violence involving Hindus and Muslims after Independence. See A. A. Engineer, *Communal Riots after Independence: A Comprehensive Account* (Delhi: Shipra, 2004).



government machinery allows a high level of impunity for those involved in mass crimes.

### 3. Bhagalpur 1989

In 1989, Hindu right-wing political groups were organizing “shilanyas processions” across North India, which involved carrying consecrated bricks to build a Ram temple in Ayodhya, where a mosque built by the Mughal emperor, Babar stood, allegedly at the site of Rama’s birthplace. In Bhagalpur, Bihar, violence broke out during one such procession on 24 October 1989, and spread to villages surrounding the town. The violence lasted for several weeks. Over a thousand people were killed, most of them Muslim. The district administration in Bhagalpur was on notice that tensions were running high, and had the opportunity to prepare for violence. It failed to do so, and once violence spread to rural Bhagalpur, it became much harder to control. We felt the Bhagalpur mass violence was important to study because of its scale and the active role the police allegedly played in allowing violence. As with the Nellie massacre, there is very little academic research and documentation on the Bhagalpur violence. In light of this, we felt studying the State records were particularly relevant.

### 4. Gujarat 2002

We decided to examine the State’s response to the post-Godhra violence in Gujarat 2002 because of the scale of violence, but also because of the high degree of concert between government forces and non-State Hindu right-wing groups. As we discussed earlier, any episode of identity-based mass violence strongly implies that the State tolerated or supported violence. Even so, the degree of State support in Gujarat was striking. The Gujarat police openly sided with violent mobs, the government provided no relief for victims of violence, and obstructed non-State efforts to provide relief. We felt it important to study the response of a government that was openly hostile to the community targeted by violence. At the same time, civil society and the media were very vocal about the government’s role in mass violence, as were the Supreme Court and the National Human Rights Commission in

the months and years that followed. In light of this, we thought it likely that the Gujarat government would have been compelled to collate a significant amount of information on the 2002 mass violence, which we thought important to pull into the public domain.

### C. What dimensions of accountability for mass violence?

Our research looks at what steps the State took towards holding individuals and institutions accountable for mass violence, and we look in particular at (1) access to criminal justice for victims of violence, (2) whether public officials implicated in violence were held accountable, and (3) access to compensation and rehabilitation for survivors of violence.

We have discussed our sources of information earlier, and mentioned that we deployed the Right to Information Act to apply for official records on the massacres we studied, as very few of these records are publicly available. We drafted a common set of applications on each dimension of accountability, and sent them to the relevant public authorities for each of the four episodes of mass violence. Below, we describe the overarching concern that guided our questions on each dimension of accountability that we examined. In Chapter 2, we outline the applications we filed on each of these dimensions.

#### 1. Access to criminal justice

Past experience suggests that the majority of complaints registered after religious massacres do not journey very far within the criminal justice system. For example, after the anti-Sikh massacre in 1984, a large number of cases were closed on the ground that there was not enough evidence to prosecute the accused. The cases that made their way through the system (and are still being fought) involved prominent political functionaries<sup>18</sup>. After the Gujarat massacre in 2002 and the anti-Christian violence in Kandhamal in 2008, however, Indian civil society has made a concerted

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<sup>18</sup> See for example, the discussion of cases related to communal violence in Gujarat in 2002 in Harsh Mander, *Fear and Forgiveness: The Aftermath of a Massacre* (New Delhi: Penguin India, 2009); H. S. Phoolka and Manoj Mitta, *When a Tree Shook Delhi* (New Delhi: Roli Books, 2007) analyses in depth the trajectory of cases related to anti-Sikh violence in 1984.

push to pursue cases that involve ‘ordinary perpetrators’ or less extreme violence. In Gujarat, for example, many victims are trying to secure justice from the lower and higher reaches of the State’s machinery, supported by NGOs such as Citizens for Justice, Jan Vikas, the Commonwealth Human Rights Initiative, and Aman Biradari which has undertaken the Nyayagraha campaign.

We know that the criminal justice system consistently fails victims of communal violence – the vast majority of cases are not brought to trial and a small fraction of acquittals are appealed. However, we need to understand the anatomy of this failure. What are the points at which the system fails? Do we see failure of a scale and type that suggests systematic subversion by the police and prosecution? Do these failures suggest that there are gaps in the law, or that the police lack the capacity to build a case against perpetrators, or that the authorities are motivated by bias? These are the questions that guided our RTI applications.

## 2. Accountability of public officials

In the aftermath of mass atrocities, one of the State’s standard responses has been to appoint a judicial Commission of Inquiry, usually headed by a sitting or retired senior judge of the High court or the Supreme Court. These commissions can be appointed by Central or state legislatures and by Central or state executives. While each commission we considered had its own mandate, all of them were asked to evaluate the government’s performance. This includes identifying negligent and culpable lapses by government officials, and in many cases, recommending administrative discipline or criminal prosecution against them. Central and state governments are obliged to present reports by commissions of inquiry to the relevant Central or state legislature within six months of receiving a report, along with a memorandum of action taken in response to the report<sup>19</sup>. Despite this legal requirement, we found that the reports of most of these commissions are not publicly available. In fact, we found it difficult to obtain copies of many of these commissions, and finally had to resort to Right to Information applications to the Home Ministry and various state governments, but even these yielded the reports after considerable legal wrangling. It is not surprising therefore that there is little public knowledge

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<sup>19</sup> The Commissions of Inquiry Act, 1952, Section 3(4).

about what they recommended and even less about what followed from their recommendations.

For many victims of mass violence, testifying before a commission is the closest they get to their day in court, because their complaints are either not recorded or incorrectly recorded, and their cases 'closed' before they are submitted for trial because the police claim that they are unable to gather sufficient evidence for this. We felt it important to enquire, in general, about the extent to which governments had acted on recommendations by commissions. However, we felt it particularly important to check whether governments had taken action against errant officials.

Restricting our inquiry to officials identified as remiss, negligent or complicit by official commissions of inquiry has some obvious limitations. Commissions of inquiry are appointed by the government of the day, and are likely to reflect views that suit the administration. Despite this, we restricted ourselves to officials against whom commissions recommended action, because Central and state governments are legally obliged to respond to these recommendations. The State's legal obligation served as a gateway to asking about progress on commissions of inquiry.

### 3. Compensation and rehabilitation

Victims of mass violence lose family members, suffer physical injuries, and lose their homes, possessions, shops and businesses. Past experience shows that hundreds, and sometimes thousands of families, have been displaced by extreme violence and have lived in relief camps, often for several months. As a result, people's earnings suffer sharply in the short term, and it can take many years to recover from the loss of livelihood.

India does not have national norms that apply to episodes of mass violence. Most States have Relief Codes, of pre-independence pedigree, which set guidelines for how the State Government should respond to natural disasters, such as floods or famine. Many Relief Codes also apply, or can apply, to widespread loss and damage caused by other forces. However, most state governments do not apply Relief Codes to large-scale communal violence, and the ones that do are not necessarily consistent

about when the Code applies. The details of compensation given after the four massacres we examined, but also after other mass atrocities, are not widely available.

In light of this, we wanted to establish what compensation and rehabilitation packages were given to victims of these four massacres, and what norms, if any, they pointed towards. Did the state government announce compensation, and if so, when? What types of loss do these packages cover? Are the compensation amounts token payments, do they follow tort principles – restoring the person to his pre-loss financial situation? Do they cover financial loss alone or include pain and suffering as well? How do they compare to one another, if they can usefully be compared across time?

#### D. Summing up

In the next chapter, we discuss our experience using the Right to Information Act to extract information on mass violence. In Chapters 3 to 6, we discuss these three dimensions of accountability in the aftermath of Nellie 1983, Delhi 1984, Bhagalpur 1989 and Gujarat 2002. In chapter 7, we draw together our findings on access to criminal justice across these four episodes of mass violence, and try to place them in the larger context of what Indian criminal procedure provides and fails to provide. Chapter 8 consolidates what we have learned about whether government officials were held appropriately accountable for failures or complicity in response to mass violence. It also discusses gaps in Indian law that weaken efforts to ensure such accountability. In Chapter 9, we summarise our findings from the official record on compensation and rehabilitation after mass violence. We consider international guidelines and national benchmarks, and directions for reform in the future. Finally, in Chapter 10 we present our concluding thoughts.

## II. The Right to Information on Mass Violence<sup>20</sup>

### A. Introduction

In the last chapter, we described our endeavour as examining the State's record on mass violence through the State's records. To pursue this, we sought official records on (1) criminal justice in the aftermath of mass violence, (2) steps to hold public officials accountable for such violence and (3) relief and rehabilitation for victims of mass violence.

Some of the records we sought were easily accessible to the public, such as Supreme Court judgments. Others were formally in the public domain, but practically difficult to access, such as legislative assembly proceedings. Some records were supposed to be available, but have never been released to the public, such as "action taken" reports by governments in response to commissions of inquiry. Other records, by their nature, are not routinely made public, such as chargesheets in a criminal case. To extract official records that fell in to the last two categories, we used the Right to Information Act, 2005 (hereinafter referred to as the RTI Act).

We use the word "extract" advisedly. Accessing information generated by State processes was not a matter simply of applying for and receiving official records. It was fairly laborious and protracted, our applications met frequently with silence or rejection. Without the legal right to information, of course, we could not have accessed whatever information we eventually secured. The RTI Act was undoubtedly the anchor of our inquiry into the State's record on responding to mass violence. At the same time, through the applications we made, our inquiry tested the potential and limits of the Act in revealing information about serious violations of human rights.

Below, we describe briefly the right and procedure the RTI Act puts in place. We then outline the specific applications we made under the categories of criminal

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<sup>20</sup> Researched by S. Chopra, P. Jha, R. Koli, S. Mander, A. Rastogi; written by S. Chopra

justice, accountability of public officials and relief and rehabilitation for victims of violence. We go on to discuss the process we used and problems we faced in using the Act. Finally, we assess our experience in the round.

## **B. The RTI Act: Context and mechanics**

When the RTI Act was passed in 2005, it upended the default position on disclosure of government records. Before 2005, the colonial-era Official Secrets Act, 1923 regulated access to official documents and, in effect, protected them from public disclosure. So the default status of all official information was that it was “secret”, unless specifically disclosed. The RTI Act, which emerged out of a long, grass-roots struggle for transparency, declared that citizens could access all official records as a matter of right, unless those records fell within certain excepted categories of information.

These categories are laid out in Section 8 of the Act, which we reproduce below:

- “(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
- (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
- (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
- (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
- (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
- (f) information received in confidence from foreign Government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over;

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information;

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this



Act.”

Information that is over 20 years old is, rightly, subject to a more liberal disclosure regime. It can only be withheld under the first three categories above – disclosure would threaten India’s sovereignty or national interest, disclosure would cause a breach of privilege of Parliament or a State legislature, or disclosure has been forbidden by a court of law or may amount to contempt of court. For our purposes, this meant that information was more freely disclosable for three of the episodes of mass violence we were studying - Nellie 1983, Delhi 1984 and Bhagalpur 1989.

The Act defines “information”<sup>21</sup> broadly, capturing electronic and paper records generated by a broad range of processes and public authorities. It also defines “public authority”<sup>22</sup> broadly, covering not just the executive, legislature and judiciary, but also bodies that are substantially funded by the public exchequer. Thus, the ambit of the Act is generous, leaving, in theory, narrow pockets of information that are shielded from disclosure.

The Act places a strong obligation on public authorities to disclose information of their own accord, listing types and classes of information that have to be made public<sup>23</sup>. It also allows individuals to apply for information from a public authority, without having to justify why they want it<sup>24</sup>. An individual can also apply to inspect official records. When a public authority receives an application, it is obliged to respond to the application within a month, either disclosing the information requested or refusing to disclose it and making clear which excepted category the information falls into<sup>25</sup>. If the public authority does not hold the particular information requested, it is supposed to transfer the application to the public authority that does, and inform the applicant of the transfer. If a public authority

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<sup>21</sup> Section 2(f), The Right to Information Act of 2005.

<sup>22</sup> Section 2(h), The Right to Information Act of 2005.

<sup>23</sup> Section 4, The Right to Information Act of 2005.

<sup>24</sup> Section 6, The Right to Information Act of 2005.

<sup>25</sup> Section 7, The Right to Information Act of 2005.

fails to respond within a month, its silence is deemed to be a refusal.

An applicant whose request for information is refused can appeal against the refusal<sup>26</sup>. His or her first appeal would be decided within the public authority – the first appeal authority is a senior office-holder within that body. If the first appeal authority upholds the initial refusal, the applicant can file a second appeal with the information commission, an independent tribunal whose decision is binding upon the public authority implicated in the appeal. Each state has a state information commission. Second appeals against refusals by public authorities in the Central government and the government of Delhi lie with the Central Information Commission. An information commission can order disclosure of information. It can go beyond that, however, and impose individual penalties on officials who have withheld information in ways that are obstructive or malicious, or deliberately given incorrect, incomplete or misleading information or destroyed information<sup>27</sup>. While a very small proportion of the penalties imposable under the RTI Act are actually imposed by commissions, the prospect of a penalty arguably makes public officials respond to applications far more than they otherwise might<sup>28</sup>.

The Act emerged out of a right to information movement in the 1990s that included groups working on access to socio-economic rights for the rural poor, environmentalists, and human rights campaigners<sup>29</sup>. Public discussion has focused primarily on the Act as a tool against official corruption and inefficiency. However, aside from its general applicability to the issues that concerned us, the Act also has specific provisions on information about human rights and civil liberties of

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<sup>26</sup> The procedure for first and second appeals is laid out in Section 19, The Right to Information Act of 2005.

<sup>27</sup> Section 20, The Right to Information Act of 2005.

<sup>28</sup> RTI Assessment and Analysis Group, and National Campaign for People's Right to Information, "Revised Executive Summary", *Safeguarding the Right to Information: Report of the People's RTI Assessment 2008* ("RaaG & NCPRI study 2008"). October 2009, p. 48 [Extracted in Resource Pack for Regional Workshop "Towards More Open and Transparent Governance in South Asia", New Delhi, 27-29 April 2010].

<sup>29</sup> S. Singh, "The Genesis and Evolution of the Right to Information Regime in India." Background Paper for Regional Workshop. *Towards More Open and Transparent Governance in South Asia*. New Delhi, April 27-29, 2010. p.7-8.

individuals. When an applicant applies for information relating to someone's life and liberty, a public authority is obliged to disclose it within 48 hours, rather than the usual 30 days<sup>30</sup>. In addition, the Act obliges even public authorities that are otherwise exempt from its ambit to disclose information about human rights abuses. Central and State governments can exclude security and intelligence agencies from the RTI regime, but these agencies have to respond to applications for information concerning human rights<sup>31</sup>.

### C. Our applications

Armed with this expansive right to information under Indian law, we sought information on the three issues discussed in Chapter 1: access to criminal justice, accountability of public officials and relief and rehabilitation for victims of mass violence. We drafted a common set of applications on each dimension of accountability, and sent them to the relevant public authorities for each of the four episodes of mass violence<sup>32</sup>.

Below, we outline what applications we filed on each issue, and why.

#### 1. Access to criminal justice

We applied for information and records from the first point of contact that a victim would have with the criminal justice system – the local police station, through to the point where the accused is convicted or acquitted, and finally to decisions on appeals against acquittals by the courts. We outline the questions below:

##### i. Complaints and FIRs:

We asked district police headquarters how many complaints police stations in

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<sup>30</sup> Proviso to Section 7 Right to Information Act of 2005

<sup>31</sup> Provisos to Section 24(1) and Section 24(4), Right to Information Act of 2005. The information commission in any State has to approve the disclosure of such information, and it has to be disclosed within 45 days rather than the usual time limit of 30 days.

<sup>32</sup> We also applied for this information in relation to mass violence in Kandhamal, Orissa in 2008 and Marad, Kerala in 2002 and 2003. Although these episodes are not a part of this study, we draw upon our experience of applying for information on them in this chapter.

the district received from people who suffered or witnessed violence. We also asked how many FIRs, or first information reports, the police recorded. We wanted to gauge how many complaints were actually reduced to FIRs – the point at which they officially enter the system. We asked for copies of all the complaints and FIRs, so that we could analyse whether the offence had been accurately recorded, whether there was delay in registering the FIR (between the complaint and the FIR, and the actual incident and the FIR). We also wanted to assess the quality of the FIR – did it record details clearly, were multiple incidents put in one FIR, were names of accused recorded clearly?

ii. Sexual violence:

We asked for the same information about complaints and FIRs on sexual violence. Given that sexual violence is silenced and under-reported, we chose to file a specific application for information on it. We wanted to get a sense of what types of acts were treated as ‘sexual violence’ by the public authorities, and by the same token, what legal provisions they were using to describe this violence. In addition, we wanted to see how many sexual violence cases were reported, and juxtapose this against estimates of sexual violence from civil society reports.

iii. Arrest:

We asked for information on how many people were arrested, disaggregated by religion and by caste. We wanted to get a sense of the nature of arrests. Were they prompt? Were they discriminatory, disproportionately targeting a particular community?

iv. Remand in police custody:

After arresting an alleged criminal, the police should press for detention in police custody or in jail and oppose bail, particularly where there is a risk the accused person is likely to commit further crimes, intimidate witnesses, or abscond. We wanted to see if remand was granted more frequently in cases where the offence alleged was more serious, and also wanted to check if the records suggested that applications or grants of remand in detention seemed biased against a

particularly community or group.

v. Judicial bail:

We hoped to cross-reference the information on remand in detention against information on remand on bail, when the court conditionally or unconditionally allows the accused his freedom. It is the prosecution's job to oppose bail where they feel it is not warranted – almost always the case where serious violence is concerned. We asked for information on how often the prosecution opposed bail applications by the defence.

vi. Summary closure:

We asked for information on the number of cases that were closed before going to trial, and whether the police complied with legal procedure on summary closure. We wanted to gauge whether the number of cases closed summarily seemed proportionate. Further, did we observe any links between the quality of the FIR in a case, and whether it was summarily closed? Finally, we wanted to see if the complainant was given notice that the police were applying for summary closure, as is required by law, so he or she could challenge this decision.

vii. & viii. Trials – JMFC and Sessions Court:

Cases that are not summarily closed go to trial, the less serious ones before a judicial magistrate ‘of the first class’ (‘JMFC’) and the more serious ones before a court of sessions. We applied for information on JMFC and Sessions trials, asking for the copies of charge-sheets in cases tried. A charge sheet is the official document that records the details of the charge against an individual. It is distinct from the First Information Report, which describes a crime that has been committed. The charge sheet usually refers to one or more FIRs, and charges an individual or organization for (some or all of) the crimes specified in those FIR(s). Once the charge sheet has been submitted to a court of law, prosecution against the accused begins.

ix. Charge sheet

We wanted to see the quality of the charge-sheet – were the correct offences charged, on the face of the information available through the records? In how many cases were there applications to amend the charge-sheet, or to re-investigate, or to add witnesses or add accused persons? We felt this information would indicate whether the prosecution tried to ensure the charge-sheet, often hastily put together in the first instance, was comprehensive. Since the charge-sheet is one of the founding documents of a criminal trial, whether such attempts were made by the prosecution could indicate the quality of the prosecution’s engagement with a case.

x. Acquittals / convictions:

We wanted to know the results of cases after each episode of mass violence, and asked for information on how many trials ended in acquittal and how many in convictions.

xi. Acquittals / appeals:

If the accused is acquitted at the end of trial, the prosecution decides whether to appeal the acquittal. We asked for information on how many acquittals were followed by appeals. We also asked for records on the prosecution's decision about whether or not to appeal. These records would help to assess whether the prosecution was doing its job and challenging acquittals that could, legally, be challenged. Was it making this decision in a rigorous way?

3. Accountability of public officials

As discussed in chapter 1, we sought information about action by Central and State governments against public officials identified as complicit in mass violence by Commissions of Inquiry. We applied for copies of commission of inquiry reports, as well as the information described below.

1. Officials identified by commissions of inquiry:

a) Officials against whom action was recommended:

We asked the Central and State Governments about whether they took steps to discipline, under administrative rules, or prosecute, under criminal law, officials who were identified by commissions of inquiry as having failed to perform their duties, or having been grossly negligent, or having been complicit in violence, and against whom the commission specifically recommended action. We asked for records on such action, and if the government took no action, we also asked for records relevant to the decision not to inquire, discipline or prosecute. We wanted to see the extent to which governments had followed these recommendations.

b) Officials who were identified as remiss:

We also filed an application requesting the same information for officials who were identified as remiss by a Commissions of Inquiry, but against whom the commission did not actually recommend action. We did this because it

became clear from reading several inquiry reports that Commissions often chose to 'name and shame' officials in the body of their report, they did not go as far as recommending disciplinary steps against them. Many Commissions opted for general, fairly emollient recommendations, suggesting that governments 'promote communal harmony'. We wanted to gauge whether the administration chose to act on analysis where officials were singled out for incompetence or actual complicity even by the usually blunt instrument of judicial Commissions of Inquiry.

2. Officials for whom permission to prosecute was requested:

Under Indian criminal law, a government official cannot be prosecuted unless the Central or State Government which employs that official grants permission, or a sanction, to prosecute. We asked the Home and Personnel Ministries centrally, and Home and personnel departments in States about whether they had received applications for permission to prosecute any officials in relation to these four episodes of mass violence. We asked for copies of these applications, and, in each instance, copies of the government's response.

D. Relief and rehabilitation

We filed RTI applications seeking information about different points at which the government might give relief and compensation, starting from the immediate aftermath of the massacre. We describe these applications below.

1. Displacement:

We asked the Home Department of each State Government for estimates of families forced to migrate or displaced from their homes as a result of the episode of violence, and details, where possible, of where they migrated from and to. Indian public authorities tend not to recognize internal displacement as a result of violence, on the ground that movement within India is free, so people forced to leave their homes are migrants rather than internally displaced persons. Nevertheless, we are of the view that district authorities or State intelligence agencies are likely to have at least rough estimates of displaced people. We filed this application as a first step to see how governments track this information, and what they do with it. For example, does the



district from where people flee coordinate with the receiving district to ensure people's safety?

2. Relief camps:

We asked the Home Department, district magistrate and relief commissioner in each State Government about government and non-government relief camps set up for people fleeing attacks. We asked about when camps were set up, when they were shut down, how many people they housed while open, what services they included and whether the government provided them with security cover. We also asked, in the event that no camps were set up, for records documenting why the administration decided they were not needed.

As far as government camps were concerned, we wanted to gauge how quickly the district administration set them up, how accessible and safe they were and whether they provided basic services for people calibrated against how long people were in camps. So, for example, did people have access to medical help if they were ill or injured? If families could not return to their homes for many weeks, did the camps have access to schools for children?

With regard to camps set up privately, we wanted to know how many camps there were to gauge how fully or partially the government responded to people rendered homeless, and the extent to which NGOs stepped in. We also wanted to get a sense of how closely the local administration tracked, coordinated and contributed to private relief efforts, and whether these camps had security cover.

3. Rates of compensation:

We asked State Governments for information on the compensation packages they issued, if any, in the aftermath of these episodes of mass violence. We asked for details that included, inter alia, the date when compensation was announced, what types of loss were covered, and what people had to do to prove eligibility. In addition to the basic information about whether and what sort of compensation the government announced, we also wanted to see how soon after the massacre it was declared, whether the instructions and eligibility requirements were user-friendly, whether the packages covered long term rehabilitation or not, and whether there were multiple compensation packages for the same episode.

4. Comparative rates of compensation:

We also asked State Governments for information on compensation packages issued since 1980 after natural or manmade disasters. We wanted these to compare relief and compensation measures issued by the same government over a period of time, and in response to different catalysts. Were rates of compensation and types of loss covered fairly consistent, allowing for inflation? Were compensation packages more or less generous in response to 'apolitical' catalysts, such as cyclones or earthquakes? Is there an emerging national standard on compensation after natural or manmade disasters?

5. Compensation for sexual violence:

We asked specifically for information on compensation for victims of sexual violence. We disaggregated sexual violence for particular attention because it tends to remain hidden - individuals and families are less likely to report it, governments are less likely to be alert to its costs. Reaching victims of sexual violence takes special measures. We wanted to see if any district or state administration had explicitly tried to reach victims of sexual violence, and if so, was there something we could learn from these steps for wider application?

6. Rebuilding religious structures:

We asked State Governments whether the State had a policy on rebuilding religious structures damaged during mass violence. We also asked whether the State Government had information on what religious structures were damaged during the particular episode we were studying, and whether the government had rebuilt it or given any funds, wholly or partially, to rebuild it. Experience shows that places of worship are destroyed during attacks targeting people based on professed or perceived faith. This destruction of public symbols of faith leaves targeted communities feeling extremely insecure, and is, of course, a violation of the Constitutional right to freedom of religion<sup>33</sup>. Repairing damaged places of worship can be an important step towards restoring a sense of security.

7. Compensation by the Central Government:

We asked the Home Ministry in the Central Government about compensation

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<sup>33</sup> Article 25, Constitution of India.

measures. We filed an application asking about any compensation measures by the Central Government in response to a natural or manmade calamity since 1980. As when we asked this question of State Governments, we wanted to get a measure of comparative compensation packages. We filed a second application asking whether the Central government had announced compensation for the specific episodes of mass violence we were studying, and asked for comprehensive information on any such measures. We needed this information to assess the full amount of compensation from the State that victims of mass violence received. We also wanted to see how soon after a massacre the Centre stepped in with compensation, and if there was any obvious trigger for this response.

8. The Prime Minister's Relief Fund:

The Prime Minister's relief fund is a fund comprising contributions by private individuals, administered by the Prime Minister's Office. The Fund is not bound to respond to any particular incident. We asked whether the Prime Minister's relief fund had ever given funds towards compensating or rehabilitating victims of communal violence since 1980. If it had, we asked for a list of incidents whose victims received these discretionary funds. We asked this question in order to get a full measure of compensation that victims received from any government source.

B. Process and problems

On deciding what information to ask for and why, we had to pin down how to apply for it. The Act lays down a simple procedure, and each State has rules on format and fees. However, in actual fact, drafting applications for information that is complex and not current presented challenges.

1. Drafting applications

For each application, we tried to strike a balance between being specific and being comprehensive. Some preliminary "test" applications had taught us that we had to draft requests for information quite tightly. Applications that require discretionary choices on the part of the public authority tend not to fare well. Similarly,

applications that are not drafted to cover all the potential records that contain a piece of information can be easily refused on technicalities by officials inclined to be recalcitrant - a particular concern with applications asking for older information that would require more effort to retrieve. For example, a request for information on relief camps after mass violence might yield no information if there were no government relief camps, and we would have to specify that we wanted information on government and non-government camps. At the same time, we had to be careful not to turn our applications into a fishing expedition, which the public authority can justifiably reject. There are several information commission decisions that make clear multiple discrete inquiries cannot be sandwiched into one application<sup>34</sup>.

## 2. Directing applications

Deciding where to send each application also took some amount of effort. To make an effective RTI application, the applicant needs to know which public authority holds the information she wants. Public authorities are supposed to disclose the types or classes of information they hold. However, it was not clear what district level officials or State level departments held the information we sought. Often, it was not clear who the decision-maker was for a process or what guidelines, manuals or instructions regulated that process. For example, it was not clear whether relief for people displaced by violence was administered by the same authority in the State Government that delivered relief during natural disasters. As another example, it was not clear whether the prosecution, the Home Department or the Law Department had formal say over whether an appeal should be filed in a criminal trial. Different states have different conventions, but even so, we were surprised that conversations with police, prosecution and defence lawyers did not entirely clarify decision-making around appeals.

So, before applying for information we had to research how the processes that generated the information unfolded by speaking to current and retired government

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<sup>34</sup> See for example, *Hakam Singh v. NDMC, GNCT Delhi Navyug School Education Society*, CIC Decision No. CIC/SG/A/2010/003570/11335; Adjunct Appeal No. CIC/SG/A/2010/003570, 18 March 2011

officials. We also had to make preliminary applications that formed the basis for subsequent, more detailed applications. For example, we applied for information on notifications and guidelines on compensation, and used this knowledge to apply for information specific to the massacres we were examining. Some of the processes we researched are occasional, and it is understandable that knowledge about them is not proactively disclosed – information about the army’s role during mass violence, for example. Other processes that we had to “unpack” were routine, such as the chain of decision making involved in appealing an acquittal. Informal information seeking helped us to formally apply for information. However, this takes time, and would prove very difficult for people who could not informally access the sort of professionals – civil servants, lawyers, police functionaries, judges – whom we consulted.

We applied to multiple authorities for information on issues where they held overlapping responsibility rather than only applying to one authority. We felt this was preferable to depending upon only one public authority to transfer an application promptly and appropriately, and would allow us to compare responses where we received information from different authorities on the same question. As we discuss below, this strategy met with mixed success.

We learned that departments formed after the events on which information is sought did not have information that pre-dates its establishment, even if those departments were responsible for the subject of the RTI application in question. For example, the South East police district in Delhi informed us that some records on violence in 1984 were with the South district, because at the time the South East district was a part of the South district. The Riot Cell in Delhi, formed in the 1990s, only had information on a sub-set of criminal cases relating to the 1984 massacre - it had records on cases that were re-opened after the Cell was set up. Similarly, applications about violence in Nellie, Assam in 1983 were repeatedly transferred between two districts because Nellie is today part of a district that was carved out of a larger one after 1983.

So, it is not clear in advance whether the date of the information determines which public authority holds it, or the subject of the information. We have discovered whether a particular public authority has information only when we have applied

for it. Thus, the applicant needs to research in advance when a public authority was set up, in addition to researching how information is generated.

### C. Procedural hurdles

#### 1. Lack of basic information for applications

The Act requires that public authorities communicate clearly how to apply for information. While most public authority websites had an RTI section, many did not give basic information such as the name and designation of the public information officer. Lacking even this information, we had to call public authorities before we could send our application. When faced with this, we sent applications to the head of the relevant department and asked that they be transferred to the right person. This usually worked, but meant that any response from the department was considerably delayed.

#### 2. Fees

Another hurdle when applying for information was cumbersome requirements for paying application fees. Under the RTI Act, State governments can make their own rules - which meant that fee rules were not just cumbersome; they were cumbersome in different ways in different States. In Delhi, RTI application fees have to be paid through an Indian Postal Order. In Mumbai, fees had to be paid through a court fee ticket. Orissa required that the applicant attach a copy of photo identification along with the application. In Gujarat, an application could be made only on judicial stamp papers worth Rs. 20 each. In Kerala, a PIO informed us that fees could be paid only through judicial stamp paper bought in Kerala. The Kerala RTI fee rules don't specify that judicial stamp paper should be bought in Kerala, and we attached a copy of the rules to any applications we sent to Kerala.

Different states also had varied rules on paying the fee for copies of records. Kerala, again, was the most difficult - the fee could only be paid through a demand draft from specific banks, but addresses for these banks were not easily available. Maharashtra and Orissa required fees for filing first appeals - this seems contrary to the RTI Act, which specifies that fees have to be paid for filing an application and for

copies of records, but does not require a fee for filing an appeal.

While we were well placed to comply with fee formats of different sorts, an applicant outside the urban middle class is unlikely to have easy access to State rules, or be able to comply easily with those rules.

### 3. Lack of suo motu disclosure

The Act emphasises that public authorities should pre-empt the need for RTI applications by disclosing information on their own initiative. Almost none of the information we sought was already accessible, including information ostensibly in the public domain such as commissions of inquiry reports and state assembly debates.

### 4. Inspection

In Delhi and Gujarat, where some of us worked, we asked in several applications to inspect information held by a public authority<sup>35</sup>. The RTI Act allows applicants to apply for inspection of records. Inspecting records is useful when the applicant does not know what information a public authority holds on a particular subject, or when it is likely that a public authority will be reluctant to disclose the information sought.

We were allowed to inspect documents whenever we requested inspection. In Delhi, when we inspected documents, we were asked why we wanted the information at issue, and whether we were doing research. Officials were curious rather than confrontational, and the inspections provided an opportunity to speak to officials about what information they had and how the public authority maintained information more openly than would have been possible in writing. On three occasions, police officials, spontaneously but off the record, spoke to us of their memories of policing during the 1984 massacre.

However, we found that actually getting the records we shortlisted during inspection was cumbersome. We had to make repeated appointments to do so. At the National Commission for Minorities, we were told that we had to come back on

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<sup>35</sup> We did not apply for inspection in Assam, Bihar, Orissa or Kerala as we did not have the funds to travel frequently and at short notice.

another day and submit a list of records we wanted - the person receiving the list had left for the day - and then gave up after several attempts to set up an appointment to go in as the records were interesting but not central to our enquiry.

In Gujarat, one occasion when we inspected documents was more hostile than our experiences in Delhi. The District Magistrate's office in Ahmedabad city asked us to inspect files relating to our application for information on relief camps set up after mass violence in 2002. Our first visit to the DM's office began with the District Magistrate expressing his displeasure and saying he was not obliged to respond to such detailed applications. He informed us verbally that the Gujarat government did not open any relief camps<sup>36</sup>. We responded that he was obliged to write and tell us whatever his response was. To which he replied that he would not do so, and we could appeal and do whatever else we wanted. This seemed to be a performance for the benefit of his subordinates, who actually made a real effort to accommodate us.

#### D. Informal strategies

Over several months, as we applied and appealed for information, it became clear that speaking to public information officers on the phone and in person, helped our applications. Supplementary contact, inquiring into the fate of our applications, did not mean the application succeeded. But it helped to nudge applications that had been neglected and elicit a response - even if that response was a refusal. In a few instances, the Public Information Officer (PIO) was confused by the application and responded after discussing it with us. In other instances, meeting PIOs gave us the opportunity to ask questions about how they maintained records, and draft fresh applications couched in terms that would be easier for the public authority to process. We saw the effect of informal contact most clearly in Gujarat, where Nyayagraha volunteers working with mass violence survivors had applied to police stations on several occasions for information on criminal cases. Our RTI applications in districts where Nyayagraha colleagues had contacts with police stations elicited

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<sup>36</sup> From collector statement on all camps provided on inspection at collectors office, on 31<sup>st</sup> March 2010.



far more comprehensive responses than other applications we filed. This could be in part because records relating to the 2002 mass violence are still “live” - in use and readily available. However, our RTI applications to the Orissa government on mass violence in Kandhamal in 2008 were almost all refused, and these more recent records must also be readily available and disclosable.

#### E. Outcomes

We filed 824 applications. We got some information - though rarely all the information requested - as a first response to 255 applications, or 31% of the total. 324 - or 40% of the total - were transferred to other public authorities. 245 of these - 29% of the total - were met with silence - or deemed refusals. We got reasoned refusals in a few applications, as a follow up to deemed refusals.

We filed 515 first appeals against deemed and reasoned refusals. Given the time frame of the study, we chose to file very few second appeals, as there are long delays before second appeal hearings. Two of the five “second appeals” we filed have been successful.

##### 1. Reasoned refusals

We received only a few reasoned refusals to our requests for information. Below, we discuss the grounds on which public authorities denied our requests, and how we responded.

###### a) Twenty-year rule:

The RTI Act provides that information that is over 20 years old is subject to only three of the seven permissible reasons for withholding information - so it is more readily “disclosable” than information created within the last 20 years. The plain words of Section 8(3) of the Act make this clear.

Four public authorities understood the 20-year rule as the opposite of what the Act intends. They responded to requests for information on mass violence in 1984 and

1983 by saying that it could not be disclosed at all because it was over 20 years old. Scanning CIC decisions reveals that several public authorities have understood the 20-year rule in this way, and the CIC has corrected them and explained what Section 8(3) lays down<sup>37</sup>. At a first appeal hearing In Delhi's South-East police district headquarters, it seemed to us that the PIO had genuinely misunderstood the 20 year rule, rather than misinterpreting it instrumentally. But his misunderstanding was upheld, as the first appeal officer refused to consider the CIC decisions on this point and reiterated that 20-year old information need not be disclosed.

b) Right to privacy:

Seven applications for information on complaints and FIRs were refused on the ground that they violated the right to privacy of the individuals - complainants and accused - named in the FIR. Section 8(1)(j) of the Act provides for a balancing act between transparency and privacy. It allows information to be withheld if disclosure would prejudice a third party's right to privacy, and allows a third party to be notified and to appeal disclosure where information that affects them is going to be disclosed. As it happened, the information requested in these seven applications was over 20 years old, so we pointed out that the privacy exception did not apply in these cases at all. However, it is noteworthy that the public authorities seemed not even to consider the balance they are supposed to strike - they used Section 8(1)(j) as a ground for outright refusal to disclose information.

c) Matters under investigation:

In two refusals, public authorities relied on Section 8(1)(h), which exempts information from disclosure if making it public would "impede the process of investigation or apprehension or prosecution of offenders". This provision does not exempt all information on cases that are being investigated or prosecuted from disclosure. The Delhi High Court emphasised this in *Bhagat Singh v. Chief Information*

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<sup>37</sup> See for example CIC decisions in *Ex-N/Sub. Gurbachan Singh v. Army Headquarters* CIC/AT/A/2006/20 and *Shri S.R. Pershad v. Directorate General of Supplies & Disposals* 37/ICPB/2006.

*Commissioner*<sup>38</sup>, where it held that the public authority must justify how investigation would be hampered by sharing the information requested. The High Court stated:

“It is apparent that the mere existence of an investigation process cannot be a ground for refusal of the information; the authority withholding information must show satisfactory reasons as to why the release of such information would hamper the investigation process. Such reasons should be germane, and the opinion of the process being hampered should be reasonable and based on some material. Sans this consideration, Section 8(1)(h) and other such provisions would become the haven for dodging demands for information.”<sup>39</sup>

The High Court’s judgment corroborates the general principle that exceptions to the right to information must be interpreted narrowly, and implies that a PIO should have justified why disclosure of records would impede the process of prosecution.

These judgments arguably apply with even stronger force in the context of protracted trials, such as those following the 1984 violence, where cases may not have been formally closed, but is not being actively investigated. However, in the two refusals we got citing ongoing investigation and prosecution, Section 8(1)(h) was treated as exempting information from disclosure wholesale.

d) Security and intelligence agencies:

The RTI Act allows Central and State Governments to place public authorities dealing with intelligence and security outside the compass of the Act, although agencies exempted in this way are still obliged to disclose information on allegations of corruption and human rights violations committed in the course of their work.

The Gujarat Home Department was the only public authority that resorted to this provision. Two applications asking about action taken against public servants

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<sup>38</sup> 146 (2008) DLT 385.

<sup>39</sup> Bhatt J. states at paragraph 13 of the judgment

allegedly involved in the 2002 mass violence were refused on the ground that the Criminal Investigation Department, dealing with their cases, fell outside the ambit of the RTI Act. We appealed this refusal on the ground that the information we sought clearly related to allegations of human rights abuses by the officials in question, and had to be disclosed even by agencies notified as outside the ambit of the Act.

Once again, the public authorities relying on this provision used it as a ground for blanket refusal, rather than applying the proviso to exemption, which requires that information about human rights allegations be made public. It is worth noting, however, that we expected more responses, particularly to applications asking about recent mass violence, which said that agencies dealing with the information were outside the ambit of the Act. Some of the information we applied for would almost certainly have been with intelligence and security agencies, in addition to other public authorities. We were encouraged that most of the reasoned refusals sent to us argued that particular *information* was exempt, rather than arguing that particular public authorities in their entirety were exempt from the demands of the RTI Act.

## 2. Deemed refusals

29% of responses to applications were refusals we did not receive. Public authorities failed entirely to respond to our applications within their deadline under the Act, a failure that the Act treats as a refusal. We filed appeals against these deemed refusals, and these appeals sometimes elicited an actual response.

## 3. Transfers

In addition to deemed refusals, we also dealt with our applications being transferred, often repeatedly. In Assam, two districts kept transferring applications for information about the Nellie massacre between themselves. Often, public authorities that almost certainly would have had the information requested transferred it to the district administration where the episode of mass violence we were asking about had taken place. For example, Home Departments in Assam and Bihar transferred applications for information about disciplinary action against officials to district

authorities in Nellie and Bhagalpur. The Army HQ transferred our application for information on when the army was called out to assist civil authorities during episodes of mass violence to the army units nearest where the violence took place. This, in particular, was completely unnecessary. There have been only a few occasions when the army has been summoned to contain mass violence, and these occasions have been serious. It is simply not credible that the army HQ in New Delhi would not have at least basic records on these instances.

In Gujarat, district administrations in Ahmedabad and Baroda, transferred our applications to several police stations within these districts. In Ahmedabad City, this meant a transfer to 37 police stations. In other districts, our applications were transferred to certain police stations, without any confirmation that these were the only police stations affected

Some public authorities seemed to transfer applications to avoid answering them, and stall the applicant. The Ministry of Home Affairs has 64 PIOs dealing with different areas. We sent applications to the PIO who seemed best suited to our query, but found that our applications were transferred to every other PIO within the Ministry. These PIOs in turn transferred the applications - also within the Ministry - until it became difficult to keep track of where the application was and where and when to file a first appeal. The S-E police district in Delhi sent an application requesting information on appeals filed in criminal cases to every other police district in Delhi, although we asked for information from that particular district.

Public authorities that are large, and have many sub-branches, can effectively stonewall an application by transferring it in several different directions. The applicant finds himself in the position of corresponding with multiple PIOs and facing significant delays because each recipient treats the application as a fresh request.

#### 4. "We don't have it"

While deemed refusals and transfers stall and delay applications, the hardest response to deal with is a complete denial that the public authority has a piece of

information, even when its remit strongly suggests that it should have that information. We discussed earlier the example of Army HQ in Delhi denying, not very credibly, that they had information on occasions when the army had been asked by Central or State Governments to help control religious riots. Another improbable denial was from the Department of Personnel and Training, Ministry of Home Affairs (“DoPT”) at the Centre, which said it did not have information on disciplinary action against Central civil service employees in connection with episodes of mass violence. The DoPT also denied having information on applications for sanction to prosecute any Central civil service employee.

It is inconceivable that these public authorities would not have records on matters that fall within their core functions. But this complete denial - rather than reasoned refusal - effectively forces the applicant to apply for inspection of what are potentially a large number of records. Another strategy we considered when faced with a dubious denial of this sort, is to lobby legislators to ask for the information in a session of the State Assembly or Parliament. We were not able to pursue this strategy within the time-frame of this study, but hope to do so in the longer term.

##### 5. “We should have it but don’t”

In many instances, a claim by a public authority that it did not hold the information we demanded was credible, but surprising. The failure of public authorities to hold certain types of information indicated serious lapses in record management. More fundamentally, it suggested a failure to recognize the importance of records related to mass violence.

We mentioned earlier our discovery that neither the police, nor the prosecution, the law department or the home department in Delhi kept records on appeals filed after acquittals in cases relating to the 1984 massacre. The Ministry of Home Affairs seemed not to have copies of reports by commissions of inquiry on some of the worst episodes of mass violence since 1947. Neither did the Parliament library. Even if some of the commissions in question were set up by State governments, surely these records should make their way to the Centre.

Applications to national and state commissions on human rights, women, and minorities for any complaints, investigations, correspondence or other records related to the episodes of mass violence we examined yielded almost no responses. National and state human rights commissions, as well as national and state commissions charged with protecting rights of particular constituencies can investigate complaints from the public and initiate their own enquiries. None of the Commissions, State or National, had information on mass atrocities that occurred before they were established, even where official processes around those atrocities – criminal trials, commissions of enquiry or delivering compensation – were still playing out after they were established.

The National Minorities Commission allowed us to inspect its records on the 2002 mass violence in Gujarat and 2008 mass violence in Kandhamal, Orissa. However, we received no responses from minorities' commissions in different States. The national women's commission and state women's commissions also did not respond to our applications. This failure to respond is particularly notable in relation to mass violence in Gujarat, where civil society groups documented widespread sexual violence against Muslim women.

Our experience with these bodies, meant to be quasi-independent watchdogs, was very disappointing. We would have expected them, at a minimum, to *respond* to queries about serious violence against groups they are supposed to protect, even if they did not have the information requested.

National and state commissions do not seem to serve as a repository of information on atrocities that affect the rights of groups they are charged with protecting, though as publicly funded institutions they should perform this function for episodes of mass violence. The National Human Rights Commission and the National Minorities Commission clearly responded to complaints and took the initiative to investigate in the immediate aftermath of mass violence. However, they do not seem to monitor access to justice for victims of mass violence in the longer term in any systematic way. This mirrors media and public attention to mass atrocities – concentrated on crises but not on longer-term consequences.

While it is in the nature of the media to highlight current rather than past crises, national commissions are supposed to hold government machinery accountable and respond to serious grievances. Surely this should include having current information on criminal justice and compensation following mass violence, as well as scrutinising current commissions of inquiry, such as those under way in Gujarat and Orissa. Their own records suggest that they do not fulfill these roles for victims of mass violence.

#### 6. Destroyed and missing information

In Nellie, we learned that basic information on criminal proceedings, including FIRs, could not be found. It was not clear when these records had been destroyed. In Delhi, complaints by victims in several police stations had been destroyed. When a public authority said records are destroyed, we asked for the Order under which that destruction had been authorized. We found, in general, that public authorities do not disclose the protocol or rules according to which they manage and destroy records.

For older episodes of mass violence, it was not surprising that records had been destroyed. Many official records are routinely destroyed according to internal timetables. However, this has serious implications for the individual affected by mass violence and also more generally, for society. If an individual wanted to reopen civil or criminal legal proceedings, destruction of records makes this nearly impossible. Destroying records of mass atrocities also means that if in the future there were State or citizen driven acknowledgement of the atrocity - a public memorial, a museum, an archive, a class taught in school or university - crucial information would have been lost.

While the RTI Act obligates public authorities to maintain and disclose information, it does not lay down classes of information that cannot be destroyed, or types of records that need to be maintained permanently. It is, of course, difficult to draw a circle around what records should be preserved, but it is important - to allow



practical recourse and to aid historical memory - to do so. At a minimum, records before a commission of inquiry looking into mass violence should not be destroyed, and should, to the fullest extent possible, be publicly available.

## 7. Technical refusals

The police headquarters in one zone of Mumbai refused our applications on the ground that the information we sought was not maintained in the format we had asked for it, and a considerable amount of resources would be spent on providing it in that format. While a public authority is well within its rights under the Act to refuse to provide information in a particular format if that would use disproportionate resources, this is not a ground for refusing entirely to disclose information. The public authority is still obliged to disclose the information in the manner in which it exists, or allow the applicant to inspect the records available. We appealed this refusal, but the First Appeal Authority upheld the PIO's refusal.

## F. Factors that affected access:

### 1. The Issue

On the whole, public authorities were willing to disclose information related to criminal proceedings. We discovered, however, that the relevant public authorities simply did not maintain and preserve in any organised way records on information we sought, such as bail applications and appeals.

Information on disciplinary proceedings against public officials proved most difficult to access. We were expecting reasoned refusals on this issue. Instead, State and Central governments failed to reply to our applications, transferred our applications, and denied they had these records. Applications seeking information about disciplinary proceedings against officials raise legitimate concerns about the balance between one person's right to information and another person's right to privacy. Our experience was that public authorities do not even attempt this balancing

exercise - they simply deflect the applications. Even where we asked for the number of disciplinary proceedings or applications for permission to prosecute officials, we did not receive a response.

Information on relief and rehabilitation was more readily disclosed. However, the quality of the information available was patchy, and we found public authorities did not maintain detailed records on relief and rehabilitation. This might, in part, be because different States have different institutions, systems and standards on relief and rehabilitation. The poor quality of information on this issue points to the need for national level guidelines on record keeping related to relief and rehabilitation.

## 2. Time

Large amounts of information on the older massacres in Nellie and Delhi had been destroyed. The barriers to access were that information had been lost, destroyed, or was going to be difficult to locate, so information officers were reluctant to make the effort. We did not encounter, on the whole, unwillingness to disclose the information as a matter of principle. By contrast, information related to a very recent massacre, in Kandhamal, Orissa, proved very difficult to access - almost all our RTI applications met with refusal. As a result, we were forced to exclude this episode of mass violence from the study. The blanket refusal to disclose information on mass violence in Kandhamal suggested active reluctance by district and State authorities. We received the most responses, and the fullest responses to RTI applications on mass violence in Gujarat, which took place almost a decade ago.

## 3. State government

We encountered what we believe is likely to be a deliberate, blanket refusal to disclose information on the Kandhamal massacre from public authorities in Orissa. RTI rules in Kerala were the most cumbersome, and created procedural barriers to applying for information. With the exception of Orissa and Kerala, we did not encounter great variations in responsiveness between the other State governments to which we addressed applications, which were the governments of Assam, Delhi,

Bihar and Gujarat.

#### 4. Public authority

While responsiveness did not vary greatly by State, it did vary by the type of public authority we approached for information. District level authorities, including offices of the district collector and superintendent of police, tended to respond to applications, even if these responses were late and even if they refused us information. Police authorities, similarly, acknowledged and responded in some way to our applications. District and police public authorities were also more responsive on the phone, and understood and responded to applications for inspection of records. While police and district public authorities often responded with incorrect information or refused information, they seemed seasoned in responding to RTI inquiries from the public, most likely because these public authorities regularly interact with members of the public.

By contrast, we found that applications directed to the army, Central and State commissions, and courts tended to be ignored. The National Commission for Minorities did not respond to repeated applications for inspection of records. The RTI contact number on the Army Headquarters website was answered by an individual who insisted that we explain our reason for applying for information before we could get details of public information officers to whom applications are to be addressed. These public authorities seemed uninformed about the RTI Act, and ill-equipped to fulfill their obligations. Our experience suggests the need for more nuanced research on differences between classes or categories of public authorities in how many RTI applications they receive, and how responsive they are to these applications. Are some branches of the State, such as the armed forces, or certain types of public authorities substantially untouched by the RTI Act?

While the army, commissions and courts lacked competence in dealing with RTI applications, some other public authorities seemed competent, but evasive. The Home Ministry responded to most of our RTI applications by “transferring” each application to every single PIO within the Home Ministry, who further transferred

them back to some of their colleagues. As the applicants who encountered this repeatedly, we believe that this was deliberate evasion rather than simple incompetence. The Department of Personnel and Training, similarly, claimed it did not have information on disciplinary proceedings against central civil service employees. Such denial is different from a reasoned refusal under the RTI Act, because it is more difficult to challenge.

## 5. Capacity

An unpredictable but relevant factor in exercising the right to information is the capacity of the public information officers. We made over 700 applications across 6 states. We spoke on phone or in person to PIOs dealing with about 10% of these applications. Obviously, individual capacity varied. However, we found overall that while most PIOs understood they had a basic disclosure obligation, they did not understand the nuances of the grounds for refusal under section 8 of the RTI Act. Public authorities also seemed unaware of or unwilling to conduct the balancing exercise required by many grounds for refusal, applying these grounds, instead, in the most expansive way possible. We encountered offices in Delhi that did not have copies of the RTI Act in Hindi, which would have assisted PIOs handling our applications. On a few occasions, we took with us copies of the Act in Hindi and found that it helped the conversation. PIOs are the frontline RTI officials whom a citizen encounters, and particularly in offices that deal with members of the public frequently, they need better training.

It is early in the life of the RTI Act and PIOs have to implement disclosure obligations fundamentally at odds with the “official secrets” regime that preceded the Act. However, we would caution against taking comfort from this fact in thinking about capacity. Our experience, in the admittedly small number of cases where we met or spoke to the PIO directly, was that once public authorities have internal precedents based on a restrictive reading of the RTI Act, even where such precedents go against the clear words of the Act and even where Information Commissions have clarified that a particular reading is too restrictive, the internal precedent tends to prevail.

## 6. Civil society pressure

A less direct, but nevertheless significant factor affecting access to information was civil society scrutiny and advocacy following an episode of mass violence. We suggest that the paucity of information on the Nellie massacre is not just because it happened many years ago, but also because it happened at a time when the media was not as diverse, ubiquitous or outspoken as it is today. More information on mass violence in 1984 in Delhi is available than on mass violence in Nellie and Bhagalpur in the 1980s. This is due in large part to the continued civil society activism on behalf of survivors of the 1984 violence, which led to commissions of inquiry, legal proceedings and debates in the legislature. There is far more public information on mass violence in Gujarat than on more recent mass violence in Kandhamal, Orissa. We believe that this difference, too, reflects greater media and civil society scrutiny of developments in Gujarat after 2002 as compared to Kandhamal in 2008. We do not want to minimise or undervalue advocacy by survivors and their supporters after the relatively “neglected” massacres. However, some episodes of mass violence have been followed by more sustained advocacy and scrutiny at different levels - local, regional and national. We argue that this greater scrutiny results in State authorities creating and maintaining more records than they otherwise might.

## G. Summing up

We began this chapter by saying that our inquiry tested the potential and limits of the Act in revealing information about serious violations of human rights.

As a law, the RTI Act is a strong tool for extracting information related to mass violence in particular, and abuses of civil and political rights in general. It has provisions that place a weightier obligation on the State to disclose information related to allegations of human rights abuses as compared to other types of information.

Using the Act - putting its strong provisions into practice - was challenging. We began with a “wish list” of information we wanted to have about the State’s response to mass violence, and then analysed what information was likely to be captured in official records. We designed our applications to cover as much of this information as possible. Ultimately, we extracted only a fraction of the information we asked for.

A lot of the information we sought had been destroyed, and a lot of information we sought was denied to us, and some of what we sought was actually disclosed. In evaluating the performance of public authorities through our experience, it would be disingenuous not to acknowledge that the RTI applications we filed were complex, and very likely placed a greater burden on public authorities than many other applications that they receive. We asked for a lot of information that is old, and we asked for a relatively high level of detail. While the RTI process challenged us, our applications in turn challenged the State. Despite a general tilt towards using the grounds for refusal in a blunt rather than nuanced way, many public authorities disclosed the information we requested.

Our experience leads us to think that the RTI Act has great potential to deepen State accountability for grave human rights abuses. Despite the frustrations involved in securing information on the State’s response to mass violence, we believe that the Act should be used aggressively in this way. It is, obviously, very important to use the RTI Act in securing justice for victims of recent episodes of mass violence. It is equally important to extract the information that survives on older episodes of mass violence, as a matter of historical record, as testimony to the experience of victims, and as a way to understand the State’s failures.

In the chapters that follow, we analyse the information we secured on mass violence in Nellie in 1983, Delhi in 1984, Bhagalpur in 1989 and Gujarat in 2002.



### III. Nellie 1983<sup>40</sup>

#### A. Introduction

In this chapter, we discuss the massacre of Bengali Muslims in Nellie, in rural Assam in 1983. The Nellie massacre was probably the most gruesome communal slaughter since Independence. Its virulence stunned the nation and laid the stage for a series of such large-scale massacres in the next two decades, including in the streets of Delhi in 1984, in Bhagalpur in 1989, in Mumbai in 1992-93 and across many districts of Gujarat in 2002. The Nellie bloodbath in the early winter months of 1983 took place during very fraught Assembly elections that year. It was not the only violent episode during the election, but it was by far the worst – official estimates put the death toll at 1800, but unofficial estimates put it at 3000. Below, we begin by briefly situating the massacre in the context of the 6-year anti-foreigner agitation in Assam. We then discuss access to criminal justice for survivors of the massacre, as well as relief and rehabilitation and action taken against errant officials. Through our discussion, we also try to analyse some of the reasons that the Nellie massacre has garnered far less attention than it should over the years.

#### B. The context

##### 1. The Assam agitation

From 1979 to 1985, there was a widespread agitation against the presence of ‘foreigners’, mainly real and alleged immigrants from East Pakistan and Bangladesh, in Assam<sup>41</sup>. The anti-foreigner movement aimed to detect illegal immigrants from

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<sup>40</sup> Researched and written by Surabhi Chopra

<sup>41</sup>This account of the anti-foreigner movement draws upon Baruah, S. “Immigration, Ethnic Conflict, and Political Turmoil--Assam, 1979-1985.” *Asian Survey* Vol. 26, No. 11 (1986), 1184-1206, available



East Pakistan and Bangladesh; to delete their names from the electoral rolls; and to deport them from Assam. Growing tensions around an increase in Bengali immigrants crystallised in February 1978, when the death of Hiralal Patwari, a Member of Parliament, necessitated a by-election to the Lok Sabha in the Mangaldoi constituency, which had a large number of settlers from East Bengal.

While holding the by-election, it was discovered that the number of voters in this constituency had increased significantly since the last election. This discovery became the flashpoint for tensions over the steady increase in Bengali immigrants in Assam over the past several decades and particularly during the Bangladeshi war of Independence in 1977<sup>42</sup>. Soon after, the All Assam Students' Union (AASU) demanded that the election be postponed and foreign nationals be deleted from the electoral rolls. The AASU and the Assam Gana Sangam Parishad (AGSP), a coalition of a few regional political and cultural organisations, demanded that the Central Government identify, disenfranchise and deport foreign nationals. They called for a boycott of the elections, which found substantial support in large parts of Assam, and marked the beginning of the six-year long movement, popularly known as the anti- foreigners movement.

The movement destabilised the Assam government, and the years since 1979 saw sustained protest, including sit-ins, picketing, strikes and civil disobedience. The

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at <http://www.jstor.org/stable/2644315>; Kimura, M. "Violence and Collective Identity in the Narratives on the Nellie Incident." *Asian Ethnicity* Vol. 4, No. 2 (2003), 225-239, doi: 10.1080/14631360301651; Report of the Tewary Commission, The Commission of Inquiry Act, (1952).

<sup>42</sup> Estimates from census data argue that the population of Assam grew at the rate of 36% between 1971-1981, while the national rate of population growth was approximately 25% [Weiner, M. "The Political Demography of Assam's Anti-Immigrant Movement," *Population and Development Review*, Vol. 9, No. 2 (1983), 283, available at <http://www.jstor.org/stable/197305> quoted in Baruah, S. "Immigration, Ethnic Conflict, and Political Turmoil," *Asian Survey*, Vol. 26, No. 11, Nov. 1986, 1187. However, as Baruah points out, it is very difficult to make reasonable estimates of how much population grew or how many immigrants entered Assam in the years before the Assam agitation. The only set of relevant census data that are likely to provide a direct estimate is the data on birthplace, but it is unlikely that immigrants of dubious legal status would provide accurate information on this. The language data are not helpful because of the tendency of Bengali Muslim immigrants to declare Assamese as their mother tongue. Most census-based estimates therefore are based on calculating the difference between the assumed natural rate of population growth and the actual rate of growth. This approach, apart from the methodological problems of arriving at an accurate natural rate of population growth of Assam, obviously does not allow for differentiation between immigrants from the rest of India and from foreign countries. Furthermore, since there was no census in Assam in 1981 because of the political turmoil, even such crude estimates are not possible for the period 1971 to 1981 when, according to partisans of the Assam movement, large-scale immigration took place.

movement disrupted Parliamentary elections in 1980, and Assembly elections in 1983. The Centre suspended the elected state government and imposed President's Rule in Assam in December 1979 for a year, in June 1981 for several months, and again in March 1982 for a year, as elected governments fell on a number of occasions . Large numbers of people, including government employees, refused to recognise the State Government, on the ground that it was illegitimate since it had been elected on the basis of invalid electoral rolls that included illegal aliens. A report by the Peoples' Union for Civil Liberties (PUCL) noted that November 1979 nearly 700,000 people in Guwahati and an estimated two million people in the state as a whole courted arrest. The entire government machinery was party to what the PUCL termed 'satyagraha'<sup>43</sup>. One journalist reports that the Postmaster General personally delivered mail to senior officials, because the postal employees refused to work in large numbers<sup>44</sup>. Academic accounts and contemporary reportage tells us that the government became increasingly repressive in 1981 and 1982, and brought in Central paramilitary forces because the State police forces were considered unreliable.

The movement directly threatened East Bengali immigrants, who had migrated to Assam steadily over nearly two centuries. Regardless of when Bengali settlers had actually moved to Assam, they were viewed as aliens - Bangladeshi foreigners. Violent attacks against Bengali settlers rose after 1979<sup>45</sup>.

Despite the continuing violence and popular protest, the Centre resolved to hold State assembly elections in February 1983. It also decided to use unrevised electoral rolls from 1979, which had triggered the anti-immigrant movement in the first place, most likely because the ruling Congress party believed it was likely to win elections in Assam. This was a direct challenge to the leaders of the movement, who called for a boycott.

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<sup>43</sup> Quoted in Baruah, S. "Immigration, Ethnic Conflict, and Political Turmoil," *Asian Survey*, Vol. 26, No. 11, (Nov. 1986),1194.

<sup>44</sup> Narayan, H. *25 Years On... Nellie Still Haunts...* (2008), 39.

<sup>45</sup>Baruah, S. "Immigration, Ethnic Conflict, and Political Turmoil," *Asian Survey*, Vol. 26, No. 11, Nov. 1986," 1195.

Leading up to the elections, Assam also experienced the worst ethnic violence in India since Independence. Potential candidates were picketed and pressured to sit out elections until the electoral rolls were revised. Owners of printing presses in Assam refused to print the electoral rolls for the election.

The State government-appointed Commission of Inquiry on Assam Disturbances (Tewary Commission) reported that between January to April 1983 in Assam<sup>46</sup>: 2072 people were killed in group clashes, and 235 were killed in police firing; 14 government employees were killed; 2,25,951 people were rendered homeless, while 2,48,292 took shelter in relief camps; 22,436 homes were burnt and 445 government buildings were burnt; there were 1031 'incidents' relating to bridges and culverts; there were 22 incidents of burning railway property and 85 incidents of tampering with railway tracks. Every district in Assam except Cachar and North Cachar Hills faced unrest, in a bewildering over-heated cauldron of enmeshed ethnic and religious hatred. In Nellie, Lalung tribals killed Bengali Muslims; in Kokrajhar Boro Kacharis fought Bengali Hindus and Muslims; in Goreswar and Khairabari Saraniand Boro Kacharis fought Bengali Hindus; in Gohpur Boros fought Assamese Hindus; in Dhemaji and Jonai Mishing tribals fought Bengali Hindus and Muslims; in Samaguri Muslims killed Hindus; in Dhaila and Thekrabariagain Muslims killed Hindus; in Chaowlkhowa Chapori Assamese Hindus and Muslims together killed Bengali Muslims<sup>47</sup>.

The potential for serious violence was so high that the election was staggered over three days to allow for the security forces to move from one polling station to the next. The Centre had to bring polling personnel from outside Assam, since State government employees had passed a resolution boycotting elections. Ballot papers were printed in Delhi and flown in to Assam. While the Centre posted security personnel in the State – one account says that over 270 companies of paramilitary forces were deployed<sup>48</sup> – Baruah notes that they concentrated almost entirely on protecting polling stations.

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<sup>46</sup> Report of the Commission of Inquiry on Assam Disturbances ("Tewary Comission"), 5-6.

<sup>47</sup> Baruah has noted that the violence "did not follow neat ethnic cleavages...because of the oscillating and coalitional nature" of ethnic coalitions in Assam in those years.

<sup>48</sup> Narayan, H. *25 Years On... Nellie Still Haunts...* (2008) (v).

## 2. The Nellie Massacre

One area where the administration ignored potential violence was in Nellie and its surrounding villages. Nellie and other Muslim immigrant villages are situated north of National Highway 37, around 35 kilometres from Morigaon, the district headquarters and 12 kilometres from Jagiroad town. The Muslim majority villages are surrounded by Tiwa (also known as Lalung) villages, as well as by other tribal and ethnic Assamese villages. People from these surrounding villages participated in the massacre in Nellie.

On the morning of 18 February 1983, thousands of people surrounded the Nellie area and attacked Bengali Muslim residents. The attack began at about 8:00 AM and continued till around 3:30 PM<sup>49</sup>. The attackers were armed with machetes and other weapons. They systematically set fire to people's huts. As residents fled their burning homes, they were hacked to death. Fourteen villages were attacked. Roads to the Nellie area were blocked and the Muslim villages surrounded, so people could not go to Jagiroad police station while violence was unfolding. Unofficial estimates say that the massacre orphaned 371 children and left over 2000 people dead<sup>50</sup>.

After the elections, in July 1983, the Assam government appointed the Commission of Inquiry on Assam Disturbances ('Tewary Commission') to, inter alia, examine the circumstances leading to disturbances in Assam between January and April 1983. When examining the Nellie massacre, the Commission's report revealed that local officials had enough warning of likely violence to take preventive action, that the massacre was the result of shocking and culpable neglect.

Polling took place in the Nellie area on 14 February 1983. Three days before the massacre, on 15 February, the Officer in charge of Nagaon police station sent a wireless message to the Commandant, 5th Assam Police Battalion who was

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<sup>49</sup> Report of the Commission of Inquiry on Assam Disturbances ("Tewary Commission"), 300, para. 13.99.

<sup>50</sup> H. Narayan, *25 Years On... Nellie Still Haunts...* (2008) 6.

supervising law and order in Morigaon, and also sent copies to the Sub-divisional Police Officer, Morigaon and the Officer in Charge, Jagiroad police station. It read:

‘INFORMATION RECEIVED THAT LAST NIGHT ABOUT ONE THOUSAND ASSAMESE PEOPLE OF SURROUNDING VILLAGES OF NELLIE ARMED WITH DEADLY WEAPONS ASSEMBLED AT NELLIE BY BEATING OF DRUM (.) MINORITY PEOPLE ARE IN PANIC AND APPREHENDING ATTACK AT ANY MOMENT (.) SUBMISSION FOR IMMEDIATE ACTION TO MAINTAIN PEACE.’<sup>51</sup>

Some residents of Nellie approached the Officer in Charge, at Nagaon and asked that he send the message – Nagaon police station itself did not have jurisdiction over Nellie. However the Officer in Charge, Nagaon did not inform the Superintendent of Police at Nagaon, and claimed that he could not do this because he ‘couldn’t apply his mind’<sup>52</sup>.

None of the three addressees of the wireless message admitted to having received the message. The Officer in Charge, Law & Order for Morigaon, MNA Kabir, told the Tewary Commission that his wife received the message and that he did not see it. Likewise, Pramode Chetia, the sub-divisional police officer (SDPO), told the Commission that the message was placed on his table rather than handed to him, and he, too, did not see it. Bhadra Kenta Chetia, Officer in Charge, Jagiroad police station, was also similarly remiss – he told the Commission that the message was in the ‘put-up basket’, but he did not see it.

A group of Hindu individuals in the Nellie area had complained to the Deputy Superintendent of Police (SP) on 15 February, saying they feared an attack by Muslims in the area. The District authorities shared this information with KPS Gill, the Inspector General Police (IGP) at the time, who advised the Officer in Charge, Jagiroad Police station to patrol the area and form peace committees.<sup>53</sup> There is, thus, a strong contrast between how the police in Morigaon responded to Assamese

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<sup>51</sup> Exhibit 55 in Report of the Commission of Inquiry on Assam Disturbances (“Tewary Commission”), 306, para 13.155.

<sup>52</sup> Ibid.

<sup>53</sup> Report of the Commission of Inquiry on Assam Disturbances (“Tewary Commission”), 301, para. 13.118.

Hindu residents expressing fears about being attacked, and Bengali Muslim residents who expressed the same, ultimately well founded, fear.

The Superintendent of Police's report after the election said that the Officer in Charge, Jagiroad had received the wireless message on 16 February, as well as applications from Assamese Hindus fearing violence from Muslims. 'So on 17/2/83, S.I. B.K. Chatia, S.I. Dhiren Gogoi along with 3<sup>rd</sup> Bn. CRPF visited the area and convened a meeting of leading persons of both the communities and they were advised to arrange day and night patrolling on their own localities'<sup>54</sup>.

Residents of Borbori village, where 585 people were murdered, said that before the massacre, the Officer in Charge of Jagiroad Police Station visited the area with the CRPF and assured them they would be safe, but turned down their requests to post an armed police picket in the area<sup>55</sup>.

The Officer in Charge of Jagiroad police station, Bhadra Kanta Chetia, heard about the violence unfolding around Nellie at 10:54 AM on the 18<sup>th</sup> from the commander of a Central Reserve Police Force (CRPF) battalion, but did not personally go to Nellie. He sent two platoons of CRPF along with a sub-inspector and an assistant sub-inspector. The Officer in Charge, followed later, but said that the Nellie area was difficult to access and further, that he began rescuing drowning people from a river en route to the villages, and making medical arrangements for survivors<sup>56</sup>. The SDPO, Pramode Chetia, heard about the violence from a Member of Legislative Assembly (MLA) at 12:30 PM on the 18<sup>th</sup>. He also did not go immediately to the site of the massacre, but sent a message to Jagiroad telling the Officer in Charge to go to the spot<sup>57</sup>.

National and international journalists were in Assam during the mass violence in Nellie. Some even witnessed it, and reported their eyewitness accounts of people

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<sup>54</sup> Ibid., 42.

<sup>55</sup> Ibid., 301, para. 13.101.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid, 42.

being surrounded and hacked to death. However, in the years that followed, the Nellie massacre received little media or academic attention<sup>58</sup>, and the district administration's lapses are largely forgotten. In the months that followed the massacre, the dominant account of the massacre amongst the Tiwa or Lalung tribe seemed to be that it was retaliatory violence. In a memorandum to the Prime Minister dated June 1983, the Lalung Darbar, representing the tribe, documented violence against Lalungs in the Nellie area in the days leading up to the massacre, allegedly by Bengali Muslim perpetrators<sup>59</sup>. The memorandum described the Nellie massacre as 'a group clash in...the same sub-division for which several hundreds of people had lose their lives [*sic*]...The exact numbers of victims are not yet known...the figures published in various newspapers and magazines of the world cannot be accepted as correct...The activities state above [attacks on Lalungs] were carried out by immigrant Bangladeshis and these activities of immigrants created panic in...Nowgong district and Lalung tribal community were first victim of loot and arson perpetrated by the immigrants and during which hundreds of Lalung popel [*sic*] lost their lives.'<sup>60</sup>

In the years that followed the massacre, Kimura argues that the majority Assamese account of the massacre gained acceptance, while the Tiwa/Lalung and Bengali Muslim accounts have little traction<sup>61</sup>. The explanation for the massacre propagated by agitation leaders was that the Tiwas in the Nellie area lost their land over time to Bengali Muslim settlers, which led to tension and eventually, violence. The Tiwa narrative is different, focusing on alleged abduction of Tiwa girls by Muslims, suggesting cultural friction between the two communities. It also reveals a sense of betrayal by the leaders of the agitation, who some Tiwas claim led the attack on Nellie, but then let responsibility for it fall on the Tiwas who participated in it.

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<sup>58</sup> Kimura notes that "though several academic works appeared on the issue of the anti-foreigners movement as a whole" her work on competing narratives around the Nellie massacre is the first academic research to focus on the issue. See Kimura, M. "Memories of the Massacre: Violence and Collective Identity in the Narratives on the Nellie Incident", *Asian Ethnicity*, Vol. 4, No. 2 (2003).

<sup>59</sup> "Lalung Darbar Memorandum to the Prime Minister," June 24, 1983, reproduced in H. Narayan, *25 Years On... Nellie Still Haunts...* (2008),16- 20.

<sup>60</sup> Ibid.

<sup>61</sup> Kimura, M. "Memories of the Massacre: Violence and Collective Identity in the Narratives on the Nellie Incident." *Asian Ethnicity* Vol. 4, No. 2 (2003).

Muslims in the Nellie area point to a more proximate cause for the massacre – they describe it as revenge for their participation in the election. One observer noted that only 109 votes were cast at the Nellie Government School polling booth that day<sup>62</sup>. Mohmmad Hussain, an independent, won the Morigaon Assembly seat by getting 714 of 1514 votes cast, of which 223 were rejected. The constituency had 78,012 voters, so less than 1% actually voted.

None of these accounts, not even the Bengali Muslim account, lays blame on the State for failing to prevent the massacre, suggesting that the lack of information about this episode of mass violence largely allowed the authorities to escape the criticism and consequences that should have followed.

### 3. The Assam Accord

The 1983 Assembly election brought a new Congress (I) government in Assam headed by Hiteswar Saikia. The extremely high Muslim death toll strained ties amongst groups in the Assam movement, and several Assamese Muslim leaders broke away<sup>63</sup>. A more fragmented movement signed an accord with the Central Government in 1985.

The Assam movement ended in 1985 with an accord signed between the Indian government and the leaders of the movement on 15 August 1985. State Assembly elections were held in Assam in December 1985, which brought the Asam Gona Parishad – the leaders of the agitation – to power. The accord also tried to address concerns about illegal immigration into India, deciding that, those who entered India before 1966 were to be made citizens, those who entered between 1966 and 1971 were to be disenfranchised temporarily, and more recent arrivals were to be deported<sup>64</sup>.

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<sup>62</sup> H. Narayan, *25 Years On... Nellie Still Haunts...* (2008), 9-10.

<sup>63</sup> Quoted in Baruah, S. “Immigration, Ethnic Conflict, and Political Turmoil,” *Asian Survey*, Vol. 26, No. 11, (Nov. 1986), 1201.

<sup>64</sup> Several commentators have noted that the Assam accord’s decisions on immigration have been very difficult to implement, and this has been a continuing source of tension in Assam. See for example Baruah, S. “Immigration, Ethnic Conflict, and Political Turmoil,” *Asian Survey*, Vol. 26, No. 11, (Nov. 1986), 1184- 1206.



The accord also incorporated an agreement to withdraw disciplinary proceedings against 'employees' (presumably government employees, though the accord does not say this explicitly), and review criminal cases connected to the agitation.

The relevant extracts of the accord are as follows:

14. The Central and State Government have agreed to:

(a) Review with sympathy and withdraw cases of disciplinary action against employees in the context of the agitation and ensure that there is no victimization;

(b) Frame a scheme for ex-gratia payment to next-of-kin of those who [were] killed in the course of the agitation;...

(d) Undertake review of detention cases, if any, as well as cases against persons charged with criminal offences in connection with the agitation, except those charged with commission of heinous offences;

(e) Consider withdrawal of the prohibitory orders / notifications in force, if any. [emphasis added]<sup>65</sup>

Provision 14(a) of the Assam accord mentions reviewing disciplinary action against government employees, but in practice appears to make withdrawing such action compulsory and universal. The accord also requires the Centre and the Assam government to prevent 'victimization' of employees facing disciplinary cases, but does not specify what victimization might mean. Provision 14(d) does not specify what 'detention cases' means. Further, the accord requires governments to review all cases except 'heinous' ones, but does not explain what crimes this covers. In practice, what the accord was interpreted to mandate was a full amnesty to all persons charged with crimes, even of murder and rape, during the mass communal violence.

The Ministry of Home Affairs was the 'nodal Ministry' for the implementation of the accord and the Government of Assam has a department dedicated to it as well.

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<sup>65</sup> Text of Assam Accord, according to Part II (A), *Assam Gazette* 23 June 1999, 7. Available at <http://aasc.nic.in/Acts%20and%20Rules%20%28GOA%29/Implementation%20of%20Assam%20Accord%20Deptt/Assam%20Accord.pdf>, accessed on 17 July 2010.

After the Assam accord, the Assam government worked on revising the electoral rolls. Baruah notes, 'The procedures followed were controversial. Critics claimed that a large number of names of legal citizens were removed from the electoral rolls.'<sup>66</sup> There were elections in Assam in 1985, and the Assom Gana Parishad (AGP) won after a campaign where they tried to reposition themselves, using "Minorities are not Foreigners, AGP for all, all for AGP" as a major campaign slogan.<sup>67</sup>

It is likely that Bengali Muslims who were not disenfranchised did not have the political wherewithal to protest the sweeping amnesty granted to those accused of crimes during the agitation, as well as to government officials with disciplinary cases against them. After the accord was signed, the State Government withdrew criminal cases against all the people charged with crimes in connection with the Nellie massacre, and more generally, withdrew cases connected to election violence across Assam<sup>68</sup>.

### C. Access to Criminal justice

#### 1. Complaints and FIRs

Six hundred and sixty eight First Information reports or FIRs were registered in relation to the violence in Nellie. However, the Morigaon district administration has only been able to locate 525 FIRs, which they disclosed to us, and said that the remaining 143 FIRs had most likely been damaged over time due to 'lack of proper storage'<sup>69</sup>.

The Tewary Commission noted soon after the Nellie massacre that it was difficult to accurately count crimes committed in Assam in the first quarter of 1983 because some police stations treated "various cases resulting in complaints as separate

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<sup>66</sup> Baruah, S. "Immigration, Ethnic Conflict, and Political Turmoil," *Asian Survey*, Vol. 26, No. 11, (Nov. 1986), 1204.

<sup>67</sup> *Ibid*, 1204.

<sup>68</sup> Reply to Right to Information application from Department of Home Affairs, Government of Assam

<sup>69</sup> Office of the SP of Morigaon, reply received by authors, March 31, 2010.

incidents” while others “clubbed together the like incidents which took place in a given area” and counted them as one incident, i.e. created what has since come to be called an omnibus FIR<sup>70</sup>.

The FIRs we extracted related to the Nellie massacre, however, are not omnibus FIRs as much as highly vague FIRs. We examined 240 FIRs where the complainant’s account was almost identical across all the FIRs. The basic text of the handwritten FIRs was as follows:

“I have the honour to report you that on 18/2/83 at 8am, Friday, a good number of miscreant equipped with guns, daos, lathis, arows attacked our villagers and following things were destroyed and burnt our houses and looted all the properties.[sic]” 25% included the following line: “I can identify some of them who were involved in this crime and even if they appear in front of me I can identify them.” However, these tend to be FIRs from the same village, and it is unlikely that the line reflects the actual ability of particular complainants to identify perpetrators. The FIRs record names of family members killed, and some record the names of people injured. Almost all of them record details of property destroyed and most of these have a monetary estimate next to this. The police are not complainants in any of these FIRs, though the pro forma statement in each makes it impossible to say whether the complainant is a direct victim of violence, a family member of someone killed or a witness. The police clearly did not seek, or ignored, or actively suppressed individual accounts, and the resulting individual crimes. That said, complainants had accused specific people in 139 out of 241, or 58% of FIRs. The remaining 42% said the perpetrators were ‘unknown’ or a mob of “14/15000 people”.

The FIRs were recorded over the two months following the massacre. In 1983, the officers recording these complaints could not have known that the Assam accord would result in a sweeping amnesty. So, these FIRs would have been the foundation for criminal proceedings, and at least 4 of every 10 FIRs would simply not have allowed for robust investigation, because there would have been no names of the accused on the record.

## 2. Arrests

The SP, Morigaon informed us that 1668 people were arrested in the wake of the Nellie massacre. However, we have not learned religious affiliations of people

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<sup>70</sup> Report of the Commission of Inquiry on Assam Disturbances (“Tewary Commission”), 6, Chapter 1.

arrested. We requested arrest registers, but we were informed that these records no longer exist.

### 3. **Summary closure and Charge-sheets**

We learned that charges were filed in 299 cases, and the remaining 389 cases – or 56% of cases – were summarily closed even before the virtual amnesty that followed from the Assam Accord. After the Assam Accord was signed in 1985, the Government of Assam petitioned to withdraw cases under section 321 of the Criminal Procedure Code, 1973, in all the trial courts that had live cases, citing lack of evidence in all of these. The courts accepted the applications, and agreed to the discharge of all the accused.

Therefore even before the blanket, informal amnesty in the Assam accord, 56% cases were closed for ‘lack of evidence’. That is telling in itself. We examined copies of 100 charge sheets from Nagaon district, and these are fairly detailed – certainly, detailed enough to ground proceedings, had the State been willing.

Once the Assam accord was signed, the Assam government withdrew cases that were not summarily closed already. Not only the police and prosecution, but the courts as well mechanically accepted a political mandate to close all cases, and failed to apply a judicial mind to the facts of each case, before deciding whether or not it deserved to be closed.

The Assam accord explicitly denied immunity to those accused of “heinous” crimes. Had the courts functioned independently, they would, at a minimum, have queried the withdrawal of cases related to the Nellie massacre.

#### D. **Accountability of public officials**

The Tewary Commission was asked to assess measures that State authorities took to anticipate, prevent and deal with election related disturbances and recommend measures to prevent similar violence in the future. It is important to note that the Commission's mandate included looking into the Nellie massacre, but extended beyond that, and its analysis and recommendations need to be evaluated in that light.

##### 1. **District administration**

The Tewary Commission was critical of the three government functionaries who had failed to read the wireless message warning of armed people gearing up to attack the Nellie area. They were:

- MNA Kabir, Commandant, 5<sup>th</sup> Armed Police Battalion was posted as Officer in charge law and order for Morigaon in February 1983.
- Pramode Chetia, SDPO, Morigaon in February 1983.
- Bhadra Kenta Chetia, O.C., Jagiroad police station, Morigaon in February 1983

The Commission said they had (1) failed to take steps to prevent the communal violence in Nellie, Assam on 18 February 1983, despite prior knowledge that violence was apprehended and (2) failed to respond to violence while it was unfolding.

The Commission states: "Had these three officers been careful about their dak [letters], they would have come to know of it [the planned attack] on 15<sup>th</sup> February itself and if their knowledge would have been converted into obvious actions, there would, perhaps, have been some effective preventive action at Nellie."<sup>71</sup> The Commission also concluded, "In so far as Nellie is concerned, even the plea of lack of previous information cannot be taken," given the exchange with the IGP, law and Order, and the Officer in Charge's visit to Borbori village the day before the massacre<sup>72</sup>.

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<sup>71</sup> Report of the Commission of Inquiry on Assam Disturbances ("Tewary Commission"), 307- 208, para 13.117.

<sup>72</sup> Report of the Commission of Inquiry on Assam Disturbances ("Tewary Commission"), 310, para 13.121.

While officials in Jagiroad police station and Morigaon did not take steps to avert violence, they also failed to rush to the Nellie area once they heard it was under attack. The Tewary Commission also notes that, while police and security forces were stretched thin, on 18 February, Jagiroad police station had a platoon of the CRPF available for urgent action, implying that they were not quite as short-staffed as they made out. The Officer in Charge, Jagiroad, Mr. Chetia, received two messages about the Nellie violence a little before 11 AM, and sent the CRPF troops to the area instead of going there himself. The SDPO also did not go from Morigaon to Nellie as soon as he heard about the massacre, and the Commission criticizes this: “it is a matter of serious concern that...[the]...SDPO preferred to...send a message...to OC Jagiroad instead of taking some more positive ...action himself”<sup>73</sup>.

The Commission found Mr. Bhadra Kanta Chetia’s claims that he was diverted because he was rescuing drowning people unreliable. The Commission found that “had Shri Bhadra Kanta Chetia, Officer in Charge, Jagiroad police station been conscious of his duties, even if preventive action could not be taken before 18 February in spite of previous information about possible clashes, prompt action could certainly have been taken on 18.2.83 to contain the trouble.” The Commission also said,

For any incidents, the plea of inadequacy of force can very easily be taken...It is the easiest way to attempt to shift the responsibility by saying that more force was demanded but was not made available. In the case of the Nellie incident, what is established is that the force that was available with the OiC of the Jagiroad police station on the 17th and then on the 18th of February 1983 was not utilized effectively and immediately on receiving the information.<sup>74</sup>

Appendix E of the Tewary Commission Report on the violence in Assam from January to April 1983 gives a list of dismissed / suspended police personnel. It tells

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<sup>73</sup> Report of the Commission of Inquiry on Assam Disturbances (“Tewary Commission”), 311, para 13.121.

<sup>74</sup> Report of the Commission of Inquiry on Assam Disturbances (“Tewary Commission”), 311, para. 13.122.

us that Mr. B.K. Chetia, the Officer in Charge, Jagiroad was suspended and the government ordered departmental proceedings against him for negligence and dereliction of duty<sup>75</sup>. Mr. Promode Chetia, the SDPO, Morigaon who also failed to read the message about impending violence, was suspended ten days after the massacre for negligence and dereliction of duty. A few months later, in October 1983, Mr. Chetia was reinstated<sup>76</sup>, but the Tewary Commission does not state why he was reinstated. The list of dismissed and suspended police personnel does not include M.N.A. Kabir, the A.P.S. Commandant, 5<sup>th</sup> Armed Battalian, and we infer from this omission that Mr Kabir did not face disciplinary proceedings. This leniency is striking, since the district administration's records indicate that the DIG in charge of law and order for Nagaon district posted Mr. Kabir in Morigaon subdivision specifically in response to increasing violence in Morigaon<sup>77</sup>. Mr. Kabir claimed that his wife did not receive the wireless message about Nellie being under siege, and that because clerical staff was on strike, the dak delivery system had not worked as it should have<sup>78</sup>. However the ASI, Morigaon deposed before the commission that the dak runner had delivered the message to Mr. Kabir's wife, she had read the message, kept it with her and instructed the runner to sign for it<sup>79</sup>. Mr. Kabir was the rank of an SP, and it is possible his relative seniority sheltered him from the inquiries that his junior colleagues, who were not of the 'officer class' faced, even though he was, on the face of the record, unconscionably negligent.

The Commission also heard allegations that Ghana Kanta Dutta, Officer in Charge, Amsoi police outpost himself led a mob of attackers and opened fire on people. He denied the allegations, said he wasn't in the area and presented copies of the general diary to prove this. The Assam government suspended him, and ordered

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<sup>75</sup> Ibid, 463, Appendix E, serial no. 10.

<sup>76</sup> Govt. Notification No. HMA. 81/83/30 dated 3.10.83, referenced in *ibid.*, 463, Appendix E, serial no. 11.

<sup>77</sup> Superintendent of Police's Report on violence in Morigaon from January to March 1983. (Office of the SP of Morigaon, reply received by authors, March 31, 2010)

<sup>78</sup> Report of the Commission of Inquiry on Assam Disturbances ("Tewary Commission"), 286, para. 13.77.

<sup>79</sup> Report of the Commission of Inquiry on Assam Disturbances ("Tewary Commission"), 298, para 13.97.

departmental proceeding against him for negligence and dereliction of duty in connection with the Nellie incident<sup>80</sup>.

We do not know the ultimate result of the proceedings against the Officers in Charge of Jagiroad and Amsoi, though it seems that the Officer in Charge, Jagiroad faced disciplinary proceedings that his seniors evaded. However, we were struck by the fact that the Tewary Commission was quite mild in its findings, despite its careful fact-checking. It euphemistically rued the fact that the three errant public officials were not 'more careful' with their dak. Surely the more reasonable response is that it is simply not credible that all three addressees of a wireless message failed to read it, even accounting for how troubled the district was at the time. In fact, as the Commission itself noted, all three individuals should have been alert to the possibility of violence even without receiving the message in light of the ample warning from events preceding the Nellie massacre. The far graver charge against the Officer in Charge, Amsoi that he actually participated in the violence also led to a mild administrative enquiry, rather than any criminal proceedings.

The SP's report on violence from January to March 1983 lists incidents of violence by and against various communities across Morigaon in February 1983, including some in the area under Jagiroad police station<sup>81</sup>. On several of these occasions, the SP reports that the police rushed to the spot and averted large scale fatalities. The Nellie massacre is a stark outlier.

The Commission found that senior district officials, including the District Magistrate and the Superintendent of Police, had acted responsibly on February, 18 1983. The Commission reports that the Deputy Commissioner and the D.I.G received messages about the massacre at Morigaon around midnight on the night of the 18<sup>th</sup>, and rushed to Nellie<sup>82</sup>. The Superintendent of Police heard about the massacre at 2:50 PM, and also rushed to Nellie. Considering that the violence began at 8 AM that

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<sup>80</sup> Ibid, 463, Appendix E, serial no. 10.

<sup>81</sup> Superintendent of Police's Report on violence in Morigaon from January to March 1983. (Office of the SP of Morigaon, reply received by authors, March 31, 2010)

<sup>82</sup> Report of the Commission of Inquiry on Assam Disturbances ("Tewary Commission"), 311, para 13.122.



morning, the information itself reached very late, despite wireless communication being available. The Commission however took their versions on face value. It is worth noting also that senior district officials, when deposing before the Commission, seemed at pains to exonerate their colleagues from blame, and put the enormous failures around Nellie down to strained resources and reduced communication as a result of the unrest.

Deposing before the Tewary Commission, set up to enquire into the political violence in Assam from January to March 1983, the Deputy Commissioner of Nagaon district said that the police were given firm instructions to quell communal violence on February 12<sup>th</sup>, and the district authorities decided not to divert any police officers from that subdivision, and that that they called in the army on February 16<sup>th</sup> to help maintain law and order<sup>83</sup>.

The SP, in his report, described four incidents of violence in the Jagiroad P.S. area on 11, 12, and 13 February 1983. He described all four incidents as attacks by Muslims and Bengali Hindus on Assamese villages, and reported that the police chased away the mobs on all four occasions. On one occasion he reported that 27 houses were burnt and five people killed, but otherwise reported no casualties. This clearly indicates that the Jagiroad PS police were expecting violence, and were capable of mobs of '2/3 thousand', so the SP should have queried more closely why they were passive when they knew crowds were building around Muslim villages in Nellie.

The Assam government did not respond to our specific query on sanction under Section 197 of the Criminal Procedure Code, 1973 which is required to prosecute officials in relation to the Nellie massacre. However, since we know that the State withdrew all criminal proceedings related to election violence after the Assam Accord, we can assume that sanction to prosecute was not granted even if there was an application for it. We cannot confirm that any such application was even made.

## 2. **The State, the Centre and the Election Commission**

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<sup>83</sup> Report of the Commission of Inquiry on Assam Disturbances ("Tewary Commission"), 262, para. 13.19.

The Tewary Commission does not delve into the responsibility of the State Government or the Central Government vis-à-vis the Nellie massacre, or election violence more generally. Two facts strongly suggest that the State Government had little commitment to finding out how or why violence unfolded and who should be held responsible. The first, discussed earlier, is the de facto amnesty to perpetrators after the Assam Accord. The second is the fact that the State Government never released the report by the Tewary Commission, the only official inquiry into the extreme election violence that Assam experienced in 1983<sup>84</sup>. The Tewary Commission's report was never formally released, and until we secured a copy through an Right to Information application, we only had access to a faint, photocopied extract informally circulated by journalists and rights activists.

While the Commission's fact finding seems thorough and reasonably even-handed, it is also fairly mild in tone and its censure of government officials. For example, its findings about official responsibility were not reflected in its recommendations, which were extremely general, speaking for instance about the need to build religious amity in Assam, or the need to tackle illegal immigration. It is possible that the Congress government after the 1983 elections did not release the report because the leaders of the Assam agitation had denounced the Commission as a sham<sup>85</sup> and set up a rival, unofficial commission. The unofficial commission was chaired by TU Mehta, a retired High Court Chief Justice and mirrored the mandate of the Tewary Commission. The unofficial Mehta Commission was sympathetic to the Assam agitation, and criticized the decision to hold elections. In 1985, when the Asom Gana Parishad came to power, the State Government had even less incentive than the previous dispensation to make the Tewary Commission public.

Commentators over the years have criticized the Central Government's push for Assembly elections in Assam in 1983. In a pamphlet of the Ministry of Information and Broadcasting of the Government of India after the elections, the decision was

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<sup>84</sup> The Commission visited each district in Assam, invited affidavits from the public at large and also sent questionnaires to officials at various level of government who had dealt with disturbances directly or indirectly. The Commission also made follow-up visits to areas where serious violence had occurred, including Nellie. The Commission examined 257 witnesses, out whom 106 were official and 151 were non-official.

<sup>85</sup> Narayan, H. *25 Years On... Nellie Still Haunts...* (2008)36.

described as necessary to avert a Constitutional crisis, because Assam was under President's Rule which could only be imposed for a year at time, and had to end in March 1983. However, clearly, the Centre and State had done nowhere near enough to prepare for elections. When talks between the Centre and the agitation leaders broke down in January 1983, the agitation leaders were arrested and elections announced. The Election Commission, in its turn, fell in line with the Central Government's argument that elections had to be held at very short notice instead of reaching an independent assessment on whether free and fair elections were viable at that time.

#### E. Relief and rehabilitation

The Revenue and Disaster Management Department of the Government of Assam (where our Right to Information application landed after a convoluted journey) informed us that in February 1983, relief and rehabilitation was governed by the Assam Relief manual and 'relevant circulars', and disclosed copies of the Relief Manual and instructions and guidelines on relief<sup>86</sup>. They also informed us that the Relief Manual is applicable in situations of communal violence<sup>87</sup>. We learned that they did not have any guidelines or instructions for repairing religious structures damaged by human-made or natural disasters<sup>88</sup>.

While the Assam Government gave copies of generally applicable guidelines, the Office of the Deputy Commissioner, Nagaon informed us that they could not trace any of the more detailed information we requested on relief measures after the Nellie massacre<sup>89</sup>.

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<sup>86</sup> Reply to RTI Application from PIO, Revenue & Disaster Management Department, Relief & Rehabilitation Branch, Government of Assam (No. RR 40/2010/6), 20 April 2010.

<sup>87</sup> Reply to RTI Application from PIO, Revenue & Disaster Management Department, Relief & Rehabilitation Branch, Government of Assam (No. RR 39/2010/3), 5 April 2010.

<sup>88</sup> Reply to RTI Application from PIO Revenue & Disaster Management Department, Relief & Rehabilitation Branch, Government of Assam (No. RR 37/2010/25), 21 April 2010.

<sup>89</sup> Reply to RTI Application from Additional Deputy Commissioner, Magistracy Branch, Nagaon (Ref No. NMM. 100/2007/92 and 100/2007/03) 27 April 2010.

So while we know what relief norms prevailed at the time, which we discuss below, we do not have records from which to piece together information about how many government or non-government relief camps were set up, when they were set up, how many people they sheltered, what facilities they offered and when they were dismantled.

## 1. **Displacement and relief camps**

The Tewary Commission mentions relief measures in Morigaon district but does not describe them in detail. Unofficial sources also mention a relief camp for victims of the Nellie massacre<sup>90</sup> that was guarded by troops from the Central Reserve Police Force<sup>91</sup>. A Government of India pamphlet by the Directorate of Advertising the Visual Publicity of the Ministry of Information & Broadcasting, Government of India claimed in April 1983 that relief was being provided in 197 camps with a population of 2,38,688 by the Government of Assam<sup>92</sup>. It also claimed that ‘at one time’ 3,10,000 ‘refugees’ were living in 250 camps, and that relief assistance included food and milk for children and expectant mothers<sup>93</sup>. It also said that about 68,000 ‘refugees have... moved back to their villages. Almost all the refugees who went to Arunachal Pradesh have returned to Assam. Efforts are also being made to persuade the refugees who went to West Bengal to return to Assam’<sup>94</sup>. These figures are for the entire State, rather than specific to the Nellie massacre, but they suggest basic relief provisioning by the State Government with some Central assistance.

The Morigaon district administration’s report tells us that, in Morigaon, “minority pockets in remote areas were leaving their villages out of fear but it not possible to provide CRPF Pickets or to cover those areas by mobile patrolling because most of the bridges were burnt and roads damaged by agitationists” and describes diverting police from other camps, noting that “as a result of large scale disturbances may relief camps had to be started and all those camps needed protection. So four more

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<sup>90</sup> M. Kimura “Memories of the Massacre: Violence and Collective Identity in the Narratives on the Nellie Incident”, *Asian Ethnicity*, Vol. 4, No. 2 (2003), 229.

<sup>91</sup> Narayan, H. *25 Years On... Nellie Still Haunts...* (2008), 8.

<sup>92</sup> DAVP, Ministry of I & B, Government of India, quoted in *ibid.*, 26-27.

<sup>93</sup> *Ibid.*, in Narayan, H. *25 Years On... Nellie Still Haunts...* (2008), 26.

<sup>94</sup> *Ibid.*, 27.

coys [companies] of the CRPF were inducted in Nagaon Dist.”<sup>95</sup> A report by the SP also mentions that survivors of the massacre were housed in the government school in Nellie on the night of the 18<sup>th</sup><sup>96</sup>. District records show that one section of the 10<sup>th</sup> CRPF was deployed in Nellie after the elections<sup>97</sup>.

## 2. General relief norms

The Assam Relief Manual<sup>98</sup> dated June 1976 and still in use today, focuses primarily on relief following floods. It was meant to be an ‘integrated plan for relief administration’, to ensure ‘speed, coordination and efficient control’. It has a chapter addressing ‘Relief on Account of other national calamities or other causes’<sup>99</sup>, which includes drought and famine, storms and cyclones, earthquakes, landslides, epidemics, major accidents in factories, mines and transport, accidents in melas and festivals, serious fires, ‘acute economic distress’ and ‘distress of people on account of grave situation arising out of international border dispute but not amounting to war’. The last category possibly reflects the fact that the Relief Manual was compiled soon after Bangladesh independence, and the large flows of refugees who came into West Bengal and Assam from Bangladesh a few years previously.

The Manual does not address steps specific to displacement caused by internal violence within Assam. It also does not lay down detailed guidelines for relief unrelated to floods, stating that variations in magnitude of loss mean ‘no hard and fast rules / regulations can be framed nor any prior preparations can be made for the grant of relief to the people in distress...relief operation will be organised by the DC [District Commissioner] as soon as emergency situation arise [*sic*] and steps will be taken to give relief to the deserving cases. The instructions...for the floods will be followed as far as applicable in these cases’<sup>100</sup>. Thus, while we have learned from the

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<sup>95</sup> Ibid, 7.

<sup>96</sup> Ibid, 43.

<sup>97</sup> Ibid, 63, Annexure F.

<sup>98</sup> Assam Relief Manual, 16 June 1976, Administrative Reforms Department, Government of Assam. Available at [http://sdmassam.nic.in/download/assam\\_relief\\_manual.pdf](http://sdmassam.nic.in/download/assam_relief_manual.pdf).

<sup>99</sup> Assam Relief Manual, Chapter XXI, p.70-71.

<sup>100</sup> Assam Relief Manual, Chapter XXI, 71.

Revenue and Disaster Management Department that the Manual applied to communal violence, in fact, there is little guidance in the Manual.

The DC is charged with supervising 'relief centres', and instructed with making special provisions for the 'infirm, destitute, orphans, children, expectant / nursing mothers'<sup>101</sup>. He or she is also empowered to set up relief works and distribute relief in the form of agricultural inputs, soft loans, and house repair grants<sup>102</sup>. The District Health Officer is charged with organising emergency medical relief teams at the district headquarters, and rushing them to sites where they are needed and open camp dispensaries if existing health facilities are not enough<sup>103</sup>.

The Manual instructs the Superintendent of Police to collect intelligence on crime in the aftermath of a calamity, assist in relief and rescue and transferring people to relief camps, help people to re-establish contact with their families, prevent and investigate crime<sup>104</sup>.

While we know what general standards applied to the Nellie aftermath, we have no information on whether these standards were followed. The Tewary Commission report says that the DC and SP provided medical relief, shelter and 'other necessary measures'<sup>105</sup>.

### 3. **Specific norms**

The Manual instructs the District Collector to begin relief works without waiting for instructions from the State Government<sup>106</sup>. The Manual grants the DC full powers to distribute gratuitous relief, as well as rehabilitation grants for, inter alia, construction or repairing houses at the rate of Rs. 300 per family for completely damaged houses and Rs. 100 per family for partially damaged houses<sup>107</sup>. However, for survivors of

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<sup>101</sup> Assam Relief Manual para 6.3.12, p. 24.

<sup>102</sup> Assam Relief Manual, Chapter VI.

<sup>103</sup> Assam Relief Manual, Chapter XI, para 11.1 – 12.1.1, p.41-42.

<sup>104</sup> Assam Relief Manual, Chapter XVI, para 16.2.2, p. 57.

<sup>105</sup> Report of the Commission of Inquiry on Assam Disturbances ("Tewary Commission")

<sup>106</sup> Assam Relief Manual, 3.

<sup>107</sup> Assam Relief Manual, 72, Chapter XXI.

the Nellie massacre, these norms were displaced the rehabilitation package announced by the Government of Assam, which consisted of:

- Rs. 5000 cash to each bereaved family for each person killed.
- Rs. 5000 towards reconstruction of houses destroyed.
- Relief assistance on the same scale as in the relief camps up to three months after people returned to their homes, 'till the harvesting of the next crop.'
- Distribution of free seed at the rate of 10 kgs. per bigha, subject to a maximum of 20 kgs for two bighas for every agriculturalist family for sowing summer paddy.
- Assistance to replace lost bullocks at the rate of two bullocks per family subsidy subject to a maximum of Rs. 1500.
- Subsidy of Rs. 500 per family for lost milch cattle.
- For small traders and businessmen, it has been decided to give business loan of Rs. 2500 per family together with a loan, subject to a maximum of Rs. 1000 in an urban area, and Rs. 200 in rural areas for the repair and reconstruction of shops damaged in the disturbances and for maintenance relief for a period of one month.

It is important to note that the rehabilitation package is not restricted to victims of the Nellie massacre – all victims of ethnic violence between January and April 1983 were entitled to this relief. The rehabilitation package focuses primarily on economic rehabilitation at a subsistence level. It does not provide for compensation for injuries and disability, however serious.

Based on the information disclosed to us by the Centre and the State government, we do not believe these rates of compensation were increased in the years following 1983. By contrast, in later chapters, we will see how the Central Government enhanced compensation in recent years to survivors of the 1984 mass violence in Delhi and the 1989 mass violence in Bhagalpur.

A majority of the FIRs we examined recorded loss of property, tracking numbers of livestock and amount of grain lost, for example. Most of these FIRs had a number for compensation on them, based on property and lives lost. Given the scant detail on actual crimes committed in these FIRs, we are of the view that they were filled in as a

formality to disburse compensation rather than investigate offences. This suggests that in the months following the Nellie massacre, the Morigaon administration took steps to distribute compensation, although we cannot judge how comprehensive or efficient they were. Scanning the losses in the FIRs also makes clear how poor most survivors of the massacre were - movable and immovable property losses were estimated at over Rs. 10,000 in only a handful of cases. Many recorded items such as a single hen or duck, or a single brass container in addition to thatched huts.

#### F. Access to information

None of the information we sought on the Nellie massacre was in the public domain, on access to criminal justice, on whether officials identified as remiss were held accountable, and on compensation and rehabilitation. Right to Information applications on this episode of mass violence proved very challenging. In 1983, Nellie was a part of Morigaon district, and it has since become a part of Nagaon district. So our Right to Information applications were repeatedly transferred between the two districts.

Very little information survived on the questions we asked in our Right to Information applications. We got copies of the few legal papers that survived, and learned that Nagaon district officials had spent time in the record room of the local trial court locating them. After several applications ricocheted back and forth between the two districts, we called the public information officer in the district headquarters who said he had tried to locate the information we asked for, but was at a loss.

Strangely, the Home Department of the Assam Government gave us a copy of the Tewary Commission report, which was never released when it was written. It is still not officially placed in the public domain. We got an original copy of the report, and can only speculate that after 27 years, officials had either forgotten that it was never officially placed before the Assembly, or were taking an admirably purposive approach to their Right to Information obligations in this one instance.



## G. Summing up

The Nellie massacre testifies to the role an active media and civil society can play, more than the three episodes of mass violence we discuss in the chapters that follow. Despite the large death toll in Nellie, the State's actions in this area did not come under sustained scrutiny beyond the immediate aftermath of the massacre. Perpetrators did not face criminal trials. Only one, fairly junior police person faced disciplinary measures. Survivors received minimal compensation. In the absence of sustained media, activist and academic scrutiny, the State's actions and account becomes difficult to challenge. Even this account, partial as it is, has remained out of public view and is in danger of being lost as records are destroyed over time, except for the records which we now have been able to access.

## IV. Delhi 1984<sup>108</sup>

### A. Introduction

In this chapter we discuss the massacre of Sikhs that took place in Delhi after the assassination of the then Prime Minister, Mrs. Indira Gandhi, by her two Sikh bodyguards on 31<sup>st</sup> October 1984. The background to this assassination is situated in the measures taken by Mrs. Gandhi's government in attempting to tackle the militant separatist movement in Punjab. These included the ordering of the army to storm into the holiest shrine of the Sikhs, the Golden Temple at Amritsar, Punjab, in an anti-insurgency operation five months earlier, destroying portions of the sacred structure, and killing scores of innocent pilgrims, as 'collateral damage'. We look at the spread of the violence in Delhi and analyse the measures taken by the Government to bring the criminals to book, to ensure accountability of officials and to compensate and rehabilitate the survivors of the violence.

The violence started on the 31<sup>st</sup> of October and continued till 7<sup>th</sup> of November 1984. Even though the violence took place in varying degrees of intensity across the country, especially in Kanpur, Bokaro and Chas, for the purpose of this study we are examining the events and the subsequent government response that took place in Delhi.

### B. Background and context

Around 9.20 a.m. on 31<sup>st</sup> October 1984, two Sikh security guards fired upon Prime Minister Mrs. Indira Gandhi at 1, Safdarjung Road, her official residence. This information spread, and thousands of people started gathering at the All India Institute of Medical Sciences (AIIMS), where the Prime Minister had been taken. By that afternoon the newspapers announced that Mrs. Gandhi had succumbed to her injuries.

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<sup>108</sup> Researched and written by Anubha Rastogi

Between 2 and 3 p.m. in the afternoon, sporadic incidents started taking place around AIIMS, situated in South Delhi. Initially these were confined to shouting of slogans against the Sikhs, calling them traitors, pulling out Sikh passengers from buses and manhandling them and chanting angry slogans such as 'Khoon ka Badla Khoon Se,' or 'Blood for Blood'. When the then President of India, Giani Zail Singh, himself a Sikh, arrived at AIIMS around 5:20 p.m., 15 to 20 people stoned his car. 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 neighbourhoods were peaceful on October 31, 1984. According to the first documentations of the violence by civil society groups, the huge crowd of mourners that had gathered at AIIMS included many Sikh people, and it was only after a group of around 20 persons started shouting slogans against Sikhs and began the first attacks on Sikhs on the road, that the crowd started getting restless. Till this time there was no sign of any aggression towards the Sikhs in and around AIIMS.

Some of the first instances of violence on 31<sup>st</sup> October 1984 were reported from the residential areas adjoining AIIMS i.e. Green Park, Defence Colony, Safdarjung, Lodhi Colony, Sarojini Nagar. Also it was observed that most instances of violence on 31<sup>st</sup> October were limited to looting, arson and hurting Sikhs travelling in public vehicles. It appears that on the night of 31<sup>st</sup> October this 'anger' and 'outrage' that the general public felt at the assassination of the Prime Minister was actively stoked, channelized and given a systematic form. What started off as mob anger targeted at the Sikh community was organised into a massacre. This is evident from the scale and manner of targeted violence that took place in entire Delhi including the outskirts from 1<sup>st</sup> November to 3<sup>rd</sup> November and spill over instances up to almost 7<sup>th</sup> November 1984.

Different mobs in various parts of the city followed the same pattern. The mob mostly consisted of outsiders, with some persons from the locality. In a number of instances this mob was led/directed by the local politician (usually belonging to the Congress Party). The houses and shops belonging to Sikhs or inhabited by Sikhs were identified. The mob usually had access to the voters list and therefore was easily able to identify Sikh homes. The male Sikh residents, irrespective of age, were

pulled out, beaten up mercilessly and then burnt alive, sometimes with a burning rubber tyre thrown around their neck. Simultaneously the houses and shops were looted and then burnt. In some instances, the task of beating the Sikh residents was of the first mob and the second mob that followed would then burn the injured bodies of the Sikhs so that no evidence is left. Almost all witnesses had reported that the mobs were carrying a white powder of some sort which was used to throw on the burning bodies of the Sikhs.

Officially, 2733 Sikhs were reported to have been killed in Delhi alone during the anti-Sikh massacre. Unofficial estimates place this figure close to 4000 persons. There is no exact estimate of the total number of persons displaced, injured and affected by the riots, loss of income and means of livelihood. In the years that followed the massacre, the Central and Delhi governments set up various commissions and committees of inquiry, but did little to pursue perpetrators seriously.

### **1. Marwah commission**

In the immediate aftermath of the violence, faced with the failure to hold organisers accountable, two leading civil rights organisations People's Union for Civil Liberties (PUCL) and People's Union for Democratic Rights (PUDR) filed a writ petition in the Delhi High Court, calling for an appointment of a commission of inquiry led by the Central Bureau of Investigation (CBI). The court dismissed the writ petition on the grounds that an independent inquiry had already been instituted by the Delhi Police, with Ved Marwah, then Assistant Commissioner of Police nominated to head the investigation on 25 November 1984.

However, the Marwah report was enjoined from publication by a Delhi High Court order, after a suit to stay publication of the report was filed by two senior police officials, who were both allegedly indicted in the report for their negligence and possible positive involvement in the riots. Both Sewa Dass, the Delhi Commissioner of Police (East), and Chander Prakash, Delhi Commissioner of Police (South), were from areas in Delhi which had the highest Sikh casualties.

On being asked to speak about the Marwah Report, Retired Chief Justice Rajit S. Narula later testified that he learned that certain police officers had told Ved Marwah about being ordered by senior officers to cover up or participate in the massacres, these statements being recorded during the personal examination of those officers. These comments however were not included in the personal statements submitted by those officers, but were a part of Marwah's personal notes<sup>109</sup>.

In the interim stay order issued by the Delhi High Court, Justice Chawla praised the performance of the officers during the Sikh massacres, stating that "the plaintiffs along with their officers and with their limited resources worked day and night to control the riots with great devotion to their duty. In fact the riots were controlled in the said two Districts (South and East) in a very short span of two to three days. However, the journalists and some other social organizations freely criticised the police alleging their administrative failure in not controlling the riots<sup>110</sup>." The injunction was not appealed by the Delhi administration, and the while the official written statements were handed over to the subsequent Mishra Commission, Marwah's crucial handwritten notes were destroyed, allegedly on instructions from higher authorities.

## **2. Mishra Commission**

In the six months following the massacres, then Prime Minister Rajiv Gandhi refused to instate an official commission of inquiry, claiming that he was "protecting the Sikhs" and that to do so would "raise issues that were already dead".<sup>111</sup> He played down the violence as a 'natural reaction', saying, in a speech given on the 19<sup>th</sup> of November, 1984, '...when a mighty tree falls, it is only natural that the earth around it does shake a little.' Finally in April 1985, giving in to public pressures, the Mishra

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<sup>109</sup> Affidavit of Justice Ranjit Singh Narula, Defence Colony, 24 available at <http://www.carnage84.com/affidavits/nanavati/promi/ranjitsinghnarula.htm>.

<sup>110</sup> Order in *Chander Prakash v. Ved Marwah*, I.A. 2246/85 in Appellate; S.No. 677/85 (Nov. 25, 1985)

<sup>111</sup> "Gandhi Rejects Demand for Inquiry into Anti-Sikh Riots", *Associated Press*, February 19, 1985. See also "Probe not in the interest of Sikhs: PM", *The Hindu*, February 20, 1985 and "Mr. Gandhi's Almost Bright Start", *New York Times*, March 22, 1985, A-30.

Commission was appointed under Section 3 of the Commission of Inquiry Act. Its mandate increased the purview of investigations beyond the violence in Delhi, and was stated as being to "inquire into the allegations in regard to the incidents of organized violence which took place in Delhi and also the disturbances which took place in Bokaro Tehsil, Chas Tehsil and at Kanpur and to recommend measures which may be adopted for prevention of recurrence of such incidents."

The operations of the Commission were mired in controversy, with most of the year of 1985 passing before investigations began. To add to the controversy a member of the Indian Police Service, D.R. Meena, was appointed to lead the commission's investigating agency despite allegations about police complicity in the episodes. Civil rights groups PUCL and PUDR applied under terms of the Commissions to be part of the inquiry, but the same were rejected. Instead the Citizen's Justice Group (CJC), formed in June 1985 to represent Sikh victims was recognised as the official body of the victims.

Proceedings of the Commission were held 'in camera' or behind closed doors, ostensibly because of 'tainted' news and the sensitivity of the inquiry. This shielded the inquiry from scrutiny and accountability, and the press too was directed to not publish any stories on the proceedings of the Commission. The victims' representative body CJC demand for copies of the affidavits received by the Commission was denied on the grounds of the fear of threats to national security, stating 'the rising wave of terrorism and such other anti-national and violent activities of anti-social elements'<sup>112</sup>.

Witnesses were only examined in January 1986, more than fifteen months after the massacre. Further evidence pointing to a bias toward the official side was that while the Commission permitted cross-examination of victims, representatives of the victims were not allowed to cross-examine any government, police or army officials which had been summoned<sup>113</sup>.

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<sup>112</sup> Reply on Behalf of Union of India to the Application of Citizen's Justice Committee for Supply of Copies of Affidavits, etc., 1, para 3, November 29, 1985 (on file with Centre for Equity Studies).

<sup>113</sup> Jaskaran Kaur, *Twenty Years of Impunity: The November 1984 Pogrom of Sikhs in India* (Ensaaf: 2006), 92 available at [http://www.ensaaf.org/publications/reports/20years/Jaskaran Kaur](http://www.ensaaf.org/publications/reports/20years/Jaskaran%20Kaur)

The Mishra Commission report submitted its report to the Indian Government in August 1986 and it was placed before Parliament in February 1987. The Delhi Administration explained the massacres as a justified reaction to the “misbehaviour and anti national character of the local Sikh youths”, stating that Sikh groups has instigated the mobs by publicly celebrating Mrs. Gandhi's death<sup>114</sup>.

The simplistic (and biased) stance of the administration was accepted by the Commission in its entirety, and despite evidence to the contrary which pointed to the involvement of Congress workers and the handing out of kerosene for the burning and access to voters lists to identify Sikh household, the final report's conclusion was that the rioting was spontaneous, stating that the "the gloom that had spread and affected Congressmen in particular<sup>115</sup>" and "the short span of time that intervened would not have permitted any scope for any organisation (of riots) to be done." Senior police officials and politicians were wholly exonerated, and the strongest charge leveled against subordinate officials was that of indifference<sup>116</sup>.

The finding on the second part of the mandate, which was to ‘recommend measures to prevent the recurrence of such incidents,’ largely comprised of recommendations consisting of measures to inculcate patriotism and communal harmony amongst the youth and warned of the 'evils of television'.

Other than the weak recommendations, the procedure followed by Justice Mishra had also come under criticism, prompting the Citizens Justice Committee, to officially withdraw from the proceedings.

### **3. Committees following the Mishra Commission**

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<sup>114</sup> Written Arguments on Behalf of the Delhi Administration, Police Station Nangloi 3 (undated) (on file with Centre for Equity Studies); See similar reasoning in Written Arguments on Behalf of the Delhi Administration, Police Station Mangolpuri 2; Police Station Gandhi Nagar; Police Station Seelampur 4; Police Station Shakarpur 3; Police Station Kalyanpuri 3-4, as cited in Jaskaran Kaur, *ibid.*, 86-94.

<sup>115</sup> Mishra Commission report 21, as cited in Jaskaran Kaur, *ibid.*, 96

<sup>116</sup> Mishra Commission report, 36 as cited in *Jaskaran Kaur, ibid.*, 96.

In accordance with the recommendations of the Mishra Commission, the government appointed three further Committees on 23 February 1987. The Kapoor-Mittal Committee was appointed to inquire into the conduct of the Delhi police, and consisted of Justice Dilip Kapoor, a retired Chief Justice of the Delhi High Court and Kusum Lata Mittal, a retired Secretary to the Government of India. The Jain Banerjee Committee, consisting of Justice M.L.Jain, a retired Judge of the Delhi High Court and Shri E.N. Renison, a retired I.P.S. officer (later on replaced by Shri A.K.Banerji, a retired I.P.S. officer) was constituted to examine cases relating to riots in Delhi. The Ahuja Committee, led by R. K. Ahuja, a Secretary in the Ministry of Home Affairs, was directed to conduct an inquiry to find out the total number of Sikhs killed in Delhi during the riots and to make appropriate recommendations regarding ex-gratia payments and other reliefs to their family members.

The **R.K. Ahuja Committee** reached a figure of 2733 as the total number of Sikhs killed in Delhi, and recommended measures for compensation. It did not, however, investigate the numbers of Sikhs killed in Kanpur, Bokaro or any other place in India.

The **Kapoor-Mittal Committee** analysed each district and each police station falling under it to determine the role played by the police personnel available in the police station, and put a lot of emphasis on information gleaned from affidavits of victims and eyewitnesses. It submitted two reports as there was a difference of opinion on the mandate between two members of Committee, and the government accepted only the report submitted by Kusum Lal Mittal, on the grounds that the Kapoor report was more in the nature of sociological analysis. Taking action on the basis of the report, the government indicted 72 police officers but insufficient action was been taken against the police personnel named, on the grounds of expiry of periods of limitation and retirement. Of the 72 indicted, one person's pension was reduced, two were censured and one was warned.

The **Jain-Banerjee Committee** examined whether there were cases of omission to register or properly investigate offences committed in Delhi during the period of riots between 31 October and 7 November 1984. Set up to examine whether there were cases of omission to register or properly investigate offences committed during



the episodes of mass communal violence in Delhi, and where necessary to recommend registration of cases and monitor investigation thereof, it recommended cases to be registered against a Congress leader and Member of Parliament, Sajjan Kumar and others. The functioning of the Committee was challenged in the Delhi High Court by Sajjan Kumar, Brahmanand Gupta and others, and the court passed a stay order in December 1987, which was not challenged by the Delhi Government. The High Court quashed the appointment of the committee in August 1989, as it found that the vesting of powers in the committee was contrary to the provisions of the Delhi Police Act and the Code of Criminal Procedure. The Delhi government then appointed the **Poti-Rosha Committee** on 23 March 1990 consisting of P. Subramaniam Poti, a retired Chief Justice of the Gujarat High Court as the chairman and P. A. Rosha, retired officer of the Indian Police Service as the member. Its mandate was much the same as the Jain-Banerjee Committee. It recommended cases to be registered against Sajjan Kumar and others, however the Committee did not seek an extension after its term of six months were over, and consequently did not finalise a report.

The **Jain-Aggarwal Committee** was then constituted as a final follow-up to the Poti-Rosha Committee and had Justice MD Jain, a retired judge of the Delhi High Court, and A. P. Aggarwal a retired IPS officer. It started functioning in December 1990 and took into consideration 669 affidavits filed before the Justice Mishra Committee and also received 415 fresh affidavits from affected persons and their family members and looked into 403 FIRs recorded by the Delhi Police in respect of the riot cases. It completed its full term and submitted a detailed report in August 1993, in which recommendations were made to the Delhi Government for reopening of cases or filing of fresh cases. It was the most comprehensive report till date on the cases that had been registered after the massacre, and made detailed observations on the casual, perfunctory and faulty manner in which the police had handled criminal cases. It found that many subsequent acquittals of the accused occurred due to a novel method adopted by the police – the use of vague, “omnibus-type” FIRs, which covering many, often unrelated incidents, rather than distinct or separate FIRs for each incident. Amongst the other gross irregularities committed by the police was the format prepared by the police for aggrieved persons for submitting complaints did not even contain a column to record names of victims and offenders. Many

written reports of incidents lodged by victims were not acted upon, and the charge sheets, when they were made were couched in general terms and did not refer to specific incidents.

The Government of Delhi, then led by the Bharitya Janata Party under Madan Lal Khurana, set up the **Narula Committee** in December 1993, and it submitted its report in January 1994. It was led by the retired Chief Justice of the Punjab and Haryana High Court, and it reviewed the findings of the previous committees. The report recommended filing of criminal cases against prominent Congress leaders, Sajjan Kumar, Jagdish Tytler and HKL Bhagat.

#### **4. Nanavati Commission**

On May 10, 2000 with the BJP-led National Democratic Alliance heading the central government, yet another commission of inquiry led by Justice G.T. Nanavati was appointed. Its mandate was, yet again, “to inquire into the causes and course of the criminal violence and riots targeting members of the Sikh community which took place in the National Capital Territory of Delhi and other parts of the country on 31st October, 1984 and thereafter, and to examine the sequence of events leading to and all the facts relating to the violence and riots; whether the heinous crimes could have been averted and whether there were lapses or dereliction of duties on part of authorities or individuals responsible; to inquire into the adequacy of the administrative measures taken to prevent and to deal with the said violence and riots; to recommend measures which may be adopted to meet the ends of the justice, and to consider other measures which may be found relevant”.

As part of its functioning, the Commission solicited new affidavits and received the ones filed before the Mishra Committee, however key records relating to the deployment of the Army were not handed over, on the excuse that these were missing.

It submitted its report to the Government on 9 February 2005, and was tabled in Parliament 8 August 2005. The report recommended cases to be filed, compensation to be enhanced and action to be taken against officials. Even though this report did

not ascribe to the assumption of the Mishra Commission that the violence was not organised, the language used in the report made no definite statements and therefore left loopholes that the Government could take advantage of. For example in recommending a case to be registered against Jagdish Tytler, the report has said that 'very probably' there was a case against him which the government used as an excuse for not taking any action against Jagdish Tytler.

As part of its findings it further reported that "...substantial increase in the anti-social population also appears to be one of the causes for the large scale looting and killing that took place during the riots."<sup>117</sup> It further found that, "What started as a spontaneous reaction became an organised effort. Large masses of people, supplying with weapons and flammable materials, There is absolutely no evidence suggesting that Shri Rajiv Gandhi or any other high ranking Congress(I) leader had suggested or organized attacks on Sikhs. Whatever acts were done, were done by the local Congress(I) leaders and workers, and they appear to have done so for their personal political reasons"<sup>118</sup>.

We filed 164 applications under the Right to Information Act to access information regarding various aspects of the 1984 anti Sikh violence in Delhi. As this chapter unfolds, the role of the police and the administration in blatantly refusing to control the violence will be clear. Further the steady reluctance of the State to take action as mandated by law in response to a massacre of such scale will also be evident.

### C. Access to criminal justice

Through RTI application, we managed to secure copies of most FIRs filed in relation to the 1984 massacre from police districts across Delhi, and we draw heavily from these in our discussion below. In accessing information on criminal proceedings through the Right to Information Act, the major hurdle proved to be what was

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<sup>117</sup> Nanavati Commission report, 16.

<sup>118</sup> Nanavati Commission report, 182.

described as the routine destruction of records. Due to this we were unable to access copies of complaints, court records including copies of charge-sheets, closure reports and judgments.

#### 4. Complaints and FIRs

When the Misra Commission of Inquiry was set up and during the course of its investigation, in response to an interrogatory, the Delhi administration replied that the police had filed a total of 228 FIRs. At the outset, it is pertinent to state here that presently Delhi is divided into 12 districts for the purpose of law and order. We received copies of FIRs from all districts except for South East and East district. Since the records have been destroyed as a matter of 'routine', copies of complaints have not been maintained and therefore were not provided to us. We were informed that a total of 458 First Information Reports (FIRs) were filed overall, and we were given copies of 425 FIRs. The remaining information is now based on the 418 FIRs that were analysed and information from commission reports.

We analysed 418 FIRs and learned the following:

- Of 418 FIRs, 281 FIRs were lodged in the year 1984, i.e. 67% of the total sample, either immediately after the act of violence occurred or after peace was restored in the city.
- 141 FIRs, (almost a 1/3 of the analysed sample) were filed in subsequent years i.e. 1985, 1987, 1991, 1993, usually after an intervention like recommendations by a Commission or a Committee.
- There are 42 FIRs i.e. 10% of the 418, where we know that previous FIRs had been lodged and either the case had been closed or the filing of a specific FIR had been refused by the police.
- In 334 FIRs we found that appropriate sections were used i.e. in 79% FIRs, as per the offence made out in the text of the FIR. In 67 FIRs i.e. 16%, even where an offence of rioting, murder, looting was made out on the facts recorded by the police, the appropriate section was not applied.
- In 147 FIRs it has been recorded in the text of the FIR that the victim/witness knows/can recognise the accused person and how the complainant recognises the accused person/s.

- 13% of FIRs were very unclear, in that important information such as date, time, duration, accused and victims are written down. Amongst these, 26 i.e. 6% were found to be what we describe in this study to be omnibus FIRs. 84% of the omnibus FIRs featured a police complainant. So, there is a correspondence between police complainants and weak FIRs.
- Of the 128 FIRs (30% of the total FIRs) in which the police is the complainant, 119 i.e. 92% were filed within 48 hours of the violence taking place. Of these 39 cases were closed summarily and in 41 cases the accused was acquitted. 22 of these FIRs were considered to be omnibus.
- Only 5 FIRs recorded the crime of rape, even though it is a widely and credibly believed that a number of instances of sexual violence took place in Delhi.

The anti riot cell got 255 new FIRs registered in and around the years 1987, 1991, 1993, following recommendations by commissions and committees of inquiry. Of these, 48%, or 123 cases were closed as the accused persons were untraceable or the FIR was cancelled or the proceedings were abated. The anti riot cell would monitor the investigation of the case but the actual investigation and follow up was carried out by the respective police station as per the jurisdiction of the incident of violence.

The Misra Commission has stated on the basis of the records placed before it that FIRs were not received if they implicated police officials or any person in authority and that the informants were forced to delete the names of such persons from their complaints. If reports were made orally then they were not recorded verbatim. Several instances have been noted by the Commission where combined FIRs have been lodged with regard to several separate incidents, which in this study we describe as omnibus FIRs. In summary, legally sound FIRs had mostly not been recorded, and these vitiated possibilities of effective investigation and prosecution later.

The Jain Aggarwal Committee has explained at length the 'novel' pattern of registration/non registration of cases with regard to commission of cognizable offences. Instead of registering a separate/distinct FIR with regard to each and every cognizable offence reported at the police station, a general, vague and omnibus type

of FIR was recorded at the concerned police station on the basis of a vague report couched in general terms and signed by some police official, say SHO/SI/ASI. This was to the effect that during the police official's visit to a particular locality falling within the jurisdiction of his police station he noticed that the law and order situation was worsening and that violent, armed mobs were attacking the business establishments/residential houses of the Sikhs and were indulging in loot and arson of their property and were even committing murders of Sikhs in the locality. FIRs were registered on such vague reports, and any further information was recorded under Section 161 Criminal Procedure Code, 1973.

The Jain Aggarwal Committee also observed that the police had devised a format for receiving complaints. This format contained various columns including the names and addresses of the complainants, the damage to the person, the kind and description of the looted/burnt property and the quantum of loss suffered by them. There was no column or space for recording facts about incidents of murders, the names of the deceased persons and the names of the culprits if these were known. This illegal procedure caused incalculable harm to the aggrieved persons, as crucial facts that would form the basis of any investigation were not recorded.

An FIR is not a piece of substantive evidence but it is nevertheless of immense importance as it furnishes in writing the earliest information regarding the occurrence and can be used for to corroborate or contradict its maker under section 157 or 145 of the Evidence Act. Any subsequent or further statement of a witness will fall under section 161 if the investigation in the case has begun and will be inadmissible in court except for the purpose of contradicting the witness when examined in court. The large numbers of weak, incomplete FIRs were almost certainly a major factor in the high rate of acquittal in cases that went to trial.

Arrests:

Table 1.2: Religious break of arrests carried out in relation to the Anti Sikh massacre in Delhi 1984

District	Total number of arrests	Majority arrests	Minority Arrests	Others
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South West	223	179	0	44
New Delhi	56	27	0	1
North	353	326	0	27
Outer	151	146	0	5
South	44	32	0	12
West	273	172	9	48
North West	115	96	0	19
Central	403	377	7	19
East	618	Break up not given		
North East	375	267	0	108
South East	123	61	8	54

It is pertinent to mention here that apart from other crimes, large scale looting was also carried out during this massacre. The police, instead of lodging cases against such persons and arresting them, asked them to place all the looted material on the streets. It obviously became completely impossible to then identify who had looted what property and the victims were asked to identify their belongings and take them back in whatever condition they were available. This was done in complete defiance of the established criminal law of the land, and was obviously designed to secure impunity for those who looted the properties.

#### 5. Remand and bail

We received no information on judicial custody and remand, mainly because information in this form is not maintained by the police or the courts. On the aspect of bail, the Justice Ranganath Misra Commission states, 'The police released most of the accused persons on bail at its level and those who were challenged to the court in custody have been released by the Court. There has been obviously no effective opposition in the matter of grant of bail nor has the order of release on bail been challenged in judicial proceedings in higher courts.'

## 6. Summary Closures

All the aspects in the conducting of a criminal trial are linked to each other. Therefore where appropriate arrests are not carried out, FIRs do not contain details of accused or the offence and investigations are perfunctory and shoddy the obvious consequence is the closure of the case. 37% of the cases from the 418 FIRs analysed resulted in summary closure and the ground recorded for closure is that the accused person/s were untraceable. The anti riot cell got 255 new FIRs registered in and around the years 1987, 1991, 1993. Of these 123 which means 49.8 % cases are recorded as closed on ground of the accused being untraceable or the FIR was cancelled or the proceedings were abated.

## 7. Charge-sheets

The Delhi police did not disclose charge-sheets filed in criminal cases pertaining to the massacre, telling us that the police in Delhi do not maintain this record. Our RTI applications were transferred to the courts and the public prosecutor, and we learned that these charge-sheets had been destroyed as a matter of routine. Thus, basic criminal records relating to one of the most serious episodes of communal violence in India no longer exist.

While we were unable to trace the progress of FIRs to the stage of charging offences, and gauge how different cases progressed, there is documentation in the public domain to suggest that the prosecution were less than robust and diligent in pursuing it case to conviction.

One report describes the quality of charge sheets as follows:

'In the charge-sheets filed in court, there was often no correlation between the specific charges and the people listed as Prosecution Witnesses. The prosecution also failed to follow the Criminal Procedure Code (Criminal Procedure Code, 1973) requirements in Sections 212 and 218 to frame distinct charges for each event. Crimes relating to the witnesses often were not included. In the charge-sheet filed with FIR



No. 351/84 of PS Nangloi, for example, no mention was made of the murders of the husbands of two of the Prosecution Witnesses. Although the prosecution did not produce the witnesses in court, alleging that they were untraceable, the Jain-Aggarwal Committee located them in Delhi and found that the police had fabricated their statements, omitting the deaths of their husbands. The charge-sheets also omitted key eye-witnesses. In the case against Rajinder Prasad alias Raj Bania, the charge-sheet did not include the names of the petitioner's four daughters all of whom had witnessed the murder of their father. Thus, the prosecution and police ensured the acquittal of the defense through reliance on faulty charge-sheets."

It is apparent from the above that as a logical conclusion of the token investigation that was carried out, weak charge-sheets made sure that even if the witnesses were ready to depose before the court either their names were struck off or they were not examined by the prosecution and paved way for a clear acquittal.

#### 8. Trials, Acquittals and Appeals

From the FIRs that we analysed, we found that 30% of the cases that proceeded to trial ended in acquittals. We do not have complete information on whether all of them were appealed or not but we do know that in July 2010 there were 44 appeals from acquittals and convictions pending in the Delhi High Court and 2 special leave petitions pending in the Supreme Court of India.

The Jain Aggarwal Committee gave some of the following reasons why in their opinion the riot related cases were resulting in acquittals and the manner in which the trials were being conducted:

- **Faulty investigation:** The Committee observed that the Investigating Officers examined only the complainant, widow or son or father of the deceased as the case may be under section 161. The statements recorded were short and sketchy and concluded that the maker of the statement was not able to identify anyone from amongst the culprits/mob.

- No correlation between cases: Since a number of incidents of mob violence took place on a particular day in a particular locality at about the same time during 31<sup>st</sup> October to 4<sup>th</sup> November 1984, the police should have correlated the various instances to find corroborative evidence. But nothing of this kind was done and a solitary witness to a crime even in cases where charge-sheets were filed was in most cases the complainant. Even the family members or neighbours were not examined or arrayed in the list of witnesses and even if the complainant had witnessed other instances of violence, no attempt was made to utilize this information. We noticed this trend while analyzing the FIRs. For example in a particular locality there was an FIR lodged at around 1 am for looting, rioting etc and the case was later closed as accused untraceable, but in the same police station the subsequent FIR filed around 3 am referred to persons being arrested for violating the curfew orders, near the same locality as above, but no correlation was chosen to be made by the police.
- No attempts to trace accused persons: No attempts were made to trace accused persons and effect recovery of weapons or stolen goods from them. Infact the police had resorted to making public announcements and asking people to deposit stolen goods on the roads so that they could be collected and given back to their owners where ever traceable. This is not an acceptable form of recovery of stolen goods as per the Criminal Procedure Code, 1973 and such recoveries have no evidentiary value.
- Joint trial: The logical fallout of an omnibus FIR which is general in nature but to which a number of complaints and/or statements are attached is a joint chargesheet for numerous offences. The general principle in the Criminal Procedure Code, 1973 is that for each distinct offence of which a person is accused, the accused will face a separate charge and a separate trial. The Committee was shocked to observe that in a large number of charge-sheets filed in court several accused persons numbering even 100 and more were arraigned to stand trial together even though allegations against a number of them were distinct and were not linked to each other. This utter confusion resulted in the acquittal of a number of persons.

- Non examination of prosecution witnesses: Another shocking trend observed by the Committee was that even though a number of complainants were cited as prosecution witnesses, they were not examined on the pretext of their not being traceable. In a number of cases these witnesses were eye witnesses and would have probably changed the course of the trial. It is also mentioned that in a number of cases, these very complainants were traced by the Committee for verifying the details of the affidavits filed by them.

Vrinda Grover, Advocate of the Supreme Court, conducted an analysis of 137 representative judgments on the November 1984 massacres, with 120 from the trial courts, seven from the High Court, and four from the Supreme Court. These cases resulted in only eight convictions for murder, with two of those overturned by the High Court. Grave lapses in police investigations, delays in filing cases, the failure to identify and investigate prosecution witnesses, the deliberate mis-recording of witness statements, and the failure to comply with legal procedures precluded effective prosecutions. For example, in *State v. Kanak Singh* the police translated the English FIR into Hindi and considered that to be their investigation<sup>119</sup>.

Sajjan Kumar, an influential Congress leader from Sultanpuri in the Outer district of Delhi is alleged to have instigated and led the rioting mobs in his district and other areas resulting in murders, looting, arson and theft being committed. Recommendations against Sajjan Kumar were made by the Jain Banerjee Committee, the Jain Aggarwal Committee and the GT Nanavati Commission. At least 7 FIRs referred to Sajjan Kumar as an accused person, but the cases were closed as accused untraceable. This issue was specifically raised by the Nanavati Commission in its recommendations while referring to FIR nos 250/84, 307/94 and 347/91 of PS Sultanpuri, FIR nos 325/93, 329/93 and 178/84 of PS Mangolpuri and FIR no 416/94 of PS Delhi Cantt.

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<sup>119</sup> Jaskaran Kaur, *ibid.*, 97.

In response, the Government in the ATR on this recommendation has specifically mentioned that in 5 FIRs the witnesses/complainants resiled from their statements and therefore Sajjan Kumar's name did not find mention in the charge sheet or the case was closed due to accused being untraceable. We do not know if the complainants were given notice before closure of the cases or whether any attempts by the investigating agency or the judge were made to assess why the witnesses had changed their statements.

Currently, the CBI is prosecuting Sajjan Kumar, Brahmanand Gupta and others in a trial going on in the Court of Additional Sessions Judge, Karkardooma, Delhi. It is pertinent to mention here that even in May 2010 Sajjan Kumar could not be produced in court by the CBI and only after the Metropolitan Magistrate threatened to summon the Director of the CBI in person and considerable media attention to this case was given that the accused person appeared in the lower court after securing bail from the Delhi High Court. Even though the trial has recently begun and the prosecution is leading evidence already this case has reached the Supreme Court on the issue of bail and on the issue of framing of charges. The fact that an extremely high profile prosecution of Sajjan Kumar an active Congress leader and a Member of Parliament is still going on and is at the stage of evidence is a telling fact. Sajjan Kumar is only one of several Congress politicians who was identified by victims and witnesses as involved in violence, and like Kumar, his counterparts have escaped criminal liability. As late as May 2010 the closure report filed by the CBI in a prosecution against Jagdish Tytler was accepted by the Court mainly on the grounds of too much time having elapsed clearly indicating that an alleged offender may not even face trial because the prosecution is doing the job of the defence.

While inspecting the available trial court records of the cases in Delhi we came across the file of *State v Rajbeer Singh* which is a window on the attitude of the investigating agency, the prosecution and the judiciary while conducting cases flowing from the 1984 massacre. The trial started on 26.07.1994 and was completed on 26.11.1994 i.e. in a span of 4 months<sup>120</sup>.

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<sup>120</sup> *State v Rajbeer*, FIR No. 559/92, PS Punjabi Bagh, u/s 147,148,149 IPC based on the affidavits of Joginder Bajwa and Inderjeet Singh, charges framed u/s 147/395/436 and 295 IPC r/w 149 IPC. SC No. 21/94.

The dateline of this case with the proceedings in brief is as follows<sup>121</sup>:

- 09.08.1994: Charges framed. Prosecution Evidence on 20.09.1994 and 22.09.1994
- 20.09.1994: Prosecution Witness (PW) Jaswant Singh has expired while other 2 PWs remain unserved. 22.09.1994 for remaining prosecution evidence (RPE)
- 11.10.1994: PW Joginder Singh Bajwa has sent application stating that he is apprehending danger to his life at the hands of the accused persons. The Judge while deciding this application was of the opinion that since the exact nature of the danger has not been pleaded in the application, the same is based on the whims of the witness and non bailable warrants (NBW) were issued against the witness. Following this date 6 different dates were put up in the case for the appearance of the said witness who did not place an appearance in the court.

After repeated hearings where the main prosecution witness did not appear, the accused was acquitted on 26 November 1994. The case file records said:

“26.11.1994: No PW is present. NBW sent against PW Joginder Singh Bajwa who is material and main witness in this case has been sent back with request that NBW against him cannot be executed for want of time. It appears that investigating agency is not interested in producing this witness to court. This witness also does not appear to be interested in appearing before the court as he did not turn up when summoned and he was not available as per the request stated to be served/ executed against him for production in court on 29.10.1994. The prosecution was given last opportunity. Thereafter, this witness was not produced on 17.11.1994. NBW was stated to be unexecuted against him and returned with report that he is not available at the given address at Kapurthala. Today also, NBW has been returned unexecuted with remarks as mentioned above. Thus it appears that neither PW Joginder Singh Bajwa nor the prosecution is interested in

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<sup>121</sup> Accessed on inspection of court records carried out in the record room of the Patiala House court in Delhi. Records on file with Centre for Equity Studies.

producing him as a witness. Even the IO is not present today though he was directed to appear in person on the last date of hearing. Assistant Public Prosecutor (APP) requests for one more adjournment which is declined. Therefore PE is ordered to be closed. On perusal of evidence no incriminating circumstance has appeared in the evidence of the prosecution to be put to the accused in his statement u/s 313 Criminal Procedure Code, 1973 to seek explanation from him. Therefore requirement to record his statement u/s 313 Criminal Procedure Code, 1973 is dispensed with and the accused is acquitted for lack of evidence, for the reasons mentioned in my judgment recorded separately.”

Clearly, the Court chose to be a silent spectator to the lackadaisical approach displayed by the Police and the Prosecution and paid no heed to the need for witness protection. The records nowhere displayed any attempt by the Judge to warn the accused persons about the consequences of intimidating the prosecution witnesses let alone assuring the witness of any protection. Further, in spite of the fact that the witness was not residing in Delhi a short period of time was given to serve the witness and finally the IO was not held to account for not appearing in the case in person.

The Delhi High Court and the Supreme Court dealt with some cases coming out of the 1984 violence. In one judgment, discussed later in this chapter, the High Court judged compensation given to a widow to be inadequate. In another, *Bhagat Singh v State*<sup>122</sup>, the High Court took into consideration the context of the massacre and especially the fact that the Misra Commission, the Kusum Lata Mittal Committee and the Jain Aggarwal Committee had severely criticised the role of the police and the administration during and after the massacre. In this case the relevance of conviction on the basis of a supplementary chargesheet was challenged when in the main chargesheet the accused were acquitted. The High Court was of the opinion that Section 173(8) clearly stipulates that nothing contained in Section 173 of the Code shall be deemed to preclude further investigation in respect of an offence after

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<sup>122</sup> MANU/DE/1082/2010

report under Section 173(2) has been forwarded to the Magistrate and therefore the conviction on a the basis of a supplementary chargesheet is not bad in law.

The Supreme Court's record with cases related to mass violence in 1984 is very mixed. In *Kishori v State*<sup>123</sup>, an appeal against conviction and sentence, the apex court seemed to treat the context of violence – the fact that it was mass communal violence – as a mitigating factor in favour of the defendant. The Supreme Court through JJs GT Nanavati and Rajender Babu upheld the conviction of the accused but altered the death sentence awarded to the accused to one of life imprisonment. The court reasoned that, inter alia, the defendants had been swept away by mob frenzy, and participants in mobs lose “one's self and the normal standard or sense of judgment and reality”. Further where the argument of a hardened criminal is being made by the State for the purpose of sentencing, the Supreme Court has observed that even though at the stage of trial the accused was convicted of 7 murders, the High Court upheld the conviction in 3 cases and only 2 were appealed before the Supreme Court, therefore the accused cannot be termed as a hardened criminal. In any case, the Supreme Court said, all the cases refer to one string of events and not various different crimes committed by the accused. One of the judges in this case, Justice GT Nanavati a year after this judgement was heading the last Commission of Inquiry looking into the anti-Sikh massacre of 1984. This rationale of the Supreme Court was also followed in *Manohar Lal@ Munna and Anr v State of NCT of Delhi*<sup>124</sup>, a case with similar facts, where the court opined, “What the appellants have done were no doubt acts of the most gruesome nature. But we bear in mind that they were on a rampage, and they ran berserk unguided by sense or reason and triggered only by a demented psyche. They had no special or personal animosity towards anyone of the deceased individually. The assassination of Prime Minister Indira Gandhi had blind folded those youths and unfortunately there was no leadership to bridle the mob frenzy unleashed with all cruelty<sup>125</sup>.”

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<sup>123</sup> AIR 1999 SC 382

<sup>124</sup> AIR 2000 SC 420

<sup>125</sup> *Ibid*, para 8

#### D. Accountability of Officials

In the previous section, we discussed how the police failed victims in the immediate aftermath of violence, by refusing to even record the first information given to them in detail and then by conducting substandard investigations. In this section we will examine the kind of action, if any, that was taken against erring officials of the government who were accused of dereliction of duty and/or active connivance during the massacre in Delhi.

In the various civil society reports<sup>126</sup> and government reports<sup>127</sup> the role of the police and other administrative officials during and after the massacre has consistently been under criticism. The authors of such reports after examining numerous affidavits of victims and eyewitnesses and interviewing them are of the view that in a number of instances the police was instigating the violence and in other places it was a silent spectator to the massacre unfolding.

As discussed earlier, the Kusum Lata Mittal report dealt with the role of the Delhi police in detail, singling out all the police personnel responsible for dereliction of duty or accused of having actively indulged in the violence. This report based its recommendations on affidavits of the victims and eyewitnesses, police records like duty registers, wireless log books and movement registers and affidavits of the police and on behalf of the Delhi administration. Wherever the Committee found that a police official had done a commendable job the report recommended positive measures be taken.

Action was recommended by Ms. Kusum Lata Mittal against 22 SHOs<sup>128</sup> while in 1984 the then Union Territory of Delhi was divided into 63 police stations<sup>129</sup> therefore

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<sup>126</sup> People's Union of Democratic Rights and People's Union of Civil Liberties, *Who are the Guilty? Report of a joint inquiry into the causes and impact of the riots in Delhi from 31 October to 10 November 1984* (Delhi: 1984) available at <http://www.pucl.org/Topics/Religion-communalism/2003/who-are-guilty.htm>; Jaskaran Kaur, *ibid.*

<sup>127</sup> Justice Misra Commission report, Jain Aggarwal Committee report, Kusum Lata Mittal Committee report and Justice GT Nanavati Commission report

<sup>128</sup> Station House Officer, overall in-charge of a police station



a clear 33% high ranking officials were recommended for suitable departmental action. Also, the committee gave recommendations against 3 Assistant Commissioners of Police and 3 Deputy Commissioners of Police who were in charge of 3 out of 5 districts functioning at that stage in Delhi. The Jain Aggarwal committee report also made recommendations against police officials apart from making recommendations on the criminal cases being pursued by the State. The table below indicates the sum total<sup>130</sup> of different types of action taken or reasons for not taking action against police officials recommended by both Kusum Lata Mittal report and the Jain Aggarwal committee report.

Sr. No	Action Taken <sup>131</sup> /Reason for no	Number
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<sup>129</sup> Justice Ranganath Misra Commission report, 8

<sup>130</sup> This information has been consolidated on the basis of information received through RTI applications and the GT Nanavati Commission report.

<sup>131</sup> As per the Delhi Police Act, 1978, Section 21 Powers of punishment

(1) Subject to the provisions of article 311 of the Constitution and the rules, the Commissioner of Police, Additional Commissioner of Police, Deputy Commissioner of Police, Additional Deputy Commissioner of Police, Principal of the Police Training College or of the Police Training School or any other officer of equivalent rank, may award to any police officer of subordinate rank any of the following punishments, namely:--

- (a) dismissal;
- (b) removal from service;
- (c) reduction in rank;
- (d) forfeiture of approved service;
- (e) reduction in pay;
- (f) withholding of increment; and
- (g) fine not exceeding one month's pay.

(2) Subject to the rule--

- (a) any police officer specified in sub-section (1) may award the punishment of censure to any police officer of subordinate rank;
- (b) the Assistant Commissioner of Police may award the punishment of censure to police officers of, or below, the rank of Sub-Inspectors of Police;
- (c) any police officer of, and above, the rank of Inspector may award punishment drill not exceeding fifteen days or fatigue duty or any other punitive duty to constables.

	action	
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1	Departmental Action	47
2	Retirement/expired	42
3	Censure	5
4	Exonerated	32
5	Reduction of pension	1
6	Pending action	4
7	Enquiry quashed	1
8	Warning	1
9	Criminal Cases	25
	Total	158

Recommendations given against 12 specific police officials by the GT Nanavati Commission of Inquiry were responded to by the Delhi Government in its memorandum of action taken. Of the 12 officials, 7 officials had retired and no action could be taken against them. 5 disciplinary proceedings were initiated which resulted in 2 exonerations and 3 cases were dropped due to lack of evidence. The GT Nanavati Commission of Inquiry observed that, '...police personnel remained passive and did not provide protection to the people.'. The government responded to this general observation with its own generality: 'The Government has noted all such general observations for taking appropriate remedial action and to advise Delhi Police (and State Governments) to ensure that the police personnel perform their duties properly in such situations in future.' The Nanavati Commission report even as late as 2005 found that the explanations given by the Lt. Governor P.G. Gavai and

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(3) Nothing in sub-section (1) or sub-section (2) shall affect any police officer's liability for prosecution and punishment for any offence committed by him.

(4) The Commissioner of Police, Additional Commissioner of Police, Deputy Commissioner of Police, Additional Deputy Commissioner of Police, Principal of the Police Training College or of the Police Training School, Assistant Commissioner of Police, or any other police officer of equivalent rank may suspend any police officer of subordinate rank who is reasonably suspected to be guilty of misconduct, pending an investigation or enquiry into such misconduct.

(5) An Inspector of Police may suspend any police officer below the rank of Sub-Inspector of Police, who is reasonably suspected to be guilty of misconduct, pending an investigation or enquiry into such misconduct.

the Commissioner of Police S.C. Tandon respectively in November 1984 were found to be unsatisfactory and that they both 'cannot escape the responsibility for their failure' but in response the government said that both the persons had been replaced and that, according to the government, was sufficient action<sup>132</sup>.

The then Commissioner of Police SC Tandon has maintained in his testimony that accurate information about the scale of violence was not being relayed to him by his subordinates and therefore he was not in a position to react. However, wireless records referred to by the Kusum Lata Mittal report disproved this, as do other sources, such as an affidavit by journalist Rahul Kuldeep Bedi which clearly establishes that the information was at all times reaching the police control room. Despite hard proof that the police commissioner was grossly negligent, and despite findings by one committee and one commission to this effect, the Delhi Government took no action against him. Negligible amount of action has been taken against the police officials in a position of command clearly setting an example of this being acceptable behaviour and setting a trend which continues to be seen in other instances of mass violence.

#### E. Relief, Rehabilitation and Compensation

##### 1. Displacement

According to civil society reports at least 50,000 persons were displaced by the 1984 mass violence<sup>133</sup>. In 2006, the Central Government acknowledged in a notification that around 22,000 families had migrated to Punjab from other riot affected states (not limited to Delhi only) and that they were still living in Punjab. Such families were to be paid a rehabilitation grant @ Rs. 2 lakh per family and other riot affected families who had moved to other states would also similarly be paid a rehabilitation grant of Rs. 2 lakh per family.

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<sup>132</sup> Action Taken Report received from Ministry of Home Affairs, response No U.14011/85/2009-Delhi-I(NC) dated 01.02.2010

<sup>133</sup> PUCL-PUDR, *ibid*.

## 2. Relief Camps

As per the RK Ahuja report<sup>134</sup> 12 relief camps had been set up. It is not clear if this was the total number of relief camps set up or if these are only the government camps that are being referred to. From accounts of survivors before two commissions of inquiry, i.e. Ranganath Misra and GT Nanavati, on 3<sup>rd</sup> November 1984 a number of the survivors were taken to relief camps by the army. There is also reference to a number of camps that were set up within gurudwaras. Civil society accounts refer to relief camps being in existence even a year after the violence<sup>135</sup>. The PUCL-PUDR report 'Who are the Guilty?' which was written soon after the massacre refers to an official figure of 10 relief camps and an unofficial figure of 18 camps more within Delhi and on its outskirts<sup>136</sup>.

After announcing a rehabilitation scheme on November 6<sup>th</sup> 1984, the government also announced the closure of relief camps<sup>137</sup>. It is only after the Delhi High Court<sup>138</sup> granted a stay that the camps were extended till November 16<sup>th</sup>, even then it is reported that the Government had stopped the water supply to the camps from November 13<sup>th</sup> itself<sup>139</sup>. At that stage with meagre compensation the victims of violence were forced to return to their houses which had either been looted or completely burnt.

## 3. Monetary compensation

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<sup>134</sup> Set up as a consequence of the recommendations of the Misra Commission of Inquiry, to determine the exact number of Sikhs killed in Delhi and to recommend relief and rehabilitation measures.

<sup>135</sup> Jaskaran Kaur, *ibid.*, 38

<sup>136</sup> PUCL-PUDR, *ibid.*

<sup>137</sup> Jaskaran Kaur, *ibid.*, 70

<sup>138</sup> *State v. Nagrik Ekta Manch*, Delhi High Court 1984

<sup>139</sup> Jaskaran Kaur, *ibid.*, 70

The Central Government appointed a Relief Commissioner<sup>140</sup> with effect from 4<sup>th</sup> November 1984<sup>141</sup> even though the violence had begun from the afternoon of 31<sup>st</sup> October itself<sup>142</sup>. The 1984 notification did not lay down in detail the procedures for applying for compensation in any of the categories stated above. The Ahuja Committee report states that, 'Since the conditions remained disturbed for some time and also in order to ensure early settlement of claims, most claims were decided on the basis of one or two local witnesses and sometime on the statement of the claimant alone. This was done because of the fact that many of the victims could not either file a FIR or because the FIRs were allegedly not registered by the police. Therefore, initially, death certificates / FIRs were not considered essential while considering the claims. Approximately 1700 claims were settled by March, 1985 and a total of approximately Rs.1.7 crores was paid to the next of kin. The scrutiny for the claims after July-August, 1985 was made more rigorous and death certificates, FIRs and a copy of the ration card were required as part of documentary evidence.'

In response to the massacre, the Government of India announced compensation packages at 5 different occasions beginning in 1984 and ending in 2006. These are discussed below.

The first compensation package announced by the Government of India on 6 November 1984 provided for a paltry compensation of Rs.10,000 to the next of kin for each death in the family, compensation of Rs.2000 for injury, grant of Rs.10000 for total destruction of the house, and for substantial and minor damage, Rs.5000 and Rs.1000 respectively.

In the subsequent year, the Government of India enhanced the compensation for death from Rs.10,000 to Rs.20,000. However the distribution of compensation was extremely delayed and many victims had received nothing up until 1998. The relief scheme increased the amount allotted for total destruction to 10,000 and

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<sup>140</sup> Central Government order No.F.8/1/84-SI of 5th November 1984

<sup>141</sup> RK Ahuja Committee report accessed on [www.carnage84.com](http://www.carnage84.com)

<sup>142</sup> Jaskaran Kaur, *ibid.*, 70

maintained Rs.5000 for substantial destruction<sup>143</sup>.

The Ahuja report recorded that 1700 claims had been settled by the Relief Commissioner's Office by March 1985, however for claims after that date, death certificates, FIRs and a copy of the ration card was required, a measure which precluded many families of the victims who had been either unable to get FIRs registered or received death certificates<sup>144</sup>.

The year after, in 1987, an ex-gratia assistance to victims for loss or damage to commercial premises or assets was announced, which was to be given at a rate of 50% of the estimated loss, up to a maximum of Rs. 50,000 and would cover both insured and uninsured property. In case of insured property, the amount received by the victim by way of insurance claims would be set off and in case it exceeded the maximum limit, then no assistance would be provided. An FIR was essential for the claim to be entertained.

In 1990, compensation for (total) destruction of house was enhanced to Rs. 20,000, which was to be paid retrospectively.

The Nanavati Commission Report recommended employment for one family member and compensation on a uniform basis. Both these recommendations were accepted by the Government in its 'Action Taken Report (ATR), which established two committees to inquire into the adequacy and uniformity of compensation through several Indian states and additional employment opportunities for survivors. The reports of the two committees were submitted on October 29, 2005, and the same recommended an additional total compensation of Rs.10,000,000<sup>145</sup>.

This led to the government announcing the most significant increase in compensation in 2006, a total increase of Rs.7,500,000. This increased the

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<sup>143</sup> Ahuja Report, as cited in page 71, 20 Years On.

<sup>144</sup> Ahuja Report, page 21, 20 Years On.

<sup>145</sup> S Satyanarayan, Panel on '84 riots, as cited in p.139, 20 years on...

compensation in case of death, by providing for the payment of ex gratia amount of Rs. 3.5 lakhs, which was to be over and above anything that had already been paid to the family of the victim. As per the directions, all death cases in trains were to be paid the ex-gratia amount after due verification. Ex gratia for damaged residential properties was to be paid at 10 times the original amount paid after adjusting the amount already paid. Ex gratia for damaged uninsured commercial/industrial properties were to be paid at the rate of ten times the original amount paid, after adjusting the amount already paid. This circular also provided for preference and age relaxation in employment opportunities for the children/family members of persons who died in the riots and asked the concerned governments to launch special recruitment drives. Necessary pension benefits for affected persons who had to leave their jobs due to the riots and have now reached the age of superannuation were also provided.

Pension benefits to widows and old aged parents of those who were killed in the riots at the rate of Rs.2500 per month were also announced. Wives of disabled persons (who had over 70% disability) and persons who have been missing since, were also held to be eligible for the pension. However, the notification was not clear on whether these benefits were to be extended retroactively or from date.

Interestingly, this is also the only notification that provides for a procedure to be followed, the kind of personnel to be used for disbursement of the compensation amounts and lastly a clear cut schedule and time line for dealing with all claims. While it is not known if all the claims have been settled or not, there have instances where the victims have had to approach the High Courts of their States for payment of claims under the 2006 notification.

#### **4. Relief for Widows and Children**

The Misra Commission had recommended that the socio-economic programmes for rehabilitation of the riot affected widows, especially in the matter of employment, should be continued.

In addition to the monetary help, the Delhi Administration also allotted DDA flats at reserve prices to the widows. The flats were allotted on payment of an initial instalment of Rs.1,000/-. A total of 942 flats were allotted to the widows against this scheme. But in 1989 the government demanded Rs. 42,000 for the price of one flat in Tilak Vihar, a widows' colony with 1600 families<sup>146</sup>. It was also decided that any widow who got married would get Rs.5,000/- and a daughter of the widow who got married would be given Rs.3,000/- after proper verification. Efforts were also made to provide training to the widows to enable them to stand on their own feet. In 1986 an attempt was made to find out the number of widows or their wards who would require employment. The Lt. Governor vide letter U.O. No.86/LG/86/914-30 dated 07.03.1986 asked various Government Departments and agencies of Delhi Administration to identify posts for the employment of these widows along with age relaxation and relaxation in qualifications vide U.O. No.313/LG/86/932 dated 29.05.1986.

Even though the Ahuja Committee recommended that in addition to other benefits, suitable Government employment should be offered to the eligible widows or one member from each family in relaxation of rules pertaining to age, educational qualifications and work experience and that old age pension of Rs.500/- per widow should be granted in such cases where the widow is of more than 55 years of aged and no employment has been given to the widow or one of her sons and a stipend of Rs.50/- and Rs.100/- per child be given to the children of those killed in riots, while studying in school and college respectively, it is not clear if these measures were implemented.

##### 5. Compensation for damage/destruction of Commercial Property

The Misra Commission recommended that reasonable compensation as may be decided by the State should be paid for commercial premises which have sustained losses due to violence and liberal compensation be paid where victims had a small business with the caveat that a victim who has received compensation in the form of

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<sup>146</sup> Jaskaran Kaur, *ibid.*, 71



private insurance will not be covered<sup>147</sup>. The Commission also recommended indirectly that the Government should tie up with major banks and ensure that soft loans are made available to the victims of the violence<sup>148</sup>.

The Dhillon Committee recommended that business establishments, which had insurance cover, but whose insurance claims were not settled by insurance companies on the technical ground that riot is not covered under the insurance, should be paid compensation under the directions of the Government. This Committee recommended that since all insurance companies were nationalized, they be directed to pay the claims. However, the Government did not accept this recommendation and as a result insurance claims were rejected by the insurance companies throughout the country.

The Central Government also propounded a scheme called 'Central Interest Subsidy Scheme (Revised)' for November, 1984 Riot Affected Borrowers (hereinafter called 'the Scheme'). The Scheme came into force from 1st September, 1993. The Reserve Bank of India issued directions to all the banks that all the borrowers who were affected by the November, 1984 riots would be eligible for relief if any loan was outstanding during the period of November, 1984 till March, 1992 in terms of the said Scheme. The Scheme provides that interest of only 1% per annum was to be charged and the balance interest amount due to the banks would be reimbursed by the Government of India to the banks as interest subsidy through RBI<sup>149</sup>.

The Nanavati Commission strongly recommended that all affected persons throughout the country should be compensation uniformly, at an early date and one member of the family who has lost all their earning male members and don't have the necessary means to provide for themselves should be provided employment. The Commission also observed that in cases where the victims have managed to approach the concerned High Courts they have managed to get compensation upto Rs. 3.5 lakhs for death of a family member. In light of this observation the

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<sup>147</sup> Justice Ranganath Misra Commission report, 64-65

<sup>148</sup> *Ibid.*, 65

<sup>149</sup> Reference to this scheme has been found in *Sawhney Brothers v UOI & Ors* 2007(97)DRJ679

Commission recommended that the Government ensure that there is complete uniformity of payment and that the standards set by the High Court should be taken into consideration while making such payments.

It can be safely said that the last compensation notification dated 16<sup>th</sup> January 2006 is a result of suggestions made by the Nanavati Commission and subsequent discussion in the Parliament, which in turn were influenced by civil society activism.

## 6. Judicial Intervention

In a number of instances the victims had to knock the doors of the Delhi High Court to be able to claim their compensation. In *Bhajan Kaur v Delhi*<sup>150</sup> the petitioner approached the Delhi High Court seeking enhancement of compensation paid for the death of her husband during the 1984 massacre. The Delhi High Court, relying on previous decisions of the Supreme Court and other High Courts, concluded that the judicial trend is to award substantial compensation for illegal extinction or deprivation of life and liberty as a result of abuses by State agents. It held that the principles for grant of compensation or financial aid to the families of the victims whose lives are taken away due to State failure to prevent mass violence should be the same<sup>151</sup>. The judgment in this case formed the basis on which enhanced compensation was recommended by the Nanavati Commission and then paid by the government.

In *Sardar Paramjeet Singh v Delhi*<sup>152</sup> the Delhi High Court intervened in a case where a survivor of the anti-Sikh massacre in Delhi had moved to Punjab in 1986 and had then returned to Delhi in 2000. In 2006 the GOI had announced enhanced compensation packages for the victims of the massacre and the Petitioner being in Delhi applied for the compensation in Delhi but was refused on the grounds that since he had moved to Punjab, he could not apply for benefits in another State. The High Court directed the Delhi government to pay the enhanced compensation to the Petitioner after carrying out the necessary verification within a specified time limit

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<sup>150</sup> 1996(38)DRJ203

<sup>151</sup> *Ibid.*, para 26-27

<sup>152</sup> MANU/DE/1347/2009

and then claim that amount from the concerned government department instead of making the Petitioner run from pillar to post.

Overall, it is amply clear that it took the Central government 22 years to reach a consensus on the amount of compensation and the categories of loss that it needs to compensate. It is also clear that all the claims have still not been settled and that victims still have to knock the doors of the High Court to get what is due to them even after almost 26 years.

## 7. Religious Structures

The Justice Ranganath Misra Commission report notes that the Delhi Development Authority (DDA) had repaired 131<sup>153</sup> Gurudwaras located in different parts of the city which had been damaged due to the massacre. The Delhi Administration had reported in response to an inquiry by the Mishra Commission that a total of 180 Gurudwaras had been damaged during the massacre and 11 educational institutions also run by Sikhs across the city had been damaged.

## F. Summing up

27 years after the 1984 massacre, high profile criminal trials are still pending or have recently been closed, housing allotment is still being carried out, enhanced monetary compensation was paid as late as 2005 and cases are still pending with the Delhi government, none of the police officials who were in charge and could have prevented large scale violence from taking place by doing their duty have been prosecuted.

It would not be incorrect to say that the State started responding only when there was external pressure either of the media, human rights groups and activists, or of the organised and influential Sikh community. Left to its own devices, the State was more than satisfied in ensuring that criminal cases are not registered or are closed

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<sup>153</sup> A list of these gurudwaras is part of the Justice Ranganath Misra Commission Report Vol.II, Appendix 6, 19-21

due to a farcical investigation, token amounts paid as compensation for the loss of life and livelihood and the junior most people being held accountable for the complete failure of the law and order machinery.

## V. Bhagalpur 1989<sup>154</sup>

### A. Introduction

In 1986, the locks of the Babri Masjid were opened in Ayodhya. In the years that followed, right-wing Hindu political parties and organisations campaigned across India to build a temple on the same site where the mosque stood. In Bhagalpur, Bihar, over 1000 people, mostly Muslims, were killed in 1989 during violence that followed a shilanyas procession carrying 'consecrated' bricks to Ayodhya for constructing the temple. This chapter examines the official record on mass violence in Bhagalpur, Bihar in 1989. We will briefly describe the violence. We then discuss access to criminal justice, whether and how public officials were held accountable, and compensation and rehabilitation for the victims.

### B. Context

In the late eighties, the town of Bhagalpur had a history of well-established, politically affiliated criminal gangs<sup>155</sup>, high rates of crime, and a history of religious riots<sup>156</sup>. Even against this background, the mass violence in 1989 was anomalous and fierce. Unlike previous riots, the riots in 1989 continued intermittently for almost 6 weeks. Violence broke out on 24 October 1989, and lasted until early December 1989<sup>157</sup>, spreading to 15 out of 21 blocks in Bhagalpur district, and extracting a heavy toll of death and injury.

Official estimates say that 982 people were murdered, including 29 people from outside Bhagalpur district<sup>158</sup>. Unofficial estimates put the number of dead at about

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<sup>154</sup> Researched and written by Surabhi Chopra

<sup>155</sup> Engineer, A. A., "Grim Tragedy of Bhagalpur Riots: Role of Police-Criminal Nexus." *Economic & Political Weekly*, Vol. 25, No. 6, (Feb. 1990), 305.

<sup>156</sup> Engineer, A. A., "Bhagalpur Riot Inquiry Commission Report", *Economic & Political Weekly*, Vol. 30, No. 28, (July 1995), 1729.

<sup>157</sup> A.K. Singh, Special ADM, Law & Order, Bhagalpur (temporary charge in 1989), "Bhagalpur Riots in Retrospect" (Report by Special ADM, Law & Order, Bhagalpur).

<sup>158</sup> Report by Special ADM, Law & Order, Bhagalpur.

1100<sup>159</sup>. Some months after the violence, the bodies of only 414 people had been recovered. Those who were missing were believed to have been drowned in the Ganga or killed and buried in paddy fields. Estimates of people seriously injured vary between 259<sup>160</sup> to 524<sup>161</sup>. 84 children were completely orphaned, with no family surviving to look after them. Over 11,500 houses were damaged in 195 villages, out of which about 4000 were completely destroyed. Thousands of people were displaced from their homes and took shelter in relief camps. A senior official estimated that 48,000 people 'were affected in various ways'<sup>162</sup>. The Bhagalpur riots were also unusual because violence spread from Bhagalpur town to villages in Bhagalpur district - official reports speak of mobs comprising hundreds, sometimes thousands of attackers, targeting villages. As we describe later, some of the worst massacres during the 1989 violence were in rural areas.

What led to the violence? The months leading up to mass violence in Bhagalpur saw friction between some Hindus and Muslims in the area, centred around public religious celebrations<sup>163</sup>. Despite violence in other parts of Bihar that year, as the Ram Janmbhoomi- BabriMasjid dispute simmered, the State Government did not stop the shilanyas processions<sup>164</sup>. On 24 October, 1989 in Bhagalpur, the shilanyas procession went to Tartarpur chowk, a Muslim locality off its licensed route, where people tried to stop the procession. A verbal scuffle led to violence, and members of the procession alleged that they were attacked with bombs thrown from a Muslim school in the area. The Superintendent of Police ('SP') ordered the police to open fire, and was attacked, and allegedly bombed, by a Muslim group in Tartarpur

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<sup>159</sup> "Recalling Bhagalpur: Aftermath of 1989 Riots." *Economic & Political Weekly*, Vol. 21, No. 18, (May 1990), 1055 - 1059; "14 Hindus Get Life in Killing of 116 Muslims", *Reuters*, July 8, 2007.

<sup>160</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

<sup>161</sup> Anand St. Das, "The Face of Bhagalpur's Horror," *Tehelka*, July 7, 2007.

<sup>162</sup> Report by Special ADM, Law & Order, Bhagalpur, [on file with author].

<sup>163</sup> For details see, Engineer, A. A., "Grim Tragedy of Bhagalpur Riots: Role of Police-Criminal Nexus." *Economic & Political Weekly*, Vol. 25, No. 6, (February 1990), 305

<sup>164</sup> Bharti, I., "Bhagalpur Riots and Bihar Government," *Economic & Political Weekly*, Vol. 24, No. 28, (November 1989), 2643.

Chowk. The Commission of Enquiry<sup>165</sup> reviewing evidence on the outbreak of violence concluded that the alleged bomb were likely to have been firecrackers, and while most processionists were not violent, a critical minority were armed and shouting anti-Muslim slogans as they went through Tartarpur chowk.

After this, violence spread through Bhagalpur town, fuelled by rumours that Muslims had killed students in the local university. Muslim homes and businesses were attacked in different parts of Bhagalpur town, including Parwatti, Ashanandpur, and Sujaganj Bazaar, where 'a number of BJP people ably assisted by a band of criminals' attacked Muslims and looted Muslim homes and shops while the police watched<sup>166</sup>.

Violence spread to the villages surrounding Bhagalpur. Official reports on the violence describe attacks by mobs of hundreds, and occasionally thousands, of people. While there were some attacks by Muslim mobs on Hindu people and property, the majority of victims were Muslim.

Thirty one Muslims were killed in Bhatoria village on 25 October<sup>167</sup>. Many Muslim families fled to the neighbouring village of Bhadki Bhatoria. The DIG ordered police to protect them, but shortly after he left, a mob of 2000 Hindus attacked. The police fired at the attackers, but when they killed one person, the police panicked and fled. This emboldened the attackers, who pulled down every Muslim home in the village. The Bhagalpur Commission of Inquiry speculated that the police feared reprisal since the person killed when they fired was a Yadav, a powerful community in the area.

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<sup>165</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

<sup>166</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 162.

<sup>167</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 537 – 541.

On October 27, 1989, about 4000 attackers surrounded the homes of about 25 Muslim families in Lugain village<sup>168</sup>. Eyewitnesses said the attackers were led by an ASI of police, Ram Chandra Singh, and the attack lasted 9 hours. One hundred and eighty Muslims were murdered and thrown into wells. When the attackers discovered that they could not disguise the stench of decomposing bodies by covering them with mud, they removed the bodies, buried them in three paddy fields and planted vegetables over them. The ASI of Jagdishpur PS, the BDO and the SI were involved in burying the bodies. Twnty five days later, the Special ADM, AK Singh, discovered the mass graves – the trees in the village were full of vultures, which alerted him to the hidden bodies. The ASI was arrested, but later released on bail.

Muslims in Tamauni village fended off a mob on October 25, then asked Kajrail police station, which was a quarter mile away, for protection. On October 26, the village was attacked again, and while many people fled, many were killed while running away. The attackers looted homes and carried away livestock owned by Muslim families. The police did not intervene. Some days later, attackers intimidated two Muslim ministers of State who were trying to locate bodies of the dead into leaving the village<sup>169</sup>.

In Fatehpur Chowk village<sup>170</sup>, Muslims sought police protection on 29 October when they were attacked, but the police did little to stop the attackers who killed people and looted homes, even though the police station was 200 yards away. The police allegedly told Muslim residents who sought help to contact the army instead. In Adani Nagar, similarly, the police watched a mob loot and kill, and did nothing to help adults and children running to safety<sup>171</sup>. In Chara Baragaon, four Muslims led the police into the village to recover their looted property from the homes of 3 other residents on 26 October 1989. The DIG left them in the protection of police officials,

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<sup>168</sup> “Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989,” R.C.P. Sinha and Shamsul Hasan, para 525 – 530.

<sup>169</sup> “Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989,” R.C.P. Sinha and Shamsul Hasan, para 542 – 546.

<sup>170</sup> *Ibid.*, para 547.

<sup>171</sup> *Ibid.*, para 550 – 551.



led by an ASI. The four Muslims were lynched and killed while the police stood by. No action was taken against the ASI and the constables on duty<sup>172</sup>.

One of the worst massacres was in Chanderi village, where 108 Muslims were killed on October 27, 1989<sup>173</sup>. Attackers surrounded the Muslim hamlet in Chanderi, looting and burning homes. At about 10:00 pm, the army arrived, and promised Muslims safe passage the next day, after assurances from the BDO and the Officer in Charge of Sabour PS that they would watch over the village. The next morning, the attackers, including the mukhiya and the sarpanch of the village, returned to the area and asked Muslims residents to go with them to another village. They led 125 Muslims to a pond close by, and attacked them. Sixty people were killed. One woman, Mallika Begum, survived by jumping into the pond, although two of the attackers chopped her right foot off with a sword. Hours later, the army commander, Major Virk, found her and took her to safety. Mallika Begum later testified before the Patna High Court that police officers were present during the massacre.

The police repeatedly failed to protect lives in Bhagalpur and its surrounding villages. The district administration as a whole did not prepare to avert violence despite advance warnings that Bhagalpur was tense, and failed to react swiftly once violence broke out. However, in the aftermath of violence, a few senior district officials reported candidly and in detail about how the district administration had failed to control violence, particularly against Muslims. We obtained through Right to Information applications reports by the then Commissioner of Bhagalpur ('Commissioner's report') and the Special Additional District Magistrate, Law & Order, Bhagalpur ('Report of Special ADM, Law & Order')<sup>174</sup>. These have provided important facts as well as analysis. The Bihar Government also gave us a copy of the report ('Inquiry report') of the Bhagalpur Riot Inquiry Commission 1989 ('Bhagalpur Commission') in response to an RTI application.

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<sup>172</sup> Ibid., para 548 – 549.

<sup>173</sup> Ibid., para 531 – 535.

<sup>174</sup> These reports were appended to the "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

The Commission was constituted in 1989, while sporadic violence still continued, and finished its inquiry in 1995 rather than in the 3 months initially stipulated when it was set up. The Commission of Inquiry did not have a smooth tenure. It was set up as a single-member commission, but the sole member, a retired judge of the Patna High Court, JN Prasad, was perceived as biased, and protests against his appointment led to two other members being appointed. Ultimately, the Chairperson submitted a dissenting report, which was very much at odds with the majority report<sup>175</sup>. Despite that, the majority report, which was accepted by the Bihar Assembly, was detailed and relatively forthright, and we have drawn heavily upon it for information. It is worth noting that none of these documents are in the public domain, even 20 years after mass violence in Bhagalpur, and we needed to appeal against an initial refusal to disclose them.

### C. Access to criminal justice

In addition to the official reports and inquiry report mentioned earlier, the Bihar Government disclosed FIRs from 3 police stations related to the 1989 mass violence in Bhagalpur. However, it failed to disclose any of the other information we requested on criminal investigation or proceedings. Since the government failed to respond, rather than giving a reasoned refusal, it is not clear if these records no longer exist, or if they are being withheld.

Below, we discuss access to criminal justice in the aftermath of the Bhagalpur mass violence based on the records available to us, with the caveat that this is a partial picture, focusing primarily on the months immediately following mass violence. Information on the fate of trials and appeals in the years that followed is drawn from media reports.

#### 1. Complaints and FIRs

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<sup>175</sup> “Recalling Bhagalpur: Aftermath of 1989 Riots.” *Economic & Political Weekly*, Vol. 21, No. 18, (May 1995), 1059.

The Bihar government did not disclose copies of complaints to us, so we cannot assess how accurately complaints were reflected in FIRs recorded by the police. However, other official reports as well as the Inquiry Commission documented serious problems, as well as bias, in the way FIRs were recorded. By government officials' own reckoning, the police delayed filing FIRs, and failed entirely to file FIRs in many serious cases. The ADM, Law & Order estimated that 982 people were murdered during mass violence. However, the list of FIRs appended to the Inquiry report shows that the police registered only 595 FIRs in the months following violence, which seem to cover only 354 of the officially reported 982 deaths. What of the other people killed? Were these people whose bodies were not recovered? One account speculates that many of the deaths that were never recorded as crimes were the result of police firing<sup>176</sup>, which, as we will discuss below, appears to have been biased against Muslims.

Delays and failures to register FIRs disproportionately targeted Muslim victims and complainants. Further, when FIRs were registered, the police often drafted them poorly, obscuring or omitting important details, thereby weakening any criminal investigation that might follow.

The very first FIR that was lodged in relation to the Bhagalpur riots featured the police as complainants, against Muslim accused, in relation to violence in Tatarpur Chowk on 24 October 1989. Although the Officer-in-charge of Kotwali Police Station had seen Muslim shops being attacked in Shujaganj Market and seen killings and looting in Parwatti Chowk, the police did not lodge an FIR on the violence in Shujaganj or Parwatti Chowk<sup>177</sup>. The Bhagalpur Commissioner remarked that 'it would have been worth investigating...whether...office bearers of Hindu community organizations...' were involved as participants or organizers<sup>178</sup>. Similarly, though Amarpur was the site of serious mass killings, only 2 FIRs had been lodged in relation to that violence even as late as the early 1990s.

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<sup>176</sup> "Recalling Bhagalpur: Aftermath of 1989 Riots." *Economic & Political Weekly*, May 4 1995, Vol. 21, No. 18, 1055 - 1059.

<sup>177</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasanpara, para. 112.

<sup>178</sup> *Ibid.*, para 40(i).

The Commissioner of Bhagalpur noted that major incidents like the Lagain massacre in Jagdishpur went undetected for almost a month<sup>179</sup> and the FIR related to the massacre was registered 41 days after it took place<sup>180</sup>. Mass killings in areas in or close to Bhagalpur town, including Parbatti, and Sahibganj in Kotwali were also ignored for about a fortnight. The report also notes delays in filing FIRs – ‘a major incident of disappearance of 22 Muslims from Sahibganj goes completely unnoticed. The FIR is registered with the police after 45 days’<sup>181</sup>.

The ADM, Law & Order reported that in the aftermath of the riots, police officers were sent to various refugee camps and instructed to record FIRs, but the administration heard that ‘the names of the attackers are not being truthfully recorded. The literate among the refugees and some members of...voluntary organizations were now involved in writing the FIR and handing it over to the police...Even then it took nearly three months for all the FIRs to be registered’.<sup>182</sup>

When the recalcitrant police filed FIRs, these were of dubious quality. Official reports strongly indicate that this was deliberate rather than simply a lack of capacity. The Commissioner of Bhagalpur noted that FIRs in cases of looting by Hindus were ‘drafted most cryptically often not indicating who is the affected person and who are the accused’<sup>183</sup>. As an example, when the police discovered the bodies of 6 Muslim adults and 4 children in a well very near Kotwali police station, the resulting FIR did not mention that the people killed were Muslim<sup>184</sup>. In another, very serious omission, the police only recorded that 4 Muslims were killed when a

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<sup>179</sup> Report of the Special ADM, Law & Order, Bhagalpur.

<sup>180</sup> “Recalling Bhagalpur: Aftermath of 1989 Riots,” *Economic & Political Weekly*, Vol.21, No.18, (May 1995), 1057.

<sup>181</sup> Report of the Special ADM, Law & Order, Bhagalpur.

<sup>182</sup> Report of the Special ADM, Law & Order, Bhagalpur.

<sup>183</sup> Report of the Special ADM, Law & Order, Bhagalpur.

<sup>184</sup> “Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989,” R.C.P. Sinha and Shamsul Hasan, para 169-17.

mob of 2000 Hindu rioters attacked the Muslim neighbourhood in Bhatoria village, when witnesses indicated that 31 Muslims had been murdered<sup>185</sup>.

On 24<sup>th</sup> October, a group comprising hundreds who broke away from the Ramshila procession attacked a business called the National Watch Company. ASI Brij Kishore deposed that armed members of the home guard joined the looters. However, in the FIR he lodged, Brij Kishore did not identify anyone by name. When the Inquiry Commission probed this, and tried to compare the FIR to notes in the police station diary, the police refused to give them the original station diary recording the day's events, and gave instead a photocopied record that seemed to be 'adjusted'<sup>186</sup>.

Even though the police attempted to disguise their failure to record FIRs properly, the Commission noted several instances where FIRs left out important details or were grossly delayed, and found that these delays and omissions were the result of bias. One example was the FIR related to killings and looting in Bhagalpur town's Parwatti area. Witnesses before the Commission said that KC Dubey, the Officer-in-charge of Kotwali Police Station, watched but didn't intervene in the violence. The district administration later suggested that the FIR filed about the Parwatti violence was fabricated by the Muslim complainants so they could claim compensation<sup>187</sup>. The Commission did not believe them, noting that the FIR had resulted in a charge-sheet (PS Cse 808/89), and said that 'in a riot...an FIR cannot be defeated merely because it is lodged after considerable delay. Particularly when the authorities...were deeply committed against the informant and were not prepared to accept such FIRs. KC Dubey having admitted that he saw the loot and arson in Sujaganj...and...in Parwati should himself have lodged the ...We totally disbelieve and reject the denial of KC Dubey...it is the duty of the State to defend the FIR if it is belated...explanation should be offered...*it was the duty of the prosecution to explain the delay and it was for the defence to take advantage of the delay. Here the process was reversed [emphasis added]*'<sup>188</sup>.

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<sup>185</sup> Ibid., para 314.

<sup>186</sup> Ibid., para 166.

<sup>187</sup> Ibid., para 171.

<sup>188</sup> Ibid., para 172-173.

The Commission noted on multiple occasions that FIRs seemed to have been doctored, or there were discrepancies between the FIR and other official documents. For example, the Commission recorded how the Officer-in-charge, Kotwali filed an FIR on the Tatarpur Chowk violence mentioning a large number of Muslims whom the SP knew, however the SP who was the target of violence identified only two people named in the FIR in his evidence<sup>189</sup>. The Commission also noted that the police had not conducted a forensic exam of the bombs hurled at the SP, and the alleged bombs were most likely to have been firecrackers<sup>190</sup>.

We secured through RTI applications copies of FIRs lodged in Kotwali, Nathnagar and Jagdishpur police stations. These are only a fraction of the FIRs filed after mass violence in 1989, but gave us a window onto the quality of FIRs registered.

Across the three police stations, the majority of complaints registered came in very soon after the incidents at issue. In Kotwali, 28% of FIRs indicated that the complainant had reported the crimes alleged on the day of the incident itself. 50% indicated that the victim had complained within a week and 85% indicated that the victim had complained within a month of the incident. In Jagdishpur, 60% of FIRs indicated that the complainant had reported the incident at issue on the day it occurred. In Nathnagar, 25% of FIRs indicated that the complainant had reported the incident at issue within a week of its occurrence, and 70% within a month.

The police also seem to have registered the FIRs quite promptly after the crimes alleged were reported by complainants. In Kotwali, 95% of FIRs were registered the same day that complainants made their complaint. In Jagdishpur and Nathnagar, all FIRs were apparently registered the same day that the police received complaints. These records are at odds with official and civil society reports that criticised delays in registering FIRs. The particular sample of FIRs we were privy to could genuinely have been registered promptly, but it is also possible that the dates on many of these

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<sup>189</sup> Ibid., para 110.

<sup>190</sup> Ibid., para 161

records were misrecorded – since complainants do not get copies of FIRs, they do not know whether it accurately reflects their complaint to and interaction with the police.

Prompt complaints by victims and witnesses should suggest that the resulting FIRs would be detailed, as complainants would reliably recall the incidents in question. However, when we look at the FIRs, we find that while they include the details of the incident, they tend not to include the details of the accused.

- In Kotwali, only 2 out of 100 FIRs – or 2% – record the actual names of the alleged perpetrators. 38 identify a ‘mob’ as responsible for the acts alleged. This is despite the fact that the complainant in 78 out of 100 FIRs is the victim of the crimes alleged.
- In Jagdishpur, less than 1% of FIRs identify the accused by name, while 68% record the details of the incident but say the perpetrators were a mob. 77% of these FIRs were lodged after victims of the alleged incidents complained.
- In Nathnagar, none of the FIRs record the names of perpetrators. This is despite the fact that 80% of the FIRs were lodged on the complaints of the victims themselves.

Very few of the FIRs across the three police stations were omnibus FIRs, that joined together and blurred the boundaries between unrelated, disparate incidents. So while the police seem to have recorded details of incidents, the Bhagalpur FIRs suggest that the police erased names of perpetrators. A number of factors could have contributed to the absence of names. In some villages, attacks were led by large groups from outside the village, so it is possible that victims or eyewitnesses were not able to name attackers. Where complaints related to property damage, it is sometimes the case that inhabitants have already fled, so cannot identify perpetrators by name. It is also likely that victims were scared to name powerful, or politically connected perpetrators. But even taking into account all these factors, the very high proportion of nameless assailants in these FIRs suggests that the police simply omitted this detail. And of course, once the names of perpetrators are dropped from the FIR, the investigation that follows is necessarily weakened and much more likely to lead to cases being closed without trial.

## 2. Arrests and Bail

The pattern of arrests during and after mass violence in Bhagalpur reflected strong bias against Muslims.

The Commissioner of Bhagalpur said as much about initial arrests: 'Notwithstanding the fact that...Muslims were at the receiving end for most of the time the number of Muslims arrested in substantial cases or in preventive cases was originally much higher than those of Hindus. After the new administration took over the arrests were examined and innocent persons released and by middle of January the number of Muslims in custody became less than those of Hindus'<sup>191</sup>.

After the Tatarpur Chowk incident, 194 Muslims were arrested, but the district administration put nothing on record to suggest that any Hindus were arrested in relation to violence in other parts of Bhagalpur on the 24<sup>th</sup> or 25<sup>th</sup> of October. The Tatarpur Chowk violence was followed by harsh searches of Muslim homes in Bhagalpur town. The Commission noted, 'Not a single house was spared even though the cause of action for such searches in most cases was revengeful'<sup>192</sup>.

The ADM, Law & Order's review of government action after the violence criticized the arrests of influential Hindus and Muslims who were peace committee members, saying 'it is debatable if they were really instrumental in inciting the riots...with their arrest, some of the saner elements who could have helped check the spread of riots were removed from the scene while doubtful characters like Mahadeo Singh moved around freely with the police. It was commonly believed that Rameshwar Yadav, the chief conspirator of the riots, was not arrested because of his close links with Mahadeo Singh'<sup>193</sup>. Several months after the violence, the Commissioner told the

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<sup>191</sup> Commissioner's report in the "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 37

<sup>192</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 111

<sup>193</sup> Report of Special ADM, Law & Order, Bhagalpur in the "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.



Commission of Enquiry that 'whatever village are visited [sic] they still complained that *prime accused have not been arrested and they are threatening the riot affected persons*' [emphasis added]<sup>194</sup>.

The ADM, Law & Order noted that the district police arrested almost the same numbers of Hindus and Muslims, despite the fact that Muslims had largely been at the receiving end of violence. 'At one point...it stood exactly at 900 each. For a short while it became 900 Muslims and 1100 Hindus. But generally the balance was maintained...even in matters of release of the arrested persons. Keeping in view the fact that Hindus had been aggressors in most of the cases, one wonders whether the District Administration should have made efforts to keep the number of arrests uniform for both the Hindus and Muslims'<sup>195</sup>.

The Commission of Inquiry found that from 24 October onwards, the police arrested Muslims in large numbers, including individuals whose names were not mentioned in FIRs, and many faced brutal treatment after arrest. The Special ADM, Law & Order deposed before the Commission that on 26 October, he saw Muslim prisoners who had bullet injuries and were being forced to walk through two rows of standing constables who were beating them, while senior district officials watched<sup>196</sup>. Many witnesses testified to being arbitrarily arrested and beaten<sup>197</sup>. Official records indicated that on 26 October 1989, police fired upon a confrontation between Hindu and Muslim rioters. The police arrested a large number of Muslims, but there was no record of any Hindus being arrested<sup>198</sup>.

The police alleged that most people who were arrested were preparing to riot and had been manufacturing bombs and storing illegal arms. In all the cases of alleged

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<sup>194</sup> Commissioner's report in the "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

<sup>195</sup> Report of the Special ADM, Law & Order, Bhagalpur in the "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

<sup>196</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 563.

<sup>197</sup> *Ibid.*, para 563.

<sup>198</sup> *Ibid.*, para 289.

seizure of weapons and bomb, the Commission noted that 'there was not a single independent witness to the recoveries and in all the case the informants were always the police' and 'no seizure list barring a few indicting the recovers was filed' before the Commission. The 'so called bombs were not examined by any forensic expert'. The lawyer for the district administration argued before the Commission that the administration's aggressive searches helped to quell the riots, but, 'had no answer to our query whether the houses of Hindus were similarly searched'<sup>199</sup>. While the administration had a list of Muslim homes that were searched, they did not have a corresponding list of Hindu houses that were searched. The Commission noted that '*absence of such list...indicated close collaboration between the police and Hindu communal group [emphasis added]*'<sup>200</sup>. Documents submitted by the district administration showed that a majority of people arrested and sent to prison were Muslims.

The Inquiry Commission opined that only a 'meagre number of Hindus were arrested'<sup>201</sup>. It noted, 'Admittedly, hordes of...Hindus, the number going into thousands, attacked the localities and villages of Muslim inhabitants, but no body was arrested in the process. No body cared to enquire from where these massacring invaders descended upon Bhagalpur and the villages. The figures expose the group and the individuals who were responsible for preplanning and how successful it was with the able assistance of the district administration, particularly the police'<sup>202</sup>.

Two different official reports submitted that the disproportionate arrests of Muslims were a result of strong police bias. The Inquiry Commission heard evidence from different parties, including victims, alleged perpetrators, and the police, and reached the strong conclusion that the police failed to arrest Hindu participants, while unfairly targeting Muslims in Bhagalpur district for arrest.

The Bihar Government did not respond to our RTI applications on the grant of bail to those arrested in connection with the massacre. Media reports suggest that bail was

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<sup>199</sup> Ibid., para 566.

<sup>200</sup> Ibid., para 566.

<sup>201</sup> Ibid., para 566

<sup>202</sup> Ibid., para 566

granted liberally to the accused. Kameshwar Yadav, for example, was arrested following an FIR alleging murder, but granted bail. Two murder cases against him were closed after the witnesses in these cases turned hostile<sup>203</sup>. Jaiprakash, a leading participant in the Logain massacre where 116 Muslims were killed, occupied about 250 acres of land belonging to victims of the massacre after their families fled the village<sup>204</sup>.

### 3. Summary closure and charge-sheets

By the end of December 1989, the administration had registered 564 cases in relation to the massacre. Of those 564 cases, 174 were charge-sheeted, while 375 were closed summarily. As the Commissioner of Bhagalpur noted, this meant that of the cases initially registered in the aftermath of the Bhagalpur massacre, almost 70% were closed summarily and about 30% resulted in charges being framed against the accused.

In some of the worst affected police stations, the percentage of cases which were summarily closed, where no charges were framed, were as follows<sup>205</sup>:

- Kotwali: 86%
- Mushairpur: 59%
- Nathnagar: 62%
- Jagdishpur: 83%
- Sabour: 59%
- Shahkund: 56%
- Rajoun: 41%

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<sup>203</sup> Anand St. Das, "The Face of Bhagalpur's Horror," *Tehelka*, July 7, 2007.

<sup>204</sup> "14 Convicted in 1989 Bhagalpur Riot Case," *Outlook*, June 18, 2007.

<sup>205</sup> Commissioner's report, para 39, in the "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan. Figures as submitted to the Commission of Inquiry before 1995.

- Amarpur: 41%

The 85% summary closure rate in Kotwali is particularly striking, since Kotwali PS dealt with some of the worst violence in Bhagalpur town.

The Commissioner ascribed the high rate of summary closure to 'very bad drafting of FIRs, delay in commencing investigations, not allowing a roving inquiry by police officers, elections, the need to complete investigations in time. Be...[that]...as it may, this would result in lower convictions'<sup>206</sup>. The Bhagalpur Commissioner noted 'important persons reportedly behind the riots have not been chargesheeted even in the mass killings of Muslims in Nayabazar, Sahebganj and Noorpur'<sup>207</sup>.

The Bhagalpur Commissioner's report includes information on the percentage of cases that have resulted in charge-sheets being filed, disaggregated by the religion of the accused and the complainant<sup>208</sup> – it seems to reflect a sample of total complaints registered with the police. We cannot analyse these figures too deeply, since the Bihar Government did not disclose copies of all the complaints, FIRs and charge-sheets underlying them. However, some of the figures point to distinct choices by the police that demand closer scrutiny.

- The highest percentage of FIRs that led to charges being framed against the accused were the ones where the police filed the complaints against Muslim accused – 77% (30 out of 39) of complaints were 'charge-sheeted'. By contrast, only 45% (26 out of 86) of complaints by police against Hindu accused resulted in charge-sheets. Some part of this big gap might be due to stronger prima facie evidence in particular cases where the accused were Muslims. However, the difference between the trajectory of police

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<sup>206</sup> Commissioner's report, para 39, in the "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

<sup>207</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 40(i).

<sup>208</sup> Commissioner's report, para 39, in the "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

complaints against Hindus and Muslims strongly indicates bias against Muslims in how FIRs were drafted and how cases were investigated.

- 45% (21 out of 49) of FIRs featuring Hindu complainants and Muslim accused resulted in charge-sheets. 51% (62 out of 122) of FIRs where Muslims identified Hindu accused resulted in charges being framed. On the face of it, these figures are reassuring. However, we would argue that they actually point towards poor, most likely prejudiced, investigation. Muslims were killed, injured and looted in significantly greater numbers than Hindus in Bhagalpur district, so one would expect a higher proportion of FIRs with Muslim complainants against Hindu accused to result in charges against the accused.
- Less than a quarter of FIRs (23% - 36 out of 153) featuring Muslim complainants against unknown or unidentified assailants resulted in charge-sheets. The high closure rate isn't surprising for cases where the accused are not identified by name. However, it is striking that of 290 FIRs based on complaints by Muslims, over half are against unknown attackers. This could be in part because some villages in Bhagalpur district were attacked by large groups of outsiders. In cases of property damage, the FIRs we have seen suggest that the victims were often away when the crime was committed. That said, the large number of cases featuring 'unknown' accused could be due in large part to the 'very bad drafting of FIRs' identified by the Commissioner of Bhagalpur. Particularly in a situation where senior officials themselves described the police as strongly biased against Muslims during the violence, it is likely that complaints by Muslims were treated with less sympathy and recorded with less care, or deliberately mis-recorded, after the violence.

It is highly likely that many of the cases summarily closed should have been taken further. In one instance, the Commission noted that the case against Laxmi Yadav was closed, though Laxmi Yadav was named in an FIR alleging the kidnapping and murder of a young Muslim woman, 'undoubtedly under the

influence of his father Kameshwar Yadav patently in the assistance of the police'<sup>209</sup>.

The high rate of summary closure was due not only to misrecorded FIRs, but also to the police's failure to investigate complaints. The Commissioner of Bhagalpur noted that the police had made no attempt to unearth who was responsible for inflammatory rumours about Hindu students getting killed, and had not registered a case in this regard<sup>210</sup>. Police also failed to investigate the extent to which rural attacks by large, thousand-strong groups of assailants shouting 'provocative Hindu slogans' were organized by Hindu Right groups, despite prima facie evidence that these attacks were organized in Bhagalpur and Amarpur<sup>211</sup>.

Muslim organizations complained to the district administration that the number of Muslims killed or missing was much higher than the numbers recorded by the police. The Jamaite Ulama submitted a detailed list to the administration in January 1990, but 'on account of election and other more pressing engagements<sup>212</sup>' this information was not verified until May 1990 - several months after the murders were committed. The Bhagalpur Commissioner admitted that fresh FIRs were being lodged but 'the delay in lodging these FIRs means that no worthwhile investigation can be made'<sup>213</sup>.

Despite the presence of the army, Central security forces and State security forces, in addition to the police, there were no raids for the recovery of looted property or seizing arms, ammunitions and explosives<sup>214</sup>.

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<sup>209</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 262.

<sup>210</sup> *Ibid.*, para 35.

<sup>211</sup> *Ibid.*, para 40.

<sup>212</sup> *Ibid.*, para 41.

<sup>213</sup> *Ibid.*, para 41.

<sup>214</sup> Report of the Special ADM, Law & Order, Bhagalpur in the "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

#### 4. Trials, acquittals and appeals

The Bihar Government did not respond to our Right to Information queries about magistrates and sessions courts trials, and resulting convictions, acquittals and appeals. Poorly recorded FIRs and grossly negligent investigation were, of course, shaky scaffolding for the trials in the 30% of cases where charges were framed instead of the cases being summarily closed. The Special ADM, Law & Order, Bhagalpur reported 'witnesses are afraid of going to the court and making depositions against the strong people of the area,' going on to observe 'Whether they would depose against the police and magistrate is also a debatable proposition. What can one do if the protectors themselves became the killers'<sup>215</sup>. The fairly senior official writing this poses the problem as an intractable dilemma, but surely his response should have been to provide enough protection for victims that they felt able to depose in court.

Civil society reports indicate that 142 cases were filed in the Sessions court, covering 1392 people of participating in physical violence and property damage. In 1995, when the Commission of Inquiry finally submitted its report, 87 cases against 901 accused were still pending. Of the 55 cases decided, 11 ended in convictions in which 50 people were variously sentenced, though we do not have official details of conviction and punishment. The PUDR reported that of the 142 cases that were tried in the Sessions court, 38 were murder cases. By 1995, 12 cases had been decided, and only one resulted in conviction - of 95 people charged with murder, 94 had been acquitted<sup>216</sup>.

In the years that followed, cases that survived summary closure made their way slowly through the courts. The Chanderi massacre case, for example, was decided only in February 2001. 38 people were accused in the case over the murder of 65 people. The sole surviving eyewitness, Mallika Begum, was threatened and offered bribes. In 2001, 16 of the accused were sentenced to life imprisonment. 22 of the

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<sup>215</sup> Ibid.

<sup>216</sup> "Recalling Bhagalpur: Aftermath of 1989 Riots." *Economic & Political Weekly*, Vol. 21, No. 18, (May 1995), 1055 - 1059.

accused, including the man who hacked off Mallika Begum's leg, were acquitted<sup>217</sup>.

When the the JDU-NDA coalition came to power in Bihar in 2006, the Chief Minister ordered the Crime Investigation Department to inquire into the investigations that followed cases filed after the Bhagalpur massacre<sup>218</sup>. Following the CID investigation, the State Government set up a second commission of inquiry in February 2006, which was asked to review 27 riot-related cases and assess why the accused were acquitted despite considerable evidence<sup>219</sup>. The Commission was intended to examine how the police and prosecution had done their jobs, and identify lapses that led to acquittal or closure. The 2006 Commission has not completed its inquiry, but its existence tells us that many cases that were not summarily closed ended in the accused being acquitted.

The JDU-BJP government re-opened 29 cases against Bhagalpur accused, including against Kameshwar Yadav, alleged to be one of the primary leaders of violence at the time, and against the accused in the Logain massacre<sup>220</sup>. In FIR No. 83/90, lodged with Kotwali police station, Bibi Walima has accused Yadav of having shot dead her son Munna. In FIR No. 77/90, a shopkeeper has accused Yadav of killing his son and making off with the body. Both these cases collapsed when witnesses turned hostile, allegedly because of political pressure. These cases were amongst those re-opened by the Janata Dal (United)-BJP government in 2006. Yadav was supported by the Sangh Parivar at the time of the riots, but subsequently was close to the RJD, which reportedly protected him from effective prosecution<sup>221</sup>. Yadav has since been convicted of murder in two of the re-opened cases against him<sup>222</sup>. In November 2007, a sessions court found him guilty of murder, as well as offences under Sections

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<sup>217</sup> "Victims of the System: Malika Begum", *Tehelka*, 2004, available at [http://www.tehelka.com/story\\_main.asp?filename=pe021404system.asp](http://www.tehelka.com/story_main.asp?filename=pe021404system.asp).

<sup>218</sup> Sanjay Singh, "Nitish Orders Fresh Probe in Bhagalpur," *DNA*, February 25, 2006.

<sup>219</sup> *Ibid*.

<sup>220</sup> Farzand Ahmed, "Politics of Conviction," *India Today*, July 23, 2007, available at <http://www.indiatoday.com/itoday/20070723/bihar.html>. [accessed on 10 December 2010].

<sup>221</sup> Anand St. Das, "The Face of Bhagalpur's Horror," *Tehelka*, July 7, 2007, available at [http://www.tehelka.com/story\\_main31.asp?filename=Ne070707the\\_face.asp](http://www.tehelka.com/story_main31.asp?filename=Ne070707the_face.asp).

<sup>222</sup> Farzand Ahmed, "Politics of Conviction," *India Today*, July 23, 2007, available at <http://www.indiatoday.com/itoday/20070723/bihar.html>. [accessed on 10 December 2010].



364 (kidnapping), 201 (destruction of evidence) and 149 (unlawful assembly) of the IPC<sup>223</sup>. In 2009, he was convicted of murder.

In June 2007, 14 people were found guilty of murder and sentenced to life-imprisonment in 2007 for their role in the Logain massacre<sup>224</sup>. Amongst the 14 people were the Officer-in-charge of Jagdishpur police station at the time, Sub-inspector Ramchandra Singh and Thakur Paswan, the police chowkidar of Logain village at the time. The accused were convicted of murder, rioting, unlawful assembly, causing disappearance of evidence and mischief by fire or explosive substance with the intent to destroy property. Even this re-trial showed the effects of the long delay, as well as granting bail even when this was likely to cause harm. Of 24 named accused in the case, six died during the trial, while four never turned up, prompting the court to proclaim them absconders and order attachment of their properties. At the time of the 2007 verdict, the police were trying to arrest Jaiprakash, a native of Logain<sup>225</sup>.

In July 2007, 6 people were found guilty of being involved in murder, though not being the direct perpetrators, and sentenced to 2 years imprisonment<sup>226</sup>. Media reports have said that, by 2008, 325 accused in cases related to mass violence were convicted, of whom 125 received life sentences<sup>227</sup>. However, the Bihar government did not disclose official records that would allow us to verify these reports, or match the number of individuals convicted to the number of cases on trial. In September 2010, 10 people out of 20 accused on trial were convicted of attacking a police party during mass violence and sentenced to 7 years in prison<sup>228</sup>.

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<sup>223</sup> "Hindu Activist Found Guilty in Bhagalpur Riots Case," *Indian Express* November 23, 2007, Patna, available at: <http://www.indianexpress.com/news/hindu-activist-found-guilty-in-bhagalpur-riots/242748/> [accessed on 24 February 2012].

<sup>224</sup> *Ibid.*

<sup>225</sup> "14 Convicted in 1989 Bhagalpur Riot Case" *Outlook*, June 18, 2007.

<sup>226</sup> "Two-year jail for 6 in Bhagalpur Riots Case" *The Hindu*, Patna, July 8, 2007.

<sup>227</sup> "Files on Bhagalpur Riot Victims Missing" *DNA* September 26, 2008 available at [dnaindia.com](http://dnaindia.com).

<sup>228</sup> "10 Sentenced to 7-year Rigorous Imprisonment in Bhagalpur Riot Case" *Times of India*, Bhagalpur, September 2, 2010.

The JDU-BJP government reportedly designated a police official, GN Sharma as Special DIG in Bhagalpur, specifically to monitor riot-related cases<sup>229</sup>. Concrete steps such as this, along with a general shift in political willingness to prosecute the accused, clearly made a striking difference to the outcome of trials. Witnesses who had previously turned hostile testified for the prosecution when cases were re-opened. The guilty verdicts in re-opened cases are almost certainly being appealed. Nevertheless, the results of the fresh trials demonstrates that, the first time around, trials collapsed because of gross negligence or collusion by the State.

#### D. Accountability of public officials

The Bhagalpur Commission of Inquiry was asked to scrutinize the Bhagalpur district administration's performance and identify any official lapses. The majority report by the Commission was surprisingly direct in some of its findings. Two of the reports by government officials before the Commission were also striking because they identified individual political functionaries as well as civil servants as irresponsible or involved in violence.

The Commission criticized the district administration for failing to tackle rumours about Hindu killings by Muslims, and Hindu mass graves<sup>230</sup>. It also said that the administration 'suffered from culpable amnesia, deliberate indifference and patent communal bias, incompetence in not anticipating the riot'<sup>231</sup>. While the Commission took the view that Muslim participants were as willing to be violent as Hindu participants, it emphasised that Hindus who participated could wreak far more damage because they were supported by the police.

#### 1. Police

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<sup>229</sup> Farzand Ahmed, "Politics of Conviction," *India Today*, July 23, 2007, available at: <http://www.indiatoday.com/itoday/20070723/bihar.html>. [accessed on 10 December 2010].

<sup>230</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 573.

<sup>231</sup> *Ibid.*, para 570.

The Commission held the police in Bhagalpur district primarily responsible for the scale and ferocity of mass violence. The Commission detailed lapses and active participation by the police at various levels of seniority, and noted that ‘from the evidence on record...we have no manner of doubt that the police force was totally anti Muslim in their attitude and had no desire or will to save the life of innocent Muslims’<sup>232</sup> and that ‘every unlawful act succeeded totally uninterrupted by any administrative interference except in one or two cases’<sup>233</sup>.

a) Failure to prevent violence

Official assessments found that the police did not do enough to avert violence, and in fact, allowed the ramshila procession to go into a sensitive part of Bhagalpur town without prior permission. The Commission felt that despite considerable warning of likely tension, the police had not provided enough security on the route of the Ramshila procession<sup>234</sup>. The Commission notes that the on 24th October 1989, the Ramshila procession headed towards Tatarpur even though it wasn’t licensed to go to this area. The district police did not prevent this detour.

b) Bias as violence unfolded

The Commission of Inquiry detailed many instances of the police watching violence against Muslims without intervening, and some instances of police actively participating in such violence.

Clear police bias against Muslims also emerges from information in official documents about police firings during the riots. The Commission report records various episodes where large groups of at least a hundred, but often running into one or two thousand, attacked people during the riots. Of *ten* episodes that are described as attacks by large Muslim mobs on Hindu people and property, the Commission records police firing in *nine* episodes. Of *five* episodes where Hindu and Muslim mobs were ranged against each other, the report records police firing in *three* episodes. By contrast, of 25 episodes that are described as attacks by Hindu

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<sup>232</sup> Ibid., para 584.

<sup>233</sup> Ibid., para 571.

<sup>234</sup> “Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989,” R.C.P. Sinha and Shamsul Hasan, para 136.

mobs on Muslims, there are records of police opening fire on *six* of these occasions. On three of these occasions, the police were commanded by the same officer, Ajit Dutta.

The Commissioner of Bhagalpur acknowledged allegations that, during curfews, the administration issued passes to Hindus allowing them almost complete freedom of movement, while being very restrictive with passes to Muslims<sup>235</sup>.

Biased policing during the rioting gave way to disproportionate arrests of Muslims, and poor investigation, as discussed earlier, and in some instances, false allegations against the Muslims that the police never substantiated. The Commission noted the absence of forensic evidence in at least three instances<sup>236</sup>, where the police alleged that bombs were thrown at the police by Muslims, and that explosives were recovered.

c) Subverting disciplinary proceedings

The police resisted the attempts of the Commission of Inquiry to assess their actions during mass violence. The Inquiry report notes several serious discrepancies in police records and police testimony before the Commission. On one occasion, the police said that they had been attacked by a large mob of Muslims and had fired on the crowd, killing one man. The Commission noted that the same incident was described differently in an FIR filed by H. Rehman, S.I. of police who was on duty – he said that the police had been firing, but not in self defence. An FIR by the dead man's wife alleged murder by Sgt. Om Prakash and his colleagues. The Commission noted that 'if the magazine had really been attacked more than person should have lost their lives, justifiably by protective firing of the police on duty...the story of attack on magazine was a concoction in defence'<sup>237</sup>. It is rare for an official body to so directly accuse government officials of dissembling, and quite telling that the Commission did so on multiple occasions.

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<sup>235</sup> Commissioners Report in "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

<sup>236</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 401.

<sup>237</sup> *Ibid.*, para 243.

After 24<sup>th</sup> October, amidst serious concerns about the SP's neutrality and competence, the State Government decided to transfer him out of Bhagalpur. On 26<sup>th</sup> October, when the Prime Minister Rajiv Gandhi arrived in Bhagalpur, a crowd of police constables led by Sergeant Om Prakash demonstrated against the SP's transfer in the company of members of the BJP. They attacked a Minister and the Speaker of the State Assembly. A complaint case was filed against Sgt. Om Prakash<sup>238</sup>, but we do not know how far it proceeded.

However, neither the SP nor any other officials arrested or dispersed the demonstration, which defied curfew, and disrupted the PM's security. The Commission noted that the demonstrators had not even been disciplined for their behaviour and recommended that the administration do so<sup>239</sup>. It was of the opinion that 'this unholy alliance between the police and the BJP...boosted the morale of the communal elements...and conveyed...they have not only the support of the police but its active participation in their activities'<sup>240</sup>. At the time, the shocking breach of protocol by the police succeeded in stopping the SP's transfer – the Prime Minister, Rajiv Gandhi agreed to stop the SP's transfer<sup>241</sup>, and the Chief Minister complied with this. The SP's conduct up to then was most likely highly partisan, and was certainly perceived as such by the Muslim community. Some of the worst violence around Bhagalpur town unfolded in the two days after the SP's transfer orders were revoked. It is likely that this early gesture shielding the SP from accountability emboldened the police in Bhagalpur to support or ignore violent attacks in the days that followed.

After the riots, the Bhagalpur police association demanded that 'false cases' against police officials be withdrawn and suspended officers reinstated. While the criminal

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<sup>238</sup> Commissioner's report in "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

<sup>239</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 574.

<sup>240</sup> Ibid., para 114.

<sup>241</sup> "Recalling Bhagalpur: Aftermath of 1989 Riots." *Economic & Political Weekly*, Vol. 21, No. 18, (May 1995), 1055 - 1059.

cases were not withdrawn, some of the suspended officers were reinstated, including Bhuvaneshwar Singh, Inspector, Amarpur PS who had allegedly looted and sold the goods of a Muslim shop in Amarpur Bazaar<sup>242</sup>.

## 2. **Army**

The Commission faulted the army for coordinating poorly with the district administration, as well as for relying too heavily for information on the district police who were 'communally biased'<sup>243</sup>. The Commission took the view that Major Virk should have acted immediately to take Muslims in Chanderi village to a relief camp, rather than leaving them in the protection of local police officers<sup>244</sup>.

## 3. **District administration**

The Commission found the entire district administration as a whole 'entirely responsible for whatever happened'<sup>245</sup>, and identified some officials for particular censure.

It singled out the SP, KS Dwivedi as being 'wholly responsible' for the violence and said that 'his communal bias was fully demonstrated not only by the manner of arresting the Muslims and by not extending adequate help to protect them<sup>246</sup>'. The Commission faulted Dwivedi for failing to act against Sgt Om Prakash and his colleagues who demonstrated against his transfer. Other official documents indicate that the SP ignored signs of imminent violence before 24 October. The SDM, Sadar ordered police to patrol 27 vulnerable points in anticipation of possible violence, but

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<sup>242</sup> Report of the Special ADM, Law & Order, Bhagalpur in "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

<sup>243</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 582-583.

<sup>244</sup> *Ibid.*, para 535.

<sup>245</sup> *Ibid.*, para 595.

<sup>246</sup> *Ibid.*, para 597.

was told that the force wasn't available. He reported this to the DM and the SP, but the SP seemed not to respond to this<sup>247</sup>.

The Commission identifies KC Dubey, OIC, Kotwali police station and Navin Kumar, as 'able assistants<sup>248</sup>' to Dwivedi, and says that they 'not only let loose fascism like aggression on the Muslims of Bhagalpur but were silent spectator[s] to the loot and arson in Sujaganj and Parvatti respectively.

The Commission said that the SDO, Arun Kumar Sinha, along with the officials named earlier, failed to separate violent criminals from the peaceful participants in the ramshila procession. It also held the BDO at the time responsible for failing to control violence, and held Mukund Mishra, ADM, Incharge Control Room, C.R. Mehta, Executive Magistrate, Bhagalpur who failed to save lives during a massacre of Muslims sheltering in a Hindu home at Naya Bazar, KK Singh, OIC Mujahidpur Police Station who participated in the massacre of Muslims of mohalla Ishakchak, Om Prakash, Sgt Major against whom a murder charge was pending at the time of the enquiry, Kailash Chandra, Officer In Charge, Sabour; Ramchandra, ASI responsible for the massacre in Lugai, Achyuta Pathak, Officer in charge, Nathnagar police station, Seheodas Singh, ASI of Tatarpur police station, Narendra Singh, ASI of Nathnagar police station, BDO Nathnagar, PS Bihar Administrative Service Officer, RN Jha ASI of Shahkund PS, Prahlad Kumar, Dy S.P. Nathnagar P.S.

The Commission also recommended that the constabulary of Bhagalpur be scrutinized in the round, and that constables who acted out of bias can be identified by checking who was on duty when particular episodes of violence occurred and investigating the role of the constables<sup>249</sup>.

The Bihar government refused to give us information about whether and how far it had followed the Commission's recommendations and taken action officials named

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<sup>247</sup> Report of Special ADM, Law & Order, Bhagalpur in *ibid*.

<sup>248</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

<sup>249</sup> *Ibid.*, para 599.

as negligent or complicit. The Inquiry report was tabled in the Bihar Assembly in 1995. Following this, in 1996, the PUDR noted that the State government had issued show cause notices to some of the officials. In addition, G P Dohre, then IG Bhagalpur and later director general of police, Bihar, was transferred<sup>250</sup>.

Reports in 2007 indicated that the Bihar government had decided to reopen cases against police and civil officials identified by the Commission of Inquiry, including 9 IPS and IAS officials, as no action had been taken thus far<sup>251</sup>. A more recent media report indicated that the Bhagalpur district police have begun departmental proceedings against 25 policemen for negligent investigation of cases related to the 1989 mass violence. 13 sub-inspectors and 12 assistant sub-inspectors were investigating officers in 25 cases that were closed, but re-opened and prosecuted more recently, strongly indicating that the investigating officials had been biased. They did not respond to show-cause notices issued by the SP of Bhagalpur in 2010<sup>252</sup>.

#### 4. State government

Although the Bhagalpur Commission of Inquiry was not asked to examine the state government's behaviour, Commission members felt moved to apportion blame for serious failures by the senior State Government officials.

The Commission noted that 'superior officers cannot absolve themselves so lightly from this responsibility'<sup>253</sup> and that state government officials should have been communicating constantly with the district administration. It took the view that 'the State Government ... did not respond adequately to the seriousness of the situation. If the army had been sent on the 24<sup>th</sup> itself by Chief Secretary, who should have obtained the order of the Government to that effect...and it [the army] had taken

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<sup>250</sup> "Recalling Bhagalpur: Aftermath of 1989 Riots." *Economic & Political Weekly*, Vol. 21, No. 18, (May 1995), 1055 - 1059.

<sup>251</sup> Sahay, A. M., "Bhagalpur Riots: Bihar Government to Reopen Cases Against Indicted Officials," *Rediff Online*, Patna, November 27, 2007.

<sup>252</sup> Sarkar, G. "Policemen Under Lens," *The Telegraph Calcutta*, Bhagalpur, July 31, 2011.

<sup>253</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 589.



charge of the whole town and the district...matter [would have]...been brought immediately under control'<sup>254</sup>.

The Commission made a point of noting that the Chief Minister personally reversed the DGP's efforts to transfer the SP<sup>255</sup>, despite the SP's divisive and biased performance. Civil society reports indicate that the Prime Minister at the time, visiting the area, ordered this reversal. This was not a decision for the Central Government to make. The Commissioner of Bhagalpur in the aftermath of the riots noted that cancelling the SP's transfer had 'an adverse effect in as much as the Muslim community interpreted [it] as the surrender of Government to the Hindu forces while section of the Hindu group was definitely embolden[ed] by it'<sup>256</sup>. It also criticized the fact that inexperienced officials were posted in an area the state government knew to be sensitive, at a time the state government also knew was sensitive, and speculated whether this was driven by electoral considerations<sup>257</sup>.

## 5. Political office holders

The Commissioner of Bhagalpur suggests that parliamentary elections should have been postponed, but were not because the ruling party might potentially benefit from the riots. He said that 'the popular perception in Bhagalpur was that ex-CM Shri Bhagwat Jha Azad wanted to have a controlled riot in Bhagalpur to boost him [sic] election prospects'<sup>258</sup>. Another official report says that the District Magistrate wrote to the Election Commission asking for the election to be postponed, but the State Government decided to press on regardless<sup>259</sup>. Because the State Government did not postpone elections, the district administration was diverted towards preparation for elections rather than responding to victims of violence. The

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<sup>254</sup> Inquiry report, para 589

<sup>255</sup> Inquiry report, para 596A

<sup>256</sup> Report of the Commissioner of Bhagalpur to the Commission of Enquiry.

<sup>257</sup> Inquiry report, para 596A

<sup>258</sup> Commissioner's report

<sup>259</sup> Report of the Special ADM, Law & Order, Bhagalpur

Commissioner says that district officials could not spend time in relief camps. They did not discover the mass killings in Logain and Sahibganj for some weeks, 'which meant that the bodies of victims had decomposed. We have...come to the conclusion that very large number of persons, close to 1000, are missing...not much investigations can be made after such a long time'<sup>260</sup>.

## 6. Political parties

Soon after the Bhagalpur riots, Bihar had State Assembly elections in February 1990. In addition to the BJP, the Akhil Bhartiya Hindu Mahasabha also contested the elections 'in a big way', and the BJP won several seats, according to the Bhagalpur Commissioner. 'Shri Madho Mandal who has been chargesheeted in connection with the communal riots and probably backed by VHP has won the election from Amarpur Assembly constituency. Shri Ratan Mandal and Shri Kameshwar Yadav whose role in the riots left much to be desired finished 2<sup>nd</sup> and 3<sup>rd</sup> respectively in Nathnagar Assembly Constituency'<sup>261</sup>.

While the Commission did not identify members of political parties as responsible for violence (this was beyond its remit), witnesses before the Commission identified BJP, VHP and RSS members as responsible for spreading rumours about Hindu killings and Hindu mass graves<sup>262</sup>. The Commission also noted that Kameshwar Yadav, allegedly close to the Hindu Right at the time and later to the RJD, led an attack on Muslim homes on 24 October, but was protected by politicians after the riots<sup>263</sup>.

## 7. Inquiries

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<sup>260</sup> Commissioner's report, para 34, in *ibid*.

<sup>261</sup> "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan, para 42.

<sup>262</sup> *Ibid.*, para 573.

<sup>263</sup> *Ibid.*, para 225.

As mentioned earlier, the Bhagalpur Commission of Inquiry's report was not publicly accessible, and there is no public information about how far the State Government acted upon its recommendations and findings. In 1996, the PUDR noted that the Bihar government had not submitted a memorandum of action taken in response to the report even a year after the report was put before the State Assembly (the memorandum should be submitted in 6 months)<sup>264</sup>. Several years later, the Bihar government refused to disclose the memorandum to us, and it is not clear if the memorandum was ever put before the Assembly (though the Inquiry report was).

As already noted, in February 2006, the Janata Dal (United) in Bihar set up a new Commission of Enquiry on the Bhagalpur riots, shortly after coming to power<sup>265</sup>. In addition to reviewing why criminal proceedings against participants in the 1989 mass violence failed, this new Commission was asked to examine whether victims sold properties under duress. The Bihar Government has stated that it would attempt to return such property to the original owners and identify those guilty of forcing distress sales. It was also asked to review progress on the recommendations of the previous Commission.

The new Commission was set up in response to accusations that the ruling party in Bihar had shielded some of the primary accused in the Bhagalpur riots from effective prosecution, out of political and caste loyalties – the Chief Minister was a Yadav, and so, it is suggested, Yadavs accused of violence found the criminal justice system sympathetic to them. The new enquiry, under a new political regime, was supposed to unpack the resulting miscarriage of justice, and lay the ground for fresh legal proceedings. The enquiry was supposed to last 6 months, however the Commission submitted an interim report after 18 months, and has yet to complete its work at the time of writing. Media reports say that, in response to an Right to Information application the Bihar Government admitted to spending about Rs. 3 lakhs a month,

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<sup>264</sup> “Recalling Bhagalpur: Aftermath of 1989 Riots.” *Economic & Political Weekly*, Vol. 21, No. 18, (May 1995), 1055 - 1059.

<sup>265</sup> “Bhagalpur Riots Commission Starts Functioning”, February 27, 2006, accessed at <http://news.webindia123.com/news/showdetails.asp?id=262510&cat=India>, available on <http://www.indianmuslims.info/book/export/html/145>.

and almost 1.5 crores in all, on the Commission up to October 2009<sup>266</sup>. The interim report is not in the public domain, and the Bihar Government ignored our Right to Information application and appeals to get a copy. In September 2011, the state government told the media that the new commission would soon submit its final report<sup>267</sup>.

#### E. Relief and Rehabilitation

We have discussed earlier the heavy toll that the Bhagalpur mass violence took on people. Over 1000 people were murdered, hundreds were injured, over 10,000 homes were destroyed and thousands of people were displaced. This cost was borne, to a large extent, by Muslims in Bhagalpur district, though Hindus also lost lives and property.

Victims of mass violence also paid a heavy monetary price. The Muslims in Bhagalpur and its surrounding villages, many of whom worked in the textile trade, were fairly well off relative to Muslims in other parts of India<sup>268</sup>. Perhaps this was one reason why attackers made what one official described as 'systematic attempts...to weaken the other community economically'. Shops were looted and burnt. Almost all the handlooms belonging to Muslim weavers in Baisbighhi Narga, Murgachak and MTN Ghosh Road were looted or burnt. Power looms were stolen and the yarn burnt<sup>269</sup>. Civil society reports suggest that many weavers fled Bhagalpur, and never returned. They were pushed into ad hoc construction jobs, permanently losing skilled livelihoods<sup>270</sup>. In rural areas, such as Tamauni and Salempur, attackers burnt tractors and stole tools belonging to Muslim farmers.

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<sup>266</sup> Mumtaz Alim, "Nitish Government Spends Huge Sum on Bhagalpur Panel, Victims Hapless", July 13, 2010, available at: [http://www.twocircles.net/2010jul13/nitish\\_govt\\_spends\\_huge\\_sum\\_bhagalpur\\_panel\\_victims\\_hapless.html](http://www.twocircles.net/2010jul13/nitish_govt_spends_huge_sum_bhagalpur_panel_victims_hapless.html).

<sup>267</sup> Faizan Ahmad, "1989 Bhagalpur Riots Panel to Give Final Report Soon: CM" *Times News Network*, September 13, 2011.

<sup>268</sup> A. A. Engineer, "Grim Tragedy of Bhagalpur Riots: Role of Police-Criminal Nexus." *Economic & Political Weekly*, February 10, 1990, Vol. 25, No. 6, 306.

<sup>269</sup> Report of Special ADM, Law & Order, Bhagalpur in "Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989," R.C.P. Sinha and Shamsul Hasan.

<sup>270</sup> "Bhagalpur Burning," *The Sunday Indian*, December 6, 2009.

They stole cattle and destroyed wells by filling them with mud and stone. In some cases, attackers harvested and stole paddy as well<sup>271</sup>. Loss of property – personal and professional – was estimated at Rs. 30 crores.

We have very limited official information about relief measures, and there are no detailed assessments of how effectively victims were compensated. However, the Bihar Government disclosed the standards of compensation that it applied to victims of mass violence in 1989. These standards were fairly progressive, and we discuss them in more detail below.

### 1. **Displacement and relief camps**

While the Bihar Government did not respond to our Right to Information query about the number of people displaced by mass violence in Bhagalpur district, official reports written soon after the riots suggest that almost 50,000 people were displaced from their homes and fled to relief camps<sup>272</sup>. However, we do not have information on how many relief camps there were, and whether these were government run or privately run.

### 2. **General standards on monetary compensation**

We sought information regarding general standards for granting compensation and relief. We were given the Bihar Famine and Flood Relief Code, 1957 (hereinafter ‘the Relief Code’) and letters sent by the department of home to various district Collectors in 1986 and 1987. The Relief Code, which details the state’s response to famine, did not guide relief and rehabilitation measures after the Bhagalpur riots. We discovered that, instead, Bihar had developed guidelines on compensation for

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<sup>271</sup> Report of Special ADM, Law & Order, Bhagalpur in “Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989,” R.C.P. Sinha and Shamsul Hasan.

<sup>272</sup> Report of Special ADM, Law & Order, Bhagalpur in “Report of the Commission of Inquiry to inquire into the communal disturbances at Bhagalpur, 1989,” R.C.P. Sinha and Shamsul Hasan.

victims of communal violence in the 1980s, which applied to victims of the 1989 mass violence<sup>273</sup>.

a) 1986 norms

Standards formulated in 1986 set down compensation for death and injury, compensation for movable property and for immovable property.

a. Relief for Death and Injury;

The rate of compensation for death was Rs. 20000; for permanent disability it was Rs. 5000; for grievous injury it ranged from Rs. 500 and 1000. Listed criminals and people who participated in communal violence were to be excluded from compensation.

b. Relief for damage to property: residential, commercial and religious

The rate for permanently destroyed property was Rs. 15000 for urban property and Rs 10000 for rural property. Houses that have been insured were not to be given relief. On the face of it, this seems to penalize owners who had the foresight to get home insurance. However, in the Indian context, poorer people are less likely to have insurance, and so this measure concentrates relief on them, at least in theory.

c. Relief for movable property

Movable property, including household items, and vehicles could be compensated at Rs. 2000, which even in 1989 would likely have been low.

b) 1987 norms

Another set of standards, formulated in 1987<sup>274</sup>, incorporated the 1986 standards, and expanded coverage to victims of terrorist activity, insurgency, caste violence

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<sup>273</sup> State Government through the Department of Home Affairs sent two letters, one dated 20.9.1986, (Letter no. 4464) and the other dated 21.9.1987, (Letter no. 1701) which detail the general guidelines for compensation.

<sup>274</sup> Letter Number 1701, dated 21 September 1987.

and displacement. The 1987 standards also made special provision for some vulnerable groups.

- For example, students whose parents' annual income is less than Rs. 6000 a year would receive relief up to Rs 200 by the Block Division Officer (BDO) and up to Rs. 500 by the Collector.
- The District Magistrate was empowered to direct the civil surgeon, to buy medicine from the open market and to give discretionary medical relief of Rs. 200.
- The BDO could spend Rs. 50 per person to transport people to relief camps. The 1987 standards also detailed the amount of ration per person per day<sup>275</sup>.
- In a particularly salient provision, the 1987 standards required the BDO to give a week's rations to families when they returned from relief camps to their homes. While displaced and poor families are likely to need more than a week's assistance, the 1987 standards did at least think about helping families at a very precarious time.
- The 1987 standards enjoined the district administration to help business owners get loans to restart their businesses, as well as facilitate quick access to insurance.

The 1987 compensation standards laid down by the Bihar Government displayed some thought and detail beyond the 'standard' post-riot monetary hand-outs. In addition to the provisions above, we also think it interesting that the standards covered not just communal violence, but also caste and terrorist violence, thus establishing a common minimum across different categories of potential victims - an important step in Bihar's fraught environment in the 1980s.

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<sup>275</sup> This was:

Food item	Per adult	Per child
Dal	25 gms	15 gms
Chana	50 gms	25 gms
Rice	150 gms	100 gms
Chooda	100 gms	50 gms
Gur	20 gms	10 gms

c) 1989 relief package

The Bihar Government announced a relief package specifically for survivors of mass violence in Bhagalpur at the end of December 1989<sup>276</sup>.

- Deaths

Most strikingly, the Bihar Government increased the amount of compensation for the families of the dead from Rs. 20,000 set in 1987 to Rs. 1 lakh. The amount given is considerably higher, not only compared to the 1987 guidelines but also in comparison to the 1984 anti-Sikh riots, after which the Delhi Government initially gave Rs. 10,000 to families of the dead, increasing the amount to Rs. 20,000 in 1986. The amount of compensation was to be divided equally among the family<sup>277</sup>, a measure likely to help women in the family and reduce family disputes over compensation. In addition, the Centre sanctioned Rs. 10,000 for the families of those killed. If a person was missing for more than 2 months the family would be given compensation for death, if they undertook to return the money if the person returned from the dead. This provision, which departs from the usual legal requirement that someone needs to be missing for 7 years before being treated as dead, is particularly striking. It demonstrates sensitivity to the forms that murder took in Bhagalpur, with many people drowned and many others buried in mass graves.

In 2009, the Central Government sanctioned Rs.3.5 lakh per deceased<sup>278</sup>. From 2009, the State Government has also begun to provide pension of Rs. 2500 per month to women widowed in 1989. The Bihar Government reportedly negotiated increased compensation from the Government of India citing the increased compensation given to the survivors of the 1984 Anti Sikh riots.

- Injury

In 1989 the government awarded Rs.5000 compensation to the permanently disabled and Rs 500 – Rs.1000 to the grievously injured. In 2009 the government of India

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<sup>276</sup> Letter dated December 29, 1989, sent from the Relief Commissioner to the District Collector and the Block Division Officer.

<sup>277</sup> “Family” defined as widow, husband, dependant son, unmarried daughter and aged parents.

<sup>278</sup> Letter Number 6044, dated August 14, 2009.



increased the compensation to Rs. 1,25,000 per person with a caveat of deducting the amount of compensation received in 1989.

- Property damage

Compensation for property damage varied depending upon the type of property lost<sup>279</sup>. Those who lost huts were sanctioned Rs. 1000 per room for a thatch roof, Rs. 2000 per room for a tiled roof and Rs. 5000 per room for a completely destroyed household. Those who lived in permanent structures were to be given Rs. 15000 per house in an urban area and Rs. 10000 per house in a rural area. The government also sanctioned Rs. 15,000 for each religious structures that was damaged.

The Bihar Government granted compensation of Rs. 2000 for damage to 'movable property' which covered everything to household goods to means of livelihood, such as bullock carts, shops and looms.

These amounts of compensation for property damage and loss seem extremely low, even for 1989. As one commentator pointed out, the compensation scheme gave the same amount to someone who lost a small shop, and large concerns like the National Watch Company.

- Other measures

Every family was to receive free ration for a week when they left the relief camps. In case of incidents of starvation, the BDO was empowered to provide free grains to the families till he deemed fit.

The state government also directed the district administration to install hand pumps in affected villages, a possible response to bodies of the dead being dumped in wells, making the water undrinkable.

### 3. Accessing compensation

On paper, compensation measures in 1989, layered upon the 1987 general standards, are relatively progressive and incorporate some important steps.

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<sup>279</sup> Parameters for granting relief based on letter number 1701 of September 21, 1987.

The DM circulated a public notice on 5<sup>th</sup> November 1989 announcing the relief measures to be undertaken by the State and also ‘asking the public to stake their claim and submit applications to their Local BDO’s office by 10<sup>th</sup> November 1989.’<sup>280</sup>

While we did not speak to survivors about how and when they accessed compensation, third party commentary suggests that the higher officials like the Relief Commissioner were honest and helpful but officials at the frontline of distributing compensation were often corrupt.<sup>281</sup> Claimants reported having to give bribes to access compensation. In certain cases the police rejected the claims of the victims’ on the grounds that those killed were rioters or killed in police firing<sup>282</sup>, thus implying that all those killed by police firing were rioters and not innocent individuals despite the dubious role of the police during the Bhagalpur mass violence. In 2008, it came to light that as many as 2440 files on compensation claims were missing at the district level<sup>283</sup>. This suggests at best that the district administration did not attend to claims by victims diligently; it may also indicate that compensation claims were deliberately ignored and misplaced.

While corruption and negligence marked victims’ access to compensation, political calculations seem to have played a strong role in how much compensation victims were granted and whether they were counted amongst the grantees. Media reports indicate that, in 2001, the RJD regime in Bihar decided to stop identifying victims who had not received compensation so far<sup>284</sup>. Reports also suggest that the Centre’s grant and release of additional compensation for victims was strategically timed to coincide with the 2009 general elections, to benefit the UPA<sup>285</sup>.

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<sup>280</sup> Ibid

<sup>281</sup> Ibid

<sup>282</sup> Ibid

<sup>283</sup> “Files on Bhagalpur Riot Victims Missing” *DNA*, September 26, 2008 available at [dnaindia.com](http://dnaindia.com).

<sup>284</sup> “Bhagalpur Burning,” *The Sunday Indian*, December 6, 2009.

<sup>285</sup> Ashish Sharma, “Government to Compensate Bhagalpur Riot Victims”, *Mint*, June 13, 2008 available at <http://www.livemint.com/2008/06/12205158/Govt-to-compensate-Bhagalpur-r.html?atype=tp>

#### 4. **Places of worship**

The mass violence in Bhagalpur destroyed nearly 60 mosques, mazaars and imambaras. A senior official noted after the riots that some of the mosques 'must have taken 3 to 4 days in being pulled down. Obviously the rioters had all the time and the freedom for this,' implying of course, that the police looked the other way as Muslim sites were desecrated. The same official reported that several Muslim sites were covered with Hindu symbols – statues of Bajrang Bali were placed over them, and a mazar at Tamauni was converted into a devasthan<sup>286</sup>.

The Bihar Government disclosed that it sanctioned Rs. 15000 for each religious structure damaged during mass violence. However, it did not respond to Right to Information queries about whether and when the district administration repaired damage to religious sites.

#### F. **Summing up**

Looking back at the Bhagalpur mass violence, it is clear that biased policing, particularly from senior police officials, ensured a high death toll as well as shoddy investigation. This, in turn, paved the way for weak evidence and impunity for perpetrators. The police cooperated with Hindu Right organisations, tolerating and assisting in violence. The Congress was in power in Bihar in 1989, followed by the Rashtriya Janata Dal. Neither government protected victims testifying in court, or punished complicit officials. Public officials who participated in a criminal, communal massacre were protected by successive governments, led by different political parties, who ostensibly opposed the BJP and its sister organisations. So, the aftermath of the Bhagalpur violence presses home the extent to which protecting officials and political functionaries has become systemic, regardless of the political dispensation of the day.

However, official records also reveal that government officials doing their jobs diligently can contribute significantly to holding people accountable. The actions of a

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<sup>286</sup> Report of Special ADM, Law & Order, Bhagalpur.

few district officials led to mass graves being discovered after the massacre. Officials responsible for relief set more progressive standards for compensation than have been applied in comparable situations. Reports by government officials helped the Commission of Inquiry to provide a fairly detailed analysis of the violence as well as a catalogue of official culpability. This record is important in its own right, and becomes even more so because non-State documentation of the Bhagalpur violence is limited. It no doubt strengthened the efforts by victims and the government to try perpetrators that began in 2006. These renewed efforts by the state government, born of greater accountability and political considerations, are still unfolding. However, the results of trials so far demonstrate that when police, prosecutors and administrators do their jobs as they are supposed to, the gains in accountability after mass violence are evident.

## VII. Gujarat 2002<sup>287</sup>

### A. Introduction

In this chapter, we focus on mass violence in Gujarat in 2002, in which around 2000 people were killed<sup>288</sup>, another 2500 are estimated to be missing<sup>289</sup> and around 2 lakh people<sup>290</sup> were displaced from their homes. This was one of the worst episodes of mass violence that India has seen since independence, not just in its scale and brutality, but also because of the evidence of planning and support from the highest levels of the government<sup>291</sup>. It was also scrutinized and reported on more closely than previous episodes of mass violence, and so extensive documentation of the administration's failure to control and punish violence exists.

This episode of mass violence is also marked by relentless litigation to pursue justice by survivors, social and legal activists, which has secured some momentous results. Gujarat 2002 saw the emergence of sustained, long-term human rights activism

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<sup>287</sup> Researched and written by Prita Jha, who would like to acknowledge the work of those who continue to devote time and energy to ensuring justice for the survivors of 2002. Special mention has to be made of four organizations, Nyayagrah, Centre for Social Justice, Jan Sangharsh Manch and Citizens for Justice and Peace who have, with remarkable energy and commitment, sustained the fight for more than ten years.

<sup>288</sup> Centre for Social Justice, "Status Report on Rehabilitation of Victims of Communal Violence in Gujarat"(Gujarat, 2005): 6, available at <http://www.centreforsocialjustice.net/images/GPID%20FINAL.pdf>. There is a huge disparity between the official figure of 1069 deaths provided by the state, and civil society estimates which place the figure above 2000.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid., 2.

<sup>291</sup> Concerned Citizens Tribunal, "Crimes Against Humanity", Vol. 2, (Mumbai: Citizens for Justice and Peace, 2005) available at <http://www.sabrang.com/tribunal/tribunal2.pdf>. See pages 75- 80, for the role of Gujarat government, and pages 81-96 for role of the police, its communalisation and names several police officers guilty of gross negligence. There is also extensive evidence of state complicity in other reports, in particular see Human Rights Watch, "We have No orders to Save you" available at <http://www.hrw.org/reports/2002/india/>, Centre for Social Justice, "Status Report on Rehabilitation of Victims of Communal Violence in Gujarat"(Gujarat, 2005); International Initiative for Justice in Gujarat, "Threatened Existence: A Feminist analysis of the genocide in Gujarat", (Forum Against Oppression of Women, December 2003); People's Union for Civil Liberties, "Violence in Vadodara: A report prepared by PUCL, Vadodara and Vadodara Shanti Abhiyan", (May 2002); Forum Against Oppression of Women and Awaaz-e-Niswaan, "Genocide in Rural Gujarat: the experience of Dahod District", (Bombay, June 2002); and Mander, Harsh, "Fear and Forgiveness: The Aftermath of Massacre" (India: Penguin Books, 2009).

confronting a belligerent and recalcitrant state, on a scale unlike any previous episode of mass violence.

Below, we describe the violence and some of the major interventions by civil society, as well as official watchdogs such as the NHRC. We then discuss access to criminal justice, followed by whether officials and political office holders have been held accountable, and finally sketch out access to relief and rehabilitation for survivors of violence.

## B. Sources of information

We received extensive responses to RTI applications in Gujarat. In addition to this information we also rely heavily on petitions filed by activists, survivors, NGOs and orders issued in these cases, as also orders issued by the National Human Rights Commission, and information submitted to the Nanavati Commission of Inquiry that have reliably entered the public domain. We draw upon the first part of the Commission of Inquiry's report, which deals solely with the Godhra incident. We also rely on human rights documentation and NGO reports produced after interviews, field visits and public hearings in the months following the outbreak of violence in Gujarat.

## C. The Context

On February 27, 2002, 57 karsevaks were burnt alive at Godhra train station when the two bogeys of the train that was carrying them caught fire. The cause of the fire is disputed – while some describe it as a complete accident, others say it is best viewed as an accident abetted by the negligence of government agencies. The Gujarat government's view was that the Godhra incident was a “terrorist conspiracy”<sup>292</sup>

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<sup>292</sup> The Chief Minister, Narendra Modi initially made statements suggesting evidence of pre-planned conspiracy, which was later supplemented with statements of ISI plot. See *The Hindu* front page reports on March 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> 2002, available at <http://www.hindu.com/thehindu/2002/03/01/01hdline.htm>, <http://www.hindu.com/thehindu/2002/03/02/> and <http://www.hindu.com/thehindu/2002/03/03/>. Also see Para 3, page 6 of the “Nanavati-Mehta Inquiry Report” (herein after referred to as the “Godhra report”), which records that Gujarat government suspected this incident to be part of conspiracy hatched by Muslim terrorists from Jammu and Kashmir, with some Muslim fundamentalists from

aiming to destabilize Gujarat. Even in official documents, the Godhra incident is described as the cause of the violence that followed in the rest of the state.<sup>293</sup>

Civil society accounts make clear that while mass violence across Gujarat followed the Godhra incident, the violence was too well coordinated to be spontaneous. There is a vast amount of information in the public domain<sup>294</sup> mapping the violence and offering detailed testimonies from victims and witnesses all over Gujarat. Within hours of the Godhra incident, the Vishwa Hindu Parishad<sup>295</sup> (VHP) gave a call for a Gujarat bandh on February 28<sup>th</sup>, which was supported by the Gujarat Chief Minister (CM), Narendra Modi, who is alleged to have held a meeting with the senior most police and administration officials on the evening of February 27<sup>th</sup> 2002, and issued (clearly illegal) instructions to those present not only to not act impartially, but to “allow the Hindus to vent their anger”<sup>296</sup>. What followed were violence, murder and looting by armed mobs. Numerous incidents of violence were reported in 16 districts<sup>297</sup> across Gujarat. Below, we briefly set out the nature of the violence which comprised large scale urban and rural<sup>298</sup> planned armed attacks by large mobs. There is evidence in many civil society reports of systematic work by Hindu Right organisations in inciting and executing the violence. There is also evidence that they

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Godhra “to spread terror ...” available at <http://home.gujarat.gov.in/homedepartment/downloads/godharaincident.pdf>.

<sup>293</sup> Many FIRS, witness statements recorded by police suggest that because of “Godhrakand” large mobs attacked Muslims elsewhere in Gujarat.

<sup>294</sup> Concerned Citizens Tribunal, “Crimes Against Humanity”, Vol. 1, 2 and 3 (Mumbai: Citizens for Justice and Peace, 2005) available at <http://www.sabrang.com/tribunal/tribunal2.pdf>. The reports, spread across three volumes, are the most comprehensive that exist on the riots to date. It collected 2094 oral and written testimonies from victim survivors, women’s groups, human right groups, NGOs and academics.

<sup>295</sup> The VHP, the RSS (Rashtriya Swamsevak Sangh), and the “Bajrang Dal” the youth wing of the VHP are a cluster of right-wing Hindu nationalist organisations belonging to the “Sangh parivar” family, who actively propagate the ideology of a Hindu Rashtra. The “kar sevaks” who were killed in the Godhra train tragedy, were returning from Ayodhya after rendering voluntary service in pursuit of building a contentious Hindu temple there.

<sup>296</sup> “A Plot from the Devil's Lair”, *Outlook Magazine*, June 3, 2002 issue available at <http://www.outlookindia.com/article.aspx?215889>) reported that a cabinet minister made such an allegation against Chief Minister Modi before the Concerned Citizens Tribunal, which was presided over by Supreme Court judge, Justice Krishna Iyer.

<sup>297</sup> Concerned Citizens Tribunal, “Crimes Against Humanity”, (Mumbai: Citizens for Justice and Peace, 2005) Vol. 1, 19.

<sup>298</sup> Forum Against Oppression of Women and Awaaz-e-Niswaan, "Genocide in Rural Gujarat: the experience of Dahod District", (Bombay, June 2002) available at <http://www.onlinevolunteers.org/gujarat/reports/rural/rural-gujarat.pdf>.

were recruiting, organizing and “saffronising” people from tribal groups in the preceding years, many of whom were trucked in to launch attacks on Muslims in the rural areas especially in Dahod and Panchmahal.

## 1. Instances of mass violence

### a) Gulbarg Society Massacre, Chamanpura, Ahmedabad<sup>299</sup>

This massacre relates to the brutal attack on the home of Congress MP Ehsan Jaffrey who was sheltering many Muslims in his home in Gulbarg. He, along with seventy others, was murdered by armed mobs of 20,000 to 22,000 over a period of seven hours. Ten to twelve women and girls are reported as having been raped and murdered from this area<sup>300</sup>. Evidence has been found to suggest that the attack and murder of Jaffrey was pre-planned.<sup>301</sup> The police, despite being well aware of the build-up and the threats to loss of many lives, failed to intervene in time.<sup>302</sup> There were also allegations of foul play in the registration and investigation of offences, and it was alleged by witnesses that the police had refused to write down the names of accused they were giving. However, this massacre sparked survivor and activist efforts, and eventually led to the incumbent CM being investigated and interrogated for the charge of criminal conspiracy to murder. We return to this later.

### b) Naroda Gam and Naroda Patiya, Ahmedabad.<sup>303</sup>

Evidence from civil society reports, eye-witness accounts and a sting operation by the *Tehelka* magazine<sup>304</sup> strongly suggest that the attacks on these Muslim areas on

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<sup>299</sup> Concerned Citizens Tribunal, “Crimes Against Humanity”, Vol. 1, (Mumbai: Citizens for Justice and Peace, 2005), 26-35.

<sup>300</sup> Ibid., 28, para. 1, “It was between 3.30-4.30 p.m. that 10-12 women were first raped, then cut into pieces with guptis, and then thrown into the fire.”

<sup>301</sup> Ibid. Also see the FIR of Zakia Jaffrey dated June 8, 2006, available at <http://www.cjponline.org/zakia/060608%20Zakia%20FIR.pdf>. The complainant Zakia Jaffrey lists 62 accused, which include Police Commissioners, Ministers and the Chief Minister, as being party to a criminal conspiracy to murder Ehsan Jaffrey and others.

<sup>302</sup> Concerned Citizens Tribunal, “Crimes Against Humanity”, Vol. 1, (Mumbai: Citizens for Justice and Peace, 2005).

<sup>303</sup> Concerned Citizens Tribunal, “Crimes Against Humanity”, Vol. 1, (Mumbai: Citizens for Justice and Peace, 2005) 36-43, has a detailed account gathered from eyewitness accounts and victim testimonies. See later discussion on investigation and charge sheet defects.

<sup>304</sup> See *Tehelka*, Issue 46, December 1, 2007.



the morning of February 28, 2002, by a large mob of 5,000 to 10,000 people armed with spears, swords, acid bombs and petrol bombs was pre-planned. The rioters used gas cylinders to blow up businesses, houses, cars and taxis. Religious buildings and symbols like mosques and tombs were targeted, attacked, damaged and destroyed. The residents of Naroda claim<sup>305</sup> that when they tried to defend themselves the police fired at them. Again, civil society reports<sup>306</sup> suggest that during the seventeen or so hours that the areas were under attack, many women and girls of Naroda Gaon and Patiya were raped. Some of the most chilling victim testimonies and narratives of cold-blooded, brutal murder, rape and mutilation emerged out of this massacre, and close to 150 persons are estimated to have been burnt alive after being gang-raped, hacked and cut. Several high profile VHP and BJP leaders were named by survivors as being complicit in the violence<sup>307</sup> -- for example, Gordon Zadephia, the Minister of State for Home, and Mayaben Kodnani, a BJP Member of the Legislative Assembly were named by some of the accused as having incited and encouraged the violence.<sup>308</sup>

c) Sardarpura and Deepda Darwaja Massacre

Two brutal massacres took place in Mehsana. In Sardarpura, thirty-one Muslims seeking shelter were locked in a room and murdered by a mob. The police are alleged to have a role in this murder<sup>309</sup>. Also in Visnagar, in the Deepda Darwaja area, eleven people from the same family: five women, five children and one man were hacked to death. The police were called repeatedly by the victims under attack, but they arrived too late.<sup>310</sup>

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<sup>305</sup> Concerned Citizens Tribunal, "Crimes Against Humanity", Vol. 1, (Mumbai: Citizens for Justice and Peace, 2005) 36-43. See the section on Naroda Gam and Naroda Patiya.

<sup>306</sup> Ibid.

<sup>307</sup> "VHP, BJP workers named in FIR on riots" *Times of India*, Ahmedabad edition, March 3, 2011. The five BJP and VHP workers named in the Naroda-Patia incident as reported here are Kishan Korani, PJ Rajput, Harish Rohera, Babu Bajrangji and Raju Noble.

<sup>308</sup> *Tehelka*, Issue 46, December 1, 2002 available at [http://www.tehelka.com/story\\_main35.asp?filename=Ne031107NarodaPatyaMassacre.asp&page=4](http://www.tehelka.com/story_main35.asp?filename=Ne031107NarodaPatyaMassacre.asp&page=4).

<sup>309</sup> Concerned Citizens Tribunal, "Crimes Against Humanity", Vol. 2, (Mumbai: Citizens for Justice and Peace, 2005), 92.

<sup>310</sup> Ibid., 91.

d) Pandharwarda Massacre, Panchmahal

In Pandharwada village on March 1, 2002, thirty-eight Muslims were killed in an attack on the village by a well-organized mob of 15,000, which included tribal people from nearby villages. In this village, there was evidence of mobilization and pre-planning of the assault by VHP/Bajrang dal outfits in the weeks before the attack. In its report, PUDR notes that there was even evidence of a betrayal of trust by Hindu neighbours, who led two groups of Muslims to shelters in houses and fields, where they were then attacked and murdered.<sup>311</sup> There were two cases registered in respect of the killings in this village. One of these, FIR No. 9 of 2002 from Khanpur dated February 28, 2002 has been registered against three Muslims accused by Hindu complainants, who admit that they were involved in breaking and damaging Muslim property on the same day. The case was tried and the accused acquitted by July 21, 2002. FIR No. 11 of 2002 from Khanpur was registered by the police as the complainant and noted only eight murders.<sup>312</sup> The accused in this case were acquitted within six months of the incident in November 2002,<sup>313</sup> mainly on account of the police charging the wrong accused.<sup>314</sup> Many witnesses named accused not named in the charge sheet, and even the trial judge noted the poor investigation by the police. In 2006, the case was reinvestigated and many accused, including the village Sarpanch<sup>315</sup> were charged, but let out on bail<sup>316</sup> despite facing serious charges of murder. The original massacres and progress of the criminal case of the murders has since been overshadowed by the victim's search for missing relatives<sup>317</sup>, which has entailed another spate of litigation with the government. In a well-publicized event, victims (having failed to get any official information from the authorities in

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<sup>311</sup> People's Union for Democratic Rights, "Maaro! Kappo! Baalo! State, Society, and Communalism in Gujarat", (Delhi, May 2002), 8-10, available at [http://www.onlinevolunteers.org/gujarat/reports/pudr/pdf/full\\_report.pdf](http://www.onlinevolunteers.org/gujarat/reports/pudr/pdf/full_report.pdf). Victim testimonies can be accessed on <http://www.sabrang.com/cc/archive/2002/marapril/Panchmahal.htm>, and *Combat Communalism*, March-April 2002 issue.

<sup>312</sup> This is based on information received from Panchmahal in respect of this case.

<sup>313</sup> Accessed from <http://www.gujarat-riots.com/illegalmassgrave.htm>,

<sup>314</sup> See *Frontline*, Vol. 20, Issue 15 (July 19 - August 01, 2003).

<sup>315</sup> Elected head of the village.

<sup>316</sup> *Frontline*, Vol. 20, Issue 15 (July 19 - August 01, 2003).

<sup>317</sup> Langa, Mahesh, "The anatomy of a Hindutva lab, 'Missing' Show Up in Lunawada Grave", *Tehelka*, Januray 26, 2006, available at [http://www.tehelka.com/story\\_main16.asp?filename=Ne012106the\\_anatomy\\_SR.asp](http://www.tehelka.com/story_main16.asp?filename=Ne012106the_anatomy_SR.asp).

respect of their missing relatives) unearthed skull and bones in a ravine near a nearby river, the Paanam, outside Lunavada<sup>318</sup>. The Khanpur police who were silent spectators to the mass deaths of Muslims on February 28 and March 1, acted speedily, registering an FIR<sup>319</sup> for illegal exhumation of bodies against the survivors and those supporting them. It took the victims several years of litigation in the High court and Supreme Court to eventually get possession of bodily remains for a dignified burial.<sup>320</sup>

e) Ode Massacres

In Ode village in Anand, twenty people were burnt alive in an attack; two FIRS have been lodged at the local Khambolaj station. Police again failed to respond to protect the Muslim citizens in question.<sup>321</sup> The complainants say that police have only confirmed four deaths and twenty two bodies were declared missing, thought to have been disposed of as a systematic effort to destroy evidence of crimes committed<sup>322</sup>.

f) Best Bakery

In Vadodara, thirteen members of a family owning a business called “Best Bakery” were targeted and murdered in an attack lasting more than eight hours. The criminal case came to be known as the Best Bakery case.

## 2. Role of the Police

The reports speak with one voice regarding the failure of the police to prevent violence and protect lives. There are many narratives on the partisan role played by many police officers, who either watched silently while people were being attacked or failed to respond to calls for help. In some cases, the police were alleged to be party to attacks on the Muslim community.

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<sup>318</sup> Ibid.

<sup>319</sup> FIR no. 13 of 2006.

<sup>320</sup> “The Hard facts” available online at <http://www.gujarat-riots.com/illegalmassgrave.htm>.

<sup>321</sup> Concerned Citizens Tribunal, “Crimes Against Humanity”, Vol. 1, (Mumbai: Citizens for Justice and Peace, 2005) 87-89.

<sup>322</sup> Ibid.

In Ahmedabad, a survey conducted across 17 relief camps involving 2797 respondents, found that an alarming half - 870 of the 1783<sup>323</sup> respondents - alleged inaction by police who were present at crime scenes. 673 respondents, amounting to more than a third of those surveyed, said that police had acted against the victims. 275 respondents reported that this action against victims took the form of police firing on the victims. Only 80 (corresponding to 4.49%) respondents said that the police action was supportive.

A report on violence in Vadodara by the People's Union for Civil Liberties<sup>324</sup> analysed 1314 incidents of violence that occurred in May, 2002. Their findings are tabulated below.<sup>325</sup>

#### **Information regarding the role of the police in 1314 cases in Vadodara**

<b>Absent at time of attack</b>	<b>Informed but inactive</b>	<b>No response from police</b>	<b>Present and participated</b>	<b>Prevented incident.</b>	<b>Total cases</b>
<b>814 (62%)</b>	<b>397 (30%)</b>	<b>60 (4%)</b>	<b>25 (2%)</b>	<b>27 (2%)</b>	<b>1314(100%)</b>

Shockingly, only 2% of the police acted to prevent violence in accordance with their constitutional duties here and only 4.49 % as per the research in Ahmedabad (see above)

### **3. The Central Government's reaction**

<sup>323</sup> See "Hard Facts", table 4.6, entitled "Details Regarding the Action Taken by Police", in Concerned Citizens Tribunal, "Crimes Against Humanity", Vol. 1, (Mumbai: Citizens for Justice and Peace, 2005), 26. The table records that out of a total of 2797 survey forms that were completed, the information regarding police action was not available in 1014 cases. The figures and analysis presented here excludes the 1014 cases in which no information was available, and is based only on the 1783 responses where some information was provided.

<sup>324</sup> PUCL, "Violence in Vadodara: A report prepared by PUCL, Vadodara and Vadodara Shanti Abhiyan", (May 2002), available online at <http://www.onlinevolunteers.org/gujarat/reports/pucl/index.htm>.

<sup>325</sup> PUCL, "Violence in Vadodara: A report prepared by PUCL, Vadodara and Vadodara Shanti Abhiyan", (May 2002), 132, Chapter 6, entitled "Role of Police".

The Centre is duty bound under Article 355 of the Constitution to protect states against external aggression and internal disturbance. It is empowered, under Article 356, to impose President's rule in a state when there is a "failure of constitutional machinery" in that state. Article 356 allows the Centre, in effect, to assume "all or any" of the functions of the state government. The Central Government could have, and should have in the circumstances, intervened in restoring law and order and called in the army to do so.

The National Democratic Alliance (NDA) coalition at the Centre, led by the BJP, did not do this, and defended its own failures as well as the manifest failure of the Gujarat administration. A Lok Sabha motion to censure the Gujarat government's failure to provide security to the minority community, seeking intervention of the centre under rule 355 was defeated by 94 votes.<sup>326</sup> On April 29, 2002<sup>327</sup>, the ruling coalition supported a Rajya Sabha motion<sup>328</sup> seeking federal intervention in Gujarat as it lacked the numbers to defeat the motion.<sup>329</sup> On May 6, 2002, the Rajya Sabha passed a unanimous resolution expressing anguish about the persistence of violence for over six weeks and urging the Centre to intervene to protect lives and properties of citizens as mandated by the constitution and to provide effective relief and rehabilitation to the victims of violence. However, far from invoking its powers under Article 355, the Centre did not even put pressure on the Gujarat government to implement the recommendations of the NHRC.<sup>330</sup> Coalition politics is assumed to have a moderating influence on the positions of major political parties. However, in 2002 it was clear that coalition partners would tolerate mass violence rather than withdraw support from the government and risk their own positions<sup>331</sup>. Many BJP

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<sup>326</sup> "Censure motion on Gujarat to be voted on April 30", *The Economic Times*, April, 24, 2002, available at [http://articles.economictimes.indiatimes.com/2002-04-24/news/27365498\\_1\\_gujarat-issue-adjournment-motion-discussion](http://articles.economictimes.indiatimes.com/2002-04-24/news/27365498_1_gujarat-issue-adjournment-motion-discussion).

<sup>327</sup> "Indian M.P's back Gujarat Motion", *BBC*, May 6, 2002, available at [http://news.bbc.co.uk/2/hi/south\\_asia/1970415.stm](http://news.bbc.co.uk/2/hi/south_asia/1970415.stm).

<sup>328</sup>Ibid. A Rajya Sabha motion was passed unanimously on May 6, 2002, expressing anguish about the persistence of violence for over six weeks and urging the Centre to intervene to protect lives and properties of citizens as mandated by the constitution and to provide effective relief and rehabilitation to the victims of violence.

<sup>329</sup> "Obligations under Art. 355 will be fulfilled: Advani" *The Hindu*, May 7, 2002.

<sup>330</sup> See earlier discussion on NHRC intervention.

<sup>331</sup> Baxi, Upendra, "The Second Gujarat Catastrophe" *Economic and Political Weekly*, Vol. 37, Issue 34, (Aug 24, 2002).

politicians defended, and even praised Mr. Modi. Coalition partners also supported the Gujarat government and downplayed the violence. George Fernandes, Union Defence Minister at the time claimed that there was “nothing new” in the allegations of mass rape, as this was a regular feature of communal violence in India.

The Centre’s refusal to intervene allowed the Gujarat government to tolerate and support large-scale violence against Muslims across Gujarat. In the months following mass violence, the state government set up a Commission of Inquiry (“the Nanavati Commission”). In the months and years that followed, survivors and civil society groups kept pressing for accountability. They pressed directly – by filing criminal complaints and applying for compensation. They also pressed indirectly – they petitioned the Gujarat High Court as well as the Supreme Court and challenged problems in criminal proceedings as well as access to compensation. They also pressed specifically for senior officials and political office holders – including the Chief Minister Narendra Modi – to be held accountable for colluding in mass violence. Survivors’ efforts often met with frustration, but also resulted in unprecedented measures, such as transferring major criminal trials out of Gujarat, re-opening 2000 criminal cases that had been summarily closed, and the appointment of a Special Investigation Team (SIT) by the Supreme Court to examine evidence in some particularly serious cases.

We look at some of these developments in more detail below, as we examine access to criminal justice, accountability of public officials, and compensation and rehabilitation.

#### D. Access to Criminal Justice

Below, we look at how the criminal justice system in Gujarat responded to mass violence in 2002.

##### 1. **Complaints and FIRs**

###### a) **Complaints**

The table below captures the responses we received across districts regarding mode of receipt of complaints.

#### Mode of Complaint

By phone	By Fax	Attended in person	By registered post
1	13	937	1

- 937 complaints were made in person, showing that approximately 25% of victims were sufficiently proactive to make the journey to the police station to get their FIR registered. This is significant given the highly charged communalized atmosphere confronting the survivors. The actual numbers are likely to be higher given that many police stations and districts simply did not provide the information regarding mode of complaint, but simply told us overall figures regarding the number of FIRs registered.
- Our inspection of one police station in Kadi indicated that there was no system maintained for recording the mode by which the complaint came to the police station except by individually reading the FIR (which often incorporated the complaint). The only information that police stations can accurately provide from their records are that X or Y number of FIRs were registered in connection with 2002.
- Given that we would expect most victims to pick up the phone and contact the local police when confronted with an emergency or an unexpected attack, it is surprising that only one complaint was received by phone as per the RTI response across districts. This finding is contradicted by research conducted in the immediate aftermath of the violence in Gujarat in 2002. A research survey conducted amongst survivors in relief camps between 5th-13<sup>th</sup> March 2002, within a week of the outbreak of violence showed 59.41% of those surveyed said they had contacted police by phone; this increases to 73.02% of

survey participants if we exclude the 72 respondents who did not answer this question.<sup>332</sup>

<b>Mode of contacting Police</b>	<b>Phone</b>	<b>In person</b>	<b>By phone and in person</b>	<b>Information not available</b>	<b>Total</b>
Number	230	81	4	72	387
Percentage <sup>333</sup>	59.41	20.93	1.03	18.61	100
% discounting cases (72) where no information.	73.02%	25.71%	1.27%	-	315

b) FIRs

In Gujarat an unprecedented 4252<sup>334</sup> FIRs were registered in the wake of mass violence, far more than in any previous episode that we examined.

- We learnt that people filed FIRs in 24 districts of Gujarat. Information received from RTI shows that FIRs were registered in 251 police stations across Gujarat. In Ahmedabad city alone 959 FIRs were registered.
- Only one district, Dang, responded by saying there was no incident of violence in 2002.

<sup>332</sup> See Table 4.5 on page 25. This table is reproduced from Citizen's Initiative, Centre for Social Justice, "Hard Facts: From a Survey of 2797 Families who have survived the Violence in Gujarat. A Report by Citizen's Initiative," (Ahmedabad, 2002), which carried out a survey of 2797 families across 17 camps of Gujarat in the period 5-13<sup>th</sup> March 2002. The permission to quote and reproduce information from the report has been expressly sought and granted by Gagan Sethy, Centre for Social Justice.

<sup>333</sup> We have added this row to the table for our analysis.

<sup>334</sup> A table setting out the number of FIRs, summary, charge-sheeted cases and acquittals was published in Frontline, and has been relied upon in various subsequent reports, (including the International Initiative for Justice) and court petitions. See *The Frontline*, Vol. 20 Issue 15, (July 19 2003 – August 01, 2003).



- In 8 districts, Ahmedabad (1049), Sabarkatha (469), Bhavnagar (310), Mehsana (176), Panchmahal (181), Vadodara rural (242), Anand (199), Kheda (190) the number of FIRs filed was in excess of 100.
- The epicenter of violence was Ahmedabad followed by Vadodara. Mehsana, Panchmahal, Sabarkantha, Kheda, Anand, Dahod, Bhavnagar and Gandhinagar.

The number of FIRs filed is an indicator of the level of violence experienced by a particular area. However, merely taking a numerical count does not tell us how serious the violence was, and how well the police handled it. In Bhavnagar, though a huge number of FIRs were filed, the information from all the reports, civil society and media show that the police were effective in controlling the violence largely due to proactive policing under the then-D.S.P. Rahul Sharma. In this case, a higher number of FIRs could actually indicate that the police were doing their jobs more diligently than in other districts.

We analysed 400 FIR's across nine districts of Gujarat including 5 districts with a high incidence of violence. The table below records the spread of incidents and FIRS as recorded in the FIRs.

#### Spread of Incidents and registration of FIRs

Incidents/FIRs	27/2/02	2/03/02 - 07/03/02	08/03/02 - 31/3/02	April	May	1.06.02 - 31.10.02	Inf. N.A	Total
Nos of Incidents	219	84	38	33	19	4	3	400
Nos of FIRs	99	117	107	42	24	7	4	400

We see that over half (54.75%) of the incidents had taken place in the first three days and over a 1/5<sup>th</sup> ( 21%) of incidents took place in the next 5 days so by the end of the first week around ¾ (75.75%) of incidents had happened. This is corroborated by the evidence in the public domain which shows that violence was most intense and concentrated in the first three days when the massacres were carried out by large mobs.

We also computed delay in registration of each FIR.

### Delay Spread across 400 samples

Delay	Less than 4 hours	Less than 24 hrs	1-3 days	4-7 days	8-30 days	31-90	More than 90	Total
Numbers	34	189	59	44	67	5	2	400

Less than 1/10<sup>th</sup> (8.5%) of the FIRs were filed within a few hours of the incident. Almost half (47.25%) were filed within 24 hours and a further 59 (14.75%) were filed within three days. A total of 282, equalling 70.5% FIRs were filed by the end of three days, which is reasonable given the kind of fear and insecurity the survivors were confronting during this period. In 74 cases, there was a significant delay of more than 8 days which according to legal requirements has to be justified and this requirement was often unfulfilled by the police.

Also, in none of the FIRs analyzed have the police recorded the delay as being on account of their actions; on the face of the records, registration took place within hours of a complaint being reported to the police. So the delay, where it exists, appears to be on account of late reporting by the complainants. Where the police do not accurately record the reason for a gap in the incident in question and the registration of the FIR, the delay becomes something that can later be used by the defence to throw doubt on the complainant's account of events.

#### c) Complainants and Accused as per the 400 sample analysis.

Out of 400 cases, the police were complainants in 148 cases (amounting to 37% of total). In 113 of these 148 FIRs with police complainants, the accused were described as an "anonymous mob". That is to say that there in 3/4 complaints (76%) filed by police, the accused were not named. Out of 400 FIRs, including the ones where victims or third party witnesses were the complainants, the accused are described only as an anonymous mob in 291 cases i.e. in 72.75% or nearly three quarter of the FIRs registered. So as per the sample it did not make a significant difference whether police or witnesses registered the complaint, in either case, around 75% the accused were not named.

d) Problems encountered during registration

The picture emerging from RTI results, of an overwhelming number of FIRs not disclosing any names of accused, is supported by the evidence of deliberate erasure of names by the police, as was recorded by the NHRC in its reports and orders and in various court petitions and applications made by social and legal activists.<sup>335</sup> The main problems that complainants faced when registering complaints with the police are summarised below.

- The police refused to register FIRs in some instances. There is overwhelming support of this in victim testimonies and interviews recorded by various NGO inquiries and reports. It is also a ground of complaint in the petitions filed for reinvestigation and transfer of some of the massacre cases and the victim petition filed regarding the closure of around 50% of the 4252 FIRS that were filed.<sup>336</sup> An IPS officer in Gujarat in 2002, Sreekumar, also asserted in his affidavit to the commission of inquiry that there were complaints that the police pressured and dissuaded survivors from filing complaints.
- The most significant noted failure of the police was to tailor the informant's version, especially their refusal to note the name of the accused, which led to closure of many cases<sup>337</sup>. There is evidence of this in the cases being followed up by Nyayagrah and also from research conducted by the Centre for Social Justice within a week of the outbreak of violence. The research showed that in

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<sup>335</sup> There is evidence of this in victim testimonies filed before the SC in the victim petition and also in interviews given by many survivors to activists and journalists in fact finding reports, see in particular, the Criminal Justice section of report, Crime against Humanity, also see chapter four, entitled, "Role Of the Police" of PUDR (Public Union of Democratic Rights) report entitled "Maaro! Kappo! Baalo! State, Society, and Communalism in Gujarat", People's Union for Democratic Rights, (Delhi, May 2002), Also see International Initiative for Justice in Gujarat, "Threatened existence: A Feminist analysis of the genocide in Gujarat", (Forum Against Oppression of Women, December 2003), 49-52, Section 4.4.

<sup>336</sup> PUCL, "Violence in Vadodara: A report prepared by PUCL, Vadodara and Vadodara Shanti Abhiyan", (May 2002), 134, where it is stated at 12 places the police refused to register FIRs. Also see International Initiative for Justice in Gujarat, "Threatened existence: A Feminist analysis of the genocide in Gujarat", (Forum Against Oppression of Women, December 2003), 80. Also see Para-20 (viii) of NHRC report, National Human Rights Commission Report on Gujarat, (New Delhi: March - May, 2002) available at <http://www.cjponline.org/gujaratTrials/statecomp/pdf%20files/pdfs/NHRC%20Report%20%20July%202002.pdf>.

<sup>337</sup> As noted earlier, the accused were not named in around 75% of cases of our 400 sample.

74 of 139 (just over 50%) FIRs registered, the accused were not named in complaints related to major offences.<sup>338</sup>

- The police created “omnibus” FIRs, where multiple disparate incidents were clubbed together, ensuring chaotic, unwieldy trials with many witnesses and many accused, which made a fair trial very difficult unless steps were taken to separate incidents into separate cases, and rectify the investigative errors.<sup>339</sup>
- The police filed “cross cases” - false cases against Muslims - under the influence of powerful persons with the sole aim of using the cross case as a bargaining tool to facilitate “compromise”, or pressure the complainants to drop the case against the accused. This clearly amounts to abuse of process by the police and has led to a serious loss of confidence by Muslims in the criminal justice system.<sup>340</sup>

The experience of Bilkis Bano is an example of the difficulties complainants faced when registering complaints. Ms. Bano’s complaint was an especially serious one, but nevertheless, she encountered active hostility from the police. The “Bilkis Bano case” was a multiple rape and murder case from Dahod district. Bilkis Bano, a young Muslim woman, five months pregnant was on the run with seventeen others from her village when they were confronted and assaulted by a mob of 20 to 30 men carrying swords and sickles. The mob gang raped four women, including Bilkis and her mother, and murdered many including her three-year-old daughter by “smashing” her on the ground. Of the seventeen who left the village, only three survived, the bodies of eight of whom were found while six are still missing. Ms. Bano fell unconscious and was taken as dead. Later, she found the courage to go to

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<sup>338</sup> “Citizen’s Initiative, Centre for Social Justice, “Hard Facts: From a Survey of 2797 Families who have survived the Violence in Gujarat. A Report by Citizen's Initiative,” (Ahmedabad, 2002)”, 46, footnote 39. Of the total FIRS analysed, the police is the complainant in 64, and those filed by citizens are 75, making a total of 139.

<sup>339</sup> Evidence regarding this comes mainly from court documents filed in the Supreme Court for reinvestigation on account of poor investigation in the massacre cases (subsequently investigated by Special Investigation Team) and the challenge to closure of 2000 summary cases, combined with the insights and experiences of Nyayagrah Justice Project from around 150 cases.

<sup>340</sup> This insight is drawn largely from the grass-roots work of the legal justice project, Nyayagrah.

the police station. The police at Limkheda Police Station acted to subvert justice in the following manner: <sup>341</sup>

- They initially refused to register her FIR<sup>342</sup>.
- Threatened her with the administration of a poisonous injection.
- Recorded a fabricated complaint, which said, the attackers were an anonymous mob of 500 despite the fact of Ms. Bano naming twelve of her attackers.<sup>343</sup>
- Did not include specific allegations of rape as narrated by her.<sup>344</sup>
- The police failed to record a proper witness statement from her.<sup>345</sup>

## 2. Complaints and FIRs on Sexual Violence

There is widespread evidence of sexual violence against women in the unofficial reports on mass violence in 2002.<sup>346</sup> Detailed and chilling testimonies of rape survivors are recorded in various civil society reports<sup>347</sup>, but the responses from police stations to our RTI applications suggest that very few cases of sexual violence were actually reported and recorded.

There were three sexual offences reported by Panchmahal district, but the FIRs provided do not record any sexual offences, indicating either that witness statements specifying sexual assault were taken after a complaint that didn't include specific allegations of rape, or that the police deliberately excluded such references, or that

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<sup>341</sup> See paragraph 3, pages 4-9 of the trial court judgement of Bilkis Bano, which sets out the prosecution's case which was largely accepted by the trial judge. Sessions case number 634 of 2004, January 21, 2008 available at <http://www.cjponline.org/gujaratTrials/statecomp/pdf%20files/pdfs/080121%20Bilkisbano%20Trial%20Court%20Jugement.pdf>

<sup>342</sup> Ibid.

<sup>343</sup> Ibid.

<sup>344</sup> Anand, S., "Bilkis Bano's Brave Fight" *Tehelka*, Vol. 5, Issue 4, February 2, 2008, Available at [http://www.tehelka.com/story\\_main37.asp?filename=Ne020208bilkis.asp](http://www.tehelka.com/story_main37.asp?filename=Ne020208bilkis.asp).

<sup>345</sup> Ibid.

<sup>346</sup> International Initiative for Justice in Gujarat, "Threatened existence: A Feminist analysis of the genocide in Gujarat", (Forum Against Oppression of Women, December 2003).

<sup>347</sup> See "Hard Facts", 42 -45, which covers details of three rape cases in Naroda and one in Gulbarg, also The IJJ report and see the sections on Narodagaon, Patiya, Sardarpura and Gulbarg in the Concerned Citizens Tribunal, "Crimes Against Humanity", Vol. 2, (Mumbai: Citizens for Justice and Peace, 2005) available at <http://www.sabrang.com/tribunal/tribunal2.pdf>.

they erroneously undercharged the accused despite the complainant alleging sexual assault. This error was made in one of cases where Nyayagraha is supporting the victims. Despite one of the witnesses alleging gang rape and having undergone a medical examination, the FIR did not include a rape charge. In this case the charge sheet was also similarly defective, and was only rectified to include the rape charge upon an application by the victim's advocate.

At least one post-mortem in the Naroda patiya case indicated a possible case of sexual assault, yet no investigations were carried out. Dozens of survivors reported rape, but not one of the three charge sheets included a rape charge.<sup>348</sup>

The Bilkis Bano case, discussed above, is the only rape case that has been successfully prosecuted so far. Six police officers and two doctors were also names in the charge sheet in that case.

### 3. Summary Closures and Reopen Cases

In Gujarat, the police class summary closures under four categories. Summary A denotes genuine criminal cases where the offences have taken place, but the police cannot trace the accused. This is the most common ground of closure. Summary B refers to cases that the police consider not to be genuine - essentially false complaints. Summary C refers to cases which are really civil matters outside the purview of criminal law. Summary D is filed where the alleged accused have died.

The government of Gujarat reported to the Supreme Court that of 4252 cases registered, 2020<sup>349</sup> were closed summarily. Therefore, 47.5% of cases registered never proceeded to trial. 202 police stations across 24 districts gave us information on summary closures. According to the information we received, summary closures were spread across four different categories as tabulated below.

	Summary A	Summary B	Summary C	Summary D	Total
Response as per RTI	1411	7	7	2	1427

<sup>348</sup> "A Window to Horror", *Tehelka Vol. 5, Issue 16, (April 26, 2008)*.

<sup>349</sup> Affidavit filed in reply by the state.

So, almost 99% of cases summarily closed were cases where the police took the view that the complaint was genuine, but the accused could not be traced. We did not receive information on summary closures from Vadodara city (reported to have 204 summary closures), Surat and Rajkot city police stations and 39 other police stations, including seven police stations in Ahmedabad. We anticipate that summary closures from these police stations will account for the most of the 593 summary closures that we could not secure through the RTI process.

A high rate of "Summary A" cases means that if the police find enough evidence to mount a charge in the future, the case can be re-opened. If the police are doing their jobs diligently, we should see a significant number of re-opened cases. We examined a sample of 400 cases to see how many cases summarily closed as "Summary A" were subsequently reopened. We found that out of 400 cases, 157 cases were initially concluded by summary, amounting to 39% (which was 11% less than the overall of an approximately 50% summary rate in 2003). Thirty three of the 157 summarily closed cases (around a 1/5<sup>th</sup> of total summaries in sample of 400) were reopened, and 31 of these were charge sheeted which amounts to 19.74 % of cases initially closed being reopened.

**Summary/Reopen table (400 sample)**

<b>No. of FIRs</b>	<b>Summary Closure</b>	<b>Re-opened</b>	<b>Reopen ed but not charge sheeted</b>	<b>Reopen ed and charge sheeted</b>	
400	157	33	2	31	

As in other episodes of mass violence, it is clear that the high rates of summary closure, and the low rate of such cases being re-opened in the future, are not coincidental. Cases are summarily closed because they are poorly investigated. In many cases, particularly those implicating politically influential accused, the police actively destroyed evidence in Gujarat. The Bilkis Bano case and the Naroda Patiya case exemplify this dynamic.

a) Bilkis Bano case

The police registered Ms. Bano's FIR reluctantly, and then proceeded to classify the case as "Summary A". Subsequent events revealed the omissions and commission of police errors that allowed such a serious case to be deemed fit for summary closure.

- The police did not preserve evidence, such as the clothes she was wearing at time of arrival to police station.
- They did not go immediately to the scene of murder to collect evidence and did not perform proper procedures like the recovery and preparation of inquest panchnamas. This is also a problem encountered in many other cases being followed by Nyayagrah.
- It was after Ms. Bano disclosed details of her ordeal to the district magistrate (DM) of Panchmahal, who was visiting the Godhra relief camp where she was housed, that the DM recorded her statement on the same day. Realizing the seriousness of the case, the DM then and ordered a medical examination by a civil surgeon in Godhra, and directed the Superintendent of Police, Dahod to take appropriate and immediate action. Proper medical examination followed by taking samples for forensic examination was done on March 7, 2002, four days after the alleged rape.
- The police made no effort to find witnesses who could corroborate Ms. Bano's evidence.
- Filed application of closure, claiming accused could not be traced, without informing Ms. Bano.

The case was classed as "Summary A", (accused were untraceable) and submitted to the Limkheda judicial magistrates <sup>350</sup> which closed the case on March 25, 2003 without giving notice to Ms. Bano, the complainant in the case.

Supported by the National Human Rights Commission, Ms. Bano successfully petitioned the SC, who ordered the Central Bureau of Investigation (CBI) to take over the investigation in December 2003. It was once the CBI took over that many investigation deficiencies (some of which were outlined above) came to light. The CBI claimed that the police had visited the site of offence following the complaint

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<sup>350</sup> As argued by Harish Salve, Ms. Bano's counsel in Supreme Court, and reported in news article, "Gujarat agrees to CBI gang rape", *Times of India* (December 17, 2003).



and taken photos, but had not carried out the panchnamas, which is the first listing of evidence in front of independent witnesses that the police is required to make at the scene of an offence, as is required by law. They instead left the bodies unguarded, and staged a false panchnama the next day with fictitious panch witnesses, followed by destruction of evidence by burying all the bodies together in a pit with common salt<sup>351</sup> and without carrying out the recovery and forensic examination as per law, such as recovering the clothes and articles found on bodies and taking samples of blood etc for forensic examination. The CID Gujarat also handed over two sets of photographs of dead bodies taken at different times which were inconsistent with one another and proved that the bodies had been moved from the murder site. Some bodies, such as that of Ms. Bano's three-year-old daughter were missing from the photographs later recovered by the police. The CBI also unearthed evidence to show that the two doctors had carried out a perfunctory post-mortem and fabricated evidence by writing notes, which they knew to be false.

In this case, the deliberate destruction of evidence came to light when a national investigative body took over the investigation. This turn of events exposed the way criminal cases across Gujarat were undermined and closed without charges being filed.

b) Naroda Patiya case

The Naroda Patiya case was another extremely serious massacre where the police went beyond gross negligence, to actively destroying evidence. The following defects are noted following investigation and analysis of the charge sheets of the Naroda Patiya case by the magazine *Tehelka* in conjunction with an advocate from the NGO Action Aid.<sup>352</sup>

- **No autopsies on 41 bodies:** The police did not carry out postmortems on 41 bodies recovered from Naroda Patiya and Naroda Gaon. No explanation has been offered for this act of grave negligence and omission.<sup>353</sup>

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<sup>351</sup> This was discovered two years later when the CBI exhumed some of the bodies.

<sup>352</sup> "A Window to Horror," *Tehelka* Vol. 5, Issue 16, (April 26, 2008).

<sup>353</sup> *Ibid.*

- **Crucial evidence destroyed:** The pit in which a large number of people were burnt alive was not even examined by the police. No samples were taken of the soil, of the traces of human tissue or of the remains of burnt fuel. The pit does not even figure in the police version of the massacre.
- **Dying Declarations not taken<sup>354</sup>:** The dying declarations of as many as seven victims were not recorded; two of them died on March 11 after prolonged treatment, but no explanation is forthcoming in the charge sheet on why their statements were not recorded.
- **No mention made of rapes<sup>355</sup>:** Three charge sheets were filed in the Naroda Gaon and Naroda Patiya massacres. None of them mentions a single rape, although dozens of survivors reported that women were raped. At least one post-mortem indicated a possible case of sexual assault, yet no investigations were carried out.”
- **Mobile phone of an accused recovered from the spot not examined<sup>356</sup>:** On the day of the massacre, a survivor named Mirza Hussain Biwi Moherble recovered a mobile phone near her residence in Naroda Patiya. It had been inadvertently dropped by one of the accused, and was handed over to the police. On enquiry, Additional Commissioner of Police, Crime Branch, A. K. Surolia found that it belonged to one Ashok Sindhi, an accused in the massacre. Mr. Surolia launched an investigation and started collecting the call records of Babu Bajrangi (a leader of the Gujarat-wing of the Bajrang Dal) and other accused, including Mr. Sindhi. Mr. Surolia was subsequently transferred.
- **No proceedings against absconding prime accused<sup>357</sup>:** Many important accused were allowed to flee after the police was forced to register FIRs against them. Babu Bajrangi, Kishan Korani, Prakash Rathod and Suresh Richard, for instance, were arrested three months after the FIR was issued.

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<sup>354</sup> Ibid.

<sup>355</sup> Ibid.

<sup>356</sup> Ibid.

<sup>357</sup> Ibid.

Bipin Panchal was arrested after a year and a half. But the police did not follow any of the usual procedures when an accused absconds, such as pasting notices outside the house of the accused declaring him an absconder, confiscating his properties, or anything of the sort.

#### Reopening of 2000 Summary Closures<sup>358</sup>

By 2003 the experience of survivors and activists on the ground had revealed faulty and biased investigation, ineffective and biased prosecution and non-filing of appeals by the State of Gujarat against bail orders and acquittals in the post-Godhra cases. In 2003, a writ petition to the Supreme Court<sup>359</sup> drew attention to the deliberate and systemic nature of summary closure across Gujarat. The petitioner argued that:

- The indiscriminate acceptance of closure reports filed by the police in around 2000 cases was contrary to law in that there was evidence of non-application of minds by the judiciary in ordering closure.
- The closures were also in contravention of the legal requirement to give notice to the victim/ complainant/informant interested in pursuing the case.

The Supreme Court<sup>360</sup> responded by directing the government of Gujarat to do the following:

- Constitute a cell consisting of Deputy Inspector Generals and Range Inspector Generals, whose job was to review the 2000 cases where summary closure reports had been filed and where necessary, reopen and reinvestigate the cases.
- The government was directed to submit quarterly reports to the SC. The first of the reports was to be submitted within 90 days of the order i.e. by November 11, 2004.

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<sup>358</sup> Also see section on “Summary Closures”.

<sup>359</sup> Vide Supreme Court order dated March 26, 2008, Criminal Miscellaneous Application, Writ Petition (Criminal) No. 109 of 2003.

<sup>360</sup> Vide Supreme Court orders dated August 17, 2004, August 23, 2004 and December 06, 2004 in Criminal Misc. Petition No.’s 3741 & 3742 of 2004.

- The Gujarat government was also directed to record reasons if after review it came to the conclusion that further investigation is not necessary. These were to be made available online for the purposes of informing anyone who may be interested in bringing the matter to the attention of the court.

However, the government of Gujarat refused to comply substantively with the Supreme Court direction, in that it only provided superficial information on 18 out of 2000 cases that it had decided to close without further investigation.

The petitioners challenged the government's non-compliance on the following points:

- It was argued<sup>361</sup> that releasing information only for 18 cases out of the total of around 2000 cases, and that too in a manner that concealed relevant information which was crucial to the victims in their efforts to pursue justice, amounted to violation of the orders of the court in letter and spirit.
- That the local police or the riot cells were not providing any information to the concerned person or non-governmental organizations to facilitate their efforts to ensure just proceedings were followed in the 2000 cases.
- In fact, the victim petition claimed that the police were still not making witnesses feel secure, to encourage them to come forward and give statements. They were not providing protection to witnesses even when it was asked for.
- A key defect repeatedly pointed out by the NHRC in its various orders was the various complaints it received regarding poor investigation on account of political interference. The NHRC unsuccessfully sought information from the Gujarat administration on the identity of those responsible for political interference and who had allegedly committed and incited serious offences. Its repeated recommendation to transfer the high profile massacre cases to CBI went unheeded, eventually leading to an application for transfer of those out of Gujarat. This led to a stay being granted in these cases and delay

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<sup>361</sup> An application was filed within the Criminal Misc. application 3741 of 2004 and 3742 of 2004, arguing for set of rights for survivors and implementation of the SC orders listed above. Accessed from Nyayagrah records.

of around six years before the SC granted reinvestigation by SIT in 2008 in nine serious cases.<sup>362</sup>

The petitioners' persistence yielded some results. In the second quarterly report of January 31, 2006, the committee responsible for reviewing closures stated that 1594 of 2020 cases had been re-opened for reinvestigation, 13 new cases had been registered and 640 people had been arrested. It also reported that departmental inquiries had been initiated against 41 policemen for alleged lapses in investigation. Of the 41 policemen, right were inspectors, eleven sub-inspectors and twenty-two constables.<sup>363</sup>

#### 4. Arrests

We sought information on arrests by the police following investigation based on FIRs registered. We received information from 202 police stations across 24 districts, which showed that there were 14830 arrests across these police stations. The total number of arrests in Gujarat will be significantly more, as this data does not include information from around 49 police stations, including no information from Vadodara and fourteen police stations in Ahmedabad.

From the records on 14,830 arrests that we were given access to, 3213 people arrested were Muslim and 9926 were Hindu. The information received shows that on the whole the vast majority of accused were Hindu across Gujarat. A significant number of accused in the districts of Bharuch, Dahod and Panchmahal were from tribal communities, which, as discussed earlier, supports the allegations in civil society reports of an increasing Hindu right-wing presence in these areas.

- There was generally a correspondence between the number of FIRs filed and the number of arrests, with the sites of most intense violence being Ahmedabad, Mehsana, Panchmahal, Sabarkatha, Anand and Kheda where more than a thousand accused were arrested.

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<sup>362</sup>The SIT was appointed by an order of March 26, 2008 in Writ Petition (Crl) 109 of 2003, *NHRC v. State of Gujarat and others*, accessed at <http://judis.nic.in/temp/109200342632008p.txt>.

<sup>363</sup>“Gujarat riot probe panel moves against 41 cops”, *The Indian Express*, February 9, 2006, available at <http://www.indianexpress.com/oldStory/87579/>.

- From the figures provided, Bhavnagar stands out for having a lot less accused (352 arrests of 310 FIRs) given the number of FIRs filed.
- In Panchmahal (1617 of 181 arrests), Anand (2459 of 199 arrests), Mehsana (1353 of 176 arrests) and Kheda (2176 of 190 arrests) the number of FIRs is less than 200, but the accused well over a thousand. The large number of accused reflects both the reality of massacres that took place at these sites, as well as the reality of a large number of omnibus FIRs that were filed.
- Sreekumar, a senior IPS officer, noted in his affidavit to the commission of inquiry that a major complaint of victims is that the Investigating Officers avoided arresting politically powerful Hindu accused, despite their names figuring in FIRs for major offences.

## 5. Remand

From Gujarat, we received some information on remand applications made in relation to criminal cases after mass violence, which was in contrast to the other episodes we looked at, where no records on remand survive. 107 police stations responded to our query on remand applications, giving us at least a partial picture of such applications. Across these 107 police stations, out of 14830 persons arrested, the prosecution made applications to put 2911 of those arrested on remand, i.e. detain them in prison custody. 674 of these applications were refused and 2165 were granted. Of the successful applications for remand, 1457 of those remanded were Hindu, 609 of those remanded were Muslim. Also, in many instances we received unclear responses to this RTI.

While we did not get comprehensive records on remand, the sample we received suggests that the prosecution chose not to apply for remand in most instances – it applied for remand for only 2911 out of 14830 people arrested, i.e. only in 20% of cases. Following mass violence, where witnesses and victims who belong to a minority group are likely to be extremely intimidated, one would expect a higher

rate of remand applications. Where the prosecution made a remand application, it was likely to be granted. Based on our records, 74% of applications were successful.

A notable exception to the usual grant of remand was in the Odh village massacre cases of Anand district, where 26 people were burnt alive on March 1, 2002. The judicial magistrate rejected the remand application, and granting interim bail for 8 days to 18 accused to celebrate the Hindu festival of Shivratri, despite the seriousness of the offences they were charged under.<sup>364</sup>

As a caveat, since the response rate was much lower for this information than that regarding arrests (107 police stations compared to 202), it may well be that many more remand applications were made but we simply have not been provided the information as requested.

## 6. **Bail**

We requested information about bail applications made by the defence in trials related to the 2002 riots. We received information from 118 police stations. Amongst the cases registered at these 118 police stations, a total of 4858 accused applied for bail and a total of 4516 accused were granted bail. The prosecution opposed only 283 applications. 455 out of 4858 applications were rejected.

Again we note that the information we received is incomplete<sup>365</sup> as many police stations failed to respond. However, unlike the case of other episodes of mass violence where this information was unavailable, we did receive this information from over a hundred police stations.

What is clear from these figures, despite their partial nature, is that the vast majority of bail applications were successful. Based on the records we have, 93% of accused

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<sup>364</sup> Page 17, Paragraph 13 of Zakia Jaffrey's FIR.

<sup>365</sup> There are gaps and inaccuracies in the information in that in many cases the total figure for total bail does not tally with bail granted broken down by number of Hindus, Muslims, Scheduled Castes and Scheduled Tribes. We surmised that in response to some applications, the concerned Public Information Officer has confused the number of cases where bail was granted with the number of persons who were granted bail.

who made bail applications were successful. Their success in unsurprising – the prosecution opposed less than 6% of bail applications.

Of course, this has serious implications for whether victims and witnesses will be intimidated, and whether trials will progress smoothly, which we discuss in more detail later.

The NHRC<sup>366</sup> noted discriminatory treatment on account of a larger percentage of Hindus being granted bail compared to Muslims. The allegations of discriminatory treatment of Muslim accused also appear in victim testimonies,<sup>367</sup> and in the affidavit of RB Sreekumar to the Nanavati Commission. In his affidavit to the Commission, Mr. Sreekumar asserted that accused persons belonging to the Hindu community who were arrested for non-bailable cases were immediately released on account of the partisan stance taken by the government public prosecutor, and also due to lack of keenness of the police. These allegations are supported by a comparison of the bail and remand experience of the 105 Muslim accused in the Godhra trial (one of the nine SIT trials) to those of the Hindu accused in the other 8 SIT trials<sup>368</sup>.

## 7. Charge-sheets

The Gujarat government has stated in its report to the NHRC that 2037 charge sheets were filed in relation to mass violence in 2002<sup>369</sup>. We secured copies of 1202 charge sheets filed across 24 districts covering 182 police stations. Since this is 60% of total charge sheets filed, the sample is likely to correspond strongly to the trajectory of all the criminal cases where charges were framed.

Across several districts, the number of charge sheeted cases amounted to about 50% of the FIRs filed, i.e. only half of all FIRs registered progress to a trial.

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<sup>366</sup> National Human Rights Commission's Order on Gujarat, (April 1, 2002), available at <http://nhrc.nic.in/gujratororders.htm#no2>. The NHRC noted discriminatory treatment from the figures it obtained for arrests of Hindu and Muslim accused. The NHRC noted discriminatory treatment from the figures it obtained for arrests of Hindu and Muslim accused.

<sup>367</sup> Many victims complained about the grant of bail to Hindu accused charged with serious offences.

<sup>368</sup> See section on "Special Investigation Teams trials", in current paper.

<sup>369</sup> National Human Rights Commission, "Annual Report: 2003-2004", para 3.18, available at <http://nhrc.nic.in/Documents/AR/AR02-03ENG.pdf> notes that NHRC received a report dated June 3, 2003 stating that 2037 cases had been charge-sheeted in various criminal courts across Gujarat.



District Name	FIR	Chargesheet
Ahmedabad	959	315 (without information from 14 PSs)
Vadodara rural	242	104
Sabarkhatah	469	185
Bavnagar	310	46
Anand	199	134
Kheda	190	136
Maheshana	176	47
Panchmahel	181	102 (based on cases finalised)

Of the 1202 charge sheeted cases we examined, so far only 549 have been “finalized” or taken to completion. This means that 54.32 % of cases that proceeded to trial are still to be decided more than nine years after the incident.

We looked closely at 400 cases where we have a substantial number of case records from the FIR onwards.

FIR total	Charge sheeted cases	Pending post charge	Total cases finalised	Total acquittals
400	274	175	99	98

Charge sheets have been filed in 68 % of the cases registered. Of the total 274 charge sheeted matters, 99, have been finalised, 175 of the charge sheeted cases (64 % of cases) are still pending as per the data analysed.

FIRs in only 109 of these cases include the names of accused. Chargesheets were filed in 274 (68%) of these cases. This suggests that names of the accused were recorded in 165 cases after they were registered. This supports the survivor testimonies to various fact-finding inquiries to the effect that the police initially refused to note down the name of the accused. It is possible that when victim statements were recorded and the accused were named in the statements, the police were compelled to put names of some persons as alleged accused.

## 8. JMFC and Sessions Court Trials

We sought information on how many cases were tried in Magistrate's courts and how many by Sessions courts. Trials following the mass violence in 2002 continued for many years – the majority of trials have not finished to date. Layered upon these trials, and the ordinary investigation and prosecution involved, is investigation and evidence gathering by a "Special Investigation Team" (SIT) appointed by the Supreme Court. The SIT<sup>370</sup> has been created by the Supreme Court to investigate nine particularly serious cases. These are Gulbarg, Naroda Gam, Naroda Patiya, Sardarpura, two cases in the Odh village of Anand, Sardarpura, Visnagar, Mehsana and Godhra<sup>371</sup>. Below, we discuss developments in JMFC trials and Sessions court trials, and focus in particular, on cases under the purview of the SIT.

We received relatively little RTI information on JMFC and sessions court trials in Gujarat. Only 125 police stations sent us information on JMFC trials. Forty-one of these police stations reported that none of the FIRs recorded there resulted in JMFC trials. The 84 remaining police stations had 156 cases being tried in Magistrates Courts. Nineteen of these cases had resulted in acquittals. Trials in the other 136 cases are either pending, or no information was given.

We received information from 142 police stations about Sessions court trials. 51 police stations said there were no Sessions court trials resulting from FIRs filed after mass violence. The remaining 91 police stations informed us that there were 315 sessions court trials based on FIRs filed after mass violence. 116 police stations did not respond to our query. We estimate that the number of trials is likely to be much larger. Given the low response from the police to this question, we had access to a relatively small sample of official records.

- Sabarkantha was the only district where we received a good response to our RTI applications regarding the number of charge sheets filed and the number of total trials underway and completed. In total, 200 charge sheets have been filed, implying that significantly less than 50% of the cases where FIRS were registered

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<sup>370</sup> Supreme Court Order dated March 26, 2008, Criminal Miscellaneous Application, Writ Petition (Criminal) No. 109 of 2003.

<sup>371</sup> Ibid.

(469) ended up in trial. Of these, over two-thirds of the cases were Session court trial-worthy, less than a third tried in JFMC, and 243 shown as summarily closed (it is unclear how many of these have now been reopened).

- In Panchmahal, 90 out of 95 completed cases were tried in a Sessions Court. Only 4 cases have been completed in the JFMC courts, showing the serious nature of offences that were committed in this district.
- In Dahod, of the 45 cases charge sheeted, 25 cases were completed in the Sessions Court.

We also wanted to gauge, for both types of trials, attempts made to rectify investigative errors or refine the case as the trial proceeded, by asking about applications made by the prosecution for reinvestigation, adding witnesses, adding accused and amending charges. However, we drew an almost universal blank from all districts on this query.

It is clear from this that most police stations have little data computed on applications made during trials. There seem to be no systems in place to monitor the progress of the trials. Even to get the status of trials, PIOs in police stations across Gujarat requested courts for updates. The details of interim applications appeared well beyond the understanding of most of the PIOs dealing with the RTI applications.

Even from the limited information we received, it is apparent that trials have continued for years and been very protracted. This is a direct consequence of the police filing unwieldy, omnibus FIRs. Many cases have a large number of accused, which makes every court date an exercise in coordination and also makes it more likely that hearings will be adjourned as adjournment applications can come from any of a number of accused. The high rate of bail is also likely to contribute to this. Since most accused are not in custody, they are able to absent themselves from court hearings more easily. Nyayagraha's experience supporting victims pursuing trials has been that a number of cases are stuck at the committal stage due to absconding accused or failure of all accused to attend court together as required. Below, we discuss in some detail the trajectory of some of the cases under the purview of the

SIT. Looking at these cases, we believe, illuminates the problems facing trials in cases related to 2002.

a) SIT trials

Special, fast-track courts have been constituted to try many of these cases. So far only two of the nine SIT cases, the Godhra case and the Sardarpura case, have been completed. Both were “finalized” in 2011, nine years after the events at issue took place. The other trials are all in their final stages.

**The Gulbarg case:** Sixty nine people were killed, but only 31 bodies have been identified. In FIR 67 of 2002 from Meghnanimagar, the SIT received 59 applications<sup>372</sup> from witnesses and interested parties, examined 227 witnesses<sup>373</sup>, arrested 18 accused and filed three chargesheets.<sup>374</sup> Among those arrested was K G Erda<sup>375</sup> (police investigator at Meghnanimagar in 2002) who was charged with abetment to murder, abetment to riot, gross dereliction of duty and tampering with evidence and remanded to 5 days custody. The alleged neglect include not collecting blood samples of the deceased, not calling the fire services at the riot spot and not making preventive arrests following a call for a bandh by the Vishwa Hindu Parishad (VHP) on February 28, 2002<sup>376</sup>.

**Naroda Gaon and Naroda Patiya massacres.** Ninety five people were killed at Naroda-Patiya on February 28, 2002, and 67 persons are facing trial for the offence in the city sessions court which have been specially appointed in Ahmedabad for the last couple of years. The evidence of prosecution has almost been completed. The SIT examined 791 witnesses in total in these 2 cases and 37 more accused were arrested. VHP leaders Jaideep Patel and Maya Kodnani, were amongst those arrested by the SIT.

The victim witnesses have made a number of applications, including application seeking further investigation, in which they urged the court to direct the SIT to

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<sup>372</sup> This information is recorded in the Supreme Court order of May 1, 2009, in Writ Petition (Criminal.) No.109 of 2003, available at <http://www.cjponline.org/gujaratTrials/SCOrdermay0109.pdf>.

<sup>373</sup> Ibid.

<sup>374</sup> Ibid.

<sup>375</sup> See “First police officer arrested in Gujarat”, *The Indian Express*, February 9, 2009, and “Arrested cop Erda sent to 5 day police custody”, *The Indian Express*, February 10, 2009.

<sup>376</sup> Ibid.

conduct detailed analysis of phone call records, and on the basis of various evidences, probe into the roles of senior police officers, including the then city Police Commissioner P.C. Pande, then Joint Commissioners of Police M.K. Tandon and R.J. Savani, besides politicians, including the then State Home Minister Gordhan Zadaphia. Jan Sangharsh Manch, representing some victims, told the court that proper analysis of call details provided by IPS officer Rahul Sharma would expose the larger conspiracy behind the 2002 riots.

**Ode massacres:** There were two cases filed<sup>377</sup> in the village of Ode, Anand District. One was in the Pirawali Bhagol locality, on March 1, 2002 in which 23 Muslims were killed after a Hindu mob had attacked the two two-storied buildings in which around 30-32 Muslims had taken shelter. The SIT reported<sup>378</sup> it had added 55 witnesses to the existing 30 witnesses and added 16 more accused and filed an amended charge-sheet. 54 accused<sup>379</sup> are facing trial. All were reported to be on bail on account of powerful political connections.<sup>380</sup>

The second Ode case is the murder of three members of a family who were burnt to death by a mob near Malav Bhagol area of Ode village on March 1, 2002. SIT filed charge sheets against 37 accused, including 7 absconders. The witnesses applied under section 319 of the Criminal Procedure Code, which empowers the court to proceed against any other person who appears to be complicit in the commission of a crime, and succeeded in securing the addition of four accused whose participation in violence was revealed by the testimonies of witnesses in June 2010 at the trial court. The trial court decision was upheld by the High court of Gujarat on appeal.<sup>381</sup> There are 41 accused under trials at present. The special court recently held a physical inspection of the murder site. Sixty-seven witnesses have given evidence and the case is in its final stages.

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<sup>377</sup> FIR numbers 23 of 2002 and 27 of 2002 dated March 1, 2002 were registered at Khambolaj police station. See Supreme Court order of May 1, 2009, in Writ Petition (Criminal.) No. 109 of 2003, accessed at <http://www.cjponline.org/gujaratTrials/SCOrdermay0109.pdf>.

<sup>378</sup> See Supreme Court order dated September 1, 2005, para 1, which sets out the progress, in the consolidated Progress Report submitted by the SIT.

<sup>379</sup> “Two Government Pleaders in Ode Riot case quit”, *Times of India*, July 18, 2010.

<sup>380</sup> “Our Irrelevant State”, *The Indian Express*, December 9, 2007.

<sup>381</sup> “Plea of Ode massacre accused rejected”, *Times News Network*, April 20, 2011 available at [http://articles.timesofindia.indiatimes.com/2011-04-20/ahmedabad/29450790\\_1\\_ode-village-ode-massacre-witnesses](http://articles.timesofindia.indiatimes.com/2011-04-20/ahmedabad/29450790_1_ode-village-ode-massacre-witnesses).

**Deepda Darwaja, Mehsana Visnagar:** This case involved the burning alive of eleven and seriously injuring another twenty-one in the Visnagar area of Mehsana. Two BJP leaders were added as accused under section 319 of the Criminal Procedure Code by the special Mehsana court after witnesses named<sup>382</sup> the MLA, Prahlad Gosa, and a member of the Taluk Panchayat, Dahyabhai Patel, as participating and inciting the violence against Muslims. Some of the witnesses also deposed that the two BJP leaders were present at police station and pressured the police not to include their names.

**Prantij / British national case:** This case involved the murder of three British Nationals and their Gujarati driver. A special court in Himmatnagar is trying the case - 73 witnesses, including the complainant, have deposed. The three eye-witnesses turned hostile in 2009.<sup>383</sup> The accused who had been on bail since 2004, were remanded in custody for 14 days on application of SIT, who alleged that a second round of lie detector tests as advised by forensic experts had not been carried out by the police<sup>384</sup>. This case is also the only one in which the kin of the deceased have filed civil law suits against the state administration, claiming damages of around Rs. 22 crore from the state administration, Mr. Modi, Mr. Zadephia, DGP Chakravarty, home secretary Ashok Narayan and 10 other who are named as respondents.<sup>385</sup>

The SIT cases discussed above are particularly serious ones. They are also cases that, since the formation of the SIT, have garnered particular scrutiny and investigation. Special, fast-track courts have been constituted to try many of these cases. The media regularly reports on developments in these cases. Despite such scrutiny, these cases continue to suffer from delays and prosecutorial apathy. Most criminal trials resulting from mass violence in 2002 are not monitored by the Supreme Court and

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<sup>382</sup> "Gujarat High Court Orders Fresh Probe into Kalol riots," *The Hindu*, February 12, 2010, available at <http://www.hindu.com/2010/02/12/stories/2010021260791000.htm>.

<sup>383</sup> "Court Issues Summons to Two British Envoys", *The Hindu*, October 7, 2011, available at <http://www.thehindu.com/news/national/article2517731.ece>.

<sup>384</sup> "Six Remanded in Murder of British Nationals in Prantij," *Times News Network*, September 6, 2008, available at [http://articles.timesofindia.indiatimes.com/2008-09-06/ahmedabad/27932807\\_1\\_police-custody-remand-gujarat-high-court](http://articles.timesofindia.indiatimes.com/2008-09-06/ahmedabad/27932807_1_police-custody-remand-gujarat-high-court).

<sup>385</sup> "NRIs seek Rs. 22 crore damages", *Times News Network*, April 30, 2004, available at [http://articles.timesofindia.indiatimes.com/2004-04-30/ahmedabad/28343342\\_1\\_damages-british-nationals-prantij](http://articles.timesofindia.indiatimes.com/2004-04-30/ahmedabad/28343342_1_damages-british-nationals-prantij).

the media as is the case in these nine SIT cases. Thus it is likely that the “ordinary” trials taking place face even more delays and missteps than the SIT trials.

## 9. Acquittals and Appeals

Many police stations across Gujarat did not respond to our query about the result of trials related to the 2002 mass violence. We received records confirming acquittals in 524 different trials across Gujarat. From the information we received, we traced the trials that resulted in the accused being acquitted as a percentage of total trials completed. Here we have defined an acquittal as a case in which *all* the accused were discharged in respect of all the offences they were charged with. Below, we frame cases resulting in acquittals as a percentage of total cases “finalized” in the 8 districts where over 100 FIRs were filed.

**Table as per overall RTI response**

District	(Acquittals as per RTI)	Total cases finalised	Rate of acquittal district wise
Panchmahal	96	102	94%
Sabarkatha	98	101	97 %
Ahmedabad	108	109	99 %
Bhavnagar	19	20	95 %
Mehsana	23	24	95%
Vadodara	No information	----	----
Kheda	No information	----	----
Anand	32	34	94 %
Total	376	390	96%.

Across the 6 districts that sent us information on acquittal, a staggering 94-99 % of cases completed so far have resulted in acquittals of all the accused.

### a) Deficient Investigation and Witness Intimidation

The reasons for these extremely high rates of acquittal are not difficult to discern. We have already discussed the poor and deliberately derelict investigation by the police. This results in a large number of cases being summarily closed. It also results in incomplete evidence being presented in cases that are charge sheeted and tried.

Layered upon this weak foundation, is apathetic and biased prosecution. We found from the records available to us that the prosecution often did not often make applications to amend charges or add evidence once the trial began. We also found that the prosecution rarely opposed bail applications made by the accused. A panel of public prosecutors led by Mr. PS Dhora, who is known to be an RSS sympathizer, handled the Ode massacre cases. This panel also handled other 2002 cases in Anand and Kheda districts.<sup>386</sup>

Judges, in turn, seem to grant bail to the accused in mass violence cases quite liberally, even where there is a high risk that they will abscond or intimidate witnesses. As just one example, K.G. Erda, a police inspector at Meghnaninagar in 2002 who was charged with, inter alia, abetment to murder, abetment to riot, gross dereliction of duty and tampering with evidence in the Gulbarg case was granted bail by the Ahmedabad City and Sessions court on February<sup>387</sup> 24, 2009.

The results of powerful accused not being remanded in custody are predictable. Witnesses – third party witnesses as well as victims – have faced intimidation and pressure to turn hostile. The Gulbarg case illustrates the challenges that witnesses face. 66 accused are currently facing trial in this case. Six new IPC sections were added against all accused in March 2011,<sup>388</sup> after it was in the hands of the SIT. 57 of the 66 accused are on bail whilst nine are in custody.<sup>389</sup>

On April 5<sup>th</sup> 2010, the counsel for Gujarat in the Gulbarg case, opposing a further stay of the trials (stay was sought by victims on account of the alleged malfunctioning of the SIT) reported that 1061 witnesses had now testified in the trials, about 100 had turned hostile and over 2,000 witnesses were yet to depose. So,

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<sup>386</sup> As reported in an online document which outlines the background of prosecutors in the 2002 cases, available at Citizens for Justice and Peace website, url: <http://www.cjponline.org/best/partisanprosecutor.pdf>.

<sup>387</sup> “Arrested DYSP gets bail from Sessions Court”, *The Indian Express*, February 25, 2008, available at <http://www.indianexpress.com/news/arrested-dysp-erda-gets-bail-from-sessions-court/427746>.

<sup>388</sup> “Gulbarg accused charged under six new IPC sections,” *The Indian Express*, March 11, 2011. These are section 186 (obstructing public servant in discharge of public functions), section 188 (disobedience to order duly promulgated by public servant), section 337 (causing hurt by act endangering life or personal safety of others), section 398 (attempt to commit robbery or dacoity when armed with deadly weapon), section 447 (punishment for criminal trespass) and section 449 (house trespass in order to commit offence punishable with death) of the Indian Penal Code.

<sup>389</sup> “Gulbarg massacre accused demand bail” *Times of India*, April 5, 2011.



despite the cases being under the watchful eyes of the SC, 10% of witnesses who gave evidence turned hostile. In these cases, a large chunk of witnesses are official, such as police officers, doctors, forensic experts. These witnesses are less likely to face personal threats, and are likely to have easier access to official protection if they are threatened. It is usually ordinary citizens who were targets or witnesses of the crimes who are under the most intense pressure to turn hostile<sup>390</sup>, so the percentage of important private witnesses who turned hostile will be much larger than 10%.

The danger to witnesses should not be underestimated. In the Naroda Patiya case, an important eyewitness, Nadeem Saiyad, was killed in broad daylight even though he had witness protection. A number of witnesses in other SIT trials have reported feeling insecure as witnesses and have applied for protection and complained that SIT was not responding quickly to their urgent requests.<sup>391</sup>

Witnesses in mass violence cases have faced intimidation not just from the accused, but from the police as well. When Ms. Bano petitioned the Supreme Court to transfer her case to the CBI, she alleged that was being harassed by the Gujarat CID police. Police officials called her for questioning at 10 p.m. on September 16, 2003. She was informed that she needed to be taken to Godhra to identify dead bodies. Ms. Bano refused to go, as the massacre had taken place 18 months ago and no identification would have been possible. The Supreme Court ordered the Gujarat CID to leave her alone till her application for transfer was adjudicated upon.<sup>392</sup>

As discussed earlier, the Supreme Court transferred the Bilkis Bano case to the CBI. The CBI submitted chargesheets against twenty accused, and reported to the Court that the Gujarat police had been complicit in derailing the investigation. The CBI also requested the DGP and IGP of Gujarat to provide protection to 33 trial witnesses to ensure they were not pressurized by the accused.<sup>393</sup> In May 2004, Bilkis was given CISF<sup>394</sup> protection following continued threats to her and some of the other witnesses.<sup>395</sup>

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<sup>390</sup> Insight is based on authors work with Nyayagrah justice project.

<sup>391</sup> See report on Witness Protection, available at <http://www.cjponline.org/witnessprotection.htm>

<sup>392</sup> <http://www.rediff.com/news/2003/sep/25godh1.htm> accessed on December 21, 2011.

<sup>393</sup> Ibid.

<sup>394</sup> Central Industrial Security Force, a security agency under the aegis of the Central Government.

<sup>395</sup> "Bilkis Bano's brave fight" *Tehelka*, Vol. 5, Issue 4, (February 02, 2008).

She successfully applied to the Supreme Court for transfer on ground that a fair trial was not possible in rural Ahmedabad on account of the communal atmosphere.

The police have failed to protect witnesses in Gujarat, and sometimes actively harassed them. Such harassment has extended beyond survivors and witnesses, to civil society advocates. Whilst police are failing to act against the absconding accused in many cases leading to delay and injustice, they were quick to wrongly issue a summons to Teesta Setalvad, an activist supporting survivors of mass violence, in the illegal graves case arising out of the Pandawada massacre. The Gujarat police kept insisting that she attend the police station in Lunavada, in response to the summons. Setalvad relied upon Section 160 of the Criminal Procedure Code, whereby a female witness can record a statement where she is residing, since she was not living in Gujarat.<sup>396</sup> The police persisted in issuing summons and named her as an absconding accused before the court. Eventually, the High Court quashed the summons, describing it as “glaring mistake” and said that it was clear that the Gujarat government “had miserably failed in showing a single instance from which it can be said that the petitioner (Teesta Setalvad) had not cooperated with the Investigating Agency....”.

The combined effects of partial or distorted evidence, lazy or biased prosecution, and witness intimidation are reflected in the Best Bakery case. We examine the trajectory of this case below.

### **Best Bakery case**

The case concerns a Muslim business called Best Bakery, located in a lower middle class, Hindu neighbourhood. The Best Bakery was attacked by a Hindu crowd from about 8.30 p.m. on March 1, 2002 to 10 a.m. on March 2, 2002. Fourteen people were murdered in the attack. Zahira Sheikh, the main witness, registered a FIR with the police on March 2, 2002, and the first arrests took place on March 21, 2002<sup>397</sup>.

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<sup>396</sup> See High Court order of Hon’ble Justice G.B. Shah in Criminal Misc. Application No. 7094 of 2011, May 27, 2011, available at Gujarat High Court website.

<sup>397</sup> People’s Union for Civil Liberties “Violence in Vadodara: A Report”, PUCL and Vadodara and Vadodara Shanti Abhiyan (May 2002).

The trial took place from February 20, 2003 to June 27, 2003. Seventy-three witnesses, including victims, eyewitnesses, expert witnesses and police officers gave evidence. Thirty-seven of the seventy-three witnesses, including the immediate victims turned hostile, and all twenty-one accused were acquitted. Ms. Sheikh and her family then turned to the organization, Citizen for Justice and Peace, and made representations to the NHRC saying they turned hostile under threats and pressure from local politicians, lack of support from police and prosecution and alleged intimidation before and after the court hearing. A central argument they made was that the arrangement for this trial had been administratively changed to allow a VHP prosecutor to conduct the trial, and that he had behaved more as a defence rather than a prosecuting counsel<sup>398</sup>. Some rather strange things had happened, such as the prosecutor and the judge both failing to elicit why such a large number of witnesses had turned hostile. Some key witnesses were not present at court because of the state's failure to go through the correct procedure to ensure their attendance at court. One witness was suddenly declared insane and unfit to give evidence by the prosecution, and the judge accepted the submission without the prosecution fulfilling the requirement of producing appropriate medical evidence.<sup>399</sup>

The prosecution filed an appeal against acquittal to the Gujarat High Court under pressure from NHRC and the Supreme Court. The appeal was dismissed by the High Court in December 2003. The case was then taken to the Supreme Court by the complainant Ms. Sheikh, supported by the NHRC.

The Supreme Court ordered retrial and reinvestigation and transferred the case from Gujarat to neighboring Maharashtra.<sup>400</sup> The Supreme Court judgment lambasted the Gujarat administration for failing in its constitutional duties to maintain law and order and for its partisan, non-secular role in the violence. The Supreme Court found

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<sup>398</sup> *Zahira Sheikh and others v. State of Gujarat*, April 4, 2004, page 4, 446-449, arising out of Special Leave Petition (Crl.) No. 538-541/2004 available at <http://judis.nic.in/supremecourt/imgs.aspx>.

<sup>399</sup> Ibid.

<sup>400</sup> Ibid.

the prosecution tainted and partisan<sup>401</sup>. It was equally critical of the quality of adjudication delivered by the Gujarati judiciary.

In the Best Bakery case, the prosecution and the trial judge were so remiss in performing their roles that it was not difficult to gauge their bias. The combined efforts of the survivors, civil society groups brought this bias to light. Since this case concerned an especially brutal massacre, the media gave it relatively sustained attention. Other trials related to the 2002 mass violence play out far from media scrutiny, and most have taken place in a similar context of official incompetence and bias, coupled with witness intimidation. The high acquittal rate that we saw from official records reflects this context.

## 10. Conviction

The corollary to a high acquittal rate in mass violence cases is, of course, a very low rate of conviction. We received very little RTI information from police stations on convictions. Forty-two police stations across 10 districts responded to our queries. 549 cases across these 42 police stations had been finalized. Only 25 of these resulted in convictions. We are defining conviction case as one in which at least one or more accused were convicted of one or more offences that they faced.<sup>402</sup> The rate of conviction, based upon the records we accessed, is just under 5%.

Below, we tabulate convictions in some major criminal trials. Two of these, Godhra and Sardarpura were under the purview of the SIT since 2008, and another two, the “Bilkis Bano” and “Best Bakery” cases were transferred out of Gujarat. In Ms. Bano’s case, twelve people were convicted of criminal conspiracy, rape and murder and received life sentences. A three year jail sentence was imposed on the head constable of Limkheda PS for framing a false complaint.<sup>403</sup> However, four police and two medical officers were acquitted on account of doubt about their role. The judge

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<sup>401</sup> “*Best Bakery Case*” 2004 Cri LJ 2050.

<sup>402</sup> If we were to use a similar definition for conviction as we have for acquittal i. e only define cases as conviction where all accused were convicted of all offences they faced, we would have what would almost account to a zero rate of conviction, as in most cases involving multiple accused and multiple offences, some of the accused were acquitted either of all, or at least of some, of the offences.

expressed the view that prosecution had proved there was evidence tampering and attempts to destroy evidence, but failed to prove that these acts were committed by the police.<sup>404</sup>

### Convictions in Some Major Criminal Trials

District / Case	Total killed / injured	Total Accused	Conviction	Acquittal
Vadodara / Best Bakery Supported by CJP. Retrial in Mumbai.	14 died	21 (4 absconding)	9 life sentences	8 acquitted
Dahod / Bilkis Bano Supported by NHRC and CSJ. Trial in Mumbai.	14 died	19	12 life and one police officer for fabricating evidence.	7 acquitted (all police and medical officers)
Sardarpura / Mehsana (SIT)	33 died	73	31 life sentences	42
Godhra / Panchmahal (SIT case)	57 died	94	31-11 death sentences, 20 lifers	63 acquitted
Ghodaser / Kheda <sup>405</sup> , supported by NGO	14 persons were killed. 46 witnesses deposed	60	12 life sentences and three accused received 2 years	48 acquitted
Viramgaam (Nyayagrah)	3 died	10	2 life sentences, 1 to 10 years, 1 to 6 yr. and 2 to 5 yr.	4 acquitted
Gharghoda / Anjanwarda, supported by NGO.			2	

There were 62 people convicted in the two SIT cases. The SIT's investigation, under the scrutiny of the Supreme Court and the resulting scrutiny of the media and the interested NGOs has very likely meant that these cases are being prosecuted more diligently than other mass violence cases. The SIT not only plays a role in investigation, it also plays a role in choosing prosecutors. Prosecutors with clear Hindu right sympathies are less likely to be conducting these trials. In addition, the

<sup>404</sup> Bilkis Bano judgment, Sessions Case No. 634/2004, January 21, 2008.

<sup>405</sup> Bhunsha, Dionne, "Justice against all the odds", *Frontline* Vol. 20, Issue 25, (December 06 - 19, 2003) available at <http://www.frontlineonnet.com/fl2025/stories/20031219004003900.htm>.

police are less likely to be harassing witnesses, and more likely to respond to complaints of witness intimidation.

There were 21 convictions in the two cases transferred out of Gujarat. The retrial of the Best Bakery case in Maharashtra started in October 2004 and ended with conviction for murder and life sentences for nine persons on February 24, 2006, and acquittal for eight. Four of the accused that had not faced trial were declared absconding<sup>406</sup>. Eleven people were convicted of criminal conspiracy, rape and murder and received life sentences.

Also it is notable that all the above cases were supported by NGOs, which gave the victims access to legal representation, the opportunity to challenge investigatory defects and to seek police protection if they felt threatened.

These convictions demonstrate that when the authorities investigate and prosecute reasonably competently, and when witnesses are not placed under pressure, it is possible to secure convictions. The high rate of acquittal reflects official failures, rather than inherent weaknesses in many mass violence cases.

The effects of biased investigation, prosecution and adjudication become even more apparent when we turn from the post-Godhra cases, to the Godhra case. The 59 victims of the Godhra incident were Hindu, and many were karsevaks, involved in cultural and political Hindu right groups. The police acted immediately, here arresting and remanding 28 Muslims from the locality on February 27 and 28. Another sixty-five Muslims were accused before the trial began.

The FIR and the first charge sheet dated May 22, 2002 were premised on the theory that the fire was pre-meditated, started by a mob standing outside the train carriage<sup>407</sup>. However, a forensic report dated May 17, 2002, recorded a finding that the fire could not be started from outside, and estimated that around 60 liters of fuel would have been required to cause the fire that burnt the coach. The police were evidently in a rush to investigate the case and secure convictions. They totally

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<sup>406</sup> "Nine convicted in Best Bakery Case", *Times of India*, February 2006.

<sup>407</sup> Ramakrishnan, Nitya, "Godhra: The Verdict analysed" *Economic & Political Weekly*, Vol. 46, No. 15, (April 2011). The facts and analysis presented here rely on Ms. Ramakrishnan's rigorous and insightful analysis of this judgment.

overlooked the inconsistency between their own expert evidence (the forensic report) and their theory of the fire being started by a mob standing outside. It has been argued that they tried to fix these defects by introducing and creating new evidence.<sup>408</sup>

The trial judge concluded that the fire was pre-meditated, that petrol had been bought in advance and six conspirators had broken into the train and set the carriage on fire. These findings are controversial<sup>409</sup>. None of the 41 train passengers interviewed by the police mentioned anyone breaking into the train.<sup>410</sup> Vendors of the local petrol pump had said nothing of the sale of 140 liters of petrol that they later (in statements given on February 23, 2003) claimed to have sold on the eve of the fire to some of the accused men when they were questioned in April 2002. The same witnesses later told a correspondent of *Tehelka* magazine on camera that they were forced by the police to implicate the accused. However, the Judge did not allow this previous inconsistent statement as evidence. The trial judge relied upon the confession of one of the accused, Jabir, as evidence against other accused. However, such a confession can only constitute evidence against Jabir himself, as under criminal procedure laws, the use of a confession made in police custody is forbidden.<sup>411</sup>

Ninety-four accused were tried in the Godhra case. In 2011, the trial judge acquitted 63, but controversially upheld the criminal conspiracy theory, and convicted eleven of the accused to death, and twenty to life imprisonment. All twenty-right individuals arrested immediately after the Godhra incident were eventually acquitted as the prosecution was unable to prove their presence on the spot of the incident.<sup>412</sup> An individual who was initially depicted as the main conspirator, Maulvi Umarji, was acquitted after nine years in prison. The only evidence against him was a remark in the confession of Jabir, later retracted, that he had heard from someone

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<sup>408</sup> Ibid.

<sup>409</sup> Ibid, page 40.

<sup>410</sup> Ibid.

<sup>411</sup> Ibid. Ramakrishnan refers to a long series of Privy Council and SC judgments, the most recent being the Parliament attack case, *Navjot Sandhu* (2005) SCC 600 in support of this point. See footnote 30, page 44 of her article.

<sup>412</sup> Ibid.

else (hearsay evidence) that Mr. Umarji had instructed him or her to set the coach of the train ablaze.

The Godhra case is troubling, and reveals the same tendencies in the police, prosecution and judiciary that the post-Godhra cases reveal. Official authorities seem entirely willing to discard the rules laid down by the Criminal Procedure Code to get the result they want. This has extended, in some post-Godhra cases, to destroying crucial evidence. The judiciary has shown itself willing to play along. In the Godhra case, this has meant arrests, denial of bail, accused being kept in remand for many years, and convictions in the face of dubious evidence. In post-Godhra cases, this has often meant lackadaisical investigation, failure to oppose bail, and acquittals despite strong evidence.

## 11. Appeals

We received responses to RTI applications on appeals from only nine police stations across five districts. One hundred and eighty two police stations provided no information, and 72 police stations said none of the mass violence cases under their purview had resulted in appeals. However, it was unclear from their responses if this meant that trials in charge-sheeted cases were still continuing, or if trials that had ended in acquittals were not being appealed. Given the exceedingly low response rate, the information obtained is too random and incomplete for any useful analysis save to state the obvious that this information is not easily available.

This information seems not to be available with either the Home Department or the Legal Department of the state government, nor with district administrations, nor with police stations. In 2004, the Supreme Court ordered the Attorney General of Gujarat to monitor the status of appeals in mass violence cases. If the government were complying with this order in any seriousness, the information we requested should have been available. When we were refused this information, we appealed the refusal and argued that, following the Supreme Court's order, this information should be readily available. We were told that we could only get this information for any particular trial if we obtained details of the case number, acquittal date and acquitting court. Since such details are not easily available in public, this means that



ordinary citizens cannot access information on whether cases are being appealed. This makes it easier for the government to accept acquittals, and to neglect to file appeals even where an appeal is warranted and viable.

#### E. Accountability of public officials

In 2002, federal checks and balances entirely failed to work. The Central government did not exercise its constitutional power to intervene and control mass violence. The Rajya Sabha passed an ineffectual resolution ruing the violence, and the Lok Sabha failed even to pass a resolution. Coalition politics at the Centre operated such that a spectrum of political parties tolerated violence, rather than moderating and checking the Hindu right stance of the BJP, which led the coalition. So while the Central government shielded the state government, the BJP government in Gujarat has never apologized for what happened in 2002, and even shielded senior office holders involved in violence.

The NHRC, soon after the outbreak of violence, issued reports and orders criticizing the state government's negligence and collusion. The Gujarat government set up a commission of inquiry - the Nanavati Commission - initially to look only at the Godhra tragedy. In the face of criticism, it expanded the commission's terms of reference to examine the responsibility of senior members of government for mass violence in 2002. Survivors and civil society groups petitioned the NHRC and participated in the commission's inquiries. However, they went beyond this, and as mentioned earlier, filed criminal complaints and applied for compensation. They also deployed public law remedies to challenge discrimination and incompetence in criminal proceedings and compensation. They persuaded the Supreme Court to take important protective measures, including the transfer of major criminal trials out of Gujarat and the re-opening of 2000 cases that the Gujarat police had summarily closed for lack of evidence.

The very fact that the Supreme Court took these steps is, in and of itself, an indictment of the Gujarat administration. The Court was clearly persuaded that certain trials simply would not be conducted fairly, and that a large number of cases were likely to have been unlawfully closed. In addition to these measures, the

Supreme Court also appointed a Special Investigation Team to look into a number of serious cases in Gujarat. In the course of the commission of inquiry and the SIT proceedings, a few senior police officials in Gujarat have spoken out about the role played by the ruling party in furthering the mass violence and allowing perpetrators to escape with impunity.

All these developments together have kept the spotlight on the role of the Gujarat administration and on whether those involved have been held accountable. We discuss below the findings of the NHRC. We then discuss the role and findings of the Nanavati Commission thus far (its work continues at the time of writing this). We also examine accounts by IPS officers in Gujarat. We look at the findings of the Special Investigation Team appointed by the Supreme Court. Finally, we discuss the limited information available on steps taken by the state government against government personnel involved in the 2002 mass violence.

## 1. **NHRC intervention**

The NHRC intervened soon after the violence broke out on account of the media reports and calls by concerned citizens suggesting “inaction by the police and the highest functionaries of the state”,<sup>413</sup> by issuing a fax notice to the chief secretary and Director General of Gujarat Police on March 12, 2002 asking them to respond urgently, setting out the measures taken and contemplated to prevent any further escalation in the violation of human rights that had been alleged.

The main concerns raised and recommendations made by the NHRC in its orders are summarized below<sup>414</sup>.

- The NHRC was quick to notice the apparent intelligence failure admitted by the state and central agencies in their report<sup>415</sup> where they claimed not to have the specific information about the return of *karsevaks* from Ayodhya

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<sup>413</sup> NHRC recommendation, National Human Rights Commission Report on Gujarat, (New Delhi: March - May, 2002) available at <http://www.cjponline.org/gujaratTrials/statecomp/pdf%20files/pdfs/NHRC%20Report%20%20July%202002.pdf>.

<sup>414</sup> Suo Motu Order of NHRC, Case No. 1150/6/2001-2002, April 1, 2002. Available at <http://gujarat-riots.com/reports/NHRC%20Report%20%20July%202002.pdf>.

<sup>415</sup> Suo Motu Order of NHRC Order, Case No. 1150/6/2001-2002, April 1, 2002, page 11, para 20(iv).

and to conclude that this<sup>416</sup> “serious failure of intelligence and action by the state government marked the events leading to the Godhra tragedy and the subsequent deaths and destruction that occurred.” The NHRC also doubted the conspiracy theory put forward by the state because, “whilst the report filed by the Gujarat state maintained that the Godhra was “pre-meditated”, it did not set out who was responsible for the attack.”

- The Commission noted political interference with the police, as suggested by the presence of political personalities in police stations and demanded that the state government identify and take action against these political personalities.
- The commission sought but did not receive a response from the state government “regarding reports and allegations of groups of well organised persons armed with mobile telephones and addresses, singling out certain homes and properties for death and destruction, sometimes within view of police stations and personnel”.<sup>417</sup>
- The failure to provide security to two Muslim High Court judges who had to leave their homes for safety and whose properties were attacked by mobs. The Gujarat administration claimed that the judges had left of their own will and it could not guarantee safety to all “societies”. The NHRC pointed out that the judges had to leave on account of the “pervasive insecurity”.
- The NHRC also noted<sup>418</sup> that “numerous allegations” had been made to it, and in the media, about FIRs being “poorly recorded” or “distorted” and that “there was widespread lack of faith in the integrity of the investigating process and the ability of those conducting investigations”.
- NHRC<sup>419</sup> also made an early recommendation to the state government to appoint a CBI investigation in Godhra, Gulbarg, Naroda Patiya, Best Bakery and Sardarpura case in Mehsana, given the evidence and serious allegations made in respect of police malpractice and mala fide investigation.
- It also sought accountability of public servants:

“Given the wide variation in the performance of public servants in the discharge of their statutory responsibilities, action should be initiated

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<sup>416</sup> Ibid., 11-12, para 20 (v) and vi.

<sup>417</sup> Ibid.

<sup>418</sup> Ibid., 12, para 20 (viii).

<sup>419</sup> Ibid., 15, para 21(i), Part I, recommendations under “Law and Order”.

to identify and proceed against those who have failed to act appropriately to control the violence in its incipient stages, or to prevent its escalation thereafter. By the same token, officers who have performed their duties well, should be commended.”<sup>420</sup>

- The Commission sought protection for witnesses to prevent intimidation and to ensure a fair trial.
- It sought a guarantee from the Gujarat administration that relief camps would not be forcibly closed, and sought adequate rehabilitation and compensation for the displaced.<sup>421</sup>
- The NHRC asked the state to address the issue of damage and destruction to around 535 mosques and dargahs.<sup>422</sup>

The NHRC also said,

“There is no doubt, in the opinion of this Commission, that there was a comprehensive failure on the part of the state government to control the persistent violation of the rights to life, liberty, equality and dignity of the people of the state...”<sup>423</sup>.

The government of Gujarat refused to hand over the massacre cases to the CBI.<sup>424</sup> So the NHRC went further and petitioned the Supreme Court to transfer these cases outside Gujarat, arguing that a fair trial was not possible in Gujarat. This was an important step. In previous episodes of mass violence, official watchdogs hesitated to identify *systemic* bias and collusion. The NHRC, in petitioning the Supreme Court, identified such bias and took the view that it was so serious and persistent that the state government could not be trusted to pursue criminal justice effectively. Evidence and recommendations by the NHRC reinforced advocacy by private citizens. The systematic undermining of criminal trials in Gujarat became harder for the Gujarat government to deny and for the Supreme Court to ignore.

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<sup>420</sup> Ibid., 16, para. 21(viii).

<sup>421</sup> Ibid., 17, Part II, para. 21(iv), recommendations under “Camps”, and recommendation under Part III, para 21(ii).

<sup>422</sup> Ibid., 17, Part III, para. 21(i), recommendation under “Rehabilitation”.

<sup>423</sup> Ibid., para. 64.

<sup>424</sup> Ibid. The reluctance and non-cooperation of the state is noted by the NHRC at various points in its orders in the period March- September 2002.

The NHRC's observations, made soon after the mass violence took place, also serve as an important record when official processes that are more sympathetic to the Gujarat government present a more diluted account of what happened in 2002.

## 2. Commission of Inquiry

Unlike previous episodes of violence, which took place when the visual and electronic media were not as routine a part of public life as they had become by 2002, the public had access to horrific images of pain and suffering that had not been witnessed before. There was a national outcry that the state government had to respond to by setting up a Commission of Inquiry.<sup>425</sup> However, despite many allegations of state complicity and failures in preventing and controlling the violence right from the beginning, the ambit of inquiry initially controversially limited itself only to the Godhra incident. It was only in July 2004, after persistent public pressure and criticism, that the terms of reference were expanded to include the functioning of the state apparatus.<sup>426</sup> This widening of terms of reference was very likely the result of a change of government at the centre, from the BJP-led NDA to the Congress-led United Progressive Alliance. The Gujarat government widened the inquiry, rather than contending with a competing inquiry instituted by the central government.

Interestingly, the Commission received 46,494 statements/affidavits in total, of these 41,999 – i.e. 90% – were received in response to the final notification which concerned the part played by the state<sup>427</sup>. It is clear from the volume of responses on the state's role in the 2002 violence what ordinary citizens felt most strongly about. The vast majority of these affidavits are from individual survivors, but a few are from three IPS officers, RB Sreekumar, Rahul Sharma and Sanjeev Bhatt. These three officers also gave evidence in person to the commission. Their testimonies shed light on why violence unfolded on the scale it did, and the degree of state collusion in mass violence in 2002.

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<sup>425</sup> Commission Report (September 2008), 182, under “Annexures”. See here for the exact wording of the Government notification of March 6, 2002 setting up the commission, accessed at <http://home.gujarat.gov.in/homedepartment/downloads/godharaincident.pdf>

<sup>426</sup> Ibid., 184 – 188, for exact wording of amending notifications, which expanded the terms of reference to include the role of state and to extend the time period coverage of violent incident to May 31, 2002.

<sup>427</sup> Ibid., 7.

a) Evidence of RB Sreekumar

Mr. Sreekumar was the first IPS officer to publicly oppose the unofficial, but clear, policy of the government to not act against communal organizations. As chief of the SIB in 2002, he advised other officers<sup>428</sup> that Muslim citizens felt insecure in the face of aggression by Hindu right organizations and had little faith in the police.<sup>429</sup> He emphasized the need to apprehend those responsible for the violence. His advice was ignored.<sup>430</sup> He claimed that he was denied promotions, and transferred following his failure to support the State's official line of "normalcy" to the election commission in 2002.<sup>431</sup> He also alleged that there were serious illegal attempts to coerce him into testifying falsely before the Nanavati-Shah inquiry, and to hide the negligence and culpability of state officials.<sup>432</sup>

b) Evidence of Rahul Sharma

Mr. Sharma, Deputy Superintendent of Police, Bhavnagar submitted an affidavit before the Commission that sets out in detail (with evidence such as minutes of

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<sup>428</sup>The information presented here comes from a register maintained by Sreekumar, at the S.I.B. where he recorded verbal instructions (39 entries) given to him by officers in the rank of DGP and above for the period of April 16, 2002 to September 19, 2002. These entries record that the Chief Minister and other senior bureaucrats did not heed advice given by Sreekumar and others to act against persons connected to the Sangh Parivar family, who were alleged to have committed serious offences in Ahmedabad. Details of these entries can be accessed in *Combat Communalism*, July-August 2007. Reference to this register is also made in other media reports, see "Gujarat Riot Muslims Eliminated" *BBC News*, April 14, 2005, available at [http://news.bbc.co.uk/2/hi/south\\_asia/4445107.stm](http://news.bbc.co.uk/2/hi/south_asia/4445107.stm) and "Retired Sreekumar Promoted as DGP", *The Indian Express*, May 3, 2008, available at <http://www.expressindia.com/latest-news/retired-sreekumar-promoted-as-dgp/304865/>.

<sup>429</sup> This is deduced from his entries and affidavits submitted to the commission. For details of Sreekumar's affidavit, see extracts at "Muslims Perceive", *Tehelka* March 12, 2005, available at [http://www.tehelka.com/story\\_main11.asp?filename=ts031205Muslims\\_perceive.asp](http://www.tehelka.com/story_main11.asp?filename=ts031205Muslims_perceive.asp). Sreekumar reported that the "The Muslim community felt vulnerable and at the mercy of right-wing communal organizations like Bajrang Dal and VHP..."; also, "The Muslims had no faith in the criminal justice system and were developing a deep sense of grievance and an intense sense of revengefulness against the Hindu community on account of the loss they suffered and also on account of their perception that the state administration and the police were heavily biased against Muslims". Also see *Communalism Combat*, July-August 2007 edition.

<sup>430</sup> Ibid.

<sup>431</sup> Ibid.

<sup>432</sup> See "Cop Nails Gujarat Lie," *Tehelka* March 12, 2005, available at, [http://www.tehelka.com/story\\_main11.asp?filename=ts031205Cop\\_Nails.asp](http://www.tehelka.com/story_main11.asp?filename=ts031205Cop_Nails.asp).

meetings, newspaper reports, letters, memos and call records) the preparations to counter violence anticipated on February 28, 2002 after Hindu right groups announced a bandh, or strike. This kind of a record of a DSP's movement, actions, orders given, and phone calls received and made during the critical hours of violence demonstrate that it was possible to control violence and protect lives if district police officials were determined to do so. Mr. Sharma, for example, held long meetings on February 27 and 28, 2002 instructing the police force under his command to control violence. The Bhavnagar police identified sensitive areas, and Mr. Sharma requested additional police forces from outside Bhavnagar to keep the peace. Mr. Sharma personally attended sites of violence and directed his juniors to use appropriate, legal force to disperse mobs. He responded to news of gathering mobs at various sites by attending with his striking force to disperse mobs. Along with the district magistrate a curfew was declared, and he ordered police officers to implement this stringently.

Mr. Sharma also moved quickly to respond to hate speech in the local press. The editor of the newspaper *Sandesh* published a provocative article on March 1, 2002, which criticized the "leaders of Bhavnagar" for failing to punish Muslims<sup>433</sup>, though it refers to Muslims as "a certain community", possibly on legal considerations. The article praised "Hindu organizations" who "opened third eye in Ahmedabad, Vadodara, Rajkot, Godhra, Modasa, Surat and other cities and have punished the elements of certain community who had spread terror...."<sup>434</sup>. Mr. Sharma wrote to the relevant authorities on 9.3.02, and asked them to take action against *Sandesh* under the Press Council Act for instigating violence<sup>435</sup>. Thus, he was aware of and willing to employ the various institutional mechanisms that Indian law provides to address hates crimes and mass violence. Rahul Sharma also collected and presented records of phone calls made by various direct participants and politicians during the period of riots to the commission.

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<sup>433</sup> Ibid, page 21. See "Anger of bitter Hindus affiliated to Hindu ideology. Hindus are burnt alive in Godhra and fattu leaders even thinking of throwing a stone in the name of Bandh in Bhavnagar," *Sandesh*, Bhavnagar edition, March 1 2002, page 11.

<sup>434</sup> Ibid.

<sup>435</sup> Ibid., pages 18-20.

For his efforts to control violence, he was transferred from Bhavnagar to the DCP control room Ahmedabad. It is alleged that he was transferred from Ahmedabad to Surat on account of finding flaws in the investigation of massacre cases of Naroda Patiya and Gulbarg.<sup>436</sup> He now stands accused of gross misconduct under Section 3(1) of All India Service Rules 1969,<sup>437</sup> for providing information to a judicial commission without prior authorization.

c. Sanjeev Bhatt's evidence

Mr. Bhatt, an IPS officer who was the deputy commissioner of intelligence, state intelligence bureau at the time of the mass violence in 2002 has testified that he was present at a meeting called by the Chief Minister of Gujarat on February 27, 2002 where the Chief Minister said that the Gujarat police were not to adopt a secular approach to violence unfolding after the Godhra massacre, and that the death of karsevaks required that the "Muslims be taught a lesson so that such incident did not recur... and it was imperative that police allow the Hindu mobs to vent their anger."<sup>438</sup> Mr. Bhatt's evidence echoes the account of Haren Pandya, a cabinet minister in the state government during mass violence who was subsequently murdered<sup>439</sup>.

Mr. Bhatt has claimed that he has evidence that he had informed the police commissioner of Ahmedabad city, and the CM about the mob that was gathering and violence that was building at Gulbarg on February 28, 2002. He has recently written to the Commission providing them with copies of faxes showing that the Home Minister of State in 2002, Mr. Zadephia, the Joint Commissioner of Police of Ahmedabad, Mr. Pande, and the CM, Mr. Modi, had

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<sup>436</sup> "Carrots and Sticks," *Tehelka* March 12, 2005, claims that nine senior state officials who kept silent or supported the government policy have been rewarded by promotions whilst five who acted to prevent violence and spoke out against the State were punished.

<sup>437</sup> "Gujarat charge-sheets IPS officer for misconduct", *The Hindu*, August 13, 2011, available at <http://www.thehindu.com/news/national/article2353644.ece>.

<sup>438</sup> These allegations were initially made to the SIT asked by the SC to investigate the complaint of Zakia Jaffrey, and subsequently in an affidavit to the SC alleging that the SIT was not acting impartially by not following up leads provided by Bhatt. Copy of Bhatt's affidavit, April 5, 2011 can be accessed at NDTV website at [http://drop.ndtv.com/common/pdf/Sanjiv\\_Bhatt.pdf](http://drop.ndtv.com/common/pdf/Sanjiv_Bhatt.pdf). Portions of it also appeared in "Truth about Godhra SIT Report" *Tehelka*, Vol.8 Issue 6, February 12, 2010, 28-41. Also *Tehelka*, Vol. 8 Issue 7, February, 30- 37.

<sup>439</sup> "A Murder Foretold," *Outlook*, November 19, 2007.



received intelligence inputs warning of gathering mobs around Gulbarg Society and Naroda Patiya, and even distress calls from Ehsan Jaffrey, the MLA who was murdered, amongst others, at Gulbarg.<sup>440</sup>

Mr. Bhatt has put evidence before the commission of inquiry, the special investigation team appointed by the Supreme Court, as well as before the Supreme Court. He has alleged that since he spoke out about events in 2002, he and his family have been at risk, but the state government has refused his requests for better security and protection.<sup>441</sup>

Bhatt has claimed that Mr. Modi and Amit Shah, Minister of Home Affairs in 2002, asked him to destroy important documentary evidence regarding Haren Pandya's murder, which he refused to do. This refusal led to him being transferred and kept without any posting for over two months in November 2003.<sup>442</sup>

More recently, Mr. Bhatt was suspended from the IPS for dereliction of duty. He was arrested on September 30, 2011 for threatening a public servant, wrongful confinement and fabricating false evidence, based on a complaint filed by his former driver three months earlier on June 24, 2011 who claimed that Bhatt had threatened and forced him to sign false affidavits.<sup>443</sup> Bhatt's arrest came within 48 hours of him filing an affidavit in the Gujarat High court alleging indirect involvement of the CM and Mr. Shah in the murder of the Cabinet Minister Mr. Pandya, who had allegedly feared for his life after giving an interview to Outlook magazine about the CM's involvement in mass violence.<sup>444</sup>

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<sup>440</sup> It was reported that fax messages sent to Modi and Zadhaphia show how the SIB was informed about the situation. A first message said that mob was gathering. In a second alert, the ministers were told that Jafri and his family were in danger. "Zadaphia lied, Sanjiv Bhatt tells Godhra commission" *Times of India*, December 31, 2011. Available at <http://timesofindia.indiatimes.com/city/ahmedabad/Zadaphia-lied-Sanjiv-Bhatt-tells-Godhra-commission/articleshow/11311514.cms>.

<sup>441</sup> Ibid.,

<sup>442</sup> "Modi Government arrests Sanjiv Bhatt", *The Hindu*, September 30, 2011.

<sup>443</sup> Ibid.

<sup>444</sup> "A Murder Foretold", *Outlook*, November 19, 2007.

The Commission has still not completed its inquiry on the controversial role of the government in 2002. Its inquiry was split into two parts – first, the Godhra incident, which led to loss of 57 Hindu lives and was limited to an incident lasting a few hours on one day at the Godhra train station and second, the state-wide violence that led to the loss of, according to official estimates, 1037 lives.

The report on the Godhra incident was published in 2008, and it gave the Gujarat government a clean chit on how it handled the incident. The report supports the Gujarat government's theory that Godhra was a pre-planned terrorist conspiracy<sup>445</sup>, despite the existence of substantial pieces of evidence presented to Commission that make this theory implausible.<sup>446</sup> The report fails to address the two most important allegations against the CM made before the panel – that he issued illegal instructions on February 27, 2002 to the police that violence against Muslims should not be controlled, and that he decided that the bodies of Godhra victims could be shown in public, in contravention of the advice of the Godhra district magistrate.

The Commission turned down applications by civil society groups such as Jan Sangharsh Manch (JSM) to summon Mr. Modi and two former staff members from the CM's office for questioning. The Commission seems not to have considered, fully and adequately, the detailed testimonies presented before it, including evidence by the senior IPS officials who have spoken out. Thus, there are fears amongst survivors of violence and activists that the report of the Commission on the role of CM and the state in the violence that followed the February 27<sup>th</sup> Godhra incident will be a "whitewash".

### 3. **The Supreme Court's Special Investigation Team (SIT)**

The Commission of Inquiry has the potential to be one of the most significant mechanisms of accountability for the 2002 mass violence, but its performance so far suggests that much of this potential is being jettisoned. However, it operates alongside other mechanisms that are also significant. The NHRC is a standing, national watchdog, and it played an important role in responding to mass violence in

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<sup>445</sup>The trial judge in the Godhra case, whilst acquitting the main conspirator along with 63 others has controversially upheld the "criminal conspiracy" theory, and convicted 11 accused to death and 20 to life in imprisonment.

<sup>446</sup> There were 31 convictions and 63 acquittals in Godhra trial.

2002. The NHRC's efforts contributed to creating another mechanism – the Special Investigation Team (SIT).

The NHRC approached the Supreme Court on July 31, 2002 seeking transfers of the major trials out of Gujarat, under section 406 of the Criminal Procedure Code<sup>447</sup>. The NHRC argued that biased investigation and prosecution was undermining any chance of successful criminal trials against the perpetrators. The NHRC noted that in several major cases important witnesses had either not been examined, or the police had inaccurately recorded their statements, with a view either to exclude the accused from the charge sheet, or to securing their acquittal. The police had taken no steps to arrest the accused named by many witnesses in their police statements. The government had appointed prosecutors with openly Hindu right sympathies.

In response to the petition, the Supreme Court stayed all trials on November 21, 2003. As discussed earlier, it transferred the Bilkis Bano trial and Best Bakery trial out of Gujarat. The 9 other major trials entered a legal limbo for more than four years till March 26, 2008, when the SC ordered a Special Investigation Team to be set up in respect of nine cases<sup>448</sup>, eight of which are cases of mass murder. One case concerns the murder of a British national in Sabarkantha, whose family are also pursuing a case against Mr. Modi using the principle of command responsibility.

The SIT order is an important one as its foundations are underpinned by the requirement to show that investigation and prosecution are not tainted by communal and partisan considerations. The order records that the Gujarat government accepted the need for further investigation “so that people’s faith in the transparency of action taken by state is fortified”. However, this begs the question as to why the Gujarat government did not accept this need in 2002 and transfer the said cases to CBI as suggested by NHRC. In the SIT order, the Supreme Court set out a framework set up special fast track courts. The SIT was to be consulted in the appointment of prosecutors by the government and the SIT decision was to be the final one in case of a difference of opinion about a prosecutor.

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<sup>447</sup> Criminal Writ Petition 109 of 2003, submitted in the SC by the petitioner, *National Human Rights Commission*.

<sup>448</sup> Gulberg, Naroda Gam, Naroda patiya, Ode massacre (two cases), Godhra, British national case in Subarkatha, Sardarpura and Deepda Darwaja.

There was an important development in June 2008, when Zakia Jaffrey, the widow of murdered Congress Member of Legislative Assembly, Ehsan Jaffrey, attempted to register a complaint for serious offences<sup>449</sup> including criminal conspiracy to murder, against Mr. Modi, eleven of his Cabinet Ministers, three sitting M.L.As., three members of the Bharatiya Janata Party, three office bearers and three other members of an extremist right wing organization, and thirty-eight high ranking police officers and bureaucrats (including IPS and IAS officers), including the Director General of Police and the Chief Secretary of the government of Gujarat.

The complaint is an impressive document of over a hundred pages, with annexures running over 2000 pages. It was originally sent to the DGP of Gujarat Police, PP Pande, who was the police commissioner of Ahmedabad city in 2002, and is named as an accused in the complaint. Upon the refusal of the DGP to register a complaint, Ms. Jaffrey<sup>450</sup> petitioned the High Court, again in vain. Ms. Jaffrey then approached the SC by way of a special leave petition (SLP) in March 2008, appealing the dismissal by the High Court of her petition. On April 26, 2009, the SC ordered the SIT already in place to investigate the charges in the SLP and take action according to law. During the course of this investigation, Chief Minister was interviewed, an important development because the commission of inquiry had thus far refused to question the Chief Minister.

a) SIT Findings<sup>451</sup>

The SIT has submitted a report to the Supreme Court that has not been released to the public. However, media outlets that secured a copy of the report covered its

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<sup>449</sup> There are 63 persons named as the accused in the FIR for offences punishable under Section 302, read with Section 120B, as also under Section 193, read with Sections 114, 186 & 153A, 186, 187 of the Indian Penal Code, 1860. FIR is dated June 8, 2006. Available at <http://www.cjponline.org/zakia/060608%20Zakia%20FIR.pdf>.

<sup>450</sup> Fully supported by the NGO, Citizens for Justice and Peace.

<sup>451</sup> This section and other discussion of the content of the 600 page report are based on the coverage in *Teelka Vol. 8, Issue 6, February 12, 2011*. (In particular, the cover story, "The smoking gun," "The Artful Faker" and "India reacts". The magazine claimed to have secured a copy of the SIT report. The report is confidential and not in the public domain. There are no reports to suggest the contents of the report are inaccurate. Sanjiv Bhatt in an affidavit to the SC expressed his concerns about personal security based on the possibility of the SIT leaking information he had given to it.

findings in some detail. The SIT's findings, as reported in the media, are discussed below.

(i) Findings against the Police:<sup>452</sup>

- The SIT report supports the documented claims of many survivors and NGOs regarding the mala fide nature of police investigations in the Naroda Patiya and Gulbarg Society massacre cases. The police, the report claims, deliberately overlooked the cell phone records of Sangh Parivar members and BJP leaders involved in the riots. Prominent among them were the Gujarat VHP president Jaideep Patel and BJP minister Maya Kodnani<sup>453</sup>.
- The report notes that the police administration failed to explain why it did not impose curfew in Naroda until 12 pm and Meghaninagar (Ahmedabad city) until 2 pm on February 28, 2002. The imposition of such a curfew could have saved hundreds of lives.
- The former Ahmedabad Joint C.P., MK Tandon, in whose area around 200 Muslims were killed, has been found guilty of deliberate dereliction of duty. (After the riots, however, far from being censured, he got prestigious postings and retired as Additional Director General of Police in June 2007.)
- Mr. Tandon's junior, former Deputy Commissioner of Police, PK Gondia, has also been found responsible for allowing the massacres. The SIT says that if the two had just carried out their duty, hundreds of Muslims could have been saved.<sup>454</sup> Neither of these officers was held accountable by the Modi government.

(ii) Findings on Individual Ministers

- The SIT has also found evidence against the then minister of state for home Mr. Zadhaphia (who was reporting directly to Mr. Modi) for his complicity in the riots, and has arrested another minister Ms. Kodnani.

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<sup>452</sup> Ibid.

<sup>453</sup> Pages 101-105 of the SIT report.

<sup>454</sup> Pages 48 – 50, SIT Report.

(iii) Findings on communal bias and collusion by the government

- The report found evidence to support claims that the government of Gujarat had placed two senior ministers – Ashok Bhatt and IK Jadeja – in the Ahmedabad city police control room and the state police control room during the riots. The SIT chairman comments that the two ministers were positioned in the control rooms with “no definite charter”, which led to the conclusion that they “had been placed to interfere in police work and give wrongful decisions to the field officers”. “The fact that he (Mr. Modi) was the cabinet minister for Home would heighten the suspicion that this decision had his blessings<sup>455</sup>.”
- The report affirms that police officers who took a neutral stand during the riots and prevented massacres were transferred by the Gujarat government to insignificant postings. SIT’s Mr. Raghavan has termed these transfers “questionable” since “they came immediately after incidents in which the officers concerned were known to have antagonized ruling party men<sup>456</sup>”.
- The report says, “The Gujarat government has reportedly destroyed the police wireless communication of the period pertaining to the riots.” It adds, “No records, documentations or minutes of the crucial law and order meetings held by the government during the riots had been kept<sup>457</sup>.”
- The SIT confirms that the government appointed VHP and RSS-affiliated advocates as public prosecutors in sensitive riot cases. The report states, “It appears that the political affiliation of the advocates did weigh with the government for the appointment of public prosecutors<sup>458</sup>.” The SIT chairman further comments that “it has been found that a few of the past appointees were in fact politically connected, either to the ruling party or to organizations sympathetic to it<sup>459</sup>.”

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<sup>455</sup> Ibid., 12.

<sup>456</sup> Ibid., 7-8.

<sup>457</sup> Ibid., 13.

<sup>458</sup> Ibid., 77.

<sup>459</sup> Ibid., 10.

- According to the report, the Gujarat government did not take any steps to stop the illegal bandh called by the Vishwa Hindu Parishad on February 28, 2002. On the contrary the BJP had supported the bandh<sup>460</sup>.

(iv) Findings on the Chief Minister

- The report states that, “In spite of the fact that ghastly and violent attacks had taken place on Muslims at Gulbarg Society and elsewhere, the reaction of the government was not the type that would have been expected by anyone. The Chief Minister had tried to water down the seriousness of the situation at Gulbarg Society, Naroda Patiya and other places, by saying that every action has an equal and opposite reaction<sup>461</sup>.”
- The report also notes that Mr. Modi’s statement “accusing some elements in Godhra and the neighbourhood as possessing a criminal tendency” was sweeping and offensive, coming as it did from a Chief Minister, that too at a critical time when Hindu-Muslim tempers were running high<sup>462</sup>.”
- “His (Mr. Modi) implied justification of the killings of innocent members of the minority community read together with an absence of a strong condemnation of the violence that followed Godhra suggest a partisan stance at a critical juncture when the state had been badly disturbed by communal violence<sup>463</sup>.”
- The report says Mr. Modi displayed a “discriminatory attitude by not visiting the riot-affected areas in Ahmedabad where a large number of Muslims were killed, though he went to Godhra on the same day, travelling almost 300 km on a single day<sup>464</sup>.” The SIT chairman also comments, “Modi did not cite any specific reasons why he did not visit the affected areas in Ahmedabad city as promptly as had in the case of the Godhra train carnage<sup>465</sup>.”

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<sup>460</sup> Ibid., 69.

<sup>461</sup> Ibid.

<sup>462</sup> Ibid., 13.

<sup>463</sup> Ibid., 153.

<sup>464</sup> Ibid., 67.

<sup>465</sup> Ibid., 8.

There were repeated questions raised regarding the functioning of the SIT and the independence of its members in the media.<sup>466</sup> Two members of the SIT, Shivanand Jha and Geeta Johri were removed from the SIT following allegations of bias. The SIT report arising out of the SLP filed by Ms. Jaffrey was viewed by many as having been tainted by the influence of the state machinery. Mr. Bhatt filed an affidavit to the SC on this issue, informing SC that the SIT had not followed up all the investigation leads it should have on account of the information it received and also accusing some members of leaking information to the alleged accused.

The SC replaced its amicus curiae in the case with another amicus curiae. The new amicus curiae was asked by the SC to examine, analyse and assess the statements of witnesses recorded by SIT and if needed to “interact with” witnesses had previously been examined by the SIT, including the police officers if he thought that was needed. Most importantly, the order of May 5, 2011 gave the amicus curiae an explicit instruction to record his opinion as to whether any person could be charged with any offences on the basis of the material available on record. Thus, the amicus curiae’s role was to be a check on how the SIT functioned.

The amicus curiae filed his report to the Supreme Court in July 2011 amidst media reports<sup>467</sup> that he had taken a different view regarding the reliability of Mr. Bhatt as a witness, and regarding culpability of Mr. Modi and other senior police officers. This was seen as exonerating the Gujarat government of complicity in mass violence, and welcomed by the Chief Minister<sup>468</sup>. The amicus curiae reportedly made the point that the reliability of witnesses such as Mr. Bhatt and others, who deny his presence at the meeting with the CM on January 27 needs to be tested by due legal processes such as cross-examination before adjudication by the trial court rather than the SIT as an investigatory body deciding prematurely that there is no evidence on basis of

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<sup>466</sup>“JSM Accuses Lower Rung SIT Official of Bias”, *Indian Express*, December 17, 2008. Dr. Mukul Sinha alleged that SIT was not carrying out its investigation properly. Teesta Setalvad has also criticized the SIT on various counts, as seen in website url: [www.cjp.online.org](http://www.cjp.online.org).

<sup>467</sup>“Modi needs to be cross examined, says Raju Ramachandran”, *NDTV*, available at <http://www.ndtv.com/article/india/modi-needs-to-be-cross-examined-says-raju-ramachandran-143834>. Also see article, “Book Gujarat cops for neglect during riots: Amicus curiae” *Times of India*, October 23, 2011.

<sup>468</sup> ““God is great,” tweets relieved Modi”, *The Hindu*, September 12, 2011.



their testing and assessment of particular witnesses.<sup>469</sup> In a media interview, the amicus explained what would happen at this point, after his report and the SIT's report have been submitted to the Supreme Court.<sup>470</sup> The SIT can choose to prosecute the accused in the cases it is investigating, or choose not to do so. If it chooses to close a case against an accused, the complainant has a right to object by filing a protest petition. The amicus curiae report may either agree or disagree with the SIT on its assessment of various pieces of evidence. If the amicus disagrees with the SIT report, a complainant could draw support from the view of the amicus. Even if the SIT and the amicus both agree that a matter ought not to proceed further, the complainant still has the right in law to be informed of and to question a closure report.

On September 12, 2011, the SC gave its final order, referring the matter back to the SIT to file its final report with the trial court dealing with the Gulbarg case in Ahmedabad and specifically noting the right of the complainant to be heard if a closure report is filed.<sup>471</sup>

Despite the controversies surrounding the SIT, the SIT enquiry has led to arrest of many accused including a BJP MLA, Ms. Kodnani, for her alleged role in leading and inciting mobs and an inspector of police, KG Erda, in respect of his failure to act during the Gulbarg Massacre. It was a historic moment when the chief minister of Gujarat was interrogated by the SIT for over 12 hours, with regard to the Gulbarg massacre, where the widow of Congress MLA, Mr. Jaffri, has given evidence that the CM not only refused to provide the protection that could have saved many Muslim lives, but also was verbally abusive to the Congress MP<sup>472</sup>.

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<sup>469</sup> “Amicus report lays the ground for charge sheeting Narendra Modi”, *The Hindu*, October 23, 2011.

<sup>470</sup> “The case has gone from no FIR, to being heard in a criminal court” *The Hindu*, September 16, 2011.

<sup>471</sup> See para 9 of the final order of *Zakia Ahsan and another v. State of Gujarat and Others*, arising out of Special Leave Petition, 1088 of 2008 and Criminal Appeal 1765 of 2011, available at the Supreme Court website at <http://courtnic.nic.in/supremecourt/temp/sr%20108808p.txt>.

<sup>472</sup> *Ibid.*, Mr. Modi claimed in his answers to the SIT that he could not remember receiving any phone calls from Jaydeep Patel or from the VHP.

If the media reports on the findings of the SIT are accurate, then this court appointed investigative body has validated, in large measure, the accounts of survivors and civil society groups about government complicity in mass violence<sup>473</sup>. However, it has been severely criticized for failing to institute criminal proceedings against many including top police officers, ministers and the CM, Mr. Modi. The SIT filed its final investigative report before the trial court on Wednesday February 8, 2012 amidst media reports that it has again recommended that there is not sufficient evidence to sustain criminal charges against Mr. Modi<sup>474</sup>. Two judges, also part of the CCT tribunal headed by SC Judge Mr. Krishna Iyer, have questioned the reported SIT stance and claimed that the SIT has neglected the evidence they gave to it regarding what they heard from the Cabinet minister Mr. Pandya, and also claiming that recorded testimony of Mr. Haren Pandya exists.<sup>475</sup> Such audiotape evidence, if it adduced and admitted by the trial court, together with the testimonies of the two judges and Mr. Bhatt has the potential to land CM Mr. Modi in serious trouble. But of course, this could only happen if the trial court, after having considered the report and having heard representations from the complainant, Ms. Jaffrey, decided that there was prima facie sufficient prosecutable evidence against Mr. Modi. It would require a level of courage and independence from the local trial court, which has so far largely been missing. Given the trajectory of criminal legal cases against the powerful, it is likely that Ms. Jaffrey will face rejection at the trial court, and will have to pursue appeals all the way to the Supreme Court.

#### 4. Measures by the Gujarat government

We filed RTI applications on how many government personnel were involved in mass violence and what measures the government had taken against them. However, these applications met with very limited success.

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<sup>473</sup> Ibid.

<sup>474</sup> The SIT report is not in the public domain but has been leaked to large sections of the electronic, print and visual media who unanimously reported that SIT has given clean chit to Mr. Modi.

<sup>475</sup> “2002 Gujarat riots: former Judge says there is audio tape with evidence against Modi,” *NDTV*, February 17, 2011, available at <http://www.ndtv.com/article/india/2002-gujarat-riots-former-judge-speaks-out-against-modi-says-sit-ignored-testimonies-177298?pfrom=home-lateststories>.

We had access to RTI information on the involvement of government officials in Sabarkantha in the riots, and whether the concerned government departments had the information needed to facilitate action against those involved<sup>476</sup>. Nineteen police stations in Sabarkantha responded with names of 49 government officers and their area of work e.g. village panchayats (3 officers), schools (25 officers), railway (1 officer), state road transport driver etc. It is worth noting that nearly 50% of those officials involved in mass violence were teachers. So one can imagine that the education imparted to children in these schools may have severe communal overtones.

There is very little information in the public domain about the steps taken by Gujarat government to hold any senior or junior members of the police or administrative service accountable for the lapses of duty that lead to murder and mayhem. There is perfunctory information on the Riot Cell website<sup>477</sup>, which says that 152 investigating officers or supervisory officers are facing departmental enquiries, and also that departmental enquiries are contemplated against 72 others. We were unable to get any further information on the status of the departmental enquiries and the designation of the officers facing such enquiries. From the information received so far, there were only two FIR's registered against government officers. One of these officials has already been acquitted.

## F. Rescue, relief, rehabilitation

### 1. Failure to rescue

We have already discussed the abysmal failure of police and district authorities in rescuing citizens under attack. The role of other emergency service providers such as fire brigade and medical services also left a lot to be desired. Research<sup>478</sup> regarding

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<sup>476</sup> Authors are grateful to Usmanbhai, coordinator of Justice Unit in Sabarkantha for initiating and following these RTIs and sharing the received information with us.

<sup>477</sup> Such a website was ordered to be set up by the SC by its order of August 17, 2004 in *CrI. MP 3741 of 2004*. This a measure to keep the public informed, in anticipation of the review of 2000 cases.

<sup>478</sup> "Hard Facts" in Concerned Citizens Tribunal, "Crimes Against Humanity", (Mumbai: Citizens for Justice and Peace, 2005), 38, Table 7.3. Total respondents in this survey were 2797. 1892 of these alleged burning of houses, however only about a third, 592 said they were able to call the fire brigade.

the response of fire brigade revealed that in 78.89 % of cases where the fire brigade were called, they failed to come. Only 13.7%<sup>479</sup> of the grievously injured (those who died eventually) received medical assistance and only in 15% of cases was the assistance timely.<sup>480</sup> Figures were better for those injured – 78.71% received medical help, though only 12.3% received help within 1-4 hours of being injured.<sup>481</sup>

## 2. Internal Displacement

Around 2 lakh people<sup>482</sup> were estimated to have been displaced from their homes on account of the large-scale attack on Muslims and their properties. This was not the first bout of mass violence to create a displaced population, but it was the first time that the inactive and ineffective response of the state in rehabilitating the displaced was closely examined and focused upon by activists, official bodies such as the NHRC, Planning Commission, Minorities Commission, large sections of the media and international human rights organizations such as Human Rights Watch and Amnesty. As a result of their efforts, we know that nearly ten years after the mass violence, the problems of people internally displaced are very much a live issue. We examine the contours of this humanitarian situation in two parts.

- a) Internally displaced, Phase 1: Insecurity and Vulnerability in Relief Camps.

Here we examine the crisis and living conditions of the displaced in the immediate aftermath of their forced homelessness between about February 27, 2002 to the end of December, 2002. There is no reliable data available regarding the people who

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Out of 592 people who called the fire brigade, 467 reported that the fire brigade failed to reach the affected place.

<sup>479</sup> “Hard Facts” in Concerned Citizens Tribunal, “Crimes Against Humanity”, (Mumbai: Citizens for Justice and Peace, 2005), 11.

<sup>480</sup> “Hard Facts” in “Concerned Citizens Tribunal, Crimes Against Humanity”, (Mumbai: Citizens for Justice and Peace, 2005), 12. Of a sample of 2397, there were 146 deaths reported by respondents. Of these, only 20 said they received any medical assistance, while 82 said that no medical assistance was available. Of the 20 who received medical assistance, only 3 (15%) said they received medical help within 1 to four hours of the attack.

<sup>481</sup> “Hard Facts”, Concerned Citizens Tribunal, “Crimes Against Humanity”, Vol. 2, (Mumbai: Citizens for Justice and Peace, 2005), 19-20.

<sup>482</sup> Hashmi, Shabnam, “The Uprooted, caught between Denial and Existence: A Document on the State of the Internally Displaced in Gujarat,” (Centre for Social Justice and Anhad, Ahmedabad: 2007), 5.

migrated out of Gujarat, or emigrated from India or those who found safety amongst extended family. So this discussion is based upon numbers and experiences of people who stayed in Gujarat, and had to seek help outside their extended families.

The vast majority of the homeless took shelter in temporary makeshift camps, referred to as relief camps in all the documentation. RTI information,<sup>483</sup> as well as unofficial sources shows that there were a total of 138 camps set up in Gujarat across 10 districts.

#### Number of relief camps per district.

Ahm	Vadodara	Sabar	Anand	Kheda	Dahod	Mehsana	P'mahal	G'nagar	Patan
77	10	6	20	1	9	6	6	2	1

It was estimated that a total of over 113, 697 people<sup>484</sup> were living in these camps. We see that over 50% of total camps were set up in Ahmedabad, this is unsurprising as the intense violence and displacement in Ahmedabad was by far the worst. Around 75,000 people were living in camps in Ahmedabad city alone. It was estimated that 95% of those displaced across Gujarat were Muslim<sup>485</sup>. In the face of displacement of this scale, in March 2002, the Revenue Minister Haren Pandya placed the official number of the relief camps all over Gujarat at ninety-one.<sup>486</sup>

#### (i) Relief Camps in Ahmedabad

In response to our RTI application to Ahmedabad we received a response requesting us to come and inspect the files at the collectors office in Ahmedabad, as there was

<sup>483</sup> The table is produced by combining the RTI responses with the information in the reports. Apart from Ahmedabad, Vadodara and Anand, the RTI application was transferred from the district to various talukas, and in some cases we received a response from one or two talukas, but largely no response was received, or it was nil. The information regarding Dahod comes mainly from "Genocide in Rural Gujarat: The Experience of Dahod District, A report prepared by Forum Against oppression of Women and Aawaaz-E-Niswaan, Bombay (2002) available at <http://www.onlinevolunteers.org/gujarat/reports/rural/rural-gujarat.pdf> last accessed April 3, 2012.

<sup>484</sup> *Communalism Combat*, March - April 2002, 17.

<sup>485</sup> Hashmi, Shabnam, "The Uprooted, caught between Denial and Existence: A Document on the State of the Internally Displaced in Gujarat," (Centre for Social Justice and Anhad, Ahmedabad: 2007), 5.

<sup>486</sup> "A Memorandum to the Government of Gujarat on its Duties", Amnesty International, March 28 2002, available at <http://www.sacw.net/Gujarat2002/amnestysGujaratreport.pdf>.

voluminous data and the PIO was unsure about the exact nature of required information. We spent two days in the collector's office going through the files to identify the information that we thought was relevant in each camp file. We found that we saw that each file had an affidavit which was sworn by the organizers by way of an indemnity bond promising to run the camp in accordance with the rules, and each had a standard annexure providing details of facilities available at camps and names of camp residents, including details of number of men, women and children. Also there was routine correspondence passing between the offices, requesting cash payment, wheat etc. In some files there was evidence of inspection and a report by a "liaison officer", who was an officer appointed by the state to monitor the camps. There were 81 separate files<sup>487</sup> maintained in respect of camps, but four camps were not approved and in respect of five camps, no records on file were made available to us.

There were a total of 77 camps approved in Ahmedabad, of which 41 (amounting to more than 50%) were started on March 3, 2002 and 40 (again, over 50%) were closed by May 31, 2002. A further twenty-nine camps (close to 38%) were closed by July 31, 2002. Only eight camps (amounting to around 10% of the total camps) were functioning between August and December. Of these, 39 camps were run by Muslim administrators, mainly for Muslims and 34 were run by Hindus, mainly for Hindus, but there were two camps where the camp residents were Muslim and Hindu in almost equal numbers.<sup>488</sup> The large number of camps for Hindus is contrary to the information in the public domain<sup>489</sup>. The official records show that the Hindu camps account for almost 50% of the camps, which raises an interesting question as to why such a large number of camps were needed for Hindus, who suffered a small fraction of casualties compared to Muslims. We don't have lists of Hindu/Muslim residents

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<sup>487</sup> "Collector Statement on All Camps", provided on inspection at Collectors Office, March 31, 2010.

<sup>488</sup> We could not have gleaned this information from the list of camps itself. We initially divided the camps into Hindu/Muslim, based mainly on the name of the camp and camp organizers. However, then there was some amount of follow-up and checking details of camps on the ground carried out by Mr. Kishor M Chauhan, coordinator of the Ahmedabad Justice Unit of Nyayagrah, which revealed that we were largely (around 90%) accurate in our identification of Hindu and Muslim camps.

<sup>489</sup> Both Concerned Citizens Tribunal, "Crimes Against Humanity", Vol. 1, (Mumbai: Citizens for Justice and Peace, 2005) and Mander, H., "Fear and Forgiveness: The Aftermath of Massacre" (India: Penguin Books, 2009), section on "Compensation" state that there were a handful of Hindu camps.

to enable us to check the number of residents and their religious identity in each camp.

The response to our RTI applications confirmed that the responsibility for providing immediate shelter and refuge fell on NGOs, mainly religious bodies, as the Gujarat government did not set up any camps<sup>490</sup>.

Our difficulty in accessing information on relief camps is indicative of the lack of government engagement in relief provision. Surprisingly, information about relief after such serious mass violence was not available at the district level. Our RTI applications were transferred to various DDOs, and then to the Taluka Development Officers. We have received responses from almost all of the districts confirming that there were no government camps, and sending details of NGO camps that were set up. A few districts have provided details of facilities at camps.

Below we summarize the main issues that emerge from the official records we accessed as well as the detailed NGO documentation<sup>491</sup> regarding the failures of the state towards the displaced and dispossessed:

- Failure to set up relief camps:

The government's own records inform us that the state did not set up any camps in the face of serious, widespread violence in the state. It has however made available to us via a circular<sup>492</sup> dated April 30, 2002, whereby senior officers were assigned responsibilities to supervise the facilities provided in the Relief Camps to the affected persons. This was likely put in place in the face of enormous

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<sup>490</sup>Mander, H., "Fear and Forgiveness: The Aftermath of Massacre" (India: Penguin Books, 2009) It has been argued that prior to Gujarat, 2002, governments have consistently organised relief camps for people who were internally displaced by the violence, but the Gujarat government was the first government to refuse to set up relief camps after a major communal conflagration.

<sup>491</sup> See Concerned Citizens Tribunal, "Crimes Against Humanity", Vol. 2, (Mumbai: Citizens for Justice and Peace, 2005); PUCL, "Violence in Vadodara: A Report", PUCL and Vadodara and Vadodara Shanti Abhiyan (2002); Amnesty International Report; "We Have No Orders to Save You: State Participation and Complicity in Communal Violence in Gujarat", Human Rights Watch, Vol. 14, No. 3(c), April 2002, and Mander, Harsh, "Fear and Forgiveness: The Aftermath of Massacre" (India: Penguin Books, 2009) particularly the "Relief and Rehabilitation" sections in all, which deal with the conditions in relief camps.

<sup>492</sup> Resolution no. R.H.L./232002/513(8)/S.4, dated April 6, 2002 on file with author.

public pressure to take relief measures by the NHRC, litigation in the courts and various national and international relief organisations).

- Failure to provide essential food

Government assistance to the camp organizers was a daily food ration<sup>493</sup> for enlisted residents of 'recognized' camps, and cash doles of as little as 5 rupees per day<sup>494</sup> for the first two months, which was then increased to seven rupees<sup>495</sup> per day.

However the government only started issuing food rations for the displaced persons around one week after the camps<sup>496</sup> had been set up, and so in the initial period the task of providing food, as well as shelter, clothes and medical treatment to the victims of the violence had been left entirely to local communities or NGOs. This allegation is supported by the information we received from RTI which shows that the circular sanctioning the cash dole per person was only issued on March 6, 2002<sup>497</sup>. It is important to remember that most of the survivors of the mass violence escaped with no personal belongings. They needed some money daily for their minimal personal expenses, which was just not available during their extended residence as internal refugees in the relief camps.

It was also reported that many camps were not receiving any rations or were not receiving them regularly. The government files that we examined in respect of one of the biggest camps in Ahmedabad, Shah Alam, records complaints regarding late payment of rations and inadequate supply of food stock.<sup>498</sup> The

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<sup>493</sup> Ration was a standard amount for each person, consisting of 400 grams flour, 100 grams rice, 50 grams sugar, 50 grams oil, 50 grams milk powder. Circular No. RHL 232002/513/S.4, dated March 5, 2002.

<sup>494</sup> "Rs. 5/- per person per day shall be paid towards the miscellaneous expenses such as vegetables, fuel, condiments etc. to the NGOs, that are running the Relief Camp." Circular No. RHL:232002:513(3)-S.4 dated April 6, 2002.

<sup>495</sup> Circular No. RHL/232002/513(3)/S.4, dated April 30, 2002.

<sup>496</sup> Circular No. RHL 232002/513/S.4 dated March 5, 2002.

<sup>497</sup> Circular No. R.H.L. 232002/513(3)/S.4 dated March 6, 2002.

<sup>498</sup> We found evidence of this in the "Shah-Alam" file, which was obtained from the Collector's Office in Ahmedabad. A letter requested that the "arrears of stock of food be supplied immediately from March 1, 2002 and March 15, 2002, and till date for 10537 persons."



authorities did not respond quickly enough to the increasing population of the camps, thereby causing severe hardship to the camp dwellers. It is reported that there was shortage of food for more than 300 people in the camps of Halol, Kalol and Himmatnagar and there are a number of media reports alleging that the quality of ration was of poor quality and insufficient.<sup>499</sup>

- Failure to provide safe access to potable water.

None of the camps were connected to the public water distribution system of their towns. Some received water supplies, others had to make private arrangements.<sup>500</sup>

- Sanitation facilities were reported to be non-existent or poor.

The facilities that the organizers of the camps could muster for sanitation, bathing and drinking water were painfully inadequate. The Sahmat (Safdar Hashmi Memorial Trust) fact-finding team in March 2002 found only one mobile toilet with four chambers for nearly 9,000 people in the Shah-e-Alam camp. A month later the numbers in the camp had swelled to a high of 12,000, but there were only 18 toilets. Even these became badly clogged as they were rarely cleaned, and emanated a nauseating stench and attracted swarms of flies.<sup>501</sup> There is also evidence of inadequate water supply at this camp for the first twenty-six days. From the file correspondence on the biggest relief camp, Shah Alam, which was set up in Ahmedabad, official records confirmed that there was no toilet facility, and inadequate water supply in the camp for at least the first twenty-six days<sup>502</sup>.

- Failure to provide security in the camps.

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<sup>499</sup> Centre for Social Justice, "Status Report on Rehabilitation of Victims of Communal Violence in Gujarat"(2005: Gujarat): 8, available at: <http://www.centreforsocialjustice.net/images/GPID%20FINAL.pdf>. Also see media reports, *Times of India* March 5, 2002, April 9, 2002 and June 9, 2002 and *Indian Express* March 25, 2002 and May 15 2002.

<sup>500</sup> Centre for Social Justice, "Status Report on Rehabilitation of Victims of Communal Violence in Gujarat"(2005: Gujarat): 9, available at: <http://www.centreforsocialjustice.net/images/GPID%20FINAL.pdf>.

<sup>501</sup> Mander, Harsh, "Fear and Forgiveness: The Aftermath of Massacre" (India: Penguin Books, 2009).

<sup>502</sup> We found evidence of this in the Shah-Alam file obtained from the Collector's Office in Ahmedabad.

Government files we examined on Shah Alam camp indicated that the camp had no security for the first 26 days.

Unofficial reports confirm this, and describe the insecurity faced by camp organizers and those dwelling in them regarding threats of closure. One camp in Dahod was ordered to be closed over a phone-call within hours of the new District Collector taking over. After complaint and protests it was reopened but many in the camp had already left to go back to villages from where they had fled. There are details of attacks on camps in Odhav and Sukhsar reported where the police present failed to provide security.<sup>503</sup>

- Lack of access to essential medical services.

RTI data from Ahmedabad indicates that medical services were provided on a daily basis and five doctors were “honorary”. However, civil society surveys at the time revealed that only a sixth of camps received free medical services<sup>504</sup>, and in many camps were discontinued after a month.<sup>505</sup> The scale of violence – and resulting injuries – make this a serious failure.

- Access to psychological and social services, especially to survivors of sexual violence and to children.

The voluntary leadership managing the camps was almost entirely male, and not sensitive to the special needs of women. In relief camps, except for some non-government efforts, there was little counselling or mental health support for the traumatized women victims of sexual violence. They were left to fester in their memories and inner suffering, sharing occasionally in groups, but mostly engaged in helping their families survive this ordeal.<sup>506</sup>

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<sup>503</sup> Forum Against Oppression of Women and Awaaz-e-Niswaan, "Genocide in Rural Gujarat: the experience of Dahod District", (Bombay: June 2002) 9-10, and Human Rights Watch, "We Have No Orders to Save You" available at <http://www.hrw.org/reports/2002/india/>.

<sup>504</sup> Centre for Social Justice, "Status Report on Rehabilitation of Victims of Communal Violence in Gujarat"(2005: Gujarat), 12, available at <http://www.centreforsocialjustice.net/images/GPID%20FINAL.pdf>.

<sup>505</sup> Ibid.

<sup>506</sup> Mander, Harsh, "Fear and Forgiveness: The Aftermath of Massacre" (India: Penguin Books, 2009).

- Replacing identity documents

The majority of the camp dwellers were unable, while fleeing their homes, to collect official document such as ration cards and proofs of residence. Research amongst the internally displaced showed that government officials were not proactive in issuing the necessary identity documentation to the survivors.<sup>507</sup> This made it impossible for them to access their legal rights and statutory entitlements that required proof of identity.

- Forcible closure of Relief Camps.

RTI information reveals only one camp of 201 residents that closed within 4 weeks of being set up on June 30, 2002. All the camps in Mehsana and Panchmahal closed by June 30, 2002. Most official relief camp files that we examined had the necessary paperwork for opening and closure of camps, in that there were letters on file from the camp owners requesting closure on ground of insufficient residents.

However, this official picture of camps being closed voluntarily is contested by affidavits filed by camp managers in court, alleging that the government forcibly closed camps after three months, claiming the situation had become normal. The “arm-twisting”<sup>508</sup> methods that were used to achieve closure emerge most clearly from the affidavits filed in a Gujarat High Court petition to prevent closure of the camps. Twenty-six<sup>509</sup> affidavits were filed by camp managers, some of which speak of tactics such as non-payments or late payment of the moneys due, and checking the number of people at camp without notifying the organizers at odd times.<sup>510</sup> This was in clear violation of the NHRC’s recommendation that no one should be forced to leave the camps till suitable alternative arrangements had

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<sup>507</sup> Hashmi, Shabnam, “The Uprooted, caught between Denial and Existence: A Document on the State of the Internally Displaced in Gujarat,” (Ahmedabad: Centre for Social Justice and Anhad, 2007), 25, reports that it was only the “mamlatdar” (officer in Collectorate, responsible inter alia, for issuing of ration cards) of Vadali district who acted proactively by coming to the camp on his own initiative and reissuing ration and voter identity cards.

<sup>508</sup> Concerned Citizens Tribunal, “Crimes Against Humanity”, Vol. 3, (Mumbai: Citizens for Justice and Peace, 2005), 30-34, Annexure 4. This is a phrase used by more than one relief manager in the extracts of the affidavits annexed to the High Court petition, and reproduced as annexure CCT report, Vol. 3.

<sup>509</sup> Ibid., 30.

<sup>510</sup> Ibid., 30-31.

been made for them.<sup>511</sup> Most of the displaced received compensation of only Rs. 1250<sup>512</sup> at the time of leaving the camps.

- Discriminatory treatment.

Human rights observers at the time alleged discriminatory treatment of Muslim camps on account of Hindu camps receiving more regular rations, better facilities and more visits from senior government officials.<sup>513</sup>

- Disrupted education and employment.

50% of the children surveyed in camps had to go schools supported by local NGOs as they could not access government schools once they were displaced<sup>514</sup>. 70% of those surveyed in camps were unable to earn a living.<sup>515</sup>

- (ii) Relief camp litigation.

As noted earlier, many relief camp providers and managers issued a petition on April 1, 2002,<sup>516</sup> alleging that the state was failing to provide basic facilities such as water, sanitation and medicine to vulnerable citizens<sup>517</sup>. The proceedings lasted only a few months and were superseded by a PIL issued by CJP covering the same issues. The High Court's order dated April 19, 2002<sup>518</sup> pursuant to this petition demonstrates the hostility that survivors and their supporters faced from all branches of the Gujarat government, even the judiciary, at the time. The High Court lambasted the petitioners, stating that their absence (due to a

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<sup>511</sup> National Human Rights Commission, order of April 1, 2002 and May 30, 2002.

<sup>512</sup> Resolution No. (1) R.H.L.- 232002/513, S.4, dated March 5, 2002 of Revenue Department.

<sup>513</sup> "A Memorandum to the Government of Gujarat on its Duties", Amnesty International, March 28 2002, available at <http://www.sacw.net/Gujarat2002/amnestysGujaratreport.pdf>, refers to the Hindu Camp of Kankaria that was regularly visited by high-profile personalities, including a visit from BJP leader, Mr. Advani.

<sup>514</sup> Centre for Social Justice, "Status Report on Rehabilitation of Victims of Communal Violence in Gujarat"(Gujarat, 2005), 18, available at <http://www.centreforsocialjustice.net/images/GPID%20FINAL.pdf>.

<sup>515</sup> Centre for Social Justice, "Status Report on Rehabilitation of Victims of Communal Violence in Gujarat"(Gujarat, 2005), 17, available at <http://www.centreforsocialjustice.net/images/GPID%20FINAL.pdf>.

<sup>516</sup> *Special Civil Application No. 3773/2002* in Gujarat High Court.

<sup>517</sup> Interestingly, there is no reference or mention of any legal dispute or proceedings in any of the relief camp files.

<sup>518</sup> See Order dated April 19, 2002 in *Special Civil Application No. 3773/2002* in Gujarat High Court.

miscommunication regarding the date, as it transpired at the next hearing) from court on this date showed that there was “no foundation” for the petition and that their absence from court also showed that the petitioners, “who are posing as caretakers on behalf of the inhabitants of the camps” were not interested in pursuing the petition, in which, he said, “reckless allegations” had been made. The judge went on to say that he would not deal with the report submitted by the Gujarat government in the absence of the petitioners but noted that the “exhaustive report” submitted by State contained minute details of services provided to the camp inhabitants. The High Court felt that the government was taking more than “reasonable care” in maintaining the camps and “looking after the inhabitants.”<sup>519</sup>

b) Internal Displacement, Phase 2: Relief colonies

After the Gujarat government pressured camp organisers to close relief camps while they were still needed, families in camps were compelled to return to their original places of residence. When they returned to their homes, many Muslim families found they were not allowed back in to their villages unless they agreed to withdraw legal cases, and agreed to repress themselves socially by, for example, not using loudspeakers for azaan, the Islamic call to prayer.<sup>520</sup> Many Muslims were unable to return to their homes on account of fear, threats and the existence of social and economic boycotts of Muslims in many areas. As a result, many displaced Muslim families migrated to urban areas where they clustered together in “relief colonies”.

On May 7, 2003, the NHRC passed an order noting inadequate rehabilitation by the state. It instructed a local NGO, Centre for Social Justice, to produce a status report based on the United Nations Guiding Principles on the Internally Displaced in April 2004.<sup>521</sup> CSJ found that, in 2004, there were more than 40 relief colonies and over 4000

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<sup>519</sup> Ibid.

<sup>520</sup> For an account of the experience of returning families in villages and towns across Gujarat, see Mander, Harsh, “Fear and Forgiveness: The Aftermath of Massacre” (India: Penguin Books, 2009) and also Hashmi, Shabnam, “The Uprooted, caught between Denial and Existence: A Document on the State of the Internally Displaced in Gujarat,” (Ahmedabad: Centre for Social Justice and Anhad, 2007).

<sup>521</sup> Centre for Social Justice, “Status Report on Rehabilitation of Victims of Communal Violence in Gujarat” (Gujarat, 2005).

families still displaced from their original homes.<sup>522</sup> CSJ conducted another survey in April 2005 and found that the number of colonies had increased to 47, housing 5170 families. In 2007<sup>523</sup> the number of colonies had increased to 69.

The Commissioners of the Supreme Court on the right to food<sup>524</sup> received disturbing information in 2005 about acute food and livelihood distress of people who were internally displaced by the 2002 riots in Gujarat. The Commissioners, mandated by the Supreme Court to monitor food and employment schemes in India, wrote to the government of Gujarat to remedy this. The Gujarat government denied the very existence of the displaced, post the closure of relief camps. It stated that no relief colonies existed in Gujarat, and that those who choose not to go back to their original homes do so on account of better livelihood options where they have decided to settle, not on account of any fear or socio-economic boycotts.<sup>525</sup>

The Supreme Court Commissioners commissioned a survey, and found 81 relief colonies with 4545 families, comprising around 30,000 persons, living in very difficult conditions.<sup>526</sup> All of the 81 colonies surveyed, without exception, were found to have been established by various Muslim organizations, ranging from conservative groups like the Jamiat Islami and Gujarat Sarvajanik, and more centrist religious organizations like Jamiat-ulema Hind, to a heterogeneous range of small, local Muslim organizations, and in at least one case by funders with known proximity to the mafia.<sup>527</sup> The land was mostly purchased from Muslim landowners at commercial rates, therefore it is not surprising that the locations of many of the colonies were commercially unattractive: their poor locations meant lower costs for the organizations that purchased the land to establish the colonies. The colonies were invariably built in the vicinity of other Muslim settlements, because it is only among people of their own faith that the displaced people felt secure.<sup>528</sup>

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<sup>522</sup> Hashmi, Shabnam, "The Uprooted, caught between Denial and Existence: A Document on the State of the Internally Displaced in Gujarat," (Ahmedabad: Centre for Social Justice and Anhad, 2007).

<sup>523</sup> Ibid.

<sup>524</sup> Appointed in *Civil Writ Petition, 196 of 2001*.

<sup>525</sup> Mander, Harsh "Inside Relief Colonies in Gujarat: Surviving State Hostility and Denial", *Economic and Political Weekly*, Vol. 41, No. 51 (December 23 – 29, 2006).

<sup>526</sup> Ibid.

<sup>527</sup> Ibid.

<sup>528</sup> Ibid.

The findings of this research were conveyed to the Supreme Court through a letter from the Commissioners in March 2007. In this letter the Commissioners recommended that contempt of court notices be issued to the Chief Secretary and other officials of the government of Gujarat, for misrepresenting facts and furnishing incomplete and inaccurate information to the Commissioners appointed by the Supreme Court. In response to this letter the government of Gujarat filed an affidavit in the Supreme Court in August 2007 apologizing for the wrong information. The Commissioners of the Supreme Court then gave detailed instructions to the state government to provide a range of services to the internally displaced persons.

The National Commission of Minorities also sent a fact-finding team to Gujarat in August 2006.<sup>529</sup> The team also found that the Gujarat state was still claiming that people were staying voluntarily in colonies and denying any insecurity or fear as being reasons why they could not return and denying basic facilities to the people living in the camps.<sup>530</sup> It concluded that the government was not fulfilling its basic constitutional responsibilities and had failed to provide a safe atmosphere to facilitate the return of displaced to their homes, even four years after the violence.<sup>531</sup>

### 3. **Monetary Compensation**

Our RTI applications on compensation were transferred between various departments. We eventually received a response from the Department of Revenue Department, which provided us with a bundle of circulars in Gujarati on compensation relating to the mass violence of 2002 on death, injury, loss and damage to residential property and losses to commercial property and relief camps. We did not receive any information on compensation for sexual violence or religious desecration. Below, we discuss what we learned from official and unofficial records.

### 4. **Compensation for Death**

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<sup>529</sup> Hashmi, Shabnam, "The Uprooted, caught between Denial and Existence: A Document on the State of the Internally Displaced in Gujarat," (Ahmedabad: Centre for Social Justice and Anhad, 2007), 7- 8. A team from the National Commission for Minorities visited 17 colonies following a complaint filed to the commission in August 2006.

<sup>530</sup> Ibid.

<sup>531</sup> Ibid.

The Gujarat government had initially fixed higher compensation rates for Hindus killed in the Godhra incident,<sup>532</sup> although it was later forced to equalise the amount<sup>533</sup> to Rs.1.5 lakhs<sup>534</sup>.

The state government responded immediately to the loss of Hindu lives at Godhra and announced on the very day of the Godhra incident a compensation of Rs.2 lakh to families of those killed. The Government Resolution ("GR") dated February 28, 2002, well before the investigation into the matter, speaks of "assassination" of karsevaks (markedly different from the language used in official records regarding deaths of Muslims, "as a reaction to Godhra").

The compensation for death resulting from violence in all other incidents, which were overwhelmingly Muslim lives, was initially fixed at Rs.1 lakh – 50% less than the compensation for those killed in the Godhra incident. It appeared that, to the government, Muslim lives were worth half as much as Hindu ones. Of course, there was a huge outcry against this outrageous step, and the Gujarat government had to backtrack and it made compensation for both Hindus and Muslims who were killed in 2002 incidents of violence, Rs.1.5 lakh. However, as the NHRC noted in one of its orders,<sup>535</sup> the reason the Gujarat government gave for this backtracking was not to treat everyone who had lost their lives equally, regardless of religion, but the fact that Hindu karsevaks had written to the government accepting reduced compensation. Interestingly, the Gujarat government did not give us details of the Rs.2 lakh circular it originally announced in favor of Hindus. It appears that this circular has been deleted from official records.

The timing of the government's response was also point to discriminatory behaviour. It announced relief for families of those killed on the same day as the Godhra

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<sup>532</sup> This fact is confirmed by the National Human Rights Commission, 2002- 2003 Annual Report, available at <http://nhrc.nic.in/Documents/AR/AR02-03ENG.pdf>, as well as in the "Crime Against Humanity: Concerned Citizen Tribunal Report", Vol. 1, (Citizens for Justice and Peace, Mumbai: 2002). However, no circular was provided to confirm this.

<sup>533</sup> Resolution no. RHL/ 232002/513-S.4, dated February 28, 2002 received by letter dated April 6, 2010 from the Revenue Department, Gujarat.

<sup>534</sup> Resolution no. RHL/ 232002/ 513(2)- S.R, dated March 4, 2002.

<sup>535</sup> NHRC recommendations dated April 1, 2002, National Human Rights Commission Report on Gujarat, (New Delhi: March - May, 2002), para 20 (xii), available at <http://www.cjponline.org/gujarat/Trials/statecomp/pdf%20files/pdfs/NHRC%20Report%20%20July%202002.pdf>.



incident, but took 3-4 days to respond to the killing of hundreds of Muslims all over Gujarat.<sup>536</sup>

Compensation for families of the dead was later supplemented by Rs.3.5 lakh compensation from the Central Government in 2006, after the UPA coalition came to power at the Centre.<sup>537</sup>

The main problem that survivors of those killed faced in applying for compensation was the requirement of a death certificate. Many people who died could not be traced or identified, mainly because of the brutal methods used in killing and disposing of the remains. Under the law, a person can be presumed to be dead if they are shown to have disappeared for seven years. This meant that heirs of missing persons could not make claims till 2009. Also this compensation is presently only available to legal heirs, not other members of the missing person's family.

The government claims that it has paid Rs.5 lakh to families of 1166 people, out of a total of 1169 people on the official list of those killed, i.e. only 3 families remain uncompensated.<sup>538</sup> Of course, this does not account for the families of the over 1000 more people who civil society groups have estimated were killed in 2002.

## 5. Compensation for Injury

There is evidence of discrimination between Hindus and Muslims by the Gujarat government in both the speed of response as well as the quantum of compensation for injury. It announced compensation for injuries for Godhra victims by a circular dated February 28, 2002, which provided for compensation of Rs. 1000 to Rs. 5000 for temporary disability and Rs. 5000 to Rs. 50,000 for permanent disability.

Injury compensation<sup>539</sup> for all other victims of mass violence was dated March 4, 2002 and was at a lesser rate.

- In cases of 10 % disability, Rs. 2,000/-.

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<sup>536</sup> The massacres described earlier and the majority of mass deaths of Muslims took place on February 28, 2002 and March 1, 2002.

<sup>537</sup> Resolution no. RHL/102007/2477S.4 dated September 24, 2007.

<sup>538</sup> See SCA (Special Civil Application) 14664 of 2008, dated September 7, 2011.

<sup>539</sup> Resolution no. RHL: 232002/ 513(2) - S.R, dated March 4, 2002.

- In cases of more than 10 % and up to 30 % disability, Rs. 3,000/-.
- In case of more than 30 % and up to 40 % disability, Rs. 5,000/-
- In cases of more than 40 % disability, Rs. 10,000/- was to be paid as immediate assistance, and the remainder was to be paid after obtaining the certificate of permanent disability.

Whilst the maximum in both cases was Rs. 50,000 for permanent disability, the amount for lesser injuries is less and harder to obtain as per this circular. This circular was changed by another dated April 30, 2002,<sup>540</sup> which was applicable to all persons injured.

- Injury compensation was increased to Rs. 1.25 lakh in 2009.

The main problems here have been getting the evidence to prove the injury and the discretionary nature of decision-making by the administering authorities and also the administrative problems encountered by amendments to the circular.<sup>541</sup>

The State claimed in SCA 14664 of 2008 that it had made payments in 2513 of 2548 cases, (amounting to Rs. 31,84 crores), further payments of Rs. 15.6 lakhs in 13 cases, and only had 22 cases left to make payments on in its identified list of eligible victims.<sup>542</sup>

## 6. RTI on women victims and sexual offences

We asked for information on compensation and rehabilitation measures tailored to victims of sexual violence, as well as measures tailored towards women. We were informed that there were no relevant norms, circulars or guidelines, and the Gujarat government had not offered any compensation of this nature.<sup>543</sup>

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<sup>540</sup> Resolution no. RHL: 232002/ 513(2) - S.4 dated April 30, 2002. This circular provided that

- In case the disability is 10 % disability, Rs. 5000/- should be paid instead of the old standard of assistance of Rs. 2,000.
- In case the disability is more than 10 % to 30 %, Rs. 15,000/- should be paid instead of the old standard of assistance of Rs. 3,000/-.
- In case the disability is more than 30 % to 40 %, Rs. 25,000/- should be paid instead of the old standard of assistance of Rs. 5,000/-.

In case the disability is more than 40 %, the immediate assistance was Rs. 10,000/- and on obtaining the certificate of permanent disability, Rs. 40,000/- and thus, in all Rs. 50,000/- was the limit for assistance. The said standard continues till date.

<sup>541</sup> Information sharing and Training meeting between CJS and NG on 9.10.10

<sup>542</sup> Special Civil Application, 14664 of 2008, dated September 7, 2011.

<sup>543</sup> RTI response from PIO Revenue Department, dated April 6, 2010.

The above responses are troubling because, despite widespread and brutal sexual violence in 2002, the Gujarat government saw no need to provide a specific circular and compensation to meet the needs of survivors affected by sexual violence. Chronic neglect of sexual violence comes across in the High Court's refusal to consider this issue in response to a writ petition<sup>544</sup> on behalf of the survivors.<sup>545</sup>

## 7. Residential Property and Goods Loss

The NHRC report of 2003-2004 indicated that the amount of compensation for property loss was, in many cases, grossly inadequate and the attitude of the state government towards tackling relief and rehabilitation "indifferent".<sup>546</sup>

The NHRC in its annual report of 2003-2004 recorded that:<sup>547</sup>

"... whilst the maximum limit of compensation fixed by the State Government was Rs. 50,000<sup>548</sup>, the average compensation being paid for a fully damaged house was only Rs. 6678.28 per house in rural areas and Rs. 8554.58 per house in urban areas. As per the report of the police agency, the total damage to properties (including houses, business establishments, vehicles etc.) was to the tune of Rs. 687.34 crore, whereas the State Government had distributed only Rs. 56.37 crore to the affected persons, which works out to just about 9 per cent of the loss."

The government refused to follow the NHRC's suggestion to set up a grievance redressal unit to deal with the numerous complaints, on the grounds that that the matter was under judicial consideration on account of pending litigation. The NHRC noted that the mere fact of a petition being filed before the High Court was not a sufficient ground for not attending to the grievances of affected citizens<sup>549</sup>.

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<sup>544</sup>SCA application 14664 of 2008, dated September 7, 2011.

<sup>545</sup>Ibid.

<sup>546</sup>National Human Rights Commission, Annual Report: 2003-2004, 19-20, paragraphs 3.21-3.24, available at <http://nhrc.nic.in/Documents/AR/AR02-03ENG.pdf>.

<sup>547</sup>National Human Rights Commission, Annual Report: 2003-2004, 20, para 3.24, available at <http://nhrc.nic.in/Documents/AR/AR02-03ENG.pdf>.

<sup>548</sup>This is confirmed by the circulars we received from RTI, Resolution No. R.H.L. 232002-513(5)-S.4, dated March 20, 2002 of Revenue Department.

<sup>549</sup>National Human Rights Commission, "Annual Report: 2003-2004", 20, paragraphs 3.23, 3.24, available at <http://nhrc.nic.in/Documents/AR/AR02-03ENG.pdf>.

The process of claiming compensation was lengthy, complex and unpredictable and most inaccessible for those who were most needy, i.e. the illiterate and destitute. Many people were unable to claim because of the requirement to produce various documents such as FIRs, panchnamas and the requirement of a "survey report". Many could not because their houses had not been surveyed. Even where there was both a survey report and a panchnama stating the damage, people received a small proportion of the maximum damage.

The amount of residential compensation was increased by a factor of ten in 2009, so that victims were eligible to receive nine times the amount they had received previously.<sup>550</sup> However, only those who had already received compensation for residential damage could apply for enhanced compensation. Claimants who had most likely been left out after the first compensation circular would have been those who were poor and less educated. So the pre-condition for enhanced compensation seems to punish the neediest, rather than trying to reach all those who are eligible.

According to an affidavit filed by the Gujarat government in March 2011, it had paid out Rs. 289.10 crores to 29,107 claimants and had a further Rs. 3 crores to pay to 360 claimants. By August 5, 2011, it claimed that Rs.126.83 lakhs had been paid to 293 claimants, leaving only 67 unpaid claims.

## **8. Compensation for commercial loss**

Compensation for commercial loss was initially fixed at a very low level of up to a maximum of Rs 10,000. The payment was subject to proper supporting evidence regarding earning assets / instrument. However, there was a provision to allow a payment of 5000/- on the basis of the affidavit / indemnity bond of the affected person, where no proof of the earning asset was available.<sup>551</sup> The Central Government increased this amount ten times - to a maximum of Rs. 100,000 - on July 24, 2007<sup>552</sup>. However, as with residential property loss, only those who claimed and received compensation for commercial loss the first time round in 2002 were eligible

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<sup>550</sup> Letter dated April 27, 2007, Human Resources Division, Ministry of Home Affairs.

<sup>551</sup> Resolution no. R.H.L. 232002/ 513(4)/ S.4, dated March 11, 2002.

<sup>552</sup> Letter dated April 27, 2007, Human Resources Division, Ministry of Home Affairs.

to claim what was now nine times the amount that they had previously received. Many businesses chose to opt for a loan, which was the alternative option open to claimants in 2002. Many of these never actually received the loan but were consequently ineligible for increased compensation as they had not received anything earlier.

The final order regarding compensation for commercial loss recorded that on March 17 2011, there were a total of 19,373 identified cases of uninsured commercial loss and the government had paid out Rs. 83.68 crores, and had Rs. 2 crores left to pay to a further 355 claimants. The government had paid a further Rs. 174.44 lakhs in 282 cases by August 5 2011, leaving only 72 unpaid cases and unpaid compensation amounting to Rs. 25.12 lakhs.

#### 9. **Desecration of Religious Places**

In 2002, symbols of Muslim identity were attacked, damaged and destroyed all over Gujarat. Under pressure from the NHRC, the Gujarat government initially conceded that it should repair destroyed religious structures, but has refused to do so in the years since 2002.

The NHRC in its order of April 1, 2002 noted that the Gujarat government had in principle agreed that the damage to religious buildings should be repaired. A year later, the NHRC noted the state's non-compliance regarding this in its report of 2002-2003. In 2003, the NHRC tried to pursue this further, but the Gujarat government refused to indicate whether it was going to repair destroyed religious structures because the matter was "sub judice", pointing out that the Islamic Relief Committee of Gujarat (IRCG) had issued a petition<sup>553</sup> demanding that the Gujarat government implement the NHRC's recommendation and either repair religious buildings or give compensation in lieu of rebuilding and repair. The NHRC noted, however, that a writ petition did not constrain the government from repairing and rebuilding property damaged during mass violence. The NHRC Chair, retired Supreme Court

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<sup>553</sup> Special Civil Application, 3023 of 2003.

Chief Justice Verma, wrote a letter<sup>554</sup> to the PM, notifying him of the state government's non-cooperation and urging the Centre to step in.

The Gujarat government dragged its feet on the litigation<sup>555</sup> initiated by IRCG for many years, until the Chief Justice of High Court of Gujarat pulled it up, in March 2010. The Advocate General argued that the State Government could not make any commitments to the court as rebuilding and repair was "a policy matter." The Chief Justice asked the government to "sit together, keeping all the grievances of the past aside, and amicably solve the issue" and to "move forward" keeping the people and their sentiments in mind...."<sup>556</sup>

The government did not shift its position, and reiterated before the Court that it would not pay anything as it had a firm policy of no compensation for religious buildings - it had, government counsel claimed, not paid any compensation for damage to religious structures caused by the 2001 earthquake, or by the terrorist attack on Akshardham temple in 2002.<sup>557</sup> Counsel for IRCG pointed out in turn that the government had failed to protect the fundamental right to religious identity in 2002, and therefore failure to repair or rebuild religious structures violated Articles 14, 19 and 21 of the Constitution.

The High Court asked both the state and Central governments whether they had received the NHRC's report on this issue, whether this report had been placed before Parliament and the State Assembly and what action, if any, they had taken in response to the report.<sup>558</sup> The Central Government confirmed that the NHRC's report

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<sup>554</sup> National Human Rights Commission, "Annual Report: 2003-2004", Annexure 1, available at <http://nhrc.nic.in/Documents/AR/AR02-03ENG.pdf>.

<sup>555</sup> The matter was listed more than 41 times by 2010 without any real progress.

<sup>556</sup> Dasgupta, Manas, "Provide the healing touch, court asks Gujarat", *The Hindu*, March 24, 2010 available at <http://www.thehindu.com/news/national/article285540.ece>.

<sup>557</sup> "Gujarat not to aid rebuilding riot-damaged religious buildings", *Legal India*, January 25, 2011 available at <http://www.legalindia.in/gujarat-not-to-aid-rebuilding-riot-damaged-religious-buildings>. Also see "Gujarat government to consider NHRC's report on religious places", *Daily News and Analysis*, December 23, 2011, available at [http://www.dnaindia.com/india/report\\_gujarat-government-to-consider-nhrCs-report-on-religious-places\\_1629318](http://www.dnaindia.com/india/report_gujarat-government-to-consider-nhrCs-report-on-religious-places_1629318).

<sup>558</sup> Soni, Nikunj, "Damage to religious structures: Gujarat government, centre asked to reply", *Daily News and Analysis*, March 22, 2011, available at [http://www.dnaindia.com/india/report\\_damage-to-religious-structures-gujarat-government-centre-asked-to-reply\\_1522827](http://www.dnaindia.com/india/report_damage-to-religious-structures-gujarat-government-centre-asked-to-reply_1522827). This was confirmed by the Gujarat High court order dated March 21, 2011, in relation to *SCA 3023/03*.

was put before Parliament on December 21, 2004, and that there is an action taken report (“ATR”) on this issue, which it has to file before the court.<sup>559</sup> Media reports<sup>560</sup> indicate that the Gujarat government has filed an affidavit which denies receipt of the NHRC report of 2002-2003 until 2011, and has informed the court that it intends to table the NHRC report at the next Assembly session in February-March 2012. On February 8, 2012, the High Court delivered a landmark judgment rejecting the state’s contention that its responsibility to compensate was limited to places of residence and places of business<sup>561</sup>.

The acting Chief Justice of Gujarat, Bhasker Bhattacharya and Justice Pardiwala held that the religious places had been destroyed on account of “negligence”, and the policy adapted by the state not to compensate was violative of articles 14, 25 and 26 of the Indian Constitution<sup>562</sup>. It also held that the state had violated section 20 of the Protection of Human Rights Act, 1993 by not putting the annual report of NHRC before the legislative assembly, despite receiving it in 2005<sup>563</sup>. The court also ordered the state government to give compensation for restoration of the buildings and set out a detailed mechanism for implementation of its order within six months. It appointed the Principal District Judges as learned Special officers of the affected districts for deciding the amount of compensation within six months of receiving the claim from applicants.<sup>564</sup>

In this case we note once more the Gujarat government’s delay, inaction, refusal to acknowledge responsibility for harm suffered by survivors of mass violence, even in the face of scrutiny by the NHRC and the High Court.

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<sup>559</sup> High Court of Gujarat order, dated August 8, 2011 *SCA 3023/03*.

<sup>560</sup> “Gujarat government to consider NHRC’s report on religious places”, *Daily News and Analysis*, December 23, 2011, available at [http://www.dnaindia.com/india/report\\_gujarat-government-to-consider-nhrCs-report-on-religious-places\\_1629318](http://www.dnaindia.com/india/report_gujarat-government-to-consider-nhrCs-report-on-religious-places_1629318). This information could not be cross-checked with further orders made by the High Court of Gujarat as no orders after August 8, 2011 have been uploaded on the High Court website.

<sup>561</sup> High Court of Gujarat, Special Civil Application 3023 of 2003, dated February 8, 2012, para. 55, accessed from the High Court of Gujarat website.

<sup>562</sup> High Court of Gujarat, Special Civil Application 3023 of 2003, dated February 8, 2012, para. 56, accessed from the High Court of Gujarat website.

<sup>563</sup> High Court of Gujarat, Special Civil Application 3023 of 2003, dated February 8, 2012, para. 57, accessed from the High Court of Gujarat website.

<sup>564</sup> High Court of Gujarat, Special Civil Application 3023 of 2003, dated February 8, 2012, paras. 60-62, accessed from the High Court of Gujarat website.

## 10. Other rehabilitative measures

Survivors of the 2002 mass violence faced discriminatory rates of compensation, strikingly low rates of compensation for personal injury and property damage, and bureaucratic barriers to accessing compensation. They face continuing displacement from their homes, and continuing loss of livelihood.

Survivors of 2002 have tried turning to the Gujarat High Court to counter these long-term financial effects of mass violence based on proposals by the Central government. In a writ petition, Special Civil Appeal No. 14664 of 2008, they sought compassionate appointment in the government of the children of those killed in mass violence, as suggested by the Central Government in a letter to the Gujarat government dated May 14, 2007. The letter proposes:

- Family members of riot deceased be given preference in recruitment in paramilitary forces, state police forces, public sector undertakings and other state and Central government departments.
- Special recruitment drives to accommodate eligible members from riot-affected families.
- Allow those who lost their jobs to rejoin their old jobs.
- To provide pensionary benefits to those who had left their jobs due to riots, and subsequently crossed the retirement age, by relaxing normal rules to the extent possible<sup>565</sup>.

The High Court held that grant of compassionate appointment was a matter of government policy and that it would not pass any specific order, in light of the detailed affidavit filed by the state of Gujarat categorically expressing its inability to accept the suggestion of the Government of India dated May 14, 2007.

The Gujarat government made the same argument it had made in relation to repairing religious structures damaged during mass violence – that compensation was a “policy matter”. The High Court was too easily persuaded by this imprecise and blanket argument. Any government’s policies are intertwined with the laws passed by the Central and state legislatures.

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<sup>565</sup> Information provided by Centre for Social Justice, regarding *Special Criminal Application 1466 of 2008* filed by them in the High Court of Gujarat.



Policymaking is bounded and guided by statutory and Constitutional obligations. The authority of the courts to assess and review the quantum of compensation for human rights violations, and in tort, is well established. So, while it is for the government to work out the details of a compensation package, it is the duty of the Court to assess whether compensation is fair, and to hold the government to established standards of just compensation for serious human rights violations.

#### G. Summing up

In this episode of mass violence, there is undeniable evidence of state complicity, which has been documented in detail by official bodies, civil society groups and survivors themselves. It is also the episode that has seen the most active and sustained intervention by victims and NGOs (at the local, national and international levels). It has been the most litigated upon episode, with some early and effective intervention by the NHRC and the Supreme Court.

While the high-profile SIT trials have garnered headlines, we still know very little about whether and to what extent the Gujarat government has examined allegations against the hundreds of government officials and political functionaries who were alleged to have acted negligently and in gross dereliction of their duties. While disciplinary action remains pending against vast majority of the officials who failed in their duties, those who fulfilled their official duties during the 2002 mass violence, and resisted political pressure were “unofficially” punished, demoted, transferred and harassed. Two such officials, Sanjeev Bhatt and Rahul Sharma, are presently subject to criminal proceedings, initiated, they claim, on instructions from the uppermost echelons of the Gujarat Government.

This episode of mass violence demonstrates the limitations of the present systems that are in place, to secure accountability from individuals situated in positions of power within the administrative and political hierarchy. The context of mass violence in Gujarat alerts us to the need to seek accountability from institutions responsible for upholding human rights. The NHRC was one institution that intervened with urgency and insight into the ground realities. It can be said that it was accountable and carried out its constitutional role by persistently

communicating and engaging in dialogues with a recalcitrant state to secure criminal justice and prevent human right violations of the displaced. The Gujarat state however failed to cooperate and implement the advice, orders and recommendations of the NHRC, which it is mandated to do under the Human Rights Act, and in line with its constitutional duties. Examples of its non-cooperation, delay and evasive tactics include:

- Delay in response to the urgent notice issued by NHRC, coupled with its “perfunctory” response.
- Failure to furnish important information regarding names of political functionaries involved in violence.
- Refusal to transfer key cases to CBI.
- Failure to take appropriate measures to protect witnesses to ensure fair trials.
- Failure to implement NHRC recommendations regarding non-voluntary closure of relief camps, setting up grievance procedures regarding compensation, repair and renovation of damaged/destroyed religious buildings and adequate rehabilitation of the displaced.

This episode alerts us to the difficulties of securing accountability from the police. The facts and figures here demand that we develop and think about changing the institutional culture of the police, which has clearly not imbibed the constitutional values of protecting citizens regardless of their religion.

Similarly, the failure to impose timely curfews and maintain public order and thereafter to provide adequate protection and shelter to the displaced across most of the sixteen affected districts denotes a systemic failure at the administrative level. A handful of sarpanch or panchayat members directly indicted by survivors have been arrested, but the vast majority has not been held accountable for their inaction and/or complicity.

On the whole, the judicial response at the trial or high court level did not inspire confidence in the integrity of the judicial process in the immediate aftermath of 2002. The SC intervened effectively in the “Best Bakery” and “Bilkis Bano” cases, and managed to secure convictions against some of the accused that had either been

acquitted or not tried at all by the lower court. But again, the problem was not limited to one or two cases, which could be addressed by reprimanding the concerned judges or rectifying their errors. The closure of 2000 cases without any evidence of proper application of mind by the lower judiciary amounted to “rubber-stamping”<sup>566</sup> rather than checking and guarding against any abuse of process by the investigation agency, as per the constitutional duty of a judge. The failure to close hundreds of cases without notifying the complainants as required clearly by law denotes a systemic, institutional failure that requires a rethinking and reformulation of the accountability mechanisms in place for an independent and competent judiciary.

The SC acted in line with its constitutional role delivering a fierce judgment in *Best Bakery* upholding the idea of a secular India founded on the rule of law. However, the facts that the NHRC and various survivors have thereafter sought its intervention in 2002 cases points to a gap between the constitutional ideals enunciated by the SC and the ground reality of Gujarati courts. Also, it is far from clear why the SC thought it appropriate to transfer just two of the massacre cases to CBI and outside Gujarat, the SIT cases have been riddled with controversies with many doubting the independent functioning of the SIT. Any policies and laws to combat communal violence will tend to focus on the police and district administration. It is imperative that these efforts also try to address the thorny issue of judicial accountability in episodes of mass violence.

There has been steady advocacy to compel the government to deliver basic compensation and rehabilitation. The first wave of litigation and public campaigns were focused around providing adequate facilities (clean water supply, sanitation, food and medical facilities) in the relief colonies which were mainly run by NGOs, trust and religious bodies, and preventing their forceful closure. Then, as the camps closed and many people still had nowhere to go, various relief colonies were set up and various NGOs and activists took up the issue of the internally displaced people within Gujarat. This campaign was backed by the intervention of various bodies such as the Planning Commission, the Commission for Minorities and the Supreme Court Food Commissioners, and eventually led to the state recognizing the existence

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<sup>566</sup> Mander, Harsh, “Fear and Forgiveness: The Aftermath of Massacre” (India: Penguin Books, 2009).

of these people, that it had denied till early 2008. The next phase of group litigation focused on compelling the government to implement compensation and restoration packages already announced by the centre and also to compel the state to provide compensation or to undertake renovation of the religious buildings damaged and destroyed.

The fight to formally prosecute the CM and senior police officers is still very much alive with Mr. Zadephia confirming he was not responsible for internal security and did not take the controversial decision to bring dead bodies of karsevaks back to Ahmedabad. The Gulbarg trial is far from over. The High Court's recent judgment on religious compensation is a historic one confirming that the state had indeed violated the constitution. The Gujarat episode is remarkable both for the level of pre-planning and complicity of the state in mass violence and the vigorous civil society and media activism to uncover the truth and hold the highest senior functionaries accountable.

## VII. Access to criminal justice after mass violence<sup>567</sup>

### A. Introduction

This study tries to understand, through official records, the performance of the criminal justice system in response to an episode of mass violence. To do so, we sought information on the entire chain of official proceedings from when an individual first complains to the police, to the result of criminal appeals in court. In this chapter, we consider what we learned across the four episodes of mass violence that we examined.

The quality and quantity of data available for each episode varied greatly depending on official records already in public and the State's response to our RTI applications. We had access to far more information on Delhi 1984 and Gujarat 2002 than on mass violence in Bhagalpur and Nellie. We also had greater access to information on some parts of the criminal justice process as compared to others. Our analysis below reflects this uneven access. However, despite gaps in the records we extracted, some themes emerge very clearly across all four episodes. It is clear that the police, at a very early stage, deflect, ignore and misreport victims' complaints in ways that undermine, often fatally, any proceedings that follow. We discuss what we learnt in more detail below.

### B. Complaints and FIRs

#### 1. Complaints

We attempted to secure copies of citizens' complaints in the aftermath of mass violence, as well as copies of the FIRs registered as a result of these complaints. We

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<sup>567</sup> Researched and written by Prita Jha and Surabhi Chopra

had hoped to compare the two records, and trace whether the substance and details of complaints were accurately reflected in FIRs. However, we found across the four episodes studied that the police did not retain copies of complaints. Police stations did not have information on number of complaints received in Nellie in 1983, Delhi in 1984 and Bhagalpur in 1989. We got some information on complaints from police stations across different districts in Gujarat. Out of a small sample of 952 complaints, 937 complaints were received in person, 13 by fax, 1 by registered post and 1 by phone. This information suggests that many people sought help in person from the police, despite the risks involved in travelling at the time. It also suggests that the police may track complaints, distinct from FIRs, when complainants go in person the police station but they do not reliably track complaints received over the phone.

Failure to track complaints and quick destruction of complaints that are officially tracked can have serious implications for a survivor of violence. If she later challenges the accuracy or completeness of the FIR, her initial account – which would back up the challenge if it is accurately recorded - no longer survives. If the police refuse to register an FIR, evidence that a complaint was made soon after an alleged offence helps to establish that delay in registering the case was not the fault of the complainant.

## 2. FIRs

### *(a) Non-registration of FIRs*

Reports by the media and human rights groups record that survivors of mass violence have often faced refusal by the police to register cases. Such refusal does not flow from the provisions of the law. Section 154 of the CrPC 1973 governs registration of FIRs, and requires that “*every information* relating to the commission of a cognizable offence [emphasis added]” be written down, the resulting FIR be read out to the informant, if needed, and that a copy be given “forthwith” to the informant. The Supreme Court has repeatedly maintained that the duty to register is

a mandatory one – where a citizen’s complaint discloses the commission of a cognizable offence, the police have no discretion on whether to register a case or not.

In *Hem Raj v State of Punjab*<sup>568</sup> the SC held as follows:

“....The law is very clear and well settled that a report which discloses the commission of a cognizable offence must be treated as the First Information Report under Section [154](#) Cr. P.C. It does not matter whether the person lodging the report had witnessed the commission of the offence or not, nor is it necessary that all details should be mentioned in the report about, the manner of occurrence, the participants in the crime, the time and place of occurrence etc. The requirement of Section [154](#) Cr. P.C. is only this that the report must disclose the commission of a cognizable offence and that is sufficient to set the investigating machinery into action.”

Clearly, the law on registering a criminal case is sufficient to allow anyone, not necessarily an eye-witness or victim, to register a complaint with the police. But our research revealed that across all episodes of mass violence police repeatedly failed to register cases. This was recorded by commissions of inquiry as well as media and NGO accounts of survivors’ experiences after mass violence.

By failing to register FIRs, the police silence complainants. Official records cannot reflect what percentage of crimes committed were not registered and were not pursued following failure to register. Any official surveys of crimes such as that carried out by the National Bureau of Criminal Records will not capture these cases because they were never registered as crimes. It would take research amongst communities that experienced mass violence to capture the number of victims who were deterred by police refusal to register an offence and estimate how many alleged offences were never investigated on account of police refusal to act in conformity with the law. All too often it is the most vulnerable survivors of violence, those who

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<sup>568</sup> *Hem Raj v State of Punjab* AIR 2003 SC 4259 para 21

are poor and illiterate, who are likely to face resistance by the police when they attempt to register crimes.

A further issue for future research is how the police deal with officials who refuse to register a reported crime. Is non-registration of an offence considered a serious matter internally? What sort of record keeping might make refusal to register an FIR easier to trace? What measures – such as citizen’s inspection committees – might be used to detect refusal to register FIRs and support victims in their dealings with the police?

Even where an FIR is registered, it might be incomplete. The police may entirely omit certain facts, so crimes based on those facts will not be charged. Most of the FIRs we examined across all four episodes listed appropriate sections of the Indian Penal Code in relation to the offences disclosed by the facts *recorded* in the FIR. However, FIRs in some cases in Gujarat were discovered to have left out important facts entirely. In the Bilkis Bano case for example, the police did not initially record Ms. Bano’s description of being sexually assaulted. This case received considerable national attention, and this omission came to light. Most FIRs that omit significant facts will not be detected as being flawed.

#### *(b) Defects in FIRs*

Clearly, there are many “missing” FIRs – FIRs that should have been recorded but were not. The FIRs that are recorded after mass violence reveal flaws that considerably undermine their role as the starting point of criminal investigation and prosecution. As discussed above, the FIR is very important because it is the earliest report made to the police and is supposed to initiate police investigation which may lead to the arrest and trial of the alleged offenders.

We secured copies of FIRs registered after all four episodes of mass violence that we studied.



- 668 FIRs were registered after the Nellie massacre, of which we secured 525 FIRs. These appear to be the FIRs that have survived.
- We were informed that 458 FIRs were registered after the 1984 mass violence, of which we secured 425 FIRs.
- 595 FIRs were registered in the months following mass violence in Bhagalpur in 1989. The Bihar government disclosed only a small sample of X FIRs in response to our RTI applications.
- 4252 FIRs were registered after the 2002 mass violence in Gujarat. We secured a sample of these from across different districts, and analysed 400 FIRs in depth.

Before we turn to our analysis of the FIRs we received, we want to consider the number of FIRs registered after the four episodes we studied, as a proportion of the officially acknowledged death toll. Of course, FIRs registered after mass violence relate not only to the crime of murder but to a range of crimes against persons and property. However, the death toll indicates the intensity of violence more generally, and is very likely to correlate with other types of violent crimes. The smallest number of FIRs registered as a proportion of the officially acknowledged death toll is in Nellie, followed by Bhagalpur. The largest number of FIRs – 4252 - more than six times that in any previous episode of mass violence, were registered in Gujarat. The large number of FIRs in Gujarat reflects the fact that mass violence in 2002 was spread over 24 districts, across hundreds of police stations over a period of more than 6 months, claiming an officially acknowledged 1037 lives, though unofficial estimates of the death toll are higher. High FIR registration also suggests that victims came forward to complain in greater numbers than after earlier episodes of mass violence, reflecting perhaps the combined effect of greater civil society support, media coverage and NHRC intervention.

That said, the *number* of FIRs recorded only partially reflects whether crimes can and will be investigated. The *quality* of FIRs recorded is very important. We analysed the FIRs we received to check whether they captured important details about the offence alleged. We tracked the following:

- The time between when the incident alleged took place and when it was reported
- The between when the incident was reported and when it was recorded in an FIR
- Whether, if there were delays in reporting the incident or recording the incident, the FIR notes the reason for the delay
- Whether the FIR was clear, in that it included details of the accused, the complainant and a reasonably detailed description of the incident in question
- Whether the FIR resulted in a chargesheet or in summary closure

The FIRs we analysed were filed in different states, at different points in time, in a number of formats and don't record exactly the same categories of information. So the information we tracked could not always be directly compared across different episodes. We found, across the four episodes, serious defects in the FIRs registered, which we discuss below.

*(c) Unnamed accused*

A large number of FIRs across all four episodes did not record the names of the accused. In Nellie, 42% of FIRs did not record names of alleged perpetrators. In the sample of FIRs we accessed from Bhagalpur, *over 98%* did not record names of perpetrators. Out of 400 FIRs related to Gujarat 2002, including the ones where victims or third party witnesses were the complainants, the accused are described as an anonymous mob in 291 FIRs i.e. in 73% of FIRs. We found a high correspondence

between FIRs where police were complainants and where perpetrators were not named, but recorded as “anonymous mob” in FIRs. At the same time, there were a large number of FIRs, particularly from Nellie and Bhagalpur, where despite victims of violence being complainants – and therefore more likely to be able to identify or describe perpetrators - the accused were recorded as mobs. 78% of FIRs from Bhagalpur where the complainant was the victim did not name the accused. From Gujarat, the percentage of FIRs where the accused were recorded as mobs was the same – 73% - whether the police, victims or witnesses were complainants. This parity between FIRs based on complaints by private citizens and complaints by police officers strongly suggests a blanket erasure of names. The police seem to have omitted the names of the accused, even where the complainant could and did identify who they were.

Commissions of inquiry noted that this recording of “anonymous mobs” was a result of police misreporting and omission. The Mishra and Nanavati inquiries into mass violence in 1984 which heard many victim testimonies confirmed that the reason behind unknown and untraced accused often resulted from the police refusing to register names of accused, sometimes under political pressure and sometimes due to the political allegiance of individual police officers. More recently, the Supreme Court found persuasive the evidence it heard on how the police in Gujarat had routinely refused to record the names of perpetrators despite complainants identifying them. As a result, the Court ordered that 2000 cases that had been summarily closed should be reopened and reinvestigated.

The effects of erasing the names of perpetrators are not difficult to gauge. It makes investigation more difficult, and also provides an alibi for lackadaisical investigation and summary closure.

*(d) Standard format rather than individualised complaint*

After mass violence in Nellie in 1983, almost all the registered FIRs used *the same text* as the complainant's account, suggesting that the police were either not questioning individual victims at all, or ignoring individual accounts. The individual particulars recorded were the property lost by the complainant, and sometimes a list of family members who were murdered.

After mass violence in Delhi in 1984, many FIRs also had a standard format. The Jain Aggarwal Committee observed that "the police had devised a format for receiving complaints. This format contained various columns including the names and addresses of the complainants, the damage to the person, the kind and description of the looted/burnt property and the quantum of loss suffered by them. There was no column or space for recording facts about incidents of murders, the names of the deceased persons and the names of the culprits if these were known."

The standard format FIRs from Nellie and Delhi appear to be designed to allow compensation claims for looting and arson, but by erasing the complainant's account of the crime committed, lay a weak foundation for investigating the crime. In Gujarat, many FIRs used the same stock phrases to justify or explain offences against Muslims, citing "Godhrakand" as the reason for the criminal acts at issue in that particular complaint. The Chief Minister of Gujarat expressed the view that mass violence in 2002 was a reaction (with the subtext that it was an inevitable, *justifiable* reaction) to what happened in Godhra. Seeing stock phrases about crimes committed "in response" to violence in Godhra in FIRs recorded across Gujarat, at different points in time indicates either striking consonance amongst individual police officers across the State with the Chief Minister's view, or direction given to the police about the tone and content of FIRs.

*(e) Delays in registration*

We examined FIRs for two different types of delay – (1) how much time had elapsed between the alleged crimes *occurring* and the complainant *reporting* the crime to the

police, and (2) how much time had elapsed between the complainant *reporting* the crime and the police *registering* the FIR.

The second type of delay – delay by the police in recording an individual's complaint - is rarely captured in FIRs. The law states, as discussed earlier, that the police should register all complaints alleging a cognizable offence, and don't need to make preliminary enquiries before they do so. Hence, there should be no delay between the complaint and the FIR being registered. FIRs after mass violence in Nellie were registered over 2 months after the massacre. 33% of FIRs registered in relation to the anti-Sikh violence were registered in 1985, 1987, 1991 and 1993. After mass violence in Bhagalpur, there were serious delays in filing FIRs, which were noted by the ADM, Law & Order, who reported that it took about 3 months for FIRs to be registered.

We raised earlier the problem of FIRs simply not being registered. It is probable that the police, after these episodes of mass violence, either did not register FIRs at all, or did so fairly promptly. However, it is also likely that the police don't record delays between reporting and registration as the law requires that there be no delay. For example, FIRs in Delhi registered in 1995 in response to a commission of inquiry have recorded no delay between receiving the complaint and registering the FIR. The experience of the victims as reflected in inquiry reports suggests that the complainants in at least some of these 1995 FIRs probably approached the police in 1984 without success. The new FIRs should have acknowledged this in some way, but most did not do so.

Delay between the incident and the complaint is captured in FIRs, unless the date of the incident is left out. There were significant delays between the incident at issue and the complaint only in Delhi, where many FIRs showed delays of over 12 months, and over 2 years in a few instances. FIRs from Gujarat 2002, Bhagalpur 1989 and Nellie 1983 showed delays between the crime and the complaint of days rather than weeks. In a situation of mass violence, such delay was very likely the result of people waiting for violence to subside. The longer delays reflected in the Delhi 1984

FIRs suggest that people seeking to complain were turned away when they approached the police, and the police registered FIRs only after the intervention of commissions of inquiry.

The striking and serious flaw in FIRs across all 4 episodes was that when there was a delay between the crime and the complaint, the police did not record the reason for the delay in the FIR. For example, the prescribed format for FIRs in Gujarat requires the police to record the reason for delay between the incident and the complaint, but we found it was not recorded in 68% of FIRs.

This is a serious omission because when and if the case comes to trial in the future, the judge can draw a prejudicial inference from the delay if it is not explained or not believed. Where such delay is unexplained, the court is expected to be far more vigilant for any contradictions or indications of fabrication by the complainant<sup>569</sup>. Clearly, omitting the reason for the delay might weaken the prosecution's case.<sup>570</sup>

*(f) Omnibus FIRs*

We examined whether the FIRs we saw were “omnibus” FIRs, putting in this category FIRs that were unclear on details of the complainant, accused and incident, and put in a single FIR disparate, unconnected incidents. We did not see omnibus FIRs related to the Nellie massacre – possibly because it was so concentrated in space

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<sup>569</sup> See *Tara Singh and ors v. State of Punjab*, AIR 1991 SC 63, para 4, where it was stated, “unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case.”

<sup>570</sup> See *Amar Singh v. Balwinder Singh and ors*, [MANU/SC/0065/2003](#), para 10, where it was said, “[t]here is no heard and fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station, etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR.”,

and time, and also because these FIRs seem intended to facilitate compensation rather than prosecution. None of the FIRs we had relating to Bhagalpur 1989 were omnibus FIRs, though these were a small sample of the total. The Bhagalpur inquiry report does not discuss omnibus FIRs. 6% of FIRs relating to Delhi 1984 were omnibus FIRs, in 84% of which the police were complainants.

The CrPC does not explicitly prohibit omnibus FIRs. Drafting FIRs so as to combine unconnected incidents is clearly such bad practice, that it was probably not thought necessary to bar it explicitly when the Code was drafted and when it has been amended over the years. The CrPC does have a number of provisions on framing charges so as to maintain clarity<sup>571</sup>. Even where an FIR is recorded in an omnibus fashion, such an FIR should give rise to several chargesheets and separate trials, if the police and prosecution abide by the CrPC.

However, after episodes of mass violence, when the police put many violent incidents that are unconnected or tangentially connected in a single FIR, the investigations that follow are likely to be confused and the resulting chargesheets and trials yoke together incidents in different locations, involving different actors. These trials have a large number of defendants, and witnesses, and are lengthy, cumbersome and confusing. Trial hearings tend to get adjourned repeatedly, if any of the many defendants cannot be in court – a strategic advantage that the accused are not slow to exploit. Built on an unclear and unwieldy foundation, the prosecution's case is also likely to be unclear and fail to meet the necessary standard of proof.

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<sup>571</sup> Section 218 requires that distinct charges have to be framed for separate offences. A complex incident where an individual committed a number of crimes must, therefore, result in a number of different charges. Section 219 provides that an individual can be charged together with up to three offences of the same kind, i.e. offences that punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local laws. Section 220 allows different offences committed by the same person to be charged and tried together, as long as they are committed in a series of acts that are connected together so that they could be considered a part of the same transaction. Section 223 lays down when different people can be charged together, and requires, inter alia, that two or more people charged together committed the same offence or different offences *as a part of the same transaction*.

(g) *"Doctored" FIRS*

The Bhagalpur commission of inquiry discussed a few serious incidents of police changing details of FIRs after the FIR had been registered, either to hide traces of their own initial negligence, or to slant the trajectory of a case. Official records on Nellie 1983, Delhi 1984 and Gujarat 2002 did not identify similar doctoring of FIRs by the police.

The defects in FIRs discussed above may have appeared separately in a FIR but often there were multiple defects in one FIR. So, for example, a single FIR may have been omnibus, vague and lacking names of the accused.

Defects in the FIR can be corrected or compensated at various points in the proceedings that follow. A defective FIR need not – and should not – damage investigation by the police. However, records from the four episodes we examined indicate that defective FIRs allow the police to avoid thorough investigation. Unclear, incomplete FIRs make it easier for the prosecution to frame inadequate charges, and thereafter, to try the case in question ineffectively.

### C. Investigation and summary closure of cases

Across all four episodes, a large number of cases were summarily closed – they never proceeded to trial. The absolute number of cases closed was high and the summary closure *rate* for cases after these episodes of mass violence was far higher than the general summary closure rates prevalent at the time. The national rate of summary



summary closure<sup>572</sup> – cases summarily closed as a percentage of all cases registered – was 7.54% in 1981, 5.71% in 1991, 5.2 % in 2002, 4.88% in 2003 and 4.48% in 2004.<sup>573</sup>

We compared the closest available national rates of summary closure compiled by the National Bureau of Criminal Records with the summary closure rates after each episode studied.

Mass violence episode	Gujarat 2002	Bhagalpur 1989	Delhi 1984	Nellie 1983
% of cases summarily closed	50%	70%	37%	56%
The closest national rate of summary closure	4.48%- 5.2%	5.71%	5.71%-7.54%	7.54%

We see summary closure rates *10 times higher* than the closest national rate in each episode of mass violence, except for Nellie, where the summary closure rate is 8 times higher than the closest national rate. These summary closure rates are strikingly high, particularly considering that most of the crimes reported would have been committed in the open, during the day, by large groups. They were witnessed by many victims and bystanders, and sometimes by television cameras. The highly concentrated and relatively public nature of these crimes would suggest a *lower* rate of summary closure than the relevant national average. So summary closure of cases at a rate this much higher than the national average was almost certainly not the result of general incompetence or happenstance. These rates suggest that FIRs were

<sup>572</sup> The National Bureau of Criminal Records does not track the rate of summary closure at a state level, which would have offered a more rigorous comparison. Nevertheless, the national rate is instructive.

<sup>573</sup> These percentages have been calculated from figures provided in Table 4(A) Disposal of IPC Crime Cases by Police-Decadal picture, accessed at <http://ncrb.nic.in/CII-2009-NEW/cii-2009/Chapter%204.pdf> (National Criminal Bureau Records 2009).

faultily recorded to a far greater degree than is usual; they suggest that cases, once registered, were investigated poorly or not at all, again to a far greater degree than is usual. These summary closure rates also indicate that unusually large numbers of flawed FIRs and shoddy investigation was not caught or corrected by senior police officials in supervisory roles. This in turn, strongly indicates that the “incompetence” of junior police personnel who were interacting with complainants, registering FIRs and investigating cases was condoned at a minimum, but very likely required by senior officials under political pressure.

We saw earlier that there is no discretion when it comes to *registering* a complaint that discloses a cognizable offence. But the police do have discretion over investigating a complaint once it is registered. Under Section 157, they have a duty to investigate the facts and circumstances surrounding a complaint brought to their attention and if necessary, to take steps to take measures for the discovery and arrest of the offender. There are two grounds on which the police need not proceed with the investigation - (1) where the offence under investigation is not of a serious nature<sup>574</sup> or (2) if it appears that there are insufficient grounds to enter into investigation<sup>575</sup>. However, under Section 157(2) police are required to report their decision not to proceed with a criminal investigation by filing a summary closure report with reasons to the concerned magistrate. The police are also required under Section 157(2) to inform the complainant that the case is not being investigated. The discretion given to police officers to investigate offences is necessary – no criminal justice system can function without such discretion. An absolute requirement to investigate all offences would overload the system to an unworkable level. However, this discretion has clearly been misused after episodes of mass violence, so as not to investigate cases effectively and close them summarily.

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<sup>574</sup> Section 157(1)(a) CrPC

<sup>575</sup> Section 157(1)(b) CrPC

Case law has further strengthened the rights of victims by requiring that the concerned magistrate must give notice to the victims and the right to represent their views on a proposed closure report.<sup>576</sup>

The official records we accessed do not record whether the complainant was given notice, as the CrPC requires, when cases were summarily closed. However, it is highly unlikely that the police and the magistrates involved gave such notice in most cases, given the high rates of unchallenged closure. Clearly, neither the police, nor the prosecutors and judges played their legally prescribed role. The *extent* of this failure strongly suggests that it was not commonplace slips and faults, but a response tailored to cases emerging from religious massacres where the perpetrators had political support.

#### 1. Re-opened cases

A subset of summarily closed cases emerging from mass violence in Gujarat, Bhagalpur and Delhi were re-opened, or registered afresh. Cases were re-opened when there was a significant intervention – not by the police on their own initiative. Reopening of the cases in Gujarat was the result of a petition before the Supreme Court. Reopening of the cases in Delhi was the result of intervention by a commission of inquiry. A few cases on the Bhagalpur mass violence were re-opened when the JDU-BJP government came to power in 2006, after many years of an RJD led government. None of the cases related to the Nellie massacre have been re-opened.

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<sup>576</sup> See *Bhagwant Singh v Commissioner of Police* (1985) 2 SCC 537, the Supreme Court has categorically held that the magistrate must inform the complainant and give him or her an opportunity to be heard before accepting the final report resulting in closure of the case. Further, the Supreme Court held that a magistrate, on receiving a summary closure report from the police, has 4 courses: (1) accept the report and drop the proceedings, (2) direct further investigation by the police, (3) investigate himself or direct another magistrate to do so, or (4) take cognisance of the matter as a private complaint under Section 200 of the CrPC when the material is sufficient in his opinion and if the complainant is prepared for this course of action.

We examined how many re-opened / re-registered cases have been summarily closed – in effect, a second time. Of 2000 cases re-opened by order of the Supreme Court in 2004, 59 cases, or 3%, have been closed so far. Of 255 re-opened cases related to the Delhi 1984 mass violence, 123, or 50% have been closed. We did not secure official records on the 29 re-opened cases in Bihar, but media reports suggest that none have been summarily closed so far.

Intervention by the courts or quasi-government watchdogs can lead to cases being reopened. But this does not mean re-opened cases will be investigated thoroughly the second time around. The high summary closure rate of re-opened cases relating to 1984 suggests that these cases were as concertedly neglected as they were the first time around. That said, even if these re-opened cases were taken seriously, the lost time would make investigation and prosecution difficult. The damage from summary closure soon after mass violence can rarely be substantially undone.

Amongst the samples of case records we had, there is a big difference between the proportion of re-opened cases closed summarily a second time in Delhi (50%) and in Gujarat (3%). However, it is premature to make too much of this figure, because we do not know how many re-opened cases will be closed in the coming months and years. Many of these re-opened cases are still being investigated.

Survivors of violence in Gujarat are pursuing re-opened cases in Gujarat (as did survivors of the 1984 mass violence in Delhi). The number of cases being pursued in Gujarat by survivors privately and supported by activist groups and NGOs is higher than in any previous episode of mass violence. Interventions by the NHRC and the Supreme Court's order re-opening 2000 cases, which criticised large-scale summary closure, have clearly had enough of an impact that the Gujarat government may not be able to close re-opened quite as easily as the Delhi government was able to in the past.

## D. Arrest

We sought information on the number of people arrested in connection with cases registered after the four episodes of mass violence we studied. After the Nellie massacre, 1668 people were arrested, but information on the religion of those arrested no longer survives. We accessed official records on 2734 arrests in Delhi in 1984. These records indicated that only a very small minority of people arrested were Sikh. The majority were Hindu and some people arrested belonged to other religious groups. In Bhagalpur, by contrast, official records, including the commission of inquiry, note that equal numbers of Muslims and Hindus were arrested despite the fact that far more Muslims were victims of violence. The Bhagalpur inquiry report records incidents of police brutality against Muslims who were arrested. It also notes that politically powerful accused persons connected to the ruling RJD party or connected to Hindu Right organisations were not arrested despite being named in FIRs.

We accessed records on 14,830 arrests in Gujarat in 2002, which were a fraction of total arrests. 67% of those arrested were Hindu, 22% were Muslim and the rest belonged to other religious groups. The proportion of Muslim persons arrested was high, considering that Muslims were overwhelmingly the targets of violence in 2002. One reason for this might be that the police registered “cross cases” against Muslim complainants and arrested them to put pressure on them to withdraw their complaints.

After each episode of mass violence, the police failed to arrest accused, often over many months, even where these individuals were identifiable and in the area. In Nellie, FIRs were not registered for about three months and the number of people eventually arrested was very small compared to the police’s own estimate in FIRs of 15000 attackers. Although most official records will generally not capture failure to arrest the accused, some of the records we looked at acknowledged and discussed this failure. For example, the ADM’s report in Bhagalpur notes that some accused were not arrested and continued to intimidate victims. In Bhagalpur, Delhi and

Gujarat, there was evidence that often it was politically connected accused, members of Hindu Right organizations in Bhagalpur and Gujarat or Congress politicians in Delhi in 1984, who evaded arrest. Sreekumar, a senior IPS officer in Gujarat in 2002, noted in his affidavit to the Nanavati Commission that victims were distressed by police failure to arrest politically powerful Hindu accused, even though their names figure in FIRs for major offences.

Senior political leaders complicit in mass violence are unlikely to be named in FIRs because they do not participate directly in inflicting violence. Politically connected participants in violence named in FIRs will almost always be more junior. Even these more junior participants have wielded enough power locally that they evaded arrest in Bhagalpur, Delhi and Gujarat. It is worth contrasting the efficiency with which the police in Gujarat arrested the accused in the Godhara case – almost immediately from the site of the incident – with their delayed, evasive response in other mass violence cases in Gujarat.

#### E. Remand and Bail

When someone is arrested, the police can detain him or her in police custody for a maximum of 24 hours before producing the individual before a magistrate,<sup>577</sup> unless the individual is detained under particular preventive detention laws. Such detention by the police before a criminal charge is often referred to as “police remand” or in police custody. Once an accused is charged, he or she will be remanded in judicial custody or released on bail. Such post-charge, pre-trial detention is in the prison system, and is described as being “undertrial” or in “judicial remand”.

We applied for information on remand and bail in an attempt to examine whether and for how long the police held individual for questioning, and whether the

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<sup>577</sup> Section 50, CrPC; *DK Basu v West Bengal* (1997) 1 SCC 416

prosecution opposed bail. We found that records on remand and bail no longer exist for Nellie 1983, Delhi 1984, and Bhagalpur 1989. Neither the police nor the prosecution nor the magistrates and sessions courts retained these particular records, and do not seem to maintain records on bail applications more generally in any organised fashion.

However, 107 police stations in Gujarat responded to our query on remand applications, giving us at least a partial picture of such applications. Across these 107 police stations, out of 14830 persons arrested, the prosecution made applications to put 2911 of those arrested on remand, i.e. detain them in prison custody. 674 of these applications were refused and 2165 were granted. Of the successful applications for remand, 1457 of those remanded were Hindu, 609 of those remanded were Muslim.

The sample of remand applications we received makes clear that the prosecution chose *not* to apply for remand in most instances – it applied for remand for only 2911 out of 14830 people arrested, i.e. only for 20% of suspects. Where the prosecution made a remand application, it was likely to be granted. 74% of the applications from our sample were successful.

We requested information about bail applications made by the defence in trials related to the 2002 riots. We received information from 118 police stations in Gujarat about this. Amongst the cases registered at these 118 police stations, a total of 4858 accused applied for bail and a total of 4516 accused were granted bail. The prosecution opposed only 283 applications. 455 out of 4858 applications were rejected. This sample suggests that the vast majority of bail applications were successful - 93% of accused who made bail applications were granted bail. Their success is unsurprising – the prosecution opposed less than 6% of bail applications.

The effects of this failure to oppose bail, or apply for bail cancellation when defendants violate bail conditions, are not difficult to anticipate. When the accused are at large, they are able and likely to intimidate victims and witnesses. The

prosecution's duty to oppose bail is surely heightened after mass violence where a particular religious or ethnic community has been targeted, and victims and witnesses from that community will be especially vulnerable.

Layered upon the prosecution's failure to apply for suspects to be remanded in custody, and the failure to oppose bail, are concerns about discriminatory responses by judges to bail applications. The NHRC<sup>578</sup> noted that a larger percentage of Hindus were being granted bail in the aftermath of violence as compared to Muslims. The allegations of discriminatory treatment of Muslim accused also appear in victim testimonies,<sup>579</sup> and the affidavit of RB Sreekumar to the Nanavati Commission.

#### F. Trials, acquittals and convictions

Cases that are not summarily closed are "chargesheeted" – after investigation, charges are filed against the accused and the case proceeds to trial.

- 299 out of 688, or 44% of cases relating to Nellie 1983 were chargesheeted.
- 63% of FIRs out of a sample of 418 relating to Delhi 1984 resulted in charges being filed.
- 30% of cases were chargesheeted overall in Bhagalpur 1989, but in most police stations the average was closer to 50%
- 2037 chargesheets were filed in relation to mass violence in Gujarat in 2002, according to the Gujarat government. This amounts to almost 50% of the 4252 FIRs registered after mass violence.

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<sup>578</sup> See order dated 1<sup>st</sup> April 2002 and report of 2001-2002 of NHRC. The NHRC noted discriminatory treatment from the figures it obtained for arrests of Hindu and Muslim accused.

<sup>579</sup> Many victims complained about the grant of bail to Hindu accused charged with serious offences.



We secured copies of chargesheets from a sample of cases filed after the Nellie, Delhi and Gujarat episodes of mass violence in response to RTI applications. The Bihar police and prosecution did not disclose any chargesheets connected to mass violence in Bhagalpur. While we could examine a selection of chargesheets from cases stemming from Nellie 1983, Delhi 1984 and Gujarat 2002, we had extremely limited access to other records related to trial proceedings, such as bail applications, interim applications to amend chargesheets, or reports on the outcomes of trials.

### 1. Nellie 1983

We know, of course, the outcome of trials following the Nellie massacre. The government of Assam withdrew all the cases related to the massacre following the Assam Accord. Applications for withdrawal were made under section 321 of the CrPC. Section 321 allows the prosecution to withdraw a case with the consent of the court at any time before judgment. If a case is withdrawn before charges are framed, the accused is discharged and if it is withdrawn after charges are framed, the accused is acquitted.

The wholesale withdrawal of cases relating to the Nellie massacre was, in our view, clearly unlawful. The Assam Accord only allowed a “review” of criminal cases that did not concern “heinous crimes”. The prosecution in cases across Assam went much further, and withdrew cases that did concern heinous crimes. This clearly indicates a policy rather than case by case review, which the Accord seems to allow. In deciding, across the board, to withdraw cases, the government of Assam violated the law at the time on withdrawal of cases. In *Chandika Mohapatra*<sup>580</sup>, P.N. Bhagwati, J., as he than was, observed:-

"The paramount consideration in all those cases must be the interest of administration of justice. No hard and fast rule can be laid down not can any

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<sup>580</sup> *State of Orissa v. Chandrika Mohapatra* (1976) 4 SCC 250

categories of cases be defined in which consent should be granted or refused. It must ultimately depend on the facts and the circumstances of each case in the light of what is necessary in order to promote the ends of justice, because the objective of every judicial process must be the attainment of the justice."

In *Balwant Singh v. State of Bihar*<sup>581</sup>, the Supreme Court said:

"The statutory responsibility for deciding upon withdrawal squarely vests on the public prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side. The Criminal Procedure Code is the only master of the public prosecutor and he has to guide himself with reference to Criminal Procedure Code only. So guided, the consideration which must weigh with him is whether the broader cause of public justice will be advanced or retarded by the withdrawal or continuance of the prosecution."

The law required that the prosecutor not cede his or her independent discretion over withdrawal to other sections of the administration, that withdrawal be considered on the facts of a particular case, and that withdrawal be in the interests of justice. Blanket withdrawal of cases clearly violated the law as it stood at the time, and amounted to State-sanctioned impunity for perpetrators of the Nellie massacre.

## 2. Delhi 1984

Commissions of inquiry and civil society reports have documented delayed and flawed trials, resulting in a high rate of acquittal. A survey of 126 Sessions Court trials showed that 94% had resulted in acquittals<sup>582</sup>. Almost 30 years after mass violence in 1984, there are appeals pending in the appellate courts. Congress

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<sup>581</sup> AIR 1977 SC 2265

<sup>582</sup> Aman Trust, *Public Prosecution in India*, April 2005, 81 discussing V. Grover, *Quest for Justice: 1984 Carnage*, VMAP-Oxfam, Unpublished, 2000

politicians who participated directly in attacks on Sikhs have still not been effectively put on trial.

### 3. Bhagalpur 1989

We got very little official information in response to RTI applications about trials that followed mass violence in Bhagalpur 1989. Civil society reports indicate that 142 Sessions court cases were filed, a small number relative to the scale and ferocity of mass violence<sup>583</sup>. 38 of these 142 cases were involved charges of murder. By 1995, 12 of these murder cases, implicating 95 accused, had been decided and only one case had resulted in any convictions. Of 95 people charged with murder in various cases, 94 were acquitted.

27 major trials were conducted so incompetently that the Bihar Government appointed a second commission of inquiry in 2006 to examine where the police and prosecution had been remiss in cases filed after 1989. The government then re-opened 29 cases related to the 1989 mass violence, focussing on cases related to prominent, politically powerful accused. Media reports indicate that by 2008, 325 accused in cases related to mass violence were convicted, of whom 125 received life sentences. Kameshwar Yadav, a leading actor in the violence, was convicted of murder and destruction of evidence in 2007. 14 people were convicted for their role in the Logain massacre in 2007. Trials in re-opened cases appear to have been relatively speedy and effectively prosecuted.

### 4. Gujarat 2002

Slightly less than 50% of FIRs registered proceeded to trial in Gujarat. We received information from over a 100 police stations across different districts about cases that went to trial. The sample of records we could access suggests that over 50% of cases

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<sup>583</sup> See Chapter 5.

that were tried went to the Sessions Court. In some districts, the proportion of Sessions Court cases was higher. Trials have been unwieldy and protracted and many have still not been completed.

Special, fast-track courts have been constituted to try many of the cases under the purview of the Special Investigation Team constituted by the Supreme Court. So far only two of the nine SIT cases, the Godhara case and the Sardarpura case, have been completed. Both were “finalized” in 2011, nine years after the events at issue took place.

In the 6 districts in Gujarat that sent us information on acquittal, a staggering 94-99% of cases completed so far have resulted in acquittals of all the accused on trial. By corollary, the conviction rate in mass violence cases is extremely low.

#### 5. Problems across episodes

Commissions of inquiry as well as non-government observers have recorded the same problems in the criminal justice system across all four episodes of mass violence. Citizens who complained were turned away, intimidated or inaccurately recorded by the police. The police investigated cases very poorly and the prosecution tried cases ineffectively. Many observers do not comment on the role of the courts, but it is clear from the trajectory of mass violence cases that the judiciary has also contributed significantly to undermining these trials.

##### *(a) Poorly drafted FIRs*

As discussed above, this was a problem across all four episodes. In Bhagalpur, for example, reviews by officials themselves admitted that the police drafted FIRs so poorly that it was difficult to redeem the investigation and trials to follow. Having said this, the FIR is only the first step of a criminal case, and the police are expected to develop the case far beyond the information contained in the FIR. The Supreme

Court has made it clear in many judgments that the FIR is not supposed to be encyclopaedic or have an exhaustive account of all facts connected to the incident<sup>584</sup>. An FIR is not substantive evidence and its only evidentiary value is to corroborate the testimony of the person who had lodged the FIR<sup>585</sup>.

(b) *Poor investigation*

There is unequivocal evidence of faulty investigation by the police after all four episodes of mass violence, manifest in official records, and documented by commissions of inquiry, civil society observers and the media. The police failed to question witnesses and gather evidence related to crimes committed during mass violence. They also failed to secure expert medical and forensic evidence where it was needed. Failure to conduct panchnamas and identify procedures promptly and correctly can lead to loss of important evidence such as recovery of weapons from the accused. In the aftermath of Bhagalpur 1989, for example, the commission of inquiry noted that the police completely failed to search the homes of Hindu accused for arms and ammunition. So flawed is investigation of mass violence crimes that it seems to go well beyond ordinary systemic incompetence, suggesting that senior political figures and officials have encouraged, tolerated, and required faulty, incomplete investigation. The Supreme Court acknowledged as much in its *Best Bakery* and *Bilkis Bano* decisions, where it transferred cases connected to two particularly gruesome massacres outside Gujarat. The Court took an even more unusual step, and created a Special Investigation Team to investigate nine especially serious cases related to mass violence in 2002. It also appointed an amicus curiae who seems to have operated, in recent months, as a counterpoint to the SIT.

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<sup>584</sup> *Umar Mohammad v State of Rajasthan* 2008 AIR SCW 120 (SC) para 32

<sup>585</sup> Section 157, Indian Evidence Act 1872; *Shaikh Hasib alias Tabarak v. State of Bihar* 1972 CriLJ 233 followed in *Sandeep Rammilan Shukla v State of Maharashtra* 2009(1)MhLj 97, para 38

*(c) Ineffective prosecution*

In a criminal trial, it is for the prosecution to prove the guilt of the accused beyond reasonable doubt. The State, representing citizens, is supposed to seek a fair result rather than seeking to punish or avenge crime in a personal way. The prosecution's role is to assist the court in this endeavour, which requires the ability to be neutral and independent. The CrPC requires that public prosecutors should have been practising as advocates for a minimum of 7 years. The institutional arrangements for prosecution differ somewhat from state to state. Some states like Delhi have a directorate of prosecution, while others like Gujarat do not have a directorate of prosecution. Across different states, however, public prosecution is not institutionalised so as to protect prosecutorial independence<sup>586</sup>. Prosecutors at the High Court level are appointed by the central or state government after consulting the court. Prosecutors in Sessions Courts and Magistrates Courts are appointed by the state government. District Magistrates consult the Sessions Judge and prepare a panel of eligible candidates. The state government then appoints prosecutors from this panel. Alternatively, the state government creates a cadre of prosecutors and appoints individuals from this pool<sup>587</sup>. The executive thus plays the primary role in appointing prosecutors with very little oversight.

Courts have emphasised the public role played by a prosecutor and struck down appointments that violate the Criminal Procedure Code and the state rules for appointing prosecutors<sup>588</sup>. The Delhi High Court has held that an advocate formerly representing the complainant in a criminal trial could not later serve as a public prosecutor in the same case as he his neutrality had been compromised<sup>589</sup>. Such

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<sup>586</sup> Aman Trust, *ibid.*

<sup>587</sup> Aman Trust, *ibid.*, 8

<sup>588</sup> See for example *Harpal Singh Chauhan and ors vs. Uttar Pradesh* AIR 1993 Supreme Court 2436, discussed in Aman Trust, *ibid.*, 11

<sup>589</sup> *Jitendra Kumar @ Aju vs. NCT of Delhi* Criminal Writ Petition no. 216 of 1999, Delhi High Court and *Vijay Kumar Gupta vs. NCT of Delhi and Ors*, Crl W.P no. 1236/ 99, Delhi High Court discussed in Aman Trust, *ibid.*, 20

review by the courts of individual appointments has not addressed the more fundamental problem of inadequate independence. In some states, prosecutors function directly under the police<sup>590</sup>. In other states, including Delhi and Bihar, the directorate of prosecution is housed within the Home Department<sup>591</sup>. In any event, prosecutors are appointed in ways that make them vulnerable to pressure and influence.

Mass violence cases that suffer from poor, often biased, investigation by the police, are in particular need of vigilant and independent prosecution. There is still a possibility of securing justice if a case is diligently prosecuted by taking the necessary steps to rectify police errors and support witnesses. An effective prosecutor would, wherever necessary, take steps such as the following:

- apply to add new accused or new offences against an existing accused;
- apply to add or recall witnesses;
- apply for reinvestigation to ensure witnesses who have relevant knowledge in relation to offences are examined;
- Seek and use expert and forensic evidence;
- Remedy defects in the FIR such as failure to record the reason for a delay in registering the FIR by bringing the reason on record;
- keep witnesses informed of important developments affecting their case;
- make use of existing case law to argue that the existence of defective investigation and/or hostile witnesses does not necessarily mean there is no prosecution case;
- emphasize that the court should keep the context of mass violence in mind when evaluating evidence.

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<sup>590</sup> The Supreme Court has said that the prosecution should be independent from the investigating agency, the police in *S.B Shahane and Others V. State of Maharashtra and Another* 1995 Supp (3) SCC 37

<sup>591</sup> Aman Trust, *ibid.*, 14

The high incidence of acquittals in mass violence cases testify to the prosecution's inability or unwillingness to make a robust case based on the evidence before it. Cases following the Nellie massacre were withdrawn, as discussed earlier.

In *RK Jain* the Supreme Court noted that prosecutors could withdraw from prosecution on the ground of "public order and peace", which might involve, inter alia, "political purposes". At the same time, the Court emphasised that "[t]he discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else...The government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so".<sup>592</sup> Clearly, prosecutors making withdrawal applications in the wake of the Assam Accord did not function independently – they operated as conduits for the party in power at the time.

Prosecution of cases connected to mass violence in 1984 was incompetent and politically compromised. The collapse of 27 major trials related to Bhagalpur 1989 indicates similar unwillingness by prosecutors to do their jobs effectively and independently.

Media and civil society reports in Gujarat have documented how prosecutors with Hindu Right sympathies were appointed cross different districts. So extreme was prosecutorial bias and incompetence in Gujarat, that the Supreme Court transferred the *Best Bakery* and *Bilqis Bano* cases to Maharashtra on the ground that a fair trial was simply not possible in Gujarat. In so doing, the Court implicitly acknowledged that the prosecutor was entirely influenced in cases such as these by the goals and sympathies of the ruling party. The Supreme Court stated in its decision in *Best Bakery* that the prosecutor who "acts more like a counsel for the defence is a liability to the fair judicial system"<sup>593</sup>. During the Sessions Court trial, the prosecution had

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<sup>592</sup> *Rajender Kumar Jain v State*, (1980) 3 SCC 435

<sup>593</sup> *Zahira Habibulla H. Sheikh and anr. v. State of Gujarat and ors.* 2004 (4) SCALE 375



alerted the court that the accused were pressuring and intimidating witnesses. Several witnesses turned hostile. The Prosecutor also refused to examine important witnesses, claiming without basis that they were mentally unfit for examination. The prosecutor also actively assisted the defence by putting several family members of the accused on the witness stand as *prosecution* witnesses.

The media has highlighted a few examples of dereliction by the prosecution in mass violence cases. Efforts by survivors and their supporters have resulted in correctives, such as the transfer of major trials or Supreme Court scrutiny over SIT trials. However, some gross instances of prosecutorial malpractice have escaped the spotlight, such as blanket withdrawal of cases connected to Nellie 1983. Moreover, extremely high acquittal rates suggest that most mass violence trials are undermined by poor prosecution.

In the four episodes of mass violence we examined, the government of the day was complicit in violence on account of its failure to act in accordance with the law to protect lives and had a stake in protecting direct participants who were on trial. Public prosecutors in these cases were very likely chosen because they agreed with or were willing to cooperate with those in political power. Weak institutional independence also renders prosecutors in such cases more willing to work towards politically desirable outcomes. This substantially inverts a legal framework intended, in theory, to promote fair trials. Prosecutors are supposed to be independent actors seeking a fair outcome, rather than partisans for the State. In mass violence cases, experience shows that prosecutors do not just abandon neutrality, they sometimes act to strengthen the defence.

Across these four episodes of mass violence there have been very few convictions. When we look at cases that resulted in convictions, such as the re-opened trials in Bhagalpur, the Sardarpura massacre case, the two Odh massacre cases, and the Best Bakery and Bilkis Bano cases, these reveal that it took active campaigning to highlight the failures of investigation and prosecution accompanied by a demand to

act against such miscarriages of justice. It was only in response to such pressure that the political establishment in Bihar and the Supreme Court in relation to Gujarat took steps to improve how these cases were prosecuted.

*(d) Witness intimidation*

Witnesses in trials following mass violence turned hostile for multiple reasons, ranging from economic necessity, fear, lack of confidence in the justice system, and lack of protection from police. Whether or not victims and third-party witnesses will report a crime and play their part in a criminal case depends on their confidence in the criminal justice system regarding the likelihood of obtaining justice and their own security. Political parties were directly and indirectly involved in all four episodes of mass violence that we examined. These parties were in power during mass violence, or, in Assam for example, came to power later and ran the government when these episodes were being investigated and tried. In Delhi and Gujarat in particular, some direct participants in violence went on to hold high office in government. It is no coincidence that the police failed to investigate complaints adequately and prosecutors did not prosecute cases in court properly.

Official records from Gujarat on bail and remand show that the prosecution rarely opposed bail for the accused, and rarely applied for the accused to be held in custody. As we discussed in the previous chapter, witnesses in criminal trials in Gujarat faced intimidation and pressure to “compromise” – drop the criminal complaint or turn hostile during trial. The ADM’s report in Bhagalpur noted that perpetrators were at large in the months following mass violence, causing survivors to feel insecure. Such pressure are layered upon the difficult experience of a criminal trial, navigating the opaque workings of the criminal justice system, confronting attackers and facing repeated delays and the resulting loss of livelihood for many witnesses. Trial records from the Sessions Court in Delhi show the prosecution’s

failure to raise before the court fears expressed by the witness, which would have explained the witness' failure to appear in court<sup>594</sup>.

The police and prosecution went beyond neglecting the concerns of witnesses being threatened. The police themselves harassed complainants and their supporters in some instances. Some complainants in criminal cases related to mass violence in 1984 were tried for perjury after they turned hostile<sup>595</sup>. In the *Best Bakery* trial, the prosecutor called witnesses who were related to the accused, and did not call witnesses who were crucial to the case against the accused. Bilkis Bano was harassed by the Gujarat police, as were human rights activists supporting survivors of mass violence.

The Supreme Court, in its *Best Bakery* decision, expressed serious concern about witnesses turning hostile:

“Time has become ripe to act on account of numerous experiences faced by the Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures or monetary considerations at the instances of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other practices ingeniously adapted to smother and stifle truth and realities coming out to the surface rendering truth and justice to become ultimate casualties.”<sup>596</sup>

The Court emphasised the urgent need for a law to protect witnesses:

As a protector of its citizens the state has to ensure that during a trial in court the witnesses could safely depose without any fear of being haunted by those against whom he had deposed. Legislative measures to emphasize

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<sup>594</sup> See Chapter 4

<sup>595</sup> Aman Trust, *ibid.*, 89

<sup>596</sup> *Zahira Shaikh v. State of Gujarat*, AIR 2006 SC 1367., 1381-82, para 38, 39 and 40.

prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day.”<sup>597</sup>

The Supreme Court’s demand for legislation<sup>598</sup> has also been espoused by the Law Commission for many years<sup>599</sup> and the NHRC more recently. The NHRC’s petition to the Supreme Court in the wake of the *Best Bakery* trial focussed primarily on how the trial had capsized because witnesses had been intimidated and pressured. In response, the Supreme Court observed:

“No law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses. For successful prosecution of the criminal cases, protection to witnesses is necessary as the criminals have often access to the police and the influential people. We may also place on record that the conviction rate in the country has gone down to 39.6% and the trials in most of the sensational cases do not start till the witnesses are won over.”<sup>600</sup>

The Court asked the Gujarat government for information on measures to protect witnesses, and also what steps it had taken to punish those who had pressured witnesses into turning hostile. It directed the state government to take such measures. Several years later, witnesses continue to face pressure and intimidation. 10% of the 1061 prosecution witnesses who had testified in the Gulbarg massacre case up to April 2010 had turned hostile, according to media reports<sup>601</sup>. 66 defendants are on trial in that case, of whom 57 were on bail. The Gulbarg trial is an SIT case, unfolding under the supervision of the Supreme Court. Witnesses in trials

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<sup>597</sup> *Zahira Shaikh v. State of Gujarat*, AIR 2006 SC 1367., 1381-82, para

<sup>598</sup> The Supreme Court also emphasised the need to protect victim-witnesses in *Sakshi v Union of India*, 2004 (6) SCALE 15. The Delhi High Court has laid down guidelines for witness protection in *Neelam Katara v. Union of India* (Crl WP 247/2002) (judgment dated 14.10.2003)

<sup>599</sup> The Law Commission has advocated better witness protection, and legislative measures in this regard, in its 14<sup>th</sup>, 154<sup>th</sup>, 172<sup>nd</sup> and 178<sup>th</sup> reports, available at <http://lawcommissionofindia.nic.in/>. These reports are discussed in the Law Commission’s Consultation Paper

<sup>600</sup> Order dated 8.8.2003 in *NHRC v. State of Gujarat* 2003 (9) SCALE 329

<sup>601</sup> See Chapter 6

that are not being supervised, that are not being reported in the press, are even more likely to face pressure.

In 2006, the main witness in the *Best Bakery* case was found guilty of perjury for repeatedly changing her account of events<sup>602</sup>. Punishing individual witnesses, however, seems misdirected when perpetrators continue to pressure witnesses in mass violence cases, and witnesses receive scant support from the police, prosecution and judiciary.

*(e) Poor adjudication*

Judges have considerable power and discretion to shape the quality of a criminal trial, even where investigation and prosecution are poor. A trial judge can order reinvestigation<sup>603</sup>, summon witnesses<sup>604</sup>, issue warrants for the arrest of witnesses where necessary, and order production of evidence. The judge in a criminal trial can ask the accused whatever questions he or she thinks necessary,<sup>605</sup> so has the opportunity to make queries that the prosecutor may have neglected to make. During the course of a trial, the court can add accused to the proceedings if it considers that the evidence points to the involvement of individuals who are not currently on trial<sup>606</sup>. A judge hearing applications for summary closure or withdrawal from prosecution has discretion over whether to grant the application or not, and the inherent power, as the decision maker to make procedural and substantive queries. For example, a judge can ask whether the police have complainants notice of summary closure. In addition, a criminal court can order the

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<sup>602</sup> Indian Express, “*Zaheera Sheikh turns herself in, says don’t send me to Gujarat*,” March 10, 2006, available at <http://www.indianexpress.com/storyOld.php?storyId=89389>

<sup>603</sup> Section 173(8), CrPC

<sup>604</sup> Section 311, CrPC

<sup>605</sup> Section 313, CrPC

<sup>606</sup> Section 319, CrPC

government to pay reasonable expenses of any complainant or witness attending proceedings before the court<sup>607</sup>.

The trajectory of mass violence cases makes apparent that criminal courts have not exercised their considerable powers to ensure fair proceedings. High rates of summary closure demonstrate that judges have clearly not ensured that complainants are given notice of summary closure, or queried whether closure is genuinely warranted. Any court exercising independent judgment should not have accepted the wholesale withdrawal of cases related to the Nellie massacre. The judiciary has been substantially willing to acquiesce in flawed investigation and incompetent, often biased, prosecution in mass violence cases.

The Supreme Court has admonished the judiciary in Gujarat for being a “silent spectator”<sup>608</sup> to the failures of police, prosecution and politically powerful forces, and advised judges to participate far more actively in the proceedings before them.

“If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves”<sup>609</sup>.

## G. Appeals

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<sup>607</sup> Section 312, CrPC

<sup>608</sup> *Zahira Habibullah Sheikh v State of Gujarat* AIR 2006 SC 1367

<sup>609</sup> *Zahira Habibullah Sheikh v State of Gujarat* AIR 2006 SC 1367

We received almost no information from state governments on appeals in response to our RTI queries. The way our applications were transferred between public authorities suggested that decision-making on appeals is muddy, and the prosecutor at trial often has little knowledge about what happens after he or she submits a report when the trial finishes.

There were, obviously, no appeals in cases relating to the Nellie massacre.

Media reports suggest that about 44 appeals in cases relating to mass violence in 1984 are pending in the Delhi High Court. Given that trials stemming from the 1984 mass violence are still continuing, there are likely to be more appeals in the future. In some recent decisions, the Delhi High Court has upheld the acquittal or overturned the conviction of the accused as the evidence left room for doubt. In one such case, *Bhagat Singh*<sup>610</sup>, the High Court acknowledged that the police had failed to accurately record the initial complaint, and filed an omnibus supplementary chargesheet. It also noted the broader context of police failure in the aftermath of violence. Nevertheless, the court found witnesses in the case unreliable and overturned the guilty verdict in that case. In *Permanand*<sup>611</sup>, the High Court also overturned the accused's conviction because it found the witnesses unreliable, but it rejected the defence' argument that delayed investigation was sufficient ground for a case to be discharged. In *Abdul Rashid*<sup>612</sup>, too, the High Court upheld the acquittal of the accused, alleged to have participated in the Trilokpuri massacre, on the ground of unreliable evidence. These decisions demonstrate how difficult it is to secure a conviction in a criminal trial once many years have elapsed since the crimes in question, particularly where the police did not gather important evidence soon after those crimes were committed. The Delhi High Court has upheld convictions as well in 1984 cases, dismissing defence arguments that a single witness' testimony is

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<sup>610</sup> *Bhagat Singh, Brij Mohan Verma & Anr v State* CRLA 849/2009

<sup>611</sup> *Permanand v State* CRLA 10/1996 [2009]

<sup>612</sup> *Abdul Rashid v State* CRLA 219/1996 [2010]

insufficient for a finding of guilt<sup>613</sup> and that the bodies of victims necessarily have to be recovered to secure a conviction for murder<sup>614</sup>. In *Sajjan Kumar v CBI*, the High Court dismissed Sajjan Kumar's challenge to charges being framed against him, holding that if a *prima facie* case is made out, it is not necessary that delay in registering an FIR, investigation and filing the chargesheet is a ground for dismissing the charges. The Court took into account 'systemic delays', and the fact that the investigating agency may have been politically coerced into delaying proceedings. The Court also noted that every delay doesn't prejudice the accused, and delays can work to his advantage – a particularly salient observation in a mass violence case.

The Delhi High Court has developed jurisprudence in recent years that should be used by trial court judges to more effectively adjudicate trials related to mass violence. The Supreme Court, as discussed earlier, has a mixed record on cases concerning mass violence in 1984. In two decisions, it upheld the convictions of the accused but treated violence at the time as spontaneous mob frenzy, contrary to the findings of commissions of inquiry and the High Court, and further considered participation in a mob a mitigating rather than an aggravating factor for sentencing<sup>615</sup>.

The Bihar government gave us no information on appeals in cases concerning mass violence in Bhagalpur. We strongly doubt whether the government actively appealed acquittals before 2006, given that cases were prosecuted so ineffectively at the trial stage. Three major trials where the accused were found guilty were concluded in 2007. It is likely that the Patna High Court will be hearing appeals in the 29 re-opened cases in the near future. It also seems likely that the Bihar government, as long as the current dispensation is in power, will seriously appeal acquittals and challenge appeals by the defence against conviction.

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<sup>613</sup> *Om Prakash & Anr v State* CrLA 291/1996

<sup>614</sup> *State v Lal Bahadur and Ors* (CRLA 6/1992) [2008]

<sup>615</sup> See discussion in Chapter 4



The Gujarat government also declined our RTI applications on appeals. Experience with appeals so far does not inspire confidence. Civil society reports indicate that the Gujarat government has repeatedly failed to appeal acquittals and inadequate sentences. Complainants have pursued revision petitions, but a revision does not allow the same degree of review as an appeal. After the severely critical decisions of the Supreme Court in the *Best Bakery* and *Bilkis Bano* cases, it is possible that the Gujarat High Court will consider appeals with more care, taking into account the context of mass violence in 2002. The High Court's 2009 decision cancelling bail for former Minister Maya Kodnani is heartening. The Court held that the lower court had erred in granting Kodnani bail, and recognised that statements by victims had to be considered against the background of fear, pressure and manipulation of evidence by the government. It said:

“The exercise of judicial discretion in favour of the respondents, who are ascribed leadership roles, on irrelevant grounds of they having not tampered with the evidence or being unlikely to commit other offence was highly improper and perverse and calls for interference, particularly when the investigation is still underway and the respondents still hold the status or position from where they can influence the witnesses...The distance in time from the date of the alleged offences to the present stage of investigation is unfortunate and attributable to the failure of law-enforcement agencies, but it cannot derogate from the requirements of bringing to book all the persons who might have had a role in rudely disrupting the lives of millions of citizens...”<sup>616</sup>

The Supreme Court has taken robust measures in response to petitions raising miscarriages of justice in mass violence cases in Gujarat. It took the unusual step of transferring trials from Gujarat to Maharashtra. Setting up the SIT was an even more unusual device. The Court has recognised in its decisions so far that the State apparatus in Gujarat was undermining access to justice in a sustained manner in the aftermath of violence, which suggests that future appeals will receive nuanced, context-sensitive consideration. However, given that it is already seized of matters

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<sup>616</sup> *State of Gujarat v Mayaben Kodnani & Ors.* Crim Misc Application 1943/2009, 27 March 2009, para 14

raising such serious concerns about access to justice, the Court should take *suo motu* action against the Gujarat government for its failure to comply with directions and orders. This includes the failure to comply adequately with the Court's 2004 Order on re-opening and re-investigation of cases as well as the Court's directions on protecting witnesses.

Given that a large number of trials are still underway, including trials in SIT cases, many appeals will come before the appellate courts. In 2009, the CrPC was amended to extend the right to appeal to against the trial court's decision to "the victim" of an offence<sup>617</sup>. This is a striking departure from the principle that prosecution and punishment of crime is the responsibility of the State, rather than a private individual. The contours of this new right to appeal seemed poorly thought out when the CrPC was amended. It was not clear whether the victim needs to seek the permission of the High Court before filing an appeal. It is also unclear, on the face of the amended provision, how it will apply to trials concluded before the new provision came into force. Different High Courts are resolving these moot points in different ways. The Gujarat High Court held in 2010 that the victim of a crime could file an appeal only if the State has not filed one, on the ground that a private individual's right to appeal cannot be higher than the State's prerogative to do so. Other High court such as Bombay and Delhi have however not followed the same reasoning and have allowed appeals by victims regardless of whether the state has filed an appeal or not. The Gujarat High Court ruling is in process of being challenged in the Supreme Court. Notwithstanding these ambiguities, this extension of the right to appeal is particularly salient for victims of mass violence, as the State has been pointedly derelict in investigating and prosecuting crimes committed during these episodes. It is important that the higher judiciary use the progressive jurisprudence available when considering appeals in mass violence cases, regardless of whether an appeal is preferred by a victim or the relevant state government.

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<sup>617</sup> Section 29, The Code of Criminal Procedure (Amendment) Act, 2008

## H. Sexual violence

We applied for information on cases of sexual violence registered after the four episodes of mass violence we studied. We thought it worth asking specifically for this information, in addition to our requests for information on all cases registered, because sexual crimes are so often ignored or taken less seriously than other violent crimes.

We received no response to our query on sexual violence in relation to Nellie 1983 and Bhagalpur 1989. None of the FIRs we examined relating to either episode recorded sexual crimes. According to the RTI information we received, 3 cases of sexual violence were registered in Gujarat. 5 FIRs from Delhi record the crime of rape.

Clearly, there is a considerable discrepancy between sexual violence recorded by civil society reports in 1984 and 2002, and the number of FIRs recorded and prosecutions mounted for sexual crimes. Particularly in Gujarat in 2002, there is considerable documentation that women were targets of serious and systematic sexual violence. Some survivors, such as Bilkis Bano, have spoken out about the brutal violence they suffered.

For Nellie 1983 and Bhagalpur 1989, we have very little independent civil society documentation in the aftermath of mass violence, so we do not know whether and to what extent sexual crimes were committed. However, we should be cautious about concluding that no sexual offences took place without engaging with survivors of these episodes of violence. Given the stigma against victims of sexual crimes, these crimes are underreported to the police. The few cases we examined in Gujarat reveal the extreme legal and social difficulties victims of sexual violence face when they come forward and report these crimes.

## I. Summing up

Access to criminal justice remains elusive for victims of mass violence. The official records we examined showed that the criminal justice system let down victims of crime from the point the police were first informed that a crime had been committed. Defective, incomplete FIRs, leaving out details of the complaint lay the ground for defective, incomplete investigation, which in turn paves the way for large-scale summary closure of mass violence cases. High rates of summary closure strongly indicate that the police are misusing the discretion given to them under Section 157 of the CrPC, and ignoring the requirement to give notice of closure to the complainant. A competent prosecutor and alert judge have the power under the CrPC to work towards a fair result, even in the face of failures by the police. However, these powers are rarely exercised. The episodes of mass violence we examined were marked by politically biased prosecution and compliant judges who ignored obvious signs of witness intimidation, and easily accepted the police saying powerful accused could not be traced. The Supreme Court, NHRC and Law Commission have rightly urged legislative measures to protect witnesses and allow them to play their key role in bringing perpetrators to justice. In the communalised context of mass violence, victims of crimes are not dealing simply with the ordinary, day-to-day deficiencies of the criminal justice system. In the episodes we looked at, institutions and personnel entrusted to investigate, prosecute and adjudicate failed to carry out their professional duties independently, according to the letter and spirit of the law. This undermined the basis of an adversarial criminal justice system where the State is supposed to hold accountable those who commit crimes. The Indian criminal justice system, like most common law systems, is heavily reliant on the police to ensure a fair, comprehensive and competent investigation. Poor investigation by police made it all the more important that vigilant prosecutors and adjudicators rectify these errors. The prosecution rarely did this, and far too many trial courts maintained the status quo by delivering acquittals based on negligent or subverted investigation rather than using their considerable powers to ask questions and order reinvestigation.

## VIII. Accountability of public officials for mass violence<sup>618</sup>

### A. Introduction

Our enquiry in this report is about accountability of responsible public officials, broadly speaking, for mass violence. We have described earlier the State's performance on criminal justice, including how information on criminal justice is preserved and disclosed. In this chapter, we examine a narrower aspect of accountability - action against officials, both career civil servants and elected officials for being involved or ineffective during mass violence.

We look at both administrative and criminal action against officials. We look at provisions in Indian law on criminal prosecution of public officials, and identify problems and gaps in the law that allow senior and mid-ranking officials to tolerate or encourage mass violence. As we discuss below, the State does not take administrative and criminal action against officials often enough, and fast enough, after mass violence. We then turn to a device that the State deploys after every major episode of mass violence - the commission of inquiry. We discuss what role public inquiries can perform, and how effective they have been.

### B. A look across episodes

#### 1. Withholding information

We asked State Governments and the Central Government reports by Commissions of Inquiry after each episode of mass violence we looked at. We also asked for the 'Action Taken Reports' a government is required to file in response to the Commission's report. We filed Right to Information applications asking what action

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<sup>618</sup> Researched and written by Surabhi Chopra and Suroor Mander

was taken against officials named as remiss or complicit in violence by Commissions of Inquiry where (1) Commissions had recommended such action, and also (2) where they had not made a specific recommendation but their analysis and findings clearly indicated negligence or complicity. Finally, we asked State Governments and the Central Government for copies of any applications for permission to prosecute a public servant under Section 132 or Section 197 of the Criminal Procedure Code 1973 for alleged involvement in or acts of omission or commission during these episodes of mass violence. We also asked for copies of replies to those applications.

On this issue – action against public servants – perhaps more than any other, there was scant information in public, and our Right to Information applications were repeatedly ignored or transferred. We managed to secure copies of reports by Commissions of Inquiry after an unexpected degree of effort, but in three out of four cases were unable to access records on the official response to these Commissions – whether there were administrative inquiries, criminal proceedings, or any internal systemic reviews. The Delhi Government disclosed Action Taken Reports, but the governments of Assam and Bihar did not. In any event, because the 1984 mass violence resulted in so many inquiry Commissions and Committees, some expressly mandated to look at the role of public officials, the information on offer was more detailed than that available for Bhagalpur or Nellie. On mass violence in Gujarat in 2002, we received some replies to our Right to Information applications, but the Nanavati Commission has yet to complete its enquiry.

## 2. Patterns of neglect and complicity

From the official and unofficial material available, we see that functionaries across different branches of the State have tended to be negligent or complicit in the following ways:

Police: The police clearly have the most direct power to respond to violence, to prevent crimes and to investigate crimes in the aftermath of violence. Correspondingly, across the four episodes of mass violence, the police bear the most direct responsibility for allowing violence to unfold. The vast majority of officials identified as negligent or complicit by Commissions are police officials. Whether in

Delhi, in Bhagalpur or in Gujarat, the police constables at the frontline allowed attacks on minorities in large numbers. Whether in Nellie, Bhagalpur or Gujarat, some senior police functionaries – officers in charge of police stations, SDPOs, SPs – allowed their troops to be derelict, and in some cases encouraged them to be derelict. In some instances, police officials led attacks themselves, such as ASI Ram Chandra Singh in Lugain in Bhagalpur or K.G. Erda in Ahmedabad in 2002. When we delved into the records on police firing during mass violence in Bhagalpur in 1989, we found strong suggestions of police bias against Muslims. In the aftermath of violence, the police failed, in large numbers, to record victim complaints accurately and to investigate complaints effectively. In Gujarat, there were many recorded instances of the police telling people they would not record their complaints. This sort of harassment is, obviously, not reflected in official records. But the way the Gujarat police harassed activists and registered false cases against them indicates their willingness to deploy such tactics against survivors who were not compliant. In some cases, as in Bhagalpur, the police quite literally, buried evidence by burying the dead before they could be identified. More typically, shoddy investigation doomed most criminal prosecutions to failure.

Other government officials: Other government servants emerge with a more mixed record than the police. It is clear from the four episodes of mass violence that we considered that the District Magistrate and his or her subordinates can make a big difference in protecting victims and assisting them in the aftermath of violence. In Bhagalpur, several district officials were criticized by the Commission of Inquiry for being ineffective in 1989. However, Bhagalpur also provided examples of administrative service officials who, in the aftermath of violence, were very diligent about recording what happened, and diligent about setting relatively nuanced standards for relief and compensation.

State level officials largely escape detailed scrutiny, as do Ministers in the State and Central Governments, since they are several layers removed from direct action against attackers or for victims. The Commission of Inquiry for Bhagalpur criticized the State Government for appointing inexperienced district officials, and shuffling officials around too frequently. In Gujarat in 2002, there are few records of district magistrates standing up against the mass violence and enforcing fair and effective

police action. Civil society groups and the media closely tracked the direct and indirect complicity of senior office holders, and as discussed earlier, this led to a Minister in the Gujarat State Government being prosecuted, and the Chief Minister being questioned by the SIT.

MPs and MLAs: MPs and MLAs have not been scrutinized closely by Commissions of Inquiry and generally the media, unless they were directly involved in violence. In Bhagalpur, criminal gangs involved in violence had close political links, and the Commission briefly mentioned that some of the perpetrators benefitted from political patronage. In Gujarat, MLAs directly involved in violence, such as Maya Kodnani in Gujarat, were covered by the media. However, there seems to be little or no official reflection, and limited civil society scrutiny, on the indirect supporting roles played by members of the legislature during these episodes of mass violence. During widespread violence, as in Gujarat in 2002, it is clear that members of the legislature had strong links with members of their political party, and with non-party affiliates who were directly involved in violence.

While MPs and MLAs should be scrutinised more closely for what they did, it is also worth thinking about what they failed to do. Members of the State or Central legislature do not have specifically enumerated positive duties in the face of mass identity based violence in the area or constituency they represent. However, their general responsibility to represent their constituents and watch over the executive becomes particularly urgent at these times.

Judiciary and prosecution: The previous chapter discusses how public prosecutors perform their jobs weakly at best, and how some prosecutors have been openly biased against victims and witnesses. It also highlights how judges, particularly trial court judges, fail to exercise the powers they have to ensure that the trial is free and fair – it is clear that judges should be doing far more to query whether summary closure is justified, correct omnibus FIRs, press police to arrest absconding accused, protect witnesses, summon witnesses, ask questions that the prosecution fails to ask, query major gaps in investigation, and intervene when defense counsel harass prosecution witnesses.



### 3. Legal and administrative proceedings against officials

Commissions of Inquiry and civil society reports tell us what official functionaries did, or did not do, during episodes of mass violence. Officials identified by commissions were accused in a few instances of direct participation in violence, including not just direct physical participation but also encouraging and inciting violence. More often, however, they were accused of a failure to prevent violence by private actors.

The Tewary Commission identified four district level officials as highly negligent before the Nellie massacre in 1983, but recommended that the government take action only in the most general terms. The Commissions and Committees of Inquiry formed to examine mass violence in 1984 in Delhi were more concrete. The Lata-Mittal Commission recommended disciplinary proceedings against 85 public officials, in some cases specifying that the misdemeanour in question should attract a major penalty. The Bhagalpur Commission laid out in detail acts of omission and commission by district officials, most of whom were police officials, and recommended that the State Government conduct inquiries and take disciplinary action, but did not specify what type of action. On the 2002 mass violence, the Gujarat government has disclosed that 152 police officials are 'facing' departmental inquiries and that departmental inquiries are 'contemplated' against 72 others<sup>619</sup>. However, the Gujarat government did not respond to our RTI query about how far these proceedings had progressed.

#### C. Administrative action

Significantly, all the Commissions of Inquiry recommended administrative discipline rather than filing criminal proceedings, even where a criminal complaint was arguably warranted. So, it would seem that while Commissions of Inquiry have been the main public forum for victims of mass violence to present their case,

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<sup>619</sup> Government of Gujarat, Riot Cell website

administrative discipline has been the only possible consequence for officials found remiss by Commissions, if at all.

Administrative discipline is regulated by 'service rules', which lay down duties, standards of behaviour, disciplinary procedures and penalties. Different public services have different service rules - officials in the Central Civil Services are governed by a different set of rules from officials in each State Administrative Service.

As an example, the All India Services (Discipline and Appeal) Rules, 1969 ('the All India Rules') lay down disciplinary procedures and penalties for, inter alia, the Indian administrative and police services. The Central Civil Services (Classification, Control and Appeal) Rules, 1965 ('the Central Rules') govern disciplinary action against all government servants except those in the railways and the All India Services.

Space does not permit detailed discussion. However, administrative disciplinary rules detail the procedure for disciplinary inquiries and penalties. They provide for basic due process in consonance with Article 311 of the Constitution which states that no civil servant shall be removed or reduced in rank except after inquiry in which he has been informed of the charges against him and has been given a reasonable opportunity to defend himself. The civil servant must be given a copy of the charge as well as all necessary documents to prepare a defence<sup>620</sup>.

The All India Rules as well as the Central Rules provide for 'major' and 'minor' penalties. Major penalties under both sets of Rules include demotion to a lower rank, compulsory retirement and removal from service<sup>621</sup>. Minor penalties include censure, withholding promotion or pay raises, and recovery of loss to the public exchequer<sup>622</sup>. The Central Rules provide that major penalties should be imposed in

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<sup>620</sup> Procedure for penalties need not be followed where a penalty flows from conduct that has led to conviction on a criminal charge.<sup>620</sup>

<sup>621</sup> Rule 6, All India Services (Discipline and Appeal) Rules, 1969

<sup>622</sup> Rule 6, All India Services (Discipline and Appeal) Rules, 1969

cases where there is reasonable ground to believe that a penal offence has been committed by a government servant but the evidence is not enough to prosecute in a court of law.<sup>623</sup> The Central Rules (but not the All India Rules) take corruption very seriously, and provide that for offences of corruption and disproportionate assets the penalty should be termination with or without disqualification from future employment under the government.<sup>624</sup> By contrast, neither the Central nor the All India Rules provide guidance specifically on instances where officials allow their subordinates to commit crimes, or where officials are negligent, partisan or complicit in the face of mass violence.

Beyond these basic procedures, the public knows little about the technicalities and tenor of departmental inquiries within government that followed episodes of mass violence. We found it difficult to ascertain even whether State governments conducted the inquiries recommended by Commissions, because public authorities consistently refused to disclose information on this issue. We don't know, for example, whether the many police officials identified by the Bhagalpur Commission faced administrative proceedings. While the Gujarat government has disclosed that some inquiries are in progress, it has not made public how far these inquiries have gone, and what the results are. The Delhi government has been more forthcoming and responded to our Right to Information query about what disciplinary action they took in relation to the 1984 mass violence. However, while we know which of the 85 police officials identified by the Kusum Lata Mittal committee faced administrative inquiries, we do not know the results of those inquiries in 47 cases. We know that 15 police officials against whom the Kusum Lata Mittal Committee recommended disciplinary proceedings escaped these proceedings because they had retired by the time the Government acted on the recommendations<sup>625</sup>. We know that inquiries against 4 police officials were dropped, and 1 was exonerated.

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<sup>623</sup> Handbook 2010 for Central Government Employees, 309

<sup>624</sup> *Ibid.*, 305

<sup>625</sup> Inquiries are restricted to events that are alleged to have taken place within the past four years.

The Rules provide that the disciplining authority and the member of service can call witnesses, and cross-examine witnesses on the other side<sup>626</sup>. However, the disciplining authority and the inquiring authority are under no obligation to inform or call upon victims of the official's alleged offences or misdemeanours. Where the misdemeanour alleged may not have direct victims who suffered death or assault – a corruption charge, for example – this is of somewhat less consequence, although victims have a right to know whether officials were punished for corruption charges as well. However, where an official is facing disciplinary charges for acts or omissions that contributed to deaths, injuries or other harm to specific individuals rather than more generalised harm to the public exchequer, it is important that victims have the opportunity to address the disciplinary authorities in some way, and at a minimum, be informed about action against the official.

Even the most attenuated conception of a State's duties includes controlling violence and preventing coercion. Public officials who do not take reasonable steps to control group attacks when they are empowered to do so are undermining the State's most basic, 'night watchman' role. Beyond the direct harm to victims who are attacked, such violence leaves a legacy of instability and distrust in government machinery. Arguably, in these cases the records of disciplinary proceedings should be made public; at a minimum, the results of proceedings should be disclosed.

On the face of it, there seems to be some incentive within government to investigate and punish public officials who participate in or tolerate violence, but mainly at junior levels and after prodding by Commissions of Inquiry. However, countervailing incentives pull away from robust investigation and discipline. If the political party in power supports the violence, or finds it politically expedient, public officials who participate or who allow mass violence to unfold are likely to be rewarded rather than punished. Rewards might mean a coveted position, or protection from prosecution and administrative enquiry.

More generally, at a systemic level, government officials responsible for inquiring into dereliction of duty by their counterparts might be inclined to 'protect their own'

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<sup>626</sup> Rule 8(15) of the All India Services (Discipline and Appeal) Rules, 1969

rather than exposing them to public scrutiny, or deal with them instead by imposing a 'shadow penalty' – such as a transfer to a post considered undesirable<sup>627</sup>. Senior officials in particular, might escape a proper enquiry. The Nanavati Commission on the 1984 mass violence found that the Lieutenant Governor of Delhi at the time, PC Gavai, did not treat the 'law and order situation' with the seriousness it demanded and that he 'could not escape responsibility for the failure'. The Delhi Government's ATR in response to the Nanavati Commission report states that PC Gavai was replaced by MMK Wali on 4 November 1984, implying that this constituted sufficient action. Given how many people were killed between 31<sup>st</sup> October and 4<sup>th</sup> November 1984, merely replacing someone who was found by an official commission to be remiss was clearly not enough. The Nanavati Commission took the view – not surprisingly – that the Commissioner of Police in Delhi at the time, SC Tandon, had to be held responsible for the government's complete failure to maintain law and order. The Delhi Government's ATR said that Mr. Tandon had been replaced as Commissioner of Police on 11 November 1984. Once again, merely being relieved of a post counted as sufficient action.

This seems to be standard practice, and the more senior the public official, the less likely it is that he will face even a shadow penalty of this sort. Sajjan Kumar, Jagdish Tytler and Kamal Nath have all held high office, including Ministerial posts, in governments led by the Congress. Tytler were pushed to resign from the office of Minister for Overseas Indian Affairs after the Nanavati Commission, which found "credible evidence" of a possible role "in organizing the attacks" was tabled in Parliament in August 2005. Sajjan Kumar also resigned as Chairperson of the Delhi Rural Development Board, a position of Cabinet rank in the Delhi government<sup>628</sup>. In Gujarat, Maya Kodnani was forced to resign from the post of Minister of Women and Child only after the SIT summoned her in 2009. Six years previously, in 2003, the

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<sup>627</sup> Alongside the formal hierarchy of ranks within Central and State civil services, there is also an informal ranking of what posts are more or less prestigious. Prestige might attach to a position because, for instance, it is located in an urban centre rather than a small town, or because it is in a department that is at the core of government, such as Finance. Perceptions of prestige reflect larger societal values – departments dealing with law and order are typically regarded as more significant than departments dealing with healthcare, which in turn carries higher prestige than departments dealing with women and children.

<sup>628</sup> V. Ramakrishnan, "1984: The Untold Story," *Frontline*, Volume 22 - Issue 18, Aug 27 - Sep 09, 2005. Available at <http://www.hinduonnet.com/fline/fl2218/stories/20050909005201900.htm>

Gujarat police questioned her following complaints that she participated in the Naroda Patiya and Naroda Gram massacres, but claimed they found no evidence against her.

#### D. Criminal proceedings against errant officials

##### 1. Substantive law

While Indian law, as it stands, lacks some substantive offences that capture the peculiarities of identity-based violence<sup>629</sup>, it criminalises the usual array of serious violent acts. Like any reasonably developed criminal justice system, it includes principal and accessorial criminal liability for violent crimes. So, in theory it bites upon the acts of officials who directly participate in violence, by committing violent acts or inciting, encouraging or assisting violent acts.

##### a) Acts of omission

However, Indian criminal law does not criminalise acts of omission by government functionaries in senior positions. It does not criminalise, for example, the failure to prevent and control violence by officials empowered and duty bound to do so. The law also does not criminalise senior officials who fail to prevent and punish their subordinates from committing crimes. In light of this, there is a strong case for explicitly delineating as a criminal offence tolerance of or tacit acquiescence in mass violence by officials whose duties include controlling violence.

##### b) Command responsibility

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<sup>629</sup> For example, Indian criminal law as it currently stands does not adequately criminalise certain types of sexual violence. This is discussed in more detail in the previous chapter.

We noted earlier some examples that suggest senior officials are likely to face 'unofficial' censure rather than formal administrative or criminal penalties. Senior officials who are complicit in mass violence also escape criminal liability because Indian law does not criminalise the failure of superiors to prevent or punish crimes by their subordinates.

Criminal liability for direct participation – for committing a crime – includes principal liability (planning, physical commission), as well as accessorial liability (aiding, abetting, ordering, instigating). The defendant must either intend to plan or intend to commit the crime or be 'aware of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.'<sup>630</sup> There will typically be several layers between a senior public servant and a violent crime committed on the ground, and it will be difficult to prove direct involvement to the criminal standard of proof. Senior officials who are principals or accessories in crimes during episodes of mass violence will generally be shielded from criminal liability by the fact of their seniority.

Command or superior responsibility<sup>631</sup> is a mode of indirect criminal responsibility in international humanitarian law<sup>632</sup>, which allows military and civilian leaders to be held liable for the criminal acts of their subordinates. The principle of command responsibility allows an individual to be held criminally responsible for acts or omissions committed by his subordinates if he knew, or should have known that the subordinate was about to commit or had committed such acts, and the superior fails to take reasonable measures to prevent his subordinate committing those acts or omissions, or fails to punish his subordinate for those acts or omissions.

In international law as it presently stands, the principle command responsibility has been applied to military as well as civilian superiors, to formal as well as informal, or

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<sup>630</sup> A. Danner A & J. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law," *California Law Review*, 2005, Vol. 93: 102, quoting *Prosecutor v. Kvočka*, Judgement, ICTY Trial Chamber, para 251

<sup>631</sup> The terms 'command responsibility' and "superior responsibility" are used interchangeably to refer to indirect superior criminal responsibility for the acts of subordinates.

<sup>632</sup> For a discussion of how the principle evolved, see Danner & Martinez, *ibid.*

de facto<sup>633</sup>, superiors<sup>634</sup>. For a superior to be responsible for the crimes of a subordinate, the following conditions should hold:

- There should exist a superior-subordinate relationship between the superior (the accused) and the perpetrator of the crime
- The crimes should be committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such forces
- The superior either knew or *should have known* that his or her subordinates were committing, or planning to commit, or had committed the crimes in question.
- That superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to investigate and punish the crimes. So, command responsibility encompasses the failure to take reasonable steps to prevent crimes, as well as the failure to punish crimes that have occurred.

Command responsibility is not vicarious liability for the acts of another person. It is liability for the superior's omission, or failure to control, which renders him individually culpable. We should emphasise that a commander who engages in positive acts to encourage his subordinates to commit crimes will have 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of a crime. Command responsibility in international criminal law involves 'indirect' responsibility for failure to act<sup>635</sup>.

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<sup>633</sup> The *Celebici* Trial Chamber held that, "In order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. So, a superior may incur command responsibility for crimes committed by persons who are not under his formal or legal control, to the extent that he exercises effective control over them.

<sup>634</sup> We use the terms "superior" and "subordinate" to describe to both civilian and military chains of command.

<sup>635</sup> However, under command responsibility, the superior is convicted not of dereliction of duty as a freestanding substantive offence, but for the actual crime committed by a subordinate.



While some elements of the command responsibility principle continue to be debated<sup>636</sup>, it has been extremely significant in international criminal proceedings dealing with mass violence since the Second World War.

At a practical level, international experience shows us that proving direct involvement of senior leaders, particularly political leaders, is extremely difficult. Particularly where individuals in high political office have a hand in orchestrating violence, they are likely to be well insulated from the physical perpetrators on the ground. They are also likely to be able to manipulate or erase records of their own involvement after the fact. Under such circumstances, the risks of acquittal loom high, and as Osiel points out, '[w]hen political leaders are acquitted in a criminal proceeding, they choose (unsurprisingly) to interpret this legal result as a complete vindication of their story.'<sup>637</sup> The principle of command responsibility offers a mode of liability that is morally justifiable, but also makes it practically possible to hold senior office-holders accountable in criminal proceedings. It deals with acts and omissions that are crucial in enabling mass violence, but do not fall within existing crimes of incitement and conspiracy.

After the Second World War, many of the Allied countries incorporated the principle of command responsibility into domestic criminal law<sup>638</sup>. Unlike some of these other jurisdictions, India lacks criminal liability for culpable omissions by senior officials. It has also seen very serious episodes of mass violence on many occasions. On

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<sup>636</sup> The mens rea requirement has generated debate and anxiety, specifically, whether a commander must have had actual knowledge of the violations committed by his subordinates to be derivatively liable for them, or whether he may be found guilty of crimes of which he had no actual knowledge. If knowledge can be imputed to a superior, how remiss must he have been to be deemed to have knowledge – is recklessness, gross negligence or ordinary negligence the appropriate standard?

The standard the ICTY Trial Chamber articulated in *Celebici* remains authoritative:

“A superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates...It is sufficient that the superior was put on further inquiry by the information...that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.”<sup>636</sup>

<sup>637</sup> M. Osiel quoted in Danner & Martinez, *ibid.*, 96.

<sup>638</sup> Danner & Martinez, *ibid.*

several of these occasions, some of which we have discussed earlier, there was significant evidence that violence unfolded because it was allowed to unfold, senior officials actively or tacitly supported violence, or tolerated it. So, the lack of command responsibility is particularly serious in the Indian context. The law should be amended to include this principle, and reflect in law that the relevant moment of choice for someone in a position of official leadership is when he chooses not to monitor subordinates or punish them for participation in identity based violence.

## 2. Procedural barriers

In addition to the substantive gaps discussed above, Indian law also has procedural barriers that make it harder to secure criminal convictions against public servants. Some classes of public officials – elected, appointed, as well as career civil servants – are procedurally shielded from prosecution, as compared to the average Indian.

Article 361 of the Indian Constitution protects the Head of State, i.e. the President of India, and heads of individual states, i.e. Governors, from being sued while they hold office, for acts done in the exercise of the powers and duties of office. It is worth noting that Article 361 does not confer immunity upon the Chief Minister or Council of Ministers in a State Government, or the Prime Minister and Cabinet Ministers in the Central Government.

Judges and some administrative officials cannot be prosecuted for acts committed in the discharge of public duty without explicit sanction by the government, under Section 197 of the Code of the Criminal Procedure. This procedural barrier applies to public servants ‘who are not removable from office save with the sanction of the government’.

It is a moot question whether Section 197 applies to Members of Parliament and Members of Legislative Assemblies, as there is some legal debate about whether MPs and MLAs are public servants within the meaning of section 21 of the Indian Penal Code. In *AR Antulay v. R.S. Nayak*<sup>639</sup>, the Supreme Court took the view that an MLA

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<sup>639</sup> 1984 Indlaw SC 338

is not a public servant within the meaning of Section 21. In the *JMM bribery* case<sup>640</sup>, the Supreme Court said that an MP was a public servant under the terms of the Prevention of Corruption Act. However, once a person is no longer an MP or an MLA, he does not fall under the ambit of Section 197 of the Criminal Procedure Code, 1973.

The State Government is the sanctioning authority where the public official facing potential prosecution is employed by the State Government or was employed by the State Government at the time he committed the alleged offences, and the Central Government is the sanctioning authority for its employees. So, granting sanction to prosecute is within the domain of the executive – it is an administrative decision. If prosecution is sanctioned, the administrative decision maker conveys this to the prosecuting authorities<sup>641</sup>, who then initiate prosecution. Sanction to prosecute the protected class of public servants is a prerequisite to criminal proceedings, and the Supreme Court has held that absence of sanction to prosecute vitiates trial<sup>642</sup>.

This additional procedural hoop for prosecuting public servants is intended to protect them from harassment, to insulate them enough so that they can do their jobs without being apprehensive about malicious complaints and prosecution. Public servants who fall within the ambit of Section 197 are protected even after they retire. However, this layer of insulation only applies to acts done by the public official in the course of her service and in the discharge of her duty. A public servant who commits a crime in his private capacity, outside office hours, will clearly not attract the protection of Section 197. Similarly, a public servant who commits an illegal act using his official position but not in discharge of his duty cannot benefit from Section 197<sup>643</sup>. To illustrate, where police officers on duty during the course of a bandh were alleged to have committed excesses during the bandh, sanction was necessary because the crimes alleged were done while they were performing their official

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<sup>640</sup> *PV Narasimha Rao v State* (1998) 8 SCC (Jour) 1

<sup>641</sup> *Rudra Datt Bhatt v. Emperor* (1933) 55 All 798

<sup>642</sup> *Haryana v. Iqbal Singh* 1978 CrLJ 46 (p&h-db)

<sup>643</sup> *R.K. Anand v. Joginder Singh* 1974 CrLJ 1007

duty<sup>644</sup>. Where a public servant asks for a bribe while performing his official duties, the act of demanding a bribe is inherently outside the course of official duty. While holding a particular office might enable the accused to commit an offence, this does not imply that the offence is within the course of duty.

Given the intention of this legal provision, the courts have held that questions of whether an act is within the course of official duty should be narrowly construed. Only acts that are clearly within the course of duty should attract this procedural protection. However, once any act or omission has been found to have been committed by a public servant in discharge of his duty, then the body deciding upon whether to sanction prosecution should construe Section 197 liberally in favour of protecting officials from unnecessary prosecution.

What implications does this have for prosecuting officials involved in episodes of mass violence? Public servants who participate in mass violence as principals or accessories should not ordinarily benefit from Section 197, since acts of violence and property damage would clearly fall outside the scope of official duty. The prosecution would not need sanction to prosecute, for example, an official in the Department of Agriculture who joins a violent mob. However, officials accused of using excessive force or unlawful methods while tackling violence, or moving groups of people from one location to another, would fall within the ambit of Section 197 – the prosecution would need sanction to proceed against them. This should only include officials who have powers and duties to maintain law and order, such as the police, the district magistrate, or senior decision-makers in the Home Department.

For the episodes of violence we considered, the governments concerned have refused to disclose information on sanction to prosecute. As a result, we cannot assess whether sanction was in fact granted according to established legal guidelines. However, Section 197 clearly covers the police performing (or not) a law and order role, and police personnel are the functionaries most often accused of breaching their duty during mass violence. Therefore, this procedural protection has serious

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<sup>644</sup> *Krishnamendu Narayan Chowdhary v. State of West Bengal* 2008 CrLJ 1691 (1697) (Cal)

implications for holding errant State functionaries accountable, particularly because past experience indicates sanction is granted late and infrequently. Should the law be reformed so that Section 197 no longer applies to complaints about complicity in mass violence? In light of the State's poor record in holding its functionaries accountable for enabling violence, there is a strong argument for doing so. At a minimum, the law should be amended so that permission to prosecute is *not* required in these cases, unless the government can persuade the court to the contrary.

Given the substantive gaps in the law, such as lack of command responsibility, and the procedural impediments to prosecution, government functionaries have rarely been held accountable for crimes committed during mass violence. When government officials have been prosecuted, these prosecutions are compromised by the same problems that hamper criminal trials after mass violence more generally. In 2010, the Delhi High Court upheld the acquittal of police officers accused of participating in the Trilokpuri massacre in 1984<sup>645</sup>. It was alleged that the police functionaries in question were called to Trilokpuri and saw houses burning. They told Sikh men to go inside certain houses and then directed a violent mob to those houses. The Misra Commission found that investigation into the role of the police and the alleged leaders of the mob, including the Block pradhan of Trilokpuri, had been perfunctory. It took 23 years after the Mishra Commission's findings for the case to be prosecuted and the appealed. The accused were acquitted for lack of sufficient evidence against them, which is not surprising given the delay in trial and the initial failure to investigate.

#### E. Commissions of Inquiry

In the four episodes of mass violence we examined, we asked State and Central governments about government follow-up after commissions of inquiry recommended action against officials. In the first chapter, we acknowledged our reservations about restricting ourselves to officials identified as remiss by commissions of inquiry, given that we felt the performance of commissions

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<sup>645</sup> *Abdul Rashid v State (Gov of Delhi)* CRLA 219/1996 [2010]

themselves is mixed at best. This chapter has focused on how public servants have been and can be held accountable for their acts and omissions during mass violence. Those who staff commission inquiry are, at least temporarily, public servants (and typically, are retired members of the judiciary and civil services). Setting up a commission has been one of the State's main responses after an episode of mass violence. Therefore, it is important to look briefly at how accountable these commissions are to the public.

Commissions are set up under and regulated by the Commissions of Inquiry Act 1952. A commission could be created either by the Executive (State or Centre) or by the State or Central legislature to inquire into questions of public interest. The scope of the commission is defined in the notification that creates it. It does not have the authority to go beyond the scope already defined. The commission has been given powers of a civil court to conduct proceedings but it can only report findings and make recommendations, which are not binding on the executive. However, a commission's report must be tabled before the legislature within six months of it being submitted to the government, along with an 'action taken' report ('ATR') by the government<sup>646</sup>.

Where crimes have been committed on a large scale, why set up a fact finding body rather than simply allowing the criminal justice machinery to function? Commissions and trials have different, though overlapping, purposes. A commission of inquiry will typically have a broader mandate than a trial and can analyse patterns of abuse, their causes and consequences. A commission that does its job well can identify institutional responsibility for past abuses and serve as a catalyst for prosecution, compensation and for educating the public. Most fundamentally, it can establish a factual record that, because it is an official record, is more difficult for State and Central Governments to dismiss than the word of victims and civil society groups.

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<sup>646</sup> Section 3(4) Commissions of Inquiry Act 1952

The Commissions of Inquiry we looked at fell short of these goals, due to the commissions' own performance, but also because of the State's weak response to them.

**Bias:** Commissions of inquiry are appointed by the government of the day, and will be asked to pass judgment on the performance of that government. The appointers have an incentive to appoint members who will be 'safe', unlikely to be too critical, particularly of those who occupy high office. While the Commissions we looked at were more direct when identifying the failings of junior functionaries, they tended to adopt an emollient tone when discussing the acts of senior officials. Most of the Commissions we looked at resorted to euphemism when pronouncing on official failings, and tended towards pious intentions and intangibles when making recommendations, urging the government they were addressing to, for example, 'spread the message of national integration amongst the youth' and 'build leadership skills'.

Over and above the likelihood that commission members will be fairly forgiving, governments have sometimes chosen members who are evidently partisan, and biased in their favour. In Chapter 4, we criticised the Ranganath Mishra Commission on the 1984 mass violence for ignoring the substantial roles played by politicians and government functionaries. Ranganath Mishra, Chief Justice of the Supreme Court when he headed that commission, went on to become a Congress MP in the Rajya Sabha. The Bhagalpur Commission on Inquiry was initially set up as a single-member commission, but, as discussed earlier, the sole member was perceived as biased and two other members were added to the commission. Ultimately, the Chairperson submitted a dissenting report, which was very much at odds with the majority report and took a far more positive view of the government's role in allowing mass violence<sup>647</sup>. The choice of Justice Nanavati to chair the commission on mass violence in Gujarat in 2002 was also controversial not least because he was simultaneously chairing a commission on the 1984 riots. More recently, the Chair of the Commission to enquire into violence against Christians in Kandhamal, Orissa in 2008 stated publicly when the Commission began its work that the violence did not

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<sup>647</sup> "Recalling Bhagalpur: Aftermath of 1989 Riots," *Economic & Political Weekly*, May 4, 1995, 1059.

target a particular religious group. The Mohapatra Commission's interim report declared that violence in Kandhamal was the result of resentment by tribal groups and made no mention of the well-documented role played by Hindu Right groups<sup>648</sup>. The Panigrahi commission, looking into the first round of anti-Christian violence in Kandhamal in 2007 reportedly refused to adjourn hearings even when fresh violence made it difficult for victims and advocates from Kandhamal to attend the hearings<sup>649</sup>.

In addition to choosing pliant members, the government of the day will have a strong incentive to set the mandate of the Commission in a way that shields the powerful. The Bhagalpur Commission was restricted to looking at the performance of the district administration, though it reached beyond its remit and commented upon what it saw as faulty decisions by the State Government. When Congress politicians implicated in the 1984 mass violence challenged the legality of the Jain-Bannerjee Committee in the Delhi High Court in 1987, the Delhi Government did not counter their challenge. The Committee was "stayed" by the High Court in 1987, and quashed in 1989. Clearly, the government had never intended the Committee to conduct its inquiry effectively.

The current law on appointing Commissions takes a benign view of a government's willingness to expose its failures and excesses to scrutiny. It is always difficult to push governments to appoint independent watchdogs, and this will hold especially true for inquiries into the serious lapses that allow mass violence to unfold. Clearly Commissions of inquiry must draw more fully upon democratic and federal checks.

**Inefficiency:** Except for the Tewary Commission report on election violence in Assam, none of the Commissions we looked at completed their inquiries on time. Inquiries into identity-based violence should be made as urgently and efficiently as possible. However, repeated extensions are the norm. The Bhagalpur Inquiry began in 1989, but was not completed until 1995. The Nanavati Commission, set up in 2002,

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<sup>648</sup> "Justice Sarat Chandra Mohapatra submits interim report on Kandhamal riot", *Orissa Diary*, July 02, 2009, <http://www.orissadiary.com/CurrentNews.asp?id=13226>

<sup>649</sup> Statement on the Orissa Violence by Archbishop Raphael Cheenath S.V.D, Archbishop of Cuttack – Bhubaneswar, 22 October 2008, available at [www.fides.org/eng/.../STATEMENT\\_ON\\_THE\\_ORISSA\\_VIOLENCE.doc](http://www.fides.org/eng/.../STATEMENT_ON_THE_ORISSA_VIOLENCE.doc), downloaded on 2 December 2010



had yet to complete its report in December 2011. As discussed earlier, there have been several commissions and committees inquiring into different aspects of the anti-Sikh pogrom on 1984, between 1984 to the present.

**Opacity:** We found that the reports of Commissions of Inquiry set up after Nellie 1983, Delhi 1984, Bhagalpur 1989 and Gujarat 2002 were extremely difficult to access. The Parliament library had copies only of the Mishra and Nanavati commissions. We could not access the collections of State Legislative Assemblies. Right to Information applications to each relevant Legislative Assembly elicited no response. Shockingly, the Ministry of Home Affairs claimed it did not have copies of Commission of Inquiry reports in response to our Right to Information application for these reports. Libraries in major universities and research institutes did not have these reports.

The Bihar and Delhi Governments disclosed Commission Reports to us after Right to Information applications and appeals. The Home Department of Assam disclosed the Tewary Commission report, not in response to a direct application for the report (which it denied), but in response to an application for information on the district administration's response to the violence. We now have what we suspect is one of the few surviving copies of a report that was never (even theoretically) made public. No government disclosed material placed before the commissions of inquiry - government documents, affidavits, records of proceedings. This material is an important and necessary public record of what happened and how the State responded. Not only should it be in public, the Governments that have this material should make it as accessible as possible.

While commission reports and background materials are not in public and apparently not in the possession of the Home Ministry, the resources used by commissions of inquiry are also hidden from public view. Again, the governments concerned should make public the salaries and perquisites of members and staff, as well as how much time is spent on hearings.

So commission reports and materials are very difficult to access after the fact. Commission proceedings have also sometimes been hidden from view. The

proceedings of the Mishra Commission after the 1984 mass violence were held 'in camera' or behind closed doors. There was also an effective press ban – the media was directed to not publish any stories on the proceedings of the Commission. As mentioned in Chapter 4, the victims' representative body was denied affidavits received by the Commission, on the grounds of national security.

**The Executive's failure to respond:** Perhaps more dismal than delays by Commissions themselves are delays by State Governments and the Centre in responding to them. The Assam Government never made the Tewary Commission report public at all. After the Assam Accord, any criminal proceedings against people who committed violent crimes were dropped. The only official assessment of what happened and who was responsible was never released. The Bihar Government appears not to have an ATR in response to the Bhagalpur Commission report, and neither does the Bihar State Assembly. The Delhi Government did not submit ATRs for several of the commission and committee reports on the 1984 riots.

The failure to file ATRs and the quality of ATRs that are filed indicates the quality of action taken. In Bhagalpur, as discussed earlier, a second commission of inquiry was set up in 2007 to review whether the recommendations of the first commission had been implemented (suggesting that they had largely been ignored). In 2005, the Nanavati Commission report on the 1984 mass violence was tabled in Parliament<sup>650</sup> (after a special mention on the delay in laying the report before the Lok Sabha)<sup>651</sup>. In the discussion that followed, MPs from the Congress party noted the failure to give adequate compensation to victims of other episodes of mass violence, and commented on the weaknesses of commissions of inquiry more generally. The Prime Minister, while acknowledging that the massacre was “a national tragedy”, also stressed that the Nanavati Commission had exonerated senior Congress party officials. He did not address the obvious point that some of the officials and Congress party functionaries in question had been relatively senior in Delhi at the

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<sup>650</sup> On 10 August 2005, there was an Adjournment Motion on *Suspension of Question Hour and motion for adjournment on need to take action against persons indicted by Nanavati Commission of Inquiry* (Motion Negatived) available at <http://164.100.47.132/LssNew/psearch/result14.aspx?dbsl=2874>

<sup>651</sup> Special Mention on delay in laying the Nanavati Commission report on 5 August 2005 by Vijay Kumar Malhotra.

time, and some went on to hold senior positions in State and Central governments. The Prime Minister offered to take action against the junior functionaries mentioned by the Commission, stating:

“In the case of some others, it has said that it is probable that they may have some involvement in some of the incidents, and that there is evidence to that effect. The Commission is in itself not certain, however, of the role of these individuals. As the ATR says, Governments cannot act when the Commission itself is uncertain of these issues. ... (Interruptions)...

However, there is something called perception, and there is the sentiment of the House. The Government respects and bows to that sentiment. Therefore, keeping in view the sentiments expressed in the House today, our Government assures the House that wherever the Commission has named any specific individuals as needing further examination or specific cases needing re-opening and re-examination, the Government will take all possible steps to do so within the ambit of law. “

It is troubling that the Prime Minister thought it necessary to emphasise that the commission had not conclusively determined the responsibility of particular individuals – it is not the role of a commission of inquiry to determine guilt beyond reasonable doubt. The government’s commitment to take action against indicted individuals seemed to come not from accepting the responsibility of those in power in Delhi in 1984, but as a concession to “perception” and “the sentiment of the House”.

There is room for, and certainly a need for, a closer and more detailed critique of how Commissions looking into episodes of mass violence have functioned. Some of the reports we examined – the Kusum Lata Mittal report on the 1984 violence and the Bhagalpur Commission report, for example – make an important contribution to establishing a factual, or forensic record. Overall though, commissions seem to function tacitly as a means to evade genuine accountability for the State’s failures.

**Legal limits:** It is also important to remember what commissions cannot legally do, no matter how well they function. Inquiries are not trials: they are investigations. They do not result in the determination of rights or liabilities; they result in findings of fact and recommendations. To preserve the right to a fair trial, statements made before a commission cannot be used against the person making the statement in civil

or criminal proceedings<sup>652</sup>. A commission's report does not have evidentiary value in a criminal trial<sup>653</sup>. While a commission can compel a witness to testify, such testimony, even if self-incriminating, cannot be directly used to incriminate the person in subsequent criminal proceedings.

Clearly, governments are disingenuous if they claim that they are waiting for the results of an inquiry before initiating administrative or criminal proceedings against officials widely alleged to be complicit in mass violence. Inquiries can divert the limited financial and emotional energies of victims, civil society organisations and religious groups, even as they offer limited recourse in holding individuals accountable. The delays that result can count against the victim in criminal trials that follow.

#### F. Summing up

When participants in mass violence are not punished, and do not even have to face criminal proceedings, this impunity is stitched in to the daily lives of communities for years to come. However, while we argue for more effective prosecution of the full range of participants in mass violence, it is also true that holding public servants accountable is particularly important. High-level government officials and political office holders are not like everyone else. They have positive obligations to maintain law and order, and to enforce certain standards of behaviour on subordinates under their control.

Viewed through the four episodes of mass violence we examined, India's record on holding bureaucrats and politicians accountable is dismal. Commissions of inquiry have tended to be timid, and skimmed over the complicity of senior functionaries. Administrative action against errant officials is largely hidden from public view, and in many cases they are transferred or resign rather than facing genuine discipline. It is worth noting that political functionaries complicit in mass violence have not been

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<sup>652</sup> Section 6, Commissions of Inquiry Act 1952

<sup>653</sup> *Kehar Singh v. Delhi* AIR 1988 SC 1883; *Ram Krishna Dalmia v. Justice S R Tendolkar* AIR 1958 S.C. 538

removed from office – they resign “voluntarily”. Governments, thus, have not taken the initiative to remove people who have participated in or encouraged serious crimes. The individuals themselves are forced to resign ostensibly in response to an official investigation or inquiry. However, as the aftermath of the 1984 and 2002 mass violence show, governments have ignored several investigations and inquiries, and jettisoned complicit individuals only when criticism by the media, civil society and the opposition in the legislature reaches a tipping point.

Trials that follow mass atrocities are politically symbolic, and play a part in forging a new equilibrium between victims, their local context, and the government. Punishing officials who acquiesced in mass violence is important to restore a sense of security for members of the group that was targeted. In light of this, the Indian State needs to amend the law to incorporate command responsibility principles, and review procedural barriers to prosecution.

It is important also to scrutinize commissions of inquiry – the default official response after mass violence – and identify how inquiries can be designed so that they are more effective. Civil society, in its turn, needs to be vigilant that the State does not use inquiries, which cannot affix individual guilt, to evade administrative and criminal prosecution.

## **IX. Compensation and rehabilitation<sup>654</sup>**

### **A. Introduction**

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<sup>654</sup> Researched and written by Surabhi Chopra

Effective reparation is closely tied to prosecution and truth-telling. When the State gives victims of mass violence money as compensation, but does not prosecute perpetrators or account openly for its own failings, the money it hands out arguably does not constitute full legitimate reparation.

That said, compensation to victims is the most tangible way the State can attempt to remedy the harm victims have suffered<sup>655</sup>. Criminal prosecution, even when pursued effectively (not the case in any of the episodes we studied), focuses squarely on the role of the accused. The adversarial trial cannot account for the victim's continuing pain and hardship, and neither can it punish complicit officials. Public testimony and information sharing can offer the relief of official acknowledgement, but rings hollow without more direct reparation. Finally, institutional reform is a protracted endeavour, and victims are unlikely to benefit directly from it.

So, while immediate relief and monetary compensation is not sufficient, it is necessary and the Indian state's measures in this regard demand close scrutiny. In this chapter, we examine information on compensation after Nellie 1983, Delhi 1984, Bhagalpur 1989 and Gujarat 2002. We look at national standards and practice on compensation. We look then at standards under international law, and consider what might be involved if India moved from narrow monetary compensation towards deeper, fuller reparation.

## B. Observations across massacres

### 1. Rescue

Rescuing those in danger of mass communal violence involves identifying people subject to or at risk of violence, protecting them in those locations, and if they are unsafe, shifting them as quickly as possible to safe places. Rescue is the first duty of the state after violence breaks out. Successful rescue averts or limits the toll of communal violence. Not surprisingly, we found that the district administrations in

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<sup>655</sup> P. De Grieff, "Introduction" in *Handbook on Reparations*, ed. P. De Grieff, (New York: Oxford University Press, 2006).

Morigaon in 1983, Delhi in 1984, Bhagalpur in 1989 and Gujarat in 2002 failed to organize safe passage to relief camps for people under threat.

## 2. Displacement

Neither the four State Governments we contacted, nor the Central Government, admitted to having estimates of people displaced as a result of mass communal violence. We are certain these estimates exist. The Gujarat government has detailed information on relief camps run by NGOs and how many people were housed within them, so it follows that it has at least estimates, if not precise numbers, on people displaced by violence. Soon after mass violence in 2002, the Gujarat government said publicly that about 98,000 had been displaced<sup>656</sup>. Similarly, a report by the Special ADM, Law & Order in Bhagalpur soon after the 1989 mass violence had an estimate of families displaced. It is possible that governmental refusal to disclose figures of people displaced as a result of these particular episodes of mass violence flows from a more general reluctance to acknowledge international standards on how the State should respond to displacement<sup>657</sup>.

## 3. Relief

In three out of the four episodes of mass violence we looked at, the district administration and State Government set up relief camps. The Tewary Commission makes reference to relief activity after the Nellie massacre. In Bhagalpur in 1989, there was a Special ADM charged with relief and rehabilitation. In 1984, the Delhi government set up several relief camps. These State Governments could not or did not give us details of services provided in the camps, numbers of people in the camps, when camps were closed and why. Some of these records had been destroyed over time. However, responses to RTI applications also suggested that

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<sup>656</sup> M. Dasgupta, "No Plans to Close Camps – Modi." *The Hindu*, April 1, 2002, in Human Rights Watch, "We Have No Orders to Save You: State Participation and Complicity in Communal Violence in Gujarat", *Human Rights Watch Report on India*, Vol. 14, No. 3 (C) (Asia Division: 2002), 52.

<sup>657</sup> Internal Displacement Monitoring Centre, "India: Tens of Thousands Newly Displaced in North-eastern and Central States. A Profile of the Internal Displacement Situation", February 9, 2006, available at <http://www.unhcr.org/refworld/docid/44031ac4.html>, 146-147, [accessed February 24, 2012].

governments simply had not tracked certain types of information, particularly whether and how many people in relief camps returned to their original homes or went elsewhere. This, in turn, suggests a very attenuated engagement with people displaced by communal violence, and the fact that victims may need practical support and security even after they leave the camps.

In general, providing relief to people displaced by communal violence, albeit bare-bones relief with very few basic services, is well-established administrative practice.

The Gujarat government in 2002 was the dishonourable exception to this norm. As discussed in chapter 5, it did not set up relief camps, and tried to force closure of NGO camps even while the situation was far from secure for displaced Muslims. Camp organisers challenged the government's actions in court, but got no relief. The Gujarat experience makes clear that setting up relief camps needs to be more than established practice - it should be legally required so that governments can be held accountable by victims of violence if they fail to provide those at risk with a safe harbour.

The actual standards in relief camps for basic services such as food, water and sanitation seem highly variable, reminding us that the Indian government has not adopted international norms on relief for displaced people, and has not developed national norms. Similarly, it is clear that there are no established or expected standards on providing security, providing displaced people with identity documents, uniting families that have been separated, or ensuring that children can access school as soon as possible. The governments of Assam, Bihar and Delhi did not disclose information on when and why relief camps were closed. As with basic services and security, there is a need for norms on closure that allow local discretion, but constrain the administration to meet a minimum standard, and prevent victims from being forced out of camps before it is safe for them to leave.

#### 4. Compensation

State Governments declared monetary compensation packages after each of the episodes of mass violence that we studied. All the packages included compensation



for at least three categories of harm – death, serious injury, and damage of domestic property. Beyond that, however, there was considerable variation between compensation given to victims under different packages. The Assam government gave families of people killed in the Nellie massacre, and in the election related violence in Assam more generally, Rs. 5000 in 1983. In 1984, the Central Government announced Rs. 10,000 compensation for those killed in the anti-Sikh riots. The Bihar Government announced far more generous compensation of Rs. 1 lakh to the families of the dead in the Bhagalpur riots in 1989, not that long after 1984. In the interim, the Centre had raised compensation for those killed in the 1984 riots to Rs. 20,000. Although these episodes of mass violence were relatively close in time, compensation for families of the dead varied considerably, and as discussed below, the differences between compensation packages widened over time as awards for the Bhagalpur and Delhi violence were increased. In 2002, the Gujarat government announced compensation of 1 lakh for families of the dead – a strikingly low figure when compared to Rs. 1 lakh announced in Bhagalpur 13 years previously.

In Delhi, Bhagalpur and Gujarat, the compensation packages announced in the immediate aftermath of violence were revised and increased several times over the years. Chapter 6 discussed, for example, how the Gujarat government was forced to increase quite meagre compensation for death and injury in the face of national and international censure. Families of those killed in the 1984 riots initially got Rs. 10,000 as compensation. As discussed in chapter 4, the Central Government increased this amount to 3.5 lakhs in 2006. Similarly, in Bhagalpur, the amount given to families of the dead increased from Rs. 1 lakh in 1989 to Rs. 3.5 lakhs in 2009, after the Bihar government, under the Janata Dal (United), petitioned the Centre for compensation on par with those killed in the 1984 riots. Compensation for victims in these cases emerged out of political negotiation between the Centre, the State, victim groups, religious leaders and civil society organizations. Of course, when compensation is subject to imperatives of the political process, victims who have fewer resources, or less forceful representation will get less compensation. Families of those killed in the Nellie massacre, and more generally in election violence across Assam at the time, have not received enhanced compensation over the years.

This variation in compensation amounts is patently unfair, and arguably unconstitutional, because it places, in effect, differential values on different lives. Variations in compensation for death quite literally place different values on human life. Likewise, variations in compensation for injuries place different values on similar types of human suffering.

Within the parameters of a *single* compensation package, rather than across different packages, the only overt discrimination we have seen was in Gujarat in 2002. The Gujarat government initially announced compensation of Rs. 2 lakh for the families of those killed in the Godhra incident, and compensation of Rs. 1 lakh for those killed in the violence that followed. Public criticism forced the State Government to equalise these amounts. It lowered the compensation to the largely Hindu families of those killed at Godhra, but refused to acknowledge its previous unfairness, citing instead the willingness of “kar sevaks”<sup>658</sup> to accept lower compensation.

Unlike compensation for death or injury, rates of compensation for damage to property *should* vary, depending upon the type of property and prevailing property markets. So the variation across time and locations was not remarkable, but the rates of compensation for property damage were, because they were low, and clearly well below prevailing market rates. In Bhagalpur, for example, the State Government gave Rs. 2000 to handloom owners whose looms were destroyed in the violence. This was meagre for a productive economic asset, even in 1989. As we discussed in Chapter 1, mass violence bespeaks State failure – at a minimum, the State’s failure to protect citizens from unlawful killing, injury and financial loss. If the State were to accept responsibility for this failure, it would have to compensate victims of property damage so as to put them back in the position they were in before the damage. Instead, the Indian State has made *ex gratia* payments to victims of mass communal violence – it does not accept the legal obligation to compensate victims, defining these payments as a discretionary favour. This is, of course, convenient for the State, in that it does not have to bear anywhere near the full cost of the financial losses resulting from a failure to control violence. It is at odds with international human

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<sup>658</sup> “Volunteer”, a term used by Hindu Right groups including the RSS and Bajrang Dal to describe their members.

rights instruments that are binding upon India. It is also at odds with developing domestic jurisprudence, that we discuss in more detail below.

Our research focused more on declared packages than on how governments implemented these packages, which would be less apparent merely from examining official records. However, it is clear that when compensation is a long-drawn out process with multiple iterations, claiming their due becomes vastly more difficult for victims.

### C. Domestic standards and guidelines

#### 1. Administrative standards

India does not have a national law regulating reparations after mass violence, nor does it have a national law or policy that deals with displacement as a result of violence or armed conflict. However, providing immediate relief and then disbursing compensation for physical harm and property damage is well-established administrative practice. There is also guidance, albeit very general, by the Ministry of Home Affairs in its Guidelines on Communal Harmony ('the Guidelines'). The Guidelines, formulated in 1997, emphasise the need for 'expeditious disbursement of relief' without any discrimination on any grounds. They state that the district administration should ensure supplies of basic necessities, including security and medical assistance in relief camps. The Guidelines also suggest setting up systems for insurance claims related to residential and commercial property. Finally, they mention that the district administration should properly implement a Central scheme for assistance of Rs. 3 lakh to "affected families" who are victims of 'terrorist or communal violence'<sup>659</sup>. Compensation under the Central scheme has not actually been implemented, but this guidance confirms that compensation for material harm is established, and expected, practice. The Guidelines suggest a shift by the Central Government towards acknowledging the right to compensation for mass violence,

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<sup>659</sup> Ministry of Home Affairs, Government of India, *Guidelines on Communal Harmony*, (1997), 21-22, available at <http://www.mha.nic.in/pdfs/ComHor141008.pdf>, accessed on 7 December 2010. The wording of the Guidelines do not specify if this is compensation for the families of those killed, but we infer that it must be, given the amount of money earmarked for "affected families."

and a shift away from treating compensation as discretionary. However, the Guidelines seem largely ignored in practice.

Moving away from the government's response specifically to mass violence, state governments have issued from time to time detailed administrative instructions, in the form of relief manuals, which lay out measures for short term relief and longer-term rehabilitation. Relief manuals are geared primarily towards responding to natural disasters. However, they are also applied often to human-made disasters – in Assam in 1983, for instance, the relief manual applied to situations of civil unrest. The district administration implements relief measures – whether the standard laid down in the relief manual or ad hoc measures in response to a local situation. Some state governments have departments specifically responsible for relief, typically called the office of the relief commissioner. Alternatively, the department of revenue in the state government is responsible for relief and rehabilitation. More recently, some governments have established departments of disaster management.

In addition to administrative guidelines and precedent, governments in India are also bound by jurisprudence on State liability for human rights violations. Below, we discuss principles on compensation developed through cases by victims of communal violence. We look also at decisions on compensation for other serious violations, which could reasonably apply to compensation for mass violence.

## 2. Judicial standards

Indian courts have affirmed that victims of communal violence suffer not merely from the individual crimes to which they were subject, but also from the failure of the State to uphold their fundamental rights under the Constitution, most importantly the fundamental right to life as guaranteed under Article 21 of the Indian Constitution. For instance, in *Bhajan Kaur vs. Delhi*<sup>660</sup> the Delhi High Court stated that such riots 'more often than not take place due to weakness, laxity and indifference of the administration in enforcing law and order. If the authorities act in time and act effectively and efficiently, riots can surely be prevented'. Likewise in

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<sup>660</sup> 1989 SCR (2) 600.

*Manjit Singh Sawhney v. Union of India*<sup>661</sup> the High Court of Delhi observed that riots occur 'on account of laxity and indifference of the administration in enforcing law and order' and that these constitute a serious violation of the citizen's fundamental rights to life and equality before the law. Individuals who suffer human rights violations at the hands of the State can initiate a public law action and claim compensation from the government body responsible. Over a number of decisions in the 1980s and 1990s, the Supreme Court upheld the principle of strict liability for State failure to respect Constitutional rights, and awarded compensation to victims. The Supreme Court developed this principle in cases concerning the State's responsibility for deaths in custody.

*Nilabati Behera v. Orissa*<sup>662</sup> was a case where the petitioner's son was taken into police custody, and found injured and dead on a railway track the next day. The son was 22 years old and his monthly income was between Rs. 1,200 and 1,500 in 1987. The Supreme Court, while directing the State of Orissa to pay a sum of Rs. 1,50,000 as compensation to the Petitioner and Rs. 10,000 as costs to the Supreme Court Legal Aid Committee, observed:

'12. ... award of compensation in a proceeding under Article 32 by this court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. [emphasis added]'

In his concurring opinion Justice Dr. A.S. Anand, (as he then was) observed:

'37. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have...an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in

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<sup>661</sup> 120 (2005) DLT 156.

<sup>662</sup> AIR 1993 SC 1960.

accordance with law - through appropriate proceedings. Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible.'

The Supreme Court's articulation of compensation for human rights violations in decisions such as *Nilabati Behara* and *DK Basu* makes clear that if a petitioner establishes a violation of Article 21, courts have 'not only the power and jurisdiction but also an obligation to grant relief'<sup>663</sup>. The Supreme Court clarifies that this is a public law remedy, that exists alongside and independent of criminal prosecution and civil, private law, remedies. In theory, the victim of a violation is free to pursue damages in tort after receiving public law compensation, though there is some suggestion that private law damages should be adjusted to reflect the public law award.

In *Nilabati Behara*, the Supreme Court suggests that the victim must establish a flagrant infringement of his Article 21 right to life. Later formulations by High Courts have seemed to move away from this threshold requirement. However, the Supreme Court reaffirmed this threshold requirement in *Sube Singh*, stating that for a victim to be eligible for compensation, the violation of Article 21 has to be 'patent and incontrovertible' and 'of a magnitude to shock the conscience of the Court'<sup>664</sup>.

In 1996, Bhajan Kaur, the widow of a man killed in the 1984 riots approached the Delhi High court, challenging the Rs. 20,000 compensation the Delhi Government gave for the death of a family member as being too low. The main question before the court was whether this amount of compensation breached her Article 21 right to life. However, the High Court made clear that just as the State's failure to respect the right to life - as in the case of custodial killing by agents of the State - entitled victims to compensation from the State, so did the State's failure to protect the right to life, by failing to prevent widespread violence against minorities by private actors. Various High Courts have affirmed that the State's *failure to prevent* death as a result

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<sup>663</sup> *Ibid.*, para 37.

<sup>664</sup> *Sube Singh v. State of Haryana* (2006) 3 SCC 178.

of violence by non-State actors, including terrorist attacks and communal violence, entitles victims to damages under public law<sup>665</sup>.

Thus, the principles for compensation for victims of communal violence are fairly clear<sup>666</sup>. Victims are entitled to compensation from the State for violation of their Article 21 right to life; governments are obliged to compensate them, the courts are obliged to enforce this right to compensation, and this public law remedy does not debar them from pursuing private damages.

There is wide judicial consensus that a failure by State authorities to respect the right to life warrants compensation. There is also High Court precedent that failure to protect citizens from serious violations of the right to life is also grounds for compensation. However, the actual awards under public law are arbitrary, and few, if any, cases articulate reasoning for quantum or develop frameworks that can be applied more generally. The courts have not, in general, adopted tort principles and looked at the financial impact of unlawful killing on the bereaved family, but arrived at figures they think just in the circumstances, which vary widely. In *Bhajan Kaur*, for instance, the petitioner contrasted the compensation she got with compensation given in other instances by State and Central governments to victims of terrorism and victims of the Bhopal gas disaster. In response, the Delhi High Court surveyed compensation under public law for unlawful killing in a series of cases (not related to riots), found that awards ranged from Rs. 1 lakh to Rs. 7.5 lakhs, and declared that the petitioner should get Rs. 3.5 lakhs for her loss. Other High Courts then adopted this figure for victims of the 1984 violence.

More recently, the Delhi High Court has tried to articulate a more systematic approach to calculating compensation for Article 21 violations, in decisions such as *Kamla Devi v. Delhi*<sup>667</sup> and *Tasleema v. State (NCT of Delhi) & Ors*<sup>668</sup>, akin to damages

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<sup>665</sup> See, for example, *Mohinder Kaur v. State of Haryana and Ors.* (2000) 124 PLR 87; *J.K. Traders v. State of A.P. and Ors.* 2000 (5) ALT 726; *Ashwani Gupta v. Government of India and Ors.* 117 (2005) DLT 112; *Manjit Singh Sawhney v. Union of India and Ors.* 120 (2005) DLT 156.

<sup>666</sup> It is not clear how this would apply to an isolated identity based hate crime, as compared to deaths during widespread violence.

<sup>667</sup> 114 (2004) DLT 57.

under tort. In these cases, the court divided the award into two parts. The first part was a standard award for non-pecuniary loss, set at Rs. 1.5 lakhs at 1996 prices, to be adjusted for inflation using the Consumer Price Index. The second part was for pecuniary loss, or future loss of earnings of the deceased.

While the Delhi High Court has recently moved towards more principled public law damages, a survey of jurisprudence reveals wide variation in compensation. However, Supreme Court and High Court jurisprudence has repeatedly affirmed a crucial principle – victims of mass communal violence are entitled to compensation from the State for its failure to protect them from violence. The Central and State Governments, by contrast, have rarely acknowledged their obligation to compensate victims, generally describing compensation as *ex gratia*, i.e. explicitly rejecting a legal obligation to make such compensation.

While courts have undermined the executive's position that compensation is discretionary rather than obligatory, they have failed to go beyond monetary compensation and engage with a fuller, more generous notion of reparations. Below, we discuss international standards on reparation, and what they imply for designing reparations that are substantively and procedurally just.

#### D. International standards on reparation

Reparation standards and obligations for States under human rights and humanitarian law are collected in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law ('Reparation Principles')<sup>669</sup>. These principles ostensibly do not create new legal obligations, 'but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights and humanitarian law'. Some States have argued that the principles go further than the legal instruments they draw upon. However, the principles are non-binding, and perhaps best viewed as consolidating relevant treaty

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<sup>668</sup> MANU/DE/0870/2009.

<sup>669</sup> Adopted by the UN General Assembly on 21 March 2006, by Resolution 60/147.



law. Whether any individual State is bound by a principle depends upon whether it is party to the original international treaty from which the principle derives.

The Reparation principles provide that a State should provide reparation for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law<sup>670</sup>. Like the Indian courts, the Reparation principles thus demand State liability for failure to protect individuals from serious human rights abuses. However, the principles go beyond monetary compensation. According to the principles, reparation should be proportional to the gravity of the violations and the harm suffered, and include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>671</sup>

Restitution, under the principles, means measures that whenever possible, restore the victim to the original situation before the serious violations of international human rights law or humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property<sup>672</sup>. Thus, the principles incorporate the basic tenet of compensation in common law negligence claims. Contrast this with monetary compensation as administered by the Central and State governments, and adjudicated by Indian courts. While jurisprudence and administrative practice uphold some financial aid or grant to victims of mass violence, there is no attempt to ensure that this aid restores the victim to her or his financial situation before being a target of violence. In fact, current State practice in India does not adequately compensate victims even for financial loss. As noted earlier, governments have grappled with the more fraught questions of how to restore liberty, family life and security to victims of mass violence in an ad hoc way, if at all.

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<sup>670</sup> Principle 25, UN General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", 21 March 2006, A/RES/60/147, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>.

<sup>671</sup> Principle 15, *ibid.*

<sup>672</sup> Principle 19, *ibid.*

The Reparation principles include the right to compensation<sup>673</sup> for any economically assessable damage, which includes, inter alia:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

As discussed earlier, compensation after the four episodes of mass violence we examined included a flat amount for different types of harm. The governments giving these compensation awards have not articulated this as such, but we can assume that the amounts given are supposed to compensate victims not just for physical harm, but also for mental harm, lost opportunities, and loss of future earnings. Victims have not been compensated for legal and medical fees.

The Reparation principles incorporate the right to longer term help, or rehabilitation, which describes access to medical and psychological care as well as legal and social services<sup>674</sup>. Across the four compensation packages we examined, governments paid only glancing attention to rehabilitation beyond monetary compensation. The standards declared specifically in response to mass violence, as well as general standards that were applicable, do not provide in any detail for re-establishing livelihoods or resuming education. There are some measures – low interest loans, enhanced food rations – that governments adopted in three of the four cases. However, none of these packages or schemes incorporated comprehensive rehabilitative measures.

Under the rubric of satisfaction for victims, the Reparation principles include official

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<sup>673</sup> Principle 20, *ibid.*

<sup>674</sup> Principle 21, *ibid.*

acknowledgment, and measures to restore civic trust, such as:<sup>675</sup>

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in educational material and administrative training at all levels.

It is worth querying whether law or policy should mandate measures such public apologies or commemorations, or whether these can only authentically emerge through social reconciliation or political accommodation negotiated over time. However, the first three measures under the principle of just satisfaction for victims – official measures to control violence, recovering the disappeared and the dead and

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<sup>675</sup> Principle 22, *ibid.*

restoring them to families, and building an accurate public record of what happened – should surely be the State's obligations after mass violence.

The principles also include longer-term institutional reform as a State obligation, identifying measures such as police and judicial reform as necessary for preventing mass violence.

The Reparation principles compile existing legal obligations, but like most soft law instruments, are also aspirational – a wish list of steps a State should take after gross human right violations. Abstracting from this list of steps, a few themes emerge as relevant for reparations programmes.

Scale: The scale of a program – the number of beneficiaries it covers – obviously varies depending upon the number of victims of gross violations. Many countries have administered large-scale reparations programs after mass atrocities, particularly after fundamental political transitions. In Latin America, several countries transitioned from dictatorship to democracy across the continent in the 1990s. Chile, Argentina and Brazil all developed large reparations programmes, as did South Africa after the transition from apartheid. This type of national programme is likely to involve trade-offs in what types of loss it covers and amount of compensation. At the other end of the spectrum, when there are isolated cases of serious human rights violations, a reasonably functioning court system should be able to accommodate and address the resulting claims against the State.

The mass violence we looked at in India, and the many more episodes that have occurred since 1947, fall at neither end of the spectrum. The four episodes we studied resulted in at least a thousand people dead, many more injured, hundreds, often thousands, displaced from their homes, and many families financially damaged. However, these episodes of mass violence unspooled within a stable political system and under the aegis of a sprawling, albeit inefficient, government machine. The administration in the areas where attacks occur may be under strain, but such episodes have not endangered regional and national governments, as they might at times of wholesale political transition. This basic stability means that governments in India can arguably sanction and implement deeper, more comprehensive reparations programmes without the painful tradeoffs that

characterize reparations in more tenuous polities. In light of this, the failure of State and Central governments to do so is particularly dishonourable.

Completeness: De Greiff describes 'completeness' as a programme's ability to cover 'the whole universe of potential beneficiaries'<sup>676</sup>. He argues that completeness is affected by (1) evidentiary standards imposed on beneficiaries and (2) structural design that encourages or impedes access by victims and efforts by the State to reach out to potential beneficiaries.

If victims of serious human rights violations have to fulfil onerous evidentiary requirements, they are less likely to qualify for benefits even where they should get them. Some requirements may be very difficult for particular victims to meet, such as proof of residence where homes and possessions have been burnt, or birth certificates where rates of registration are low. In Gujarat, for example, we learned that survivors who did not claim compensation after the State Government issued the first compensation package in 2002 found it difficult to claim compensation under subsequent packages. Requirements that disadvantage those who were unable to claim compensation early very likely punish the most vulnerable, since they are likely to have the least information in the immediate aftermath of violence.

Similarly, access for people who should benefit is limited by structural barriers, such as narrow application deadlines, having to apply in person for benefits, lack of public information about the program and its requirements. Experience in India and in other countries shows that governments need to spread the word and assist potential beneficiaries to make reparations effective. Fear after identity-based attacks stops people from coming forward to claim their dues. This is even more the case where the victim group has traditionally been poor or persecuted.

Governments distributing compensation also need to consider how dues are disbursed, particularly where the recipients are vulnerable within their own families or communities. Should, for example, compensation awards take the form of government bonds, fixed deposits, or other low-risk investments? Where a family is

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<sup>676</sup> Pablo De Greiff, "Introduction", in *The Handbook of Reparations*, P. De Greiff, (Oxford: Oxford University Press, 2006) 4-5.

receiving compensation when their home was burnt, should the authorities give the award to the formal home-owner, or to one of the women in the family? In the case of *Naraini Bai v. State of Haryana*, the High Court of Punjab and Haryana stepped in to protect the married daughter of a couple killed in 1984 from the sexism of the Haryana government, which argued that married daughters were not entitled to compensation<sup>677</sup>. In Bhagalpur after mass violence in 1989, the State Government provided for compensation for death to be divided equally amongst the immediate family of the deceased, presumably to prevent disputes and ensure that survivors share the award equally. Large sums of cash compensation to women or children who have lost many family members sometimes places them under great social risk. In the Indian context, the State needs to disburse compensation in ways that protect those who are vulnerable within the family unit, particularly women and girls. Children orphaned by violence also need particular protection, not only to secure monetary compensation, but to guard their access to education, health and access to food.

Depth: By the 'depth' of a reparations effort we mean the types of harm it covers or the types of violations it compensates. What types of material harm does it cover? How is the State's liability for each type of harm determined? Does it cover both material and non-material harm? Does it include individual as well as collective reparations?

Monetary compensation to individuals for material harm should take precedence over collective or symbolic reparations. However, designing the right framework for monetary compensation is challenging. Most large-scale programmes, like the four compensation schemes we looked at, are administrative. They create categories of damage, and assign standardized rates or amounts of compensation to each category. The underlying principle of administrative compensation schemes is, arguably, always strict liability, whether the government administering them acknowledges this explicitly or not. While in theory such a programme might be guided by the *restitutio in integrum* standard – restoring the victim to her position before she suffered harm – in practice, it is likely to mean a quantum different from

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<sup>677</sup> AIR 2004 P&H 206.

what an award applying the principle under the law of torts would yield. Many beneficiaries might be under-compensated for current and future loss as a result, while some may be over-compensated. In addition, administrative compensation does not accommodate the demands of individual cases that might warrant exemplary damages because of particularly egregious failures on the part of the State. Some commentators have asked whether victims should be allowed to choose whether to opt into administrative compensation programmes, or opt out and pursue judicial compensation, which is likely to be higher. However, this sort of option might create an easy alibi for a recalcitrant government that is not committed to reparations, where the State can blame the victim for not seeking compensation. As we mentioned earlier, the Gujarat government's procedures for claiming compensation disadvantage victims who did not claim compensation after the first set of rates was announced in 2002. Another alternative is administrative compensation for material harm, which does not extinguish the beneficiary's right to bring an individual claim in court if he feels circumstances warrant this<sup>678</sup>. The Indian courts have explicitly protected a victim's right to pursue private damages from the perpetrator in addition to compensation from the State. However, given that tort law in India is not very developed, this has not been tested in practice.

The compensation schemes we looked at include compensation for physical violations, or putting it another way, violations of certain core civil and political rights, including the rights to life, dignity and freedom from torture<sup>679</sup>. However, they do not include compensation for mental harm, in the sense of mental illness triggered by an attack. They also do not cover compensation for mental harm, in the sense of anguish and suffering, or what, in a private negligence claim would be termed 'pain, suffering, loss and injury'. Finally, these schemes do not include, in any comprehensive way, compensation for violations of socio-economic rights and their resulting economic costs. For example, compensation does not cover disruption in a child's schooling; for a child from a poor family, such disruption can be a

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<sup>678</sup> J. E. Malamud-Goti and L.S. Grosman, "Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies" in *Handbook of Reparations*, ed., de Greiff. (Oxford: Oxford University Press, 2006), 539.

<sup>679</sup> The right to be free from torture and cruel, inhuman and degrading treatment is violated when State employees or agents inflict such treatment themselves, or when they fail to protect citizens from such treatment by private actors.

catalyst for dropping out of education. It may not include compensation for 'future loss', continuing harm to livelihood as a result, for instance, a drivers taxi or a weaver's loom being burnt.

The particular compensation packages we examined, but also reparations efforts more generally, struggle to accommodate certain types of hidden harm. Reparations efforts should include compensation for different types of sexual violence (which they often do not). However, victims of sexual violence – women as well as men – are unlikely to identify themselves. Compensation for torture can also be difficult to include adequately, particularly after episodes of mass violence where torture is not inflicted in controlled, 'official' environments and proving torture can be genuinely difficult.

Symbolic reparations: The Reparations principles reiterate the State's obligation under international law to take symbolic measures of acknowledgement and apology under the rubric of 'just satisfaction'. Non-monetary reparations, which might include public commemoration of victims, memorials, public markers, official apology, go beyond particular harm to particular individuals, and aim instead to repair the insecurity, public humiliation and trauma that politically organized violence engenders.

Examples of symbolic reparations for the four episodes of mass violence we looked at are scant. The Prime Minister apologised in Parliament in August 2005 on behalf of Government of India for the 1984 violence. He addressed his apology "not only to the Sikh community but the whole Indian nation" with the assertion that "what took place in 1984 was the negation of the concept of nationhood... enshrined in our Constitution"<sup>680</sup>. However, Central and State governments have not made similar gestures for mass violence in Nellie, Bhagalpur or Gujarat.

Hamber makes the point that reparations are a 'social barometer' – they communicate to victims their place in society, and symbolic measures by the State

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<sup>680</sup> V. Ramakrishnan, "1984: The Untold Story" *Frontline*, Vol. 22, Issue 18, Aug 27 - Sep 09, 2005, available at: <http://www.hinduonnet.com/fline/fl2218/stories/20050909005201900.htm>.



can communicate social acceptance of their violation, social space for their anger and grief.<sup>681</sup> Restoring cultural markers that were destroyed during mass violence and memorializing the victims' loss and suffering is an important part of healing.

Some symbolic reparations could, arguably, be ineffective or counterproductive. For example, an official apology would mean little unless it was backed or preceded by material reparations, prosecution and an honest account of what happened. The Prime Minister's apology for the 1984 mass violence, for example, did not translate into effective prosecution of criminal cases or pursuit of administrative discipline.

That said, there are some basic non-material measures that the State should implement as soon after mass violence as possible, regardless of whether this is sincere or politically expedient, and regardless of whether this is controversial locally. This includes exhuming mass graves, financing and providing security for last rites by family members, and rebuilding religious sites that have been destroyed during violence.

#### E. Summing up

A survey of the Indian State's response on relief and rehabilitation reveals that it is highly variable and ad hoc. While there is established administrative precedent on providing relief, the lack of a legal obligation to provide relief and rescue those targeted by violence allow the government in charge to be completely derelict, as in Gujarat in 2002. Similarly, the lack of national standards on monetary compensation means victims are subject to the vagaries of the political formation in power and their own ability to lobby the State in securing compensation. State governments appear to make no effort to make compensation easily accessible to victims. While compensation packages across different episodes of mass violence vary, they share one constant. The Centre and State governments subscribe to a very attenuated notion of what constitutes recompense for their failure to prevent large-scale identity

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<sup>681</sup> B. Hamber, "Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition", in *Handbook of Reparations*, ed. De Greiff (Oxford: Oxford University Press, 2006), 571.

based violence. The Indian State delivers poorly on monetary compensation, and is a long way from taking steps towards fuller, more adequate, restitution to victim.

## X. Conclusion

After the many episodes of mass violence in India, it has not been uncommon to hear victims being encouraged to “move on”, or hear assumptions that victims have, in fact, “moved on”. Pressing for accountability many years after mass violence, on this view, disturbs the peace. We began this work on the premise that authentic peace is not possible unless it is built upon a substantial measure of truth and justice.

What the State did or did not do in response to mass violence, is important information, that citizens should be able to examine. Very little of this information is publicly accessible. This study was a modest attempt to use the legal right to information to try to secure the survivors’ right to truth.

Therefore, we sought official information on steps the State took towards holding individuals and institutions accountable for mass violence, and looked in particular at (1) access to criminal justice for victims of violence, (2) whether public officials implicated in violence were held accountable, and (3) access to compensation and rehabilitation for survivors of violence.

Our experience of using the RTI Act to extract information on mass violence was mixed. A vast amount of information had been destroyed, particularly information about the older episodes of mass violence. Most public authorities initially ignored our applications, and responded only when we nudged them with first appeals. Many public information officers betrayed a poor understanding of the provisions of the RTI Act. That said, while we were refused a lot of information, we also received a significant number of official records. So, while accessing information was difficult, we believe the RTI Act is a valuable resource that should be used aggressively to seek such records. As we said earlier, we felt that the State’s failure to make its own performance public shared a pedigree with its multiple failures to make reparations. Denial and impunity become harder to sustain in the face of information about the State’s actions.

It is, obviously, very important to use the RTI Act in securing justice for victims of recent episodes of mass violence. It is equally important to extract the information that survives on older episodes of mass violence, as a matter of historical record, as testimony to the experience of victims, and as a way to understand the State's failures.

Victims of mass violence were let down severely by the criminal justice system across all four episodes of mass violence. The system failed them from their first point of contact with it - when registering FIRs. Flawed FIRs gave way to poor investigation, which in turn led to high rates of summary closure. We found summary closure rates *10 times higher* than the closest national rate for each episode of mass violence, except for Nellie, where the summary closure rate was 8 times higher than the closest national rate. The number of people arrested in the aftermath of violence was small, relative to the scale of violence. Gross negligence by the police was followed by poor prosecution. Bail and remand application information from Gujarat revealed that the prosecution made a remand application for only 20% of suspects who were arrested, and opposed less than 6% of bail applications. Rates of acquittal were so high as to suggest that the judiciary at the trial court level has been passive to the point of being complicit in subverting fair, credible trials. The scale of these failures, the fact that they are repeated across different episodes, demonstrates that they are systematic rather than occasional aberrations. Poor investigation and protracted trials seem to be facilitated by senior functionaries in government and politics. Recent results in re-opened cases in Bhagalpur and SIT cases in Gujarat show that when mass violence cases are prosecuted seriously, the rate of conviction is much higher. These exceptions are telling - usually in the aftermath of mass violence, the police, prosecution and judiciary have worked to further the goals of politically powerful actors.

Those in senior government positions or high political office have rarely even been put on trial. Governments have used the muted, euphemistic findings of commissions of inquiry as a shield, instead of using the hard information that emerges from inquiries to hold officials accountable. As the aftermath of the 1984 and 2002 mass violence show, governments have ignored several investigations and inquiries, and jettisoned complicit individuals only when criticism by the media, civil society and the opposition in the legislature reaches a tipping point. Substantive

gaps in the law and procedural barriers to prosecution also make it easier for complicit ministers and government officials to escape prosecution. The Central Government needs to amend the law to incorporate command responsibility principles into criminal law, and amend how permission to prosecute government officials is granted, so that Section 197 of the CrPC does not stymie legitimate prosecutions.

Any episode of mass violence testifies to a failure by the State to prevent and control identity based violence. Clearly, the State has a duty to reconstitute victims of mass violence, restoring them to their former circumstances. Various High Courts have affirmed that the State's *failure to prevent* death as a result of violence by non-State actors, including terrorist attacks and communal violence, entitles victims to damages under public law.

Central and State governments have given compensation to victims of mass violence far more readily than they have pursued criminal prosecution of perpetrators. However, the details of compensation given after the four massacres we examined are not widely available and we discovered that many official records had been destroyed over time. Compensation packages after each episode of mass violence, across different states, cover similar types of loss. The amount of compensation offered does not seek to restore victims of violence to their former circumstances. Rates of compensation for damage to property, for example, have amounted to token payments rather than the value of what was actually lost. Compensation for similar types of loss varies across episodes, even factoring in the passage of time. This variation in compensation amounts results in some lives and some injuries being valued lower than others. The Central Government should lay down binding national norms on compensation that set a minimum standard below which State Governments cannot fall. National norms should make compensation compulsory. While courts have said the State is obliged to compensate victims of mass violence, Central and state governments maintain the position that the compensation they offer is discretionary. Given that governments have resisted acknowledging their basic legal obligation to compensate victims, it is no surprise they have failed entirely to rehabilitate victims more fully by taking steps to restore physical, economic and cultural security in targeted communities.

The Indian State owes survivors of mass violence access to truth, access to justice, and access to material and non-material restitution. It has failed on all these counts, a failure confirmed by its own records. Central and state governments should pursue criminal prosecutions, especially of those with greatest responsibility. They should undertake comprehensive reparations programmes. They should disclose all the information they can while respecting the privacy of survivors. They should initiate pressing institutional reform of the police and prosecution systems to prevent mass violence in the future, and to break decisively from India's shameful tradition of impunity for such violence.

