

Sack Goldblatt Mitchell LLP *Lawyers*

20 Dundas St. W., Suite 1100, Toronto ON M5G 2G8
T 416.977.6070 www.sgmlaw.com

Marlys A. Edwardh
Direct Line: 416.979.6070
Fax: 416.979.4430

Louis Century
Direct Line: 416.979.6070
Fax: 416.591.7333
Our File No. 15-507

April 8, 2015

Via Same Day Courier

The Honourable Peter Gordan Mackay
Minister of Justice and Attorney General of
Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Copy To (Without Appendices) (Via Courier):
Mr. Andrew P.W. Bennett
Canadian Ambassador for Religious Freedom

Copy To (Without Appendices) (Via Courier):
Amb. Vishnu Prakash
High Commissioner of India to Canada

Dear Minister:

Re: Request to Prosecute Narendra Modi for the 2002 Massacre of Muslims in Gujarat

We are writing on behalf of our clients, Sikhs for Justice,¹ to request that, during the upcoming visit of the Prime Minister of India, Narendra Modi, to Canada on April 14-16, 2015, you do the following:

- (1) charge Modi for the crime of inflicting torture under section 269.1 of the *Criminal Code*, or provide your consent to such a proceeding pursuant to section 3(7) of the *Code*; and
- (2) charge Modi for the crime of genocide under section 6 of the *War Crimes and Crimes Against Humanity Act*, provide your personal consent in writing, or that of your deputy, pursuant to section 9(3) of the *Act*, and direct the Public Prosecution Service of Canada to conduct the prosecution.

¹ Sikhs for Justice is a human rights advocacy organization based in New York and Toronto whose mandate includes advancing the Universal Declaration of Human Rights (UDHR) and creating an environment in which minorities – regardless of race, religion, language, gender, or ethnicity – can freely exercise their right to self-determination as enshrined in the UDHR and the International Covenant on Civil and Political Rights.



It is submitted that in February-March 2002, as Chief Minister of the Indian state of Gujarat, Modi aided, abetted and counselled in relation to an organized massacre of thousands of Muslim Indians, and that Modi may be charged and prosecuted for torture and genocide under Canadian law.

Below, you will find a detailed analysis of Modi's liability for the above offences and your jurisdiction to charge him. Our analysis relies on documentary evidence and affidavits of two witnesses, attached as Appendix A and Appendix B, respectively.² Please note that the affidavits are strictly confidential. While there are a number of persons copied on this letter, the appendices, including the affidavits, are attached only for you. We kindly request your assurance that the names of the affiants, the names of their family members, and the contents of their affidavits, remain confidential. Should the proceedings go forward, their names and identities should be subject to a publication ban. All references to the affiants within this letter have been anonymized.

Due to the urgency of this matter, we kindly request that you respond in writing within five days so that process can be issued in respect of the above-described charges.

1. Context for the Gujarat Massacres in 2002

As history records, beginning on February 27, 2002, communal violence, that was religiously motivated violence, involving the slaughter of what appears to be several thousand³ Muslims occurred in the state of Gujarat, India. The violence began after a train carrying Hindu nationalists was set aflame and 58 people died in the city of Godhra. Much attention has been given to the cause of this violence and the fact that such violence has a history in this state. In particular, the Concerned Citizens Tribunal, which sat in the state of Gujarat after these events, identified a troubling political backdrop. The Tribunal was composed of eight members including three jurists and several academics and collected over 2,000 oral and written testimonies from individual victim survivors as well as interested human rights groups, women's groups, non-governmental organizations, and others.⁴

The terms of reference of the Tribunal required it to investigate "the facts of the incidents and circumstances behind the Godhra massacre on February 27, 2002" as well as "the cause of violence from February 27, 2002 in Gujarat" including the role of the state executive, government and administration in response to this violence, as well as the role of the state

² The affiant at Appendix A shall be referred to as Affiant #1, while the affiant at Appendix B shall be referred to as Affiant #2. Affiant #1's affidavit was sworn on April 6, 2015. Affiant #2's affidavit has been signed and will be sworn on or about April 16, 2015, and forwarded to you.

³ Human Rights Watch reported that in the days following February 27, 2002, some 850 people were known to have been killed. They also observed that unofficial estimates were as high as 2,000 and violence was continuing in rural areas at publication in April 2002. Human Rights Watch, "We Have No Orders To Save You: State Participation and Complicity in Communal Violence in Gujarat" (April 2002), Vol. 14, No. 3(C) ("HRW, *We Have No Orders To Save You*"), p. 21 (**Appendix D**).

⁴ Concerned Citizens Tribunal – Gujarat 2002, "Crime Against Humanity: An inquiry into the carnage in Gujarat" (2002), Vol. I ("Concerned Citizens Tribunal, Vol. 1"), pp. 9-10 (**Appendix C**).

police, among others. Of equal importance to the Tribunal was an investigation into the political policies followed by the BJP government since it assumed power in Gujarat in 1998 and its approach to religious minorities.⁵ Narendra Modi was the Chief Minister of the state of Gujarat as of October 2001 representing the BJP. In earlier episodes of communal violence in 1986, 1987, 1989 and 1990, Modi was the General Secretary of the BJP and a central figure in Hindu nationalist politics in the state of Gujarat.⁶

The BJP is the political wing of a broader Hindu nationalist movement known as the *sangh parivar*, which encompasses at least three other inter-related organizations that propagate a militant form of Hindu nationalism: (1) the original *sangh parivar* organization founded in 1925, the Rashtriya Swayamsevak Sang (RSS), (2) an organization founded in 1964 to cover the social aspects of RSS activities, the Vishwa Hindu Parishad (VHP), and (3) the militant youth wing of the VHP, the Bajrang Dal. The BJP and its supporting network of organizations are committed to *Hindutva*, a political ideology built on creating a nation based only on Hindu religion and culture. Religions such as Islam and Christianity are depicted as alien to India and the religions of foreign invaders,⁷ while Sikhism and Sikh identity are undermined and discriminated against in other ways. Modi's appointment as Chief Minister of the BJP in October 2001 was considered a huge victory for the RSS, as he was also an RSS volunteer, the first ever to become Chief Minister.⁸ In the years leading up to 2002, accompanying the rise of the BJP, a campaign of hate was undertaken by the RSS, VHP and Bajrang Dal against Gujarat's minority Christian and Muslim communities, which included the distribution of flyers, a systemic, and strictly enforced, economic boycott of Muslims, and associated violence. One flyer issued by the VHP warned, "Caution Hindus! Beware of inhuman deeds of Muslims... Muslims are destroying Hindu Community by slaughter houses, slaughtering cows and making Hindu girls elope. Crime, drugs, terrorism are Muslim's empire."⁹

Some have argued that all political parties including the BJP have used communal violence to manipulate the electorate. This suggestion has been made in respect of the position of the BJP shortly before the events of February-March 2002. In September 2001, the BJP began to lose seats in various by-elections. In by-elections held in February 24, 2002, the BJP lost a further two electoral seats to the Congress Party by large margins. Given the continuous downslide of the BJP, the question has been raised by many as to whether there were electoral and political calculations behind the governing BJP's response to events that occurred in February and March 2002. Indeed, some have suggested that Modi cynically tried to use the politics of division and violence to gain a fresh mandate from the people.¹⁰

⁵ Concerned Citizens Tribunal, Vol. 1, *supra* at Annexure 1, p. 238 (Appendix C).

⁶ Concerned Citizens Tribunal, Vol. 1, *supra* at pp. 14-15 (Appendix C).

⁷ HRW, *We Have No Orders To Save You*, *supra* at pp. 39-40 (Appendix D); Amnesty International, "Five years on – the bitter and uphill struggle for justice in Gujarat" (March 2007), AI Index: ASA 20/007/2007 ("AI, *Five years on*"), p. 6 (Appendix E).

⁸ HRW, *We Have No Orders To Save You*, *supra* at p. 42 (Appendix D).

⁹ HRW, *We Have No Orders To Save You*, *supra* at p. 43 (Appendix D); AI, *Five years on*, *supra* at p. 6 (Appendix E).

¹⁰ Concerned Citizens Tribunal, Vol. 1, *supra* at p. 17 (Appendix C).

2. The Offences

It is our submission that against this political backdrop, the events of February and March 2002 provide evidence that Narendra Modi, through acts and omissions, has committed the offences of counselling genocide and inflicting torture under Canadian law. Modi will be present in Canada on April 14 to 16, 2015. Appended to this letter is evidence, both in the public record and affidavit evidence, that provides sufficient grounds to charge Modi for these horrific crimes during his visit. As a result, Modi can be charged and prosecuted in Canada. Canada should not be seen to condone these actions by failing to take steps, under Canadian law and international law to which Canada is signatory, to hold Modi to account.

Under section 269.1 of the *Criminal Code*,¹¹ every “official” who inflicts “torture” on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. “Official” means any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by, among others, a public officer, whether the person exercises powers in Canada or outside Canada. “Torture” means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for, among other reasons, any reason based on discrimination of any kind. Under section 7(3.7) of the *Criminal Code*, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against section 269.1 shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is, after the commission thereof, present in Canada.

Section 6 of the *Crimes Against Humanity and War Crimes Act*¹² provides that every person who, outside Canada, commits “genocide”, or, among other things, counsels in relation to the commission of genocide, is guilty of an indictable offence under the *Act*. Section 8(b) of the *Act* provides that a person who is alleged to have committed an offence under section 6 may be prosecuted for that offence if, after the time the offence is alleged to have been committed, that person is present in Canada. “Genocide” is defined as an act or omission committed with intent to destroy, in whole or in part, an “identifiable group” of persons, as such. The definition of genocide in the *Act* refers to customary international law, which was codified in the *Rome Statute of the International Criminal Court*,¹³ which in turn clarifies, at article 6, that identifiable group means “national, ethnical, racial or religious group”. Section 7(2) of the *Act* further provides that a superior, i.e. a person in authority other than a military commander, may be found liable for genocide on the basis of the doctrine of superior responsibility, and that the superior may be prosecuted in Canada pursuant to section 8(b).

¹¹ *Criminal Code*, R.S.C., 1985, c. C-46.

¹² *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

¹³ Section 6(4) states: “For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date.” S.C. 2000, c. 24, s. 6(4).

3. Evidence of Modi's Commission of the Offences of Inflicting Torture and Counselling Genocide

a. Aftermath of the Godhra Train Incident

In the morning of February 27, 2002, 58 persons died in a fire on a train travelling through Godhra, Gujarat. Many of the victims were Hindu nationalists who were returning from the city of Ayodhya, where Hindu nationalists wished to construct a Hindu temple on the site of a previously destroyed mosque, called Babri Masjid. Initially, Modi claimed that the Godhra killings were an “organized terrorist attack”¹⁴ and stated in a public broadcast that he saw the hands of Pakistan’s intelligence service, the ISI, behind the Godhra train incident.¹⁵ Subsequent investigation has shown that this incident was unconnected to the ISI or any other Muslim state agency.¹⁶

In the immediate aftermath of the Godhra train incident, as violence spread through the state of Gujarat, Modi was quoted in various media as saying, “[e]very action has an equal and opposite reaction... The five crore (50 million) people of Gujarat have shown remarkable restraint under grave provocation.”¹⁷ Modi called for the culprits responsible for the Godhra tragedy to be “awarded such exemplary punishment so that no one would dare to involve himself in such an incident.”¹⁸ These remarks were made in the immediate aftermath of the Godhra train incident, while Hindus throughout the state of Gujarat carried out organized attacks on the Muslim community. On March 1, 2002, in the height of the violence, Modi said the riots “[resulted] from the natural and justified anger of the people.”¹⁹

These attacks are well-documented and commenced in the early evening hours of February 27, 2002. Thousands of people, primarily Muslims, died. A detailed chronology of attacks between February 27 and March 4, 2002 was compiled by the Concerned Citizens Tribunal in a report that is appended to this letter.²⁰ Notably, this chronology confirms the attack on March 1, 2002 on the particular village described in the attached affidavits.

In short, the majority of districts in the state of Gujarat – at least 21 cities and 68 provinces²¹ – were engulfed in what can only be described as organized, armed, mob attacks on Muslims. The mobs numbered in the thousands, were armed with swords, agricultural instruments that

¹⁴ HRW, *We Have No Orders To Save You*, *supra* at pp. 13-14 (Appendix D).

¹⁵ Amnesty International, “India: Justice, the victim – Gujarat state fails to protect women from violence” (January 2005), AI Iundex: ASA 20/001/2005 (“AI, *India: Justice, the victim*”), p. 65 (Appendix F).

¹⁶ HRW, *We Have No Orders To Save You*, *supra* at pp. 13-14 (Appendix D).

¹⁷ HRW, *We Have No Orders To Save You*, *supra* at p. 7 (Appendix D), citing Scott Baldauf, “Indian government struggles to maintain order; Continuing riots test Hindu-led coalition’s credibility,” *Christian Science Monitor*, March 4, 2002, online: <http://www.csmonitor.com/2002/0304/p07s01-wosc.html>.

¹⁸ “SIT says illegal instruction given in private is not an offence,” *The Hindu*, May 11, 2012, online: <http://www.thehindu.com/todays-paper/tp-national/sit-says-illegal-instruction-given-in-private-is-not-an-offence/article3406417.ece>.

¹⁹ HRW, *We Have No Orders To Save You*, *supra* at p. 34 (Appendix D).

²⁰ Concerned Citizens Tribunal, Vol. 1, *supra* at pp. 19-22 (Appendix C).

²¹ HRW, *We Have No Orders To Save You*, *supra* at p. 7 (Appendix D).

could kill, and carried out the attacks in a “chillingly similar manner” that spoke to a carefully laid out plan. Dozens of witnesses interviewed by Human Rights Watch shortly after the attacks described “almost identical operations”. The following is an explanation of attacks in Gujarat’s largest city, Ahmedabad:

“Between February 28 and March 2 the attackers descended with militia-like precision on Ahmedabad by the thousands, arriving in trucks and clad in saffron scarves and khaki shorts, the signature uniform of Hindu nationalist—Hindutva—groups. Chanting slogans of incitement to kill, they came armed with swords, *trishuls* (three-pronged spears associated with Hindu mythology), sophisticated explosives, and gas cylinders. They were guided by computer printouts listing the addresses of Muslim families and their properties, information obtained from the Ahmedabad municipal corporation among other sources, and embarked on a murderous rampage confident that the police was with them. In many cases, the police led the charge, using gunfire to kill Muslims who got in the mobs’ way. [...] Portions of the Gujarati language press meanwhile printed fabricated stories and statements openly calling on Hindus to avenge the Godhra attacks.”²²

Human Rights Watch concluded, based on its interviews, that there was a “consistent pattern in the methods used”, which “[undermined] government assertions that these were ‘spontaneous’ ‘communal riots.’”²³ Indeed, the police services responsible for protecting Gujarati citizens were complicit in many of the attacks:

“In almost all of the incidents documented by Human Rights Watch the police were directly implicated in the attacks. At best they were passive observers, and at worse they acted in concert with murderous mobs and participated directly in the burning and looting of Muslim shops and homes and the killing and mutilation of Muslims. In many cases, under the guise of offering assistance, the police led the victims directly into the hands of their killers. Many of the attacks on Muslim homes and places of business also took place in close proximity to police posts. Panicked phone calls made to the police, fire brigades, and even ambulance services generally proved futile. Many witnesses testified that their calls either went unanswered or that they were met with responses such as: “We don’t have any orders to save you”; “We cannot help you, we have orders from above”; “If you wish to live in Hindustan, learn to protect yourself”; “How come you are alive? You should have died too”; “Whose house is on fire? Hindus’ or Muslims’?” In some cases phone lines were eventually cut to make it impossible to call for help.”²⁴

²² HRW, *We Have No Orders To Save You*, *supra* at p. 5 (Appendix D).

²³ HRW, *We Have No Orders To Save You*, *supra* at p. 7 (Appendix D).

²⁴ HRW, *We Have No Orders To Save You*, *supra* at pp. 5-6 (Appendix D).

b. Narendra Modi's Acts and Omissions

It is an undisputed fact that on February 27, 2002 at around 11:00 p.m., Modi convened a meeting at his residence at which senior bureaucrats and senior police officials were present. There were no minutes taken of this meeting. Subsequently, Sanjiv Bhatt, the then Deputy Commissioner of Police (Intelligence), stated that he was present at the meeting and that Modi issued orders that police were to stand down in the face of violence against Muslims. Specifically, Bhatt stated that Modi impressed upon the gathering that:

“for too long the Gujarat Police had been following the principle of balancing the actions against the Hindus and Muslims while dealing with the communal riots in Gujarat. This time the situation warranted that the Muslims be taught a lesson to ensure that such incidents do not recur ever again. The Chief Minister Shri Narendra Modi expressed the view that the emotions were running very high amongst the Hindus and it was imperative that they be allowed to vent out their anger.”²⁵

While a Special Investigative Team (SIT), charged with gathering relevant evidence in a criminal complaint against Modi and others, concluded that Bhatt’s testimony had significant frailties, it was the clear position of *amicus curiae*, who had been appointed by the Supreme Court of India in light of “growing concerns over the SIT’s independence”²⁶, that such frailties went to ultimate reliability: “it is ultimately for the competent court to decide whether Shri Bhatt is to be believed or not. As long as some material indicates that the allegation may be true, the case must proceed further in accordance with law.”²⁷ Bhatt’s evidence provided a clear foundation to determine that there were reasonable grounds to believe that such an order had issued. The *amicus*’ view was not shared by the SIT and so charges were not made.

The SIT also concluded, in the alternative, that “even if such allegations are believed for the sake of argument, mere statement of alleged words in the four walls of a room does not constitute an offence.”²⁸ We, like *amicus*²⁹, submit that this was in error. This utterance, when

²⁵ “SIT says illegal instruction given in private is not an offence,” *The Hindu*, May 11, 2012, online: <http://www.thehindu.com/news/national/article3405602.ece>, citing Special Investigative Team (SIT), Report in Compliance to the Order Dtd. 12.09.2011 of the Hon’ble Supreme Court of India in the Complaint Dtd. 08.06.2006 of Smt. Jakia Nasim Ahesan Jafri, online: <http://www.cjponline.org/zakia/SITClosReport/SIT%20Clos%20VolI%201-100.pdf>.

²⁶ International Human Rights and Conflict Resolution Clinic at Stanford Law School, “When Justice Becomes the Victim: The Quest for Justice After the 2002 Violence in Gujarat” (May 2014) (Stanford Law School, “When Justice Becomes the Victim”), p. 3 (Appendix G).

²⁷ Raju Ramachandran, Report by the *Amicus Curiae* Dated 25.07.2011 Submitted Pursuant to the Order of This Hon’ble Court Dated 05.05.2011 (“*Amicus* report”) at para. 29 (Appendix H).

²⁸ “SIT says illegal instruction given in private is not an offence,” *The Hindu*, May 11, 2012, online: <http://www.thehindu.com/news/national/article3405602.ece>.

²⁹ *Amicus* found, at para. 22, that the following offences could be made out against Modi at the *prima facie* stage: “offences *inter alia* under Sections 153A(1)(a) & (b) [Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to the maintenance of harmony], 153(1)(c) [Imputations, assertions prejudicial to national integration], 166 [Public servant disobeying the law, with

made by the highest official in government, in the midst of widespread attacks against Muslims, can only be understood as a direction to the policing authorities. Perhaps most significantly, the evidence shows that both the police and the army were slow to respond, if at all, and in the face of pleas for assistance, did nothing or actively connived with perpetrators. There are numerous accounts of officers declining to offer assistance citing the authority of the orders they had received from Modi.³⁰ There can be no doubt that the order was implemented.

Moreover, hours before Modi is alleged to have ordered police to stand down, he publicly endorsed a state-wide political strike or shut-down, known as a *bandh*, to take place the following day. The *bandh* was called by the Hindu nationalist VHP as a call to action following the purported attack on Hindu nationalists in the Godhra train incident. Modi endorsed the *bandh* through a press release around 8:00 p.m. on February 27, 2002, which would have been interpreted by the VHP and its militant youth wing, the Bajrang Dal, as an endorsement of their stand.³¹ Gujarat has a long history of communal violence during state-wide *bandhs* and, as Amnesty International noted, “violence during a *bandh* was predictable.”³² It is noteworthy that when the press release was issued, serious violence had already broken out.

It is submitted that the very endorsement of the state-wide *bandh*, called for by Hindu nationalists in a context in which the killing of Muslims was predictable, establishes criminal liability for Modi. Modi provided state sanction for an event whose predictable consequence was the massacre of large numbers of Muslims. Compounding his criminal conduct in endorsing the *bandh*, Modi spoke of the need to “punish” the [Muslim] perpetrators of the Godhra incident and repeatedly cited Newton’s law that “every action has an equal and opposite reaction” to justify retaliatory violence against Muslims.³³

The endorsement by Modi and the BJP of the strike also “sent a message to the police.”³⁴ A Hindu-dominated police force would clearly be hesitant to act given the message of its political masters. Such a message also merely reaffirmed an acknowledged anti-Muslim bias in the police force, the result being that police stood back and let rioting Hindu nationalists proceed unchecked, often in close proximity to police stations and, in some cases, with active direction and participation of police officials. Modi’s support for the strike is entirely consistent with the order given by him in the evening hours of February 27, 2002, directing the police to let the Hindu community vent its anger. Indeed, the nationalist strike, which Modi endorsed hours before, provided a vehicle for this to occur.

Perhaps the most telling evidence is to be found in the evidence of members of the Muslim community who sought the assistance of the police during the riots. Numerous accounts, including those of both affiants, establish that when contact was made with the police seeking

intent to cause injury to any person], and 505(2) [Statements concerning public mischief] of the [Indian Penal Code]” (Appendix H).

³⁰ Affiant #1 at para. 10 (Appendix A); HRW, *We Have No Orders To Save You*, *supra* (Appendix D).

³¹ HRW, *We Have No Orders To Save You*, *supra* at p. 21 (Appendix D).

³² AI, *India: Justice, the victim*, *supra* at p. 23, fn. 66 (Appendix F).

³³ AI, *India: Justice, the victim*, *supra* at p. 65 (Appendix F).

³⁴ HRW, *We Have No Orders To Save You*, *supra* at p. 21 (Appendix D).

assistance in the face of this violence, the police declined to come to their aid, citing orders from, among others, Modi. Incidents of police participation and complicity are documented throughout a report by Human Rights Watch, “We Have No Orders To Save You: State Participation and Complicity in Communal Violence in Gujarat” (April 2002).³⁵ As sworn by the Affiant #1:

8. Before and during the attack, I personally contacted various police stations and police officials urging them to protect my family.

9. Specifically, I called the police station in Anand, since the village of [] is a suburb of Anand and was and still is under the jurisdiction of Anand Rural Police. When I called the Anand police station, I spoke to, among others, Mr. B.D. Vaghela, Deputy Superintendent of Police (DSP) for Anand District and Mr. Sadhvani, Second DSP for Anand District. I requested that the police rescue my family and other Muslims being attacked [...].

10. Both Mr. Vaghela and Mr. Sadhvani refused to act upon my request. Specifically, Mr. Sadhvani told me that he had orders from the Chief Minister of Gujarat, Narendra Modi, “not to save any Muslim property and life.”

Notably, the attacks described by the two affiants occurred on March 1, 2002, the day of the state-wide *bandh*. Both affiants describe large public rallies with inflammatory anti-Muslim speeches, leading up to the attack on their family home.³⁶

It was further alleged that Modi positioned two of his cabinet ministers with portfolios unconnected to policing at the State Police Control Room and the Ahmedabad City Police Control Room, respectively, beginning on the day of the *bandh*, February 28, 2002. The evidence is uncontroverted that these two ministers were indeed present in the Control Rooms during the riots. At a minimum, their very presence was with the tacit approval of Modi.³⁷ Indeed, some of the most brutal violence occurred in Ahmedabad on the day Modi’s cabinet minister occupied the Ahmedabad City Police Control Room. On February 28, 2002 in Naroda Patia, located “just across the road from the State Reserve Police (SRP) quarters”, at least 65 people were killed by a 5,000-strong mob that torched the entire locality. Police looked on as houses and a mosque burned, fired into crowds of Muslims attempting to flee, and helped perpetrators identify Muslims.³⁸ Elsewhere in Ahmedabad, at Gulberg Society, less than a kilometre from the closest police station, an attack that lasted seven hours resulted in 69 deaths, including that of Ehsan Jafri, a former Member of Parliament, who was “hacked and burned to death” after making dozens of calls to high-level police and state officials seeking protection.³⁹

³⁵ HRW, *We Have No Orders To Save You*, *supra* (Appendix D).

³⁶ Affiant #1, *supra* at paras. 5-7 (Appendix A); Affiant #2, *supra* at para. 4 (Appendix B).

³⁷ Concerned Citizens Tribunal, Vol. 1, *supra* at pp. 210-211 (Appendix C); *Amicus* report at paras. 35 and 39 (Appendix H).

³⁸ HRW, *We Have No Orders To Save You*, *supra* at pp. 15-18 (Appendix D).

³⁹ HRW, *We Have No Orders To Save You*, *supra* at pp. 18-20 (Appendix D); Stanford Law School, “When Justice Becomes the Victim”, *supra* at pp. 11-14 (Appendix G).

It is submitted that parachuting ill-qualified cabinet ministers into these operational positions is circumstantial evidence that their purpose was to oversee the execution of Modi's order and of his position welcoming and endorsing the Hindu nationalist strike. The message became clear: Muslims no longer enjoyed the rule of law.

Further support for this interpretation is derived from an understanding of what happened when the Indian army was called in to assist in maintaining law and order. Upon its arrival, the army was not deployed, but rather remained inactive awaiting the order of the Chief Minister. This order did not come "until twenty-four hours after they arrived and only once the worst violence had ended."⁴⁰

All of the events subsequent to Modi's order, described above, are important pieces of corroborative evidence supporting the testimony of Bhatt.

4. Have the Elements of the Offences Been Made Out?

a. Inflicting Torture (s. 269.1 of Criminal Code)

While it is not suggested that Modi actually inflicted torture on a human person, his conduct clearly amounts to aiding and abetting as well as counselling torture. Modi was clearly a person who exercised powers, pursuant to law in force in the state of Gujarat, India, that would, in Canada, be exercised by a public officer (section 269.1(2) of the *Criminal Code*). Modi was the Chief Minister of the state of Gujarat.

The following acts for which there are reasonable and probable grounds to believe have occurred, constitute a clear basis for finding that his conduct falls within section 21(1)(b) and (c) of the *Criminal Code*. Section 21(1) founds criminal liability on a person who (b) "does or omits to do anything for the purpose of aiding any person to commit an offence" or (c) "abets any person in committing it". Abetting, under our law, merely requires evidence of encouragement. Actual presence at the scene of the offence is not required.

In addition to aiding and abetting, it is also submitted that Modi's conduct constitutes the act of counselling the commission of torture within the meaning of section 22 of the *Criminal Code*. This provision provides that (1) where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled. Further, (2) every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling. Finally, (3) for the purpose of the *Criminal Code*, "counselling" includes inciting.

⁴⁰ HRW, *We Have No Orders To Save You*, *supra* at pp. 21-22 (Appendix D).

Canadian law in respect of parties to an offence can be analogized to international criminal law which would have resort to the doctrine of command, or superior, responsibility in circumstances similar to the case at bar.

The description of Modi's conduct set out above establishes that there are reasonable grounds to believe that (1) he issued an order that was understood to tell policing authorities to not interfere with Hindu nationalist violence perpetrated on the Muslim community in retaliation for the burning of the train in Godhra; (2) he endorsed a state-wide strike action called by Hindu nationalists, including the VHP and its youth wing, where violence against Muslims was a clearly foreseeable consequence; (3) he delayed mobilizing the army that had arrived in the state of Gujarat until the worst violence had subsided; and (4) he made public statements which, read in proper context, can only be understood to have encouraged Hindu nationalists to inflict violence on the Muslim community, and to have reinforced his earlier message to policing authorities that they ought not intervene to protect the Muslim community. The foregoing is corroborated by the responses of policing authorities wherein they simply failed to discharge their duty to assist citizens who were facing mob violence, they told persons calling for assistance that they had orders to stand down, and, lastly, they actively participated in acts of violence perpetrated against the Muslim community.

Equally, the violence that swept the state of Gujarat obviously caused severe pain and suffering, both physical and mental, inflicted for reasons based on discrimination against the Muslim population in Gujarat (s. 269.1(2)). The kind of violence experienced on this occasion, including death, is described by the affiants.

The Supreme Court of Canada recently had the opportunity to discuss the prohibition of torture in *Kazemi Estate v. Islamic Republic of Iran*.⁴¹ LeBel J., speaking for the majority of the Court, found that the prohibition against torture had reached the status of a peremptory norm, or *jus cogens* norm in international law, which means it is a fundamental tenet of international law and is non-derogable.⁴² Canada is a State Party to the *Convention Against Torture* (CAT). Under CAT, Canada is required to take legislative and administrative measures to prevent acts of torture (articles 2, 3, 4) and to investigate potential acts of torture believed to have been committed in any territory under its jurisdiction (article 12).

In giving effect to these requirements, Canada has passed section 269.1 of the *Criminal Code*. Of particular note is how Canada has managed the question of jurisdiction. The provision, unlike most provisions in the *Criminal Code*, is one of universal jurisdiction. This is achieved through section 7(3.7), which provides that anyone who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against or counseling in relation to section 269.1, shall be deemed to commit that act or omission in Canada if (e) the person who commits the act or omission is, after the commission thereof, present in Canada.

⁴¹ *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62.

⁴² *Kazemi*, *supra* at para. 47.

As a result, when Modi arrives in Toronto or Ottawa on April 14 to 16, 2015, he will be in Canada and therefore subject to the court's jurisdiction on the charge outlined above. It matters not that he is the Prime Minister of India or that the acts were committed while he was the Chief Minister of Gujarat. The Supreme Court of Canada in *Kazemi* affirmed that Iranian officials had immunity from civil proceedings in Canada in respect of acts of torture committed in Iran. However, in reaching this conclusion, the Court clearly articulated that this was not the case in respect of criminal prosecutions for torture, as there exists "an exception to immunity for *jus cogens* violations in the criminal context."⁴³ Moreover, by signing the *Convention Against Torture*, India agreed with other States Parties, including Canada, that all signatory states should have jurisdiction to try official torture even if such torture were committed in India, and as a result, India has waived its immunity for acts of official torture.

b. Counselling Genocide (s. 6(1)(a) of the Crimes Against Humanity and War Crimes Act)

It is submitted that the facts referred to above also provide reasonable grounds to believe that Modi committed an offence under section 6(1)(a) of the *Crimes Against Humanity and War Crimes Act*. Section 6(1.1) of the *Act* provides that every person who, outside Canada, "counsels" genocide, is guilty of an indictable offence. Counselling is defined in section 22 of the *Criminal Code*, as set out above, which has obvious application to section 6(1.1) of the *Crimes Against Humanity and War Crimes Act*.⁴⁴ Section 8(b) of the *Act* bestows jurisdiction on Canadian courts if "after the time the offence is alleged to have been committed, the person is present in Canada."

Genocide is defined in section 6(3) of the *Act* as follows:

"genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Section 6(4) clarifies that the crime of genocide at customary international law was codified in article 6 of the *Rome Statute of the International Criminal Court*,⁴⁵ under which genocide "means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;

⁴³ *Kazemi, supra* at paras. 103-104.

⁴⁴ Section 2(2) of the *Act* states: "Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*." S.C. 2000, c. 24, s. 2(2).

⁴⁵ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.

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

The Rome Statute’s *Elements of Crimes*⁴⁶ define the following elements of genocide by killing (article 6(a)), which, it is submitted, are incorporated into the definition of “genocide” in section 6 of the *Crimes Against Humanity and War Crimes Act*:

1. The perpetrator killed one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

The elements of genocide by causing serious bodily or mental harm (article 6(b)) are the same, except that the first element is substituted with “The perpetrator caused serious bodily or mental harm to one or more persons.”

It is submitted that Modi clearly counselled in relation to the commission of all four elements of the offence of genocide. With respect to the first two elements, there can be no doubt that killing and serious bodily and mental harm occurred, and that the victims of such killing and harm were from an identifiable religious group, i.e. the Muslim population of Gujarat.

With respect to the third element, “the intent to destroy, in whole or in part”, article 30 of the *Rome Statute* provides for the *mens rea* of intent and knowledge. A person has “intent” where, (a) in relation to conduct, that person means to engage in the conduct, and (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. “Knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Modi’s intent to destroy the Muslim population of Gujarat, in whole or in part, is met on the facts of this case, by the evidence of Bhatt, which describes the order given by Modi to have police services stand down as Hindu violence spread. This intent is corroborated by Modi’s endorsement of the Hindu nationalist strike, by his various public statements justifying retaliatory violence against Muslims, and by his failure to deploy the Indian army promptly when it was open to him, and he was duty-bound, to do so. There can be no doubt that Modi was aware that the consequence of his actions and omissions – “in the ordinary course of events” – would be the partial destruction of the Muslim population in Gujarat.

⁴⁶ *Elements of Crimes of the International Criminal Court*, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

Finally, the above acts were committed while widespread violence against Muslims was in fact spreading throughout the state of Gujarat, and were therefore clearly committed in the context of a manifest pattern of similar conduct directed against an identifiable group. Moreover, the context in which Modi's acts occurred serves as further evidence of his genocidal intent. As the Supreme Court of Canada has said in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, “[i]ntent can be inferred from the circumstances... A speech that is given in the context of a genocidal environment will have a heightened impact, and for this reason the environment in which a statement is made can be an indicator of the speaker's intent.”⁴⁷

Modi's liability for the crime of genocide arises because he “counselled” in relation to the killing of Muslims. Under the *Criminal Code*, counselling includes incitement.⁴⁸ There can be no doubt that Modi's counselling, or incitement, was direct. In *Mugesera*, the Supreme Court of Canada, examining the separate offence of advocating genocide, found that the question of whether acts of incitement are direct “necessarily focusses mainly on the issue of whether the persons for whom the message was intended immediately grasp the implications thereof... The words used must be clear enough to be immediately understood by the intended audience.”⁴⁹ As set out above, the import of Modi's conduct could not have been clearer.

In addition to his liability for having “counselled” genocide, Modi is also liable for breaching his responsibility as a superior under section 7(2) of the *Act*. Modi was clearly a superior, which is defined as a person in authority other than a military commander. He is liable as a superior because, applying the requirements in section 7(2):

- (a) while outside Canada, Modi failed to exercise control properly over a person (i.e. policing authorities, cabinet members and others) under his effective authority and control, and as a result the person committed genocide under section 6;
- (b) Modi knew that the person was about to commit or was committing genocide, or consciously disregarded information that clearly indicated that genocide was about to be committed or was being committed by the person;
- (c) the genocide related to activities for which Modi had effective authority and control; and
- (d) Modi subsequently failed to take, as soon as practicable, all necessary and reasonable measures within his power to prevent or repress the commission of genocide, or the further commission thereof, or to submit the matter to the competent authorities for investigation and prosecution.

Although there have been investigations into Modi's conduct in India, he has neither been charged nor put on trial for his crimes. Pursuant to section 12(1) of the *War Crimes and Crimes Against Humanity Act*, Modi has not “been tried and dealt with outside Canada in respect of the offence in such a manner that, had [he] been tried and dealt with in Canada, [he] would be able

⁴⁷ *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para. 89.

⁴⁸ *Criminal Code*, R.S.C., 1985, c. C-46, s. 22(3).

⁴⁹ *Mugesera*, *supra* at para. 87.

to plead *autrefois acquit, autrefois convict* or pardon.”⁵⁰ He may therefore be charged, for the first time, in Canada.

Moreover, state immunity does not prevent Canadian authorities from charging Modi for genocide during his upcoming visit. The *Crimes Against Humanity and War Crimes Act* was enacted, *inter alia*, to retain and enhance Canada’s capacity to prosecute and punish persons accused of the “core” international crimes, including genocide. Much like the *Criminal Code*, it is passed pursuant to section 91(27) of the *Constitution Act, 1867* as an exercise of the criminal law power by Parliament. We have discussed, above, why Modi’s status in the Indian government does not immunize him from violations of the *jus cogens* prohibition of torture, and he may therefore be prosecuted under section 269.1 of the *Criminal Code*. Where, as here, Modi’s acts of counselling genocide are virtually identical to his acts of aiding and abetting and counselling torture, it is submitted that immunity cannot be conferred under one statute but not the other.

5. Conclusion

In the aftermath of the 2002 Gujarat massacres, many governments, including the Canadian government, recognized Modi’s role in the violence and banned him from entering their borders.⁵¹ Although Modi’s rising political fortunes within India, culminating in his election as Prime Minister of India, have caused Canada, the United States and others to reverse their policies, Modi has not taken responsibility for the massacre of Muslims under his watch, and indeed has denied any wrongdoing.

The fact is that in the decade after the 2002 massacres, while Modi remained Chief Minister of Gujarat, his BJP government actively obstructed justice for victims, failed to provide adequate reparations, and generally remained unrepentant about its role in the massacres. In one prosecution, for example, after 37 eye-witnesses withdrew their statements resulting in the acquittal of all accused, the Indian Supreme Court intervened and ordered a new trial in another state, which resulted in convictions. The Supreme Court said:

“When the investigating agency helps the accused, the witnesses are threatened to depose falsely and [the] prosecutor acts in a manner as if he was defending the accused, and the Court was acting merely as an onlooker and there is no fair trial at all, justice becomes the victim.”⁵²

⁵⁰ *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, s. 12(1).

⁵¹ See, for e.g., the 2008 correspondence between the U.S. Department of State and 27 Members of Congress requesting Chief Minister Modi’s visa request be denied, in which the Acting Assistant Secretary of Legislative Affairs confirms that Modi’s tourist visa was revoked under section 212(a)(2)(G) of the *Immigration and Nationality Act*, because Modi “was responsible for or directly carried out... particularly severe violations of religious freedom” (Appendix I).

⁵² Stanford Law School, “When Justice Becomes the Victim”, *supra* at p. 26; AI, *Justice, the victim, supra* at pp. 41-47, 77 (Appendix G).

In 2007, five years after the massacres, Amnesty International found that 250,000 individuals had been displaced as a direct result of the Gujarat violence, the vast majority having left the state or – as in the case of the affiants’ family – moved to majority Muslim localities within the state. Modi’s government returned \$4.3 million in relief funds to the Government of India on the grounds that there were no unfinished tasks, despite the fact that thousands of internally displaced Muslims still lived in “relief colonies”.⁵³

In 2012, Human Rights Watch found that “[a]uthorities in India’s Gujarat state are subverting justice, protecting perpetrators, and intimidating those promoting accountability 10 years after the anti-Muslim riots that killed nearly 2,000 people.”⁵⁴

Modi has never been charged or prosecuted. We urge you to uphold Canada’s commitment to ending impunity for torture and genocide, and, at a minimum, to consent to the prosecution of Modi under section 269.1 of the *Criminal Code*, or to undertake said prosecution, and further, to institute and carry forward a prosecution of Modi under section 6 of the *Crimes Against Humanity and War Crimes Act* upon his arrival in Canada on April 14-16, 2015.

May we have the courtesy of an immediate reply.

Sincerely,



Marlys A. Edwardh
Louis Century
Lawyers for Sikhs for Justice



Gurupwant Singh Pannun, Legal Adviser⁵⁵
Jatinder Singh Grewal, Director of International Policy
Sikhs for Justice

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⁵³ AI, *Five years on, supra* at pp. 7-8 (Appendix E).

⁵⁴ Human Rights Watch, “India: A Decade on, Gujarat Justice Incomplete,” February 24, 2012 (Appendix J).

⁵⁵ Admitted to the Bar of New York.